

AUTHORITY, CONTINUITY,
AND CHANGE IN
ISLAMIC LAW



WAEEL B. HALLAQ

McGill University



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JURISTIC TYPOLOGIES: A FRAMEWORK FOR ENQUIRY

I

A juristic typology is a form of discourse that reduces the community of legal specialists into manageable, formal categories, taking into consideration the entire historical and synchronic range of that community's juristic activities and functions. One of the fundamental characteristics of a typology is the elaboration of a structure of authority in which all the elements making up the typology are linked to each other, hierarchically or otherwise, by relationships of one type or another. The synchronic and diachronic ranges of a typology provide a synopsis of the constitutive elements operating within a historical legal tradition and within a living community of jurists. It also permits a panoramic view of the transmission of authority across types, of the limits on legal hermeneutics in each type, and of the sorts of relationships that are imposed by the interplay of authority and hermeneutics.

The evolution of the notion of the typology as a theoretical construct or conceptual model presupposes a conscious articulation of the elements that constitute them. To put it tautologically, since typologies purport to describe certain realities, these realities must, logically and historically speaking, predate any attempt at typification. And since Islamic juristic typologies presuppose, by virtue of their hermeneutical constitution, loyalty to the *madhhab* or legal school, then it is expected that no typology can be possible without positing a school structure.

Furthermore, and as a prerequisite to the formation of a typology, there must be developed a fairly sophisticated historical account of the school. In other words, no typology can be formulated without a substantial repertoire of the so-called *ṭabaqāt* (bio-bibliographical) literature. This literature, in its turn, totally depends on the conception of the *madhhab* as a doctrinal entity composed of jurist-scholars, their tradition of learning, and profession. The final formation of the schools was thus a

precondition to the emergence of *ṭabaqāt* literature, just as this literature was a prerequisite for the rise of typologies.

Since the legal schools took shape by the middle of the fourth/tenth century,¹ and since the first *ṭabaqāt* works of the jurists seem to have been written by the end of the fourth/tenth century and the beginning of the fifth/eleventh,² we must not expect to find any typology emerging before the middle or end of the latter century. Indeed, it is no surprise that our sources have not revealed a typology prior to that of the distinguished Andalusian jurist Abū al-Walīd Muḥammad Ibn Rushd (d. 520/1126).

II

One year before his death, the Cordoban jurist Ibn Rushd was called upon to answer what is in effect three questions:³ First, what are the qualifications of the *muftī* in “these times of ours” according to the school of Mālik? Second, what is the status of the *qāḍī*’s ruling if he is a *muqallid* within the Mālikite school and if, in his region, no *mujtahid* is to be found? Should his rulings be categorically accepted, categorically revoked, or only provisionally accepted? Third, should the ruler – with respect to whom the *qāḍīs* are but *muqallids* – accept or revoke their decisions?

¹ This is based on extensive research by this writer as well as on Christopher Melchert, *The Formation of the Sunni Schools of Law* (Leiden: E. J. Brill, 1997). See also nn. 1 and 3 of the preface, above.

² It suffices here to quote one of the most important legal biographers in Islam, Tāj al-Dīn al-Subkī, who could not find a Shāfi‘ite biography earlier than the beginning of the fifth/eleventh century. In explaining his sources, he states: “I have searched hard and researched much in order to find those who wrote on *ṭabaqāt*. The first one who is said to have discoursed on that [subject] is the Imām Abū Ḥafṣ ‘Umar Ibn al-Muṭawwī [d. 440/1048] . . . who wrote a book he entitled *al-Mudhabbab fī Shuyūkh al-Madhhab*. After him, the Qāḍī Abū al-Ṭayyib al-Ṭabarī [d. 450/1058] wrote a short work.” See Subkī, *Ṭabaqāt al-Shāfi‘iyya al-Kubrā*, 6 vols. (Cairo: al-Maktaba al-Ḥusayniyya, 1906), I, 114. Furthermore, in his *al-Majmū‘: Sharḥ al-Muhadhdhab*, 12 vols. (Cairo: Maṭba‘at al-Taḍamun, 1344/1925), I, 40–54, Sharaf al-Dīn al-Nawawī devotes a section to *adab al-muftī* and there declares his debt to the works of Ibn al-Ṣalāḥ and ‘Abd al-Wāḥid al-Ṣaymarī (d. 386/996), another Shāfi‘ite who wrote a work with the same title. But judging by the typology put forth by Nawawī, it is clear that his debt is exclusively to Ibn al-Ṣalāḥ, since nowhere in his discussion of the types of *muftīs* does he mention Ṣaymarī. On Ṣaymarī and his work, see Amīn b. Aḥmad Ismā‘īl Pāshā, *Īdāh al-Maknūn fī al-Dhayl ‘alā Kashf al-Zunūn*, 6 vols. (repr., Beirut: Dār al-Kutub al-‘Ilmiyya, 1992), I, 633.

³ Muḥammad b. Aḥmad Ibn Rushd, *Fatāwā Ibn Rushd*, ed. al-Mukhtār b. Ṭāhir al-Talīlī, 3 vols. (Beirut: Dār al-Gharb al-Islāmī, 1978), III, 1494–1504; Aḥmad b. Yaḥyā al-Wansharīsī, *al-Mī‘yār al-Mughrib wal-Jāmi‘ al-Mu‘rib ‘an Fatāwī ‘Ulamā’ Ifriqiyya wal-Andalus wal-Maghrib*, 13 vols. (Beirut: Dār al-Gharb al-Islāmī, 1401/1981), X, 30–35.

Ibn Rushd answered that the community of jurists consisted of three groups. The first had accepted the validity of Mālik's school by following it without knowledge of the evidence upon which the school's doctrine was based. This group concerned itself merely with memorizing Mālik's views on legal questions along with the views of his associates. It does so, however, without understanding the import of these views, let alone distinguishing those which are sound from those which are weak.

The second group deemed Mālikite doctrine valid because it had become clear to its members that the foundational principles on which the school was based were sound. Accordingly, they took it upon themselves to study and learn by heart Mālik's legal doctrines alongside the doctrines of his associates (*aṣḥāb*).⁴ Despite the fact that their legal scholarship was not proficient enough to enable them to derive positive legal rulings from the texts of revelation or from the general precepts laid down by the founders, they also managed to learn how to distinguish between those views that accord with the school's principles and those that do not.

The third group also came to a deep and thorough understanding of Mālik's doctrine as well as the teachings of his associates. Like the second group, this group knew how to differentiate between the sound views that accord with the school's general precepts and those that are weak and therefore are deemed to stand in violation of these precepts. However, what distinguished the members of this group from those belonging to the other two is that they were able to reason on the basis of the revealed texts and the general principles of the school. Their knowledge encompassed the following topics: the legal subject matter of the Quran; abrogating and abrogated verses; ambiguous and clear Quranic language; the general and the particular; sound and weak legal *ḥadīth*; the opinions of the Companions, the Followers, and those who came after them throughout the Islamic domains; doctrines subject to their agreement and disagreement; the Arabic language; and methods of legal reasoning and the proper use in them of textual evidence.

Now in terms of their function, the members of the first group are disqualified from issuing *fatwās*. True, they may have memorized the

⁴ The term *aṣḥāb* (pl. of *ṣāhib*) here means those who studied with Mālik, as well as those who happened, generations later, to follow his doctrines together with the doctrines of his immediate students. On *ṣubḥa* in the educational context, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981), 128–29; Michael Chamberlain, *Knowledge and Social Practice in Medieval Damascus, 1190–1350* (Cambridge: Cambridge University Press, 1994), 118–22; Jonathan Berkey, *The Transmission of Knowledge in Medieval Cairo* (Princeton: Princeton University Press, 1992), 34–35.

founding doctrines of the Mālikite school, but they have not yet developed the critical apparatus which allows one to discriminate between doctrines that are sound and those that are less sound. What they possess, in other words, is not *‘ilm*, i.e., the genuine understanding of the quality of textual evidence and the lines of legal reasoning through which legal norms are derived. All they have managed to do is to acquire by rote the school’s doctrine, which permits them to issue *fatwās* only for themselves, that is, in situations where they are personally involved (*fī ḥaqqi nafsihi*). Should there be more than one opinion on the matter, then members of this group would be governed by the same rule applied to the layman (*‘ammī*), namely, that they are to accept one of the following options: (1) to adopt whichever opinion they deem suitable; (2) to investigate the credentials of the jurists who held these opinions so as to adopt the view of the most learned of them; and (3) to choose the most demanding of the available opinions in order to be on the safe side.

Since the members of the second group have distinguished themselves by a proficient knowledge of the school’s doctrines and general precepts, they are qualified to give legal opinions lying within the doctrinal boundaries of the school of Mālik and his associates. In other words, they are not to attempt any form of *ijtihād* which may lead to the discovery of an unprecedented legal ruling.

By contrast, those belonging to the third group do have the freedom to exercise *ijtihād* since they have perfected the tools of original legal reasoning on the basis of the revealed texts. The qualifications permitting them to practice *ijtihād* are not a matter of quantitative memorization of legal doctrines; rather, they are the refined qualities of legal reasoning and an intimate knowledge of the Quran, the Sunna, and consensus. But how are these qualifications to be recognized? Ibn Rushd maintains that acknowledgment of an accomplished jurist who has reached such a distinguished level of legal learning must come from both the community of legal specialists in which he himself lives, and from the jurist himself. The judgment is thus both objective and subjective.⁵

Let us recall that the first question addressed to Ibn Rushd referred in part to the *muftī*’s qualifications during “these times of ours.” It is remarkable, and quite significant for us – as shall become clear later – that Ibn Rushd did not view his own age as being any different from the ones preceding it, insisting that “the attributes of the *muftī* which he should fulfill do not change with the changing of times.”⁶

⁵ Ibn Rushd, *Fatāwā*, III, 1503. ⁶ Ibid.; Wansharīsī, *al-Mi‘yār al-Mughrib*, X, 34.

Ibn Rushd's tripartite classification of *muftīs* is intended to prepare the ground for a reply to the first question, namely, What are the qualifications of the *muftī* according to Mālikite doctrine? The answer is that, in light of the classification set forth earlier, no one is entitled to issue *fatwās* – whether in accordance with Mālikite law or otherwise – unless he is able to investigate the textual sources of the law by means of the proper tools of legal reasoning. Put differently, if the jurist is unable to reach this level of competence, then no matter how extensive his knowledge of Mālikite law he lacks the necessary qualifications of a *muftī*. Thus, the prerequisite is the attainment of *ijtihād*, and *ijtihād*, Ibn Rushd seems to say, cannot be confined to any particular school or to boundaries preset by any other *mujtahid*, be he a contemporary, a predecessor or even the founder of a school.

As for the second question, the solution may be found in the discussion of the second category of jurists, namely, those who study and learn by heart the Mālikite doctrines and who are able to distinguish between sound and unsound opinions, but who are unable to derive positive legal rulings from the texts of revelation or from general precepts laid down by the masters. It is clear that Ibn Rushd places *qādīs* in this category by process of elimination, since they fit neither in the first category of *muqallids* nor in the third, which comprises only *mujtahids*. These *qādīs* are permitted to rule on cases already elaborated in Mālikite law, but in cases where there is no precedent they are obliged to seek the opinion of a *muftī* who is qualified to practice *ijtihād*, whether or not this *muftī* is to be found in the locality where the judge presides. Here, Ibn Rushd is merely acknowledging an age-old practice where jurists were in the habit of soliciting the opinion of a distinguished *muftī*.⁷

The third question Ibn Rushd answers summarily: If a *muqallid* presiding as a judge should rule on a matter requiring *ijtihād*, then his decision would be subject to judicial review. The ruler's duty is to decree that such judges should not dabble in matters involving *ijtihād* but should refer these matters to jurists who are properly qualified.⁸

The issues which gave rise to these questions were the subject of heated debate among the jurists of early twelfth-century Tangiers. Failing to persuade each other, these jurists addressed themselves to Ibn Rushd, at the time the most distinguished and recognized legal scholar in the

⁷ Ibn Rushd's own *fatwās*, published in three volumes, reflect this reality. A large number of the *istiftā'*'s came from both *qādīs* and private individuals who resided in nearby and distant Spanish and North African locales. The present *fatwā*, for instance, came from Tangiers.

⁸ Ibn Rushd, *Fatāwā*, III, 1504.

Mālikite school. The authority that Ibn Rushd carried was beyond dispute, whether during his lifetime or centuries thereafter. What he said was taken seriously, and his *fatwās* and other writings became, over the course of the following centuries, authoritative statements that were incorporated into law manuals, commentaries, and super-commentaries.⁹ The *fatwā* discussed above, for instance, was incorporated in a number of works, including Wansharīsi's *Mi'yār*, Burzulī's *Nawāzil*, al-Mahdī al-Wazzānī's *Nawāzil*, Ibn Salmūn's *al-Iqd al-Munazzam*, and Ḥaṭṭāb's *Mawāhib al-Jalīl*.¹⁰ The point to be made here is that Ibn Rushd's opinion continued to have relevance for centuries after his death, and as such it stood as an authoritative statement reflecting a juristic reality within the Mālikite school both during and long after the lifetime of this eminent jurist.

I shall reserve further commentary on Ibn Rushd's *fatwā* to a later stage in the discussion, but for now it is worth noting one significant aspect. The point of departure in this *fatwā* is that the limits of legal interpretation are confined to Mālikism, an assumption that seems implicit in the question posed by the jurists of Tangiers. The three questions they submitted to Ibn Rushd revolved exclusively around the tasks and hermeneutical skills of *muftīs* and *qāḍīs*. These were the parameters that Ibn Rushd accepted in his discussion of the first two types of jurists, whom he regarded as indeed obliged to conform to school doctrine since they lacked the tools of *ijtihād* (although the second type was still permitted to issue *fatwās*). When he came to discuss the third type, however, Ibn Rushd parted company with his fellow jurists. In his eyes, the *muftī–mujtahid* was not bound by the limitations of the school, and his task (once the case proved to require *ijtihād*) entailed a direct confrontation with the revealed texts. Dependence on the opinions and doctrines of the predecessors – that is, on established authority – was no longer relevant nor needed at this stage. Even *muftīs* of the second type were not permitted to issue *fatwās* “according to Mālik's school” unless they themselves were able, through independent means, to verify the opinions they cited from earlier authorities. That is to say, once *ijtihād* enters the picture, independence of mind becomes a must. This is the context for Ibn Rushd's leading statement, which is of

⁹ On the significance of incorporating *fatwās* in law manuals and commentarial literature, see chapter 6, below.

¹⁰ Editorial references to these works are to be found in Ibn Rushd, *Fatāwā*, III, 1496–97. Ḥaṭṭāb discusses Ibn Rushd's *fatwā* in Muḥammad b. Muḥammad al-Ḥaṭṭāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, 6 vols. (Ṭarāblus, Libya: Maktabat al-Najāh, 1969), VI, 94–96.

particular significance for us: “The attributes of the *muftī* [–*mujtahid*] which he should fulfill do not change with the changing of times.” Thus, the *ijtihād* of Mālik himself, and of the other founding masters of Mālikism, did not differ from that of later jurists, including, probably, Ibn Rushd himself, who was known to have exercised *ijtihād* in a number of cases.¹¹

If later *mujtahids* were as qualified as the founding masters, however, did this mean that later *mujtahids* could establish their own schools? To the best of my knowledge, Ibn Rushd does not address this question. But we can generally infer from his *ijtihād*ic activities¹² and writings that undertaking fresh *ijtihād* in one or more cases does in no way entail either the abandonment of a legal school or the establishment of a new one. For Ibn Rushd, this simply was not an issue. The three types of jurists he articulated operated entirely within the Mālikite system, with one significant exception. When *muftīs* of the third type encountered a case necessitating *ijtihād*, they dealt with it as independent *mujtahids*, in the sense that they were not bound by the criteria which the founding masters had established for their own legal construction. This activity, however, though independent, did little to alienate them or their new opinions from the Mālikite school. On the contrary, the resulting opinions were added to the repertoire of the school’s doctrine, and were memorized and debated in their turn by succeeding generations of jurists.

III

About a century later, another major jurist was faced with a similar question. This was Abū ‘Amr ‘Uthmān Ibn al-Ṣalāḥ (d. 643/1245), a Shāfi‘ite *muftī*, teacher, and author who lived in Damascus for a good part of his life.¹³ Ibn al-Ṣalāḥ wrote at a time when the legal schools had already taken their final shape, which explains why he framed his discussion in terms of affiliation and loyalty to the school, and in a more developed and self-conscious manner than we found in Ibn Rushd.

¹¹ See, for example, Wael B. Hallaq, “Murder in Cordoba: *Ijtihād, Ifiā’* and the Evolution of Substantive Law in Medieval Islam,” *Acta Orientalia*, 55 (1994): 55–83, and Burzulī’s commentary on the *fatwā* of Ibn Rushd discussed here, in Ibn Rushd, *Fatāwā*, III, 1504–06.

¹² See previous note.

¹³ See his biography in Taqī al-Dīn b. Aḥmad Ibn Qāḍī Shuhba, *Ṭabaqāt al-Shāfi‘iyya*, ed. ‘Abd al-‘Alīm Khān, 4 vols. (Hyderabad: Maṭba‘at Majlis Dā‘irat al-Ma‘ārif al-‘Uthmāniyya, 1398/1978), II, 144–46; ‘Abd al-Qādir b. Muḥammad al-Nu‘aymī, *al-Dāris fī Tārīkh al-Madāris*, ed. Ja‘far al-Ḥusaynī, 2 vols. (Damascus: Maṭba‘at al-Taraqī, 1367/1948), I, 20–21.

He begins by dividing the *mufṭīs* into two categories, independent (*muṣtaqill*) and dependent (*ghayr muṣtaqill*),¹⁴ two terms that augur the emergence of a technical language through which juristic typification came to be articulated. The first category stands by itself, signaling the momentous achievement of the school founders. The second category encompasses four types to which a fifth informal type is added. Thus, all in all, Ibn al-Ṣalāḥ's typology consists of the following categories and types:

Category 1 (one type)

Category 2 (types 1, 2, 3, 4, and 5)

Mufṭīs of the first category, which he also identifies as absolute (*muṭlaq*), possess expert knowledge of *uṣūl al-fiqh*, which includes Quranic exegesis, *ḥadīth* criticism, the theory of abrogation, language, and the methods of exploiting the revealed texts and of deriving rulings therefrom. They are also knowledgeable in the realms of positive law (having mastered its difficult and precedent-setting cases), the science of disagreement (*khilāf*) and arithmetic. The *mujtahids* in this category must maintain these qualifications in all areas of the law, thereby distinguishing themselves from lesser *mujtahids*.¹⁵

Those who possess these lofty qualifications are able to dispense with the communal duty, the *farḍ al-kifāya*, which is incumbent upon all members of the community but discharged if certain members could fulfill it. They follow no one and belong to no school, the implication being – given the then current perception of the schools' history – that this definition applies to the founders of their own schools, the imams, who appeared on the scene during a fleeting moment in history. Ibn al-Ṣalāḥ declares these jurists long extinct, having left behind others to tread in their footsteps.

Those who follow in their path make up the second category, the dependent *mufṭīs* who are by definition affiliated with the founding masters, the imams. Ibn al-Ṣalāḥ falls short of making any explicit connection between the two types, but the connection seems to be assumed and appears to follow logically. The assumption is necessary because the entire community of *mufṭīs* is conceived here in terms of leaders and followers, of founding masters and succeeding generations of adherents who are progressively, in diachronic terms, inferior in knowledge to the

¹⁴ Abū ʿAmr ʿUthmān b. ʿAbd al-Raḥmān Ibn al-Ṣalāḥ, *Adab al-Mufṭī wal-Mustaftī*, ed. Muwaffaq b. ʿAbd al-Qādir (Beirut: ʿĀlam al-Kutub, 1407/1986), 86 ff.

¹⁵ *Ibid.*, 89–91.

imams. This is perhaps why, in the course of the discussion, Ibn al-Ṣalāḥ changes the designation of the second category from *ghayr mustaqill* to *muntasib*, the affiliated *muftī*.

This second category is in turn divided into four (possibly five) types:

Type 1: Curiously, the first type is far from being a *muqallid*, i.e. one who follows the positive doctrine of the founding master or absolute *mujtahid*. Rather, this type of *muftī* possesses all the qualifications found in the absolute, independent *mujtahid*, and seems to equal him in every way. However, his affiliation with the latter is due to the fact that the *muftī* has chosen to follow his particular methods of *ijtihād* and to advocate his doctrines. In this context, Abū Ishāq al-Isfarāʾīnī (d. 418/1027) is on record as saying that this was the case with a number of *mujtahids* who affiliated themselves with the school founders not out of *taqlīd* but rather because they found the imams' methods of *ijtihād* most convincing. What he in effect means here is that the affiliation was created on the grounds that the *muftī* of the first sub-type happened to believe in the soundness of the *ijtihād* methods adopted by the absolute *mujtahid* because he had arrived independently at the same conclusions. *Taqlīd* plays no role here, because the adoption of the founder's *ijtihād* methods presupposes the existence of the quality of *ijtihād* which enables him to determine that the imam's methodology is the most sound.

This being the case, the distinction between these two types of *mujtahid* is drastically blurred, which raises, for instance, the question: Why should jurists of the second type "follow" the first if they are equally qualified? Or to put it another way: Why should those of the second type not establish their own schools? It is probably this ambiguity, or blurring of distinctions, that prompted Ibn al-Ṣalāḥ to interject a clarifying statement: The claim that the affiliated *mujtahids* are devoid of all strands of *taqlīd* is incorrect, for they, or *most of them* (*aktharuhum*), have not completely mastered the sciences of absolute *ijtihād* and thus have not attained the rank of independent *mujtahids*. This assertion seems to stand in flagrant contradiction to what Ibn al-Ṣalāḥ had said a little earlier, namely, that this kind of *muftī* possesses all the credentials of the absolute, independent *mujtahid* and stands on a par with him in nearly every way. The difficulty in accounting for the role of these *mujtahids* in the school hierarchy is underscored by Ibn al-Ṣalāḥ's qualification "most of them." This is significant since it allows for a certain blurring of distinctions between this type of *muftī* and the absolute *mujtahid*. Isfarāʾīnī's assertion thus remains largely unaffected, while Ibn al-Ṣalāḥ's undifferentiated reality tends to accord with the facts of history, for we now know that the eponyms were not exclusively responsible for the rise and evolution of the schools.¹⁶

¹⁶ A point we shall develop in chapter 2, below. See also Wael B. Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies*, 4 (1993): 587–605.

Type 2: The second type is the limited *mujtahid* (*muqayyad*) who is fully qualified to confirm and enhance the doctrines of the absolute *mujtahid*. His qualifications, however, do not allow him to step outside the principles and methods laid down by the imam of his school. He knows the law, legal theory, and the detailed methods of legal reasoning and linguistic analysis. He is an expert in *takhrīj*¹⁷ and in deducing the law from its sources.¹⁸ This last qualification becomes necessary because he is held responsible for determining the law in unprecedented cases according to the principles of his imam and of the school with which he is affiliated. Despite his ability to perform *ijtihād*, these qualifications of his are marred by a weakness in certain respects, such as in his knowledge of *ḥadīth* or in his mastery of the Arabic language. These weaknesses, Ibn al-Ṣalāḥ observes, have in reality been the lot of many *muftīs* who happened to be of this type. He also finds it easier to cite examples of such *muftīs* than he was when articulating the first type. He declares, for instance – without invoking the attestation of other authorities (as he did with Isfarāʾinī before) – that a certain class of eminent Shāfiʿite jurists did belong to this type, calling these latter *aṣḥāb al-wujūh* and *aṣḥāb al-turuq*.¹⁹

The relationship existing between the revealed texts and the absolute *mujtahid* appears identical to that which links the imam’s founding positive doctrines to the limited *mujtahid* of the second type. This latter, in other words, derives rulings for unprecedented cases on the basis of the imam’s doctrines, just as his imam derived his own doctrines from the revealed sources. In rare cases, he may even embark on *ijtihād* in the same manner as the *muftī* of the first type does. At a later stage of the discussion, Ibn al-Ṣalāḥ develops this point. He argues that in unprecedented cases the limited *mujtahid* is permitted to conduct *ijtihād* in the same manner as the absolute *mujtahid*. Shāfiʿite *mujtahids* who have mastered the fundamental principles (*qawāʿid*) as laid down by Shāfiʿī, and who are fully trained in his methods of legal reasoning, are considered to have the same abilities as the absolute *mujtahid* does. In fact, Ibn al-Ṣalāḥ continues, such *mujtahids* may even be more capable than the absolute *mujtahid*, for they, we understand, have lived at a time when the fundamental school principles have long been prepared and established. Such tools as were available to them were never within the reach of the absolute *mujtahid*. Thus, Ibn al-Ṣalāḥ seems to say, they enjoy a definite advantage.

¹⁷ For a detailed account of *takhrīj*, see chapter 2, sections III–IV, below.

¹⁸ In fact, Jalāl al-Dīn al-Suyūṭī calls this type of jurist *mujtahid al-takhrīj* since the characteristic activity in which he is involved is that of *takhrīj*. See his *al-Radd ʿalā man Akhlada ilā al-Ard wa-Jahila anna al-Ijtihād fī Kulli ʿAṣrin Farḍ*, ed. Khalīl al-Mays (Beirut: Dār al-Kutub al-ʿIlmiyya, 1983), 116.

¹⁹ Norman Calder, “al-Nawawī’s Typology of *Muftīs* and its Significance for a General Theory of Islamic Law,” *Islamic Law and Society*, 4 (1996): 146, mistakenly defined *aṣḥāb al-wujūh* as “those [jurists] whose opinions are preserved.” On this expression, see chapter 2, section III, below. On *aṣḥāb al-turuq*, see chapter 5, section I, below.

It is important to realize that the license given to the limited *mujtahid* to perform the various activities of *ijtihād* is not mere theorization on the part of Ibn al-Ṣalāḥ. In a key sentence, he declares that the province of this *mujtahid*'s activities is acknowledged in both theory and practice. "This is the correct doctrine which has been put into practice, the haven of the *muftīs* for ages and ages."²⁰

However, if the limited *mujtahid* finds that a ruling in a particular case has already been derived and elaborated by his imam, he must adopt it and ought not to question them by seeking textual evidence that might countervail or contradict it (*mu'arid*). The ability to give preponderance to one piece of evidence over another belongs to the imam, who is seen as the real founder of the school. This is why the *fatwā* of the limited *mujtahid* of this type does not reflect his own juristic endeavor, but rather that of the imam. "He who applies [or adopts; *'āmil 'alā*] the *fatwā* of the limited *mujtahid* is a *muqallid* of the imam, not of the limited *mujtahid* himself, since the latter relies in validating his opinion on the imam, for he is not acting independently in validating its attribution to the Lawgiver."²¹ Authority here is hierarchical: *Direct confrontation with the revealed texts endows the hermeneutical enterprise of the imam with the highest level of authority*. A derivative hermeneutic therefore yields only derivative and subordinate authority. The derivative nature of this authority translates, formally, into affiliation, and substantively, into loyalty.

Type 3: Jurists of the third type are, expectedly, inferior to their counterparts of the second type: Ibn al-Ṣalāḥ calls them the "jurists who articulated the *wujūh* and *ṭuruq*" (*aṣḥāb al-wujūh wal-ṭuruq*).²² The *muftī* of the third type has a trained intelligence, knows by heart the doctrines of the imam he follows (*madhhab imāmihi*), and is an expert in his methods and ways. These doctrines and methods he confirms, defends, refines, clarifies, reenacts, and makes preponderant, presumably over and against the doctrines of others. His qualifications, however, fall short of those posited for *muftīs* of the preceding types because he fails to match their knowledge in one or more of the following areas: (1) the authoritative law of the school, the *madhhab*;²³ (2) the methods of legal reasoning needed for the derivation of rulings; (3) *uṣūl al-fiqh* in all its aspects and details; and (4) a variety of tools needed for the practice of *ijtihād*, tools which the *aṣḥāb al-wujūh wal-ṭuruq* have perfected.

Who belonged to this type? Ibn al-Ṣalāḥ is even more specific about which jurists who fell into this group than he was about the first and second types. Here he introduces an explicit chronological element, hitherto absent from his typology. Many of the later jurists (*muta'akhhirūn*) who flourished up to the end of the fifth/eleventh century were, according to him, of this category.

²⁰ Ibn al-Ṣalāḥ, *Adab al-Muftī*, 96: "*hādihā huwa al-ṣaḥīḥ al-ladhī 'alayhi al-'amal wa-ilayhi mafza' al-muftīn min mudadīn madīda*." On the significance of *ṣaḥīḥ* and *'amal*, see chapter 5, sections IV and VI, below.

²¹ Ibn al-Ṣalāḥ, *Adab al-Muftī*, 95. ²² See n. 19, above.

²³ See chapter 5, section VI, below.

They were author–jurists (*muṣannifūn*)²⁴ who produced the magisterial works studied so assiduously by later generations of legal scholars, including, admittedly, the generation of Ibn al-Ṣalāḥ himself. Their juristic competence does not match that of their colleagues of the second type, but they did contribute to the ordering and refinement of the authoritative positive doctrine of the school, the *madhhab*. In their *fatwās*, they elaborated law in the same detailed manner as jurists of the second type did, or, at any rate, very close to it. Their competence in legal reasoning permitted them to infer rulings for new cases on the basis of established and already solved cases. In this respect, Ibn al-Ṣalāḥ states, they were not limited to certain types of legal reasoning, the implication being that their competence in this sphere was of a wide range.

Type 4: Muftīs belonging to this type are the carriers and transmitters of the *madhhab*. They fully understand straightforward and problematic cases, but their knowledge does not go beyond this stage of competence, for they are weak in establishing textual evidence and in legal reasoning. In issuing *fatwās*, they merely transmit the authoritative doctrine of the school as elaborated by the imam and his associates who are themselves *mujtahids* operating within the boundaries of their school. In referring to the latter authorities, Ibn al-Ṣalāḥ has in mind jurists belonging to the first category and types 1 and 2 of the second, for he uses a particular term, *takhrījāt*, when referring to that part of the school’s authoritative doctrine which cannot be attributed to the imam’s juristic activity. Since the sole juristic activity of type 2 is characterized as *takhrīj*, then *muftīs* of type 4 must transmit the doctrines of the imam, *muftīs* of type 1, and, by definition, those of type 2.

When *muftīs* of type 4 do not find in the school’s doctrine answers to the questions facing them, they look for analogical cases that might provide solutions to the questions addressed to them. If they find such cases, and if they know that the analogy is sound (i.e., that differences between the cases are irrelevant),²⁵ then they transfer the rule of the established case to the new. Similarly, they may venture to apply, in a deductive manner, a general, well-defined school principle to the case at hand. Such opportunities are common, for it is unlikely that a jurist should encounter a case which has no parallel in the school or which does not conform to a general principle. However, should a *muftī* be incapable of reasoning on such a level, he should refrain from issuing *fatwās* when the answer has not been established in the school. Finally, *muftīs* of this type are unable to commit the entirety of the school’s positive doctrines to memory. They can memorize most of the doctrines, but must be adequately trained in retrieving the rest from books.²⁶

²⁴ On the author–jurist and his role in legitimizing legal change, see chapter 6, below.

²⁵ Commonly known as *qiyās ilghā’ al-fāriq* or *qiyās nafī al-fāriq*. See Muwaffaq al-Dīn Ibn Qudāma, *Rawdat al-Nāzīr wa-Junnat al-Munāzīr*, ed. Sayf al-Dīn al-Kātib (Beirut: Dār al-Kitāb al-‘Arabī, 1401/1981), 262–63; Jamāl al-Dīn Abū ‘Amr Ibn al-Ḥājjib, *Mukhtaṣar al-Muntahā al-Uṣūlī* (Cairo: Maṭba‘at Kurdistān al-‘Ilmiyya, 1326/1908), 132–33.

²⁶ Ibn al-Ṣalāḥ, *Adab al-Muftī*, 100.

In a subsequent discussion, related to, but not an integral part of the typology, Ibn al-Ṣalāḥ remarks that Imām al-Ḥaramayn al-Juwaynī (d. 478/1085) and others held the view that a jurist who is adept at *uṣūl* and knowledgeable in *fiqh* is not permitted, solely on that basis, to issue *fatwās*.²⁷ Others are also reported to have maintained that a *muqallid* is not allowed to issue *fatwās* in those areas of the law in which they are *muqallids*. To be sure, there were those who opposed such views and were prepared to allow a *muqallid* with thorough knowledge of the imam's law (*mutabāḥḥiran fīhi*) to issue *fatwās* in accordance with it. At this point, Ibn al-Ṣalāḥ interjects to explain that what is intended by the provision that a *muqallid* should not issue *fatwās* is that he should not appear as though he is the author of the *fatwā*; rather, he should clearly attribute it to the *mujtahid* whom he followed on that particular point of law. Accordingly, Ibn al-Ṣalāḥ adds, "in the ranks of *muftīs*, we have counted *muqallids* who are not true *muftīs*, but who have taken the places of others performing their tasks on their behalf. Thus, they have come to be counted amongst them. For example, they should say [when they are asked a question]: 'The opinion of Shāfi'ī is such and such.'²⁸

This preliminary discussion seeks to introduce, in a less conscious manner, what is in effect a fifth type. Ibn al-Ṣalāḥ explicitly observes that this type has nothing in common with the other categories of his typology, and yet at the same time refuses to assign it a formal place. This sub-type appears as subsidiary to the formal structure of the typology, its informality suggesting that it originated as an afterthought. Its exclusion from the formal structure of the typology is implicitly rationalized in the preliminary discussion where the main point made is that the true or quintessential *muftī* is the one who is himself able to reason independently, either by deriving legal rulings directly from the revealed texts (category 1 and types 1 and 2 of category 2) or by being knowledgeable in the methods of derivation and in the material sources so as to be able to verify the soundness of the opinions he issues (types 3 and 4). A person of the subsidiary type, however, possesses none of these qualities, for he is deficient (*qāṣir*) and all he has "studied is one or more books of the *madhhab* . . . If a layman does not find in his town anyone other than him, then he must consult him, for this is still better than a situation where the layman remains confused, having no solution to his problem."²⁹ If the town is devoid of *muftīs*, then the layman should turn to this *qāṣir* individual who must relay the solution

²⁷ Ibid., 101 f. ²⁸ Ibid., 103. ²⁹ Ibid., 104.

to the layman's problem as found in a reliable and trustworthy book. Here the layman would of course be following the opinion (*muqallidan*) of the imam, not that of the *qāṣir*. But if he cannot find an identical case in any written sources, then he should in no way attempt to infer its solution from what he might think to be similar cases in their pages.

Overall, then, Ibn al-Ṣalāḥ's typology encompasses six sorts of jurists, ranging from the independent *muftī*, the imam, down to the deficient jurist who is merely able to locate in the law books the cases about which he is asked. It is interesting that Ibn al-Ṣalāḥ's younger contemporary, Nawawī (d. 676/1277), reproduces, with a somewhat different arrangement of materials, the same typology, including the supplementary, informal discussion.³⁰ Like Ibn Rushd's typology, Ibn al-Ṣalāḥ's version became highly influential within and without the Shāfi'ite tradition, more so than Nawawī's reproduction of it. In fact, it remained influential even after Suyūṭī reformulated it nearly three centuries later.³¹

IV

Some three centuries after Ibn al-Ṣalāḥ and Nawawī, and perhaps shortly after Suyūṭī's lifetime, the Ottoman Shaykh al-Islām Aḥmad Ibn Kamāl Pāshāzādeh (d. 940/1533)³² articulated a Ḥanafite typology of jurists in

³⁰ Calder, who studied Nawawī's typology in the larger context of his *Majmū'*, curiously arrives at eight types altogether. He recognizes the first six, as I do. But he adds two more types for which I see no basis either in Ibn al-Ṣalāḥ or in Nawawī. The seventh type which Nawawī is said to have articulated is indeed not a type but rather a discussion I have characterized as preliminary to his less formal type 5 of the second category. The eighth type that Calder identifies is again not a type since it deals with laymen not *muftīs*, and *muftīs* are what the entire typology is all about. See Calder, "al-Nawawī's Typology," 148; cf. Nawawī, *al-Majmū'*, I, 44–45.

³¹ See, for instance, the widely quoted work of Shams al-Dīn Ibn Farḥūn, *Tabṣirat al-Ḥukkām fī Uṣūl al-Aqḍiyya wa-Manāḥij al-Aḥkām*, 2 vols. (Cairo: al-Maṭba'at al-ʿĀmira al-Sharafiyya, 1883), I, 51. For Suyūṭī's reformulation, see his *al-Radd*, 112–16. Suyūṭī, however, differs with Ibn al-Ṣalāḥ on the terminological definition of the first type in the second category. Whereas Ibn al-Ṣalāḥ uses the term "absolute" to describe *muftīs* of the first category, Suyūṭī argues that type 1 of the second category is also absolute, albeit affiliated: "*fā-bādhā muṭlaq muntasib lā mustaqill.*" Cf. Aḥmad b. ʿAbd al-Raḥīm Shāh Walī Allāh al-Dahlawī, *ʿIqd al-Jīd fī Aḥkām al-Ijtihād wal-Taqlīd*, ed. Muḥibb al-Dīn al-Khaṭīb (Cairo: al-Maṭba'at al-Salafiyya, 1385/1965), 3–5.

³² For his biography, see ʿAbd al-Qādir al-Tamīmī, *al-Ṭabaqāt al-Saniyya fī Tarājim al-Ḥanafīyya*, ed. ʿAbd al-Fattāḥ al-Ḥulw, 3 vols. (Cairo: Dār al-Rifāʿī lil-Nashr, 1983), I, 355–57; Abū al-Ḥasanāt ʿAbd al-Ḥayy al-Laknawī, *al-Fawā'id al-Bahīyya fī Tarājim al-Ḥanafīyya* (Cairo: Maṭba'at al-Sa'āda, 1324/1906), 21–22; Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāshiyat Radd al-Muḥtār ʿalā al-Durr al-Mukhtār: Sharḥ Tanwīr al-Abṣār*, 8 vols. (Beirut: Dār al-Fikr, 1979), I, 26.

which seven ranks (*ṭabaqāt*) are recognized.³³ The first is the rank of *mujtahids* in the Sharḥ, consisting of the four imams, the founders and eponyms of the four legal schools. Also holding this rank are others “like them,” almost certainly a reference to the eponyms of the schools that failed to survive. These eponyms established fundamental principles (*taʿzīs qawāʿid al-uṣūl*) and derived positive legal rulings from the four sources, i.e., the Quran, the Sunna, consensus, and *qiyās*. They are independent, and follow no one, whether it be in the general principles and methodology of law (*uṣūl*) or in positive legal rulings (*furūʿ*).

Second is the rank of *mujtahids* within the boundaries of the *madhhab*, such as Abū Ḥanīfa’s students, especially Abū Yūsuf and Shaybānī. These latter were capable of deriving legal rulings according to the general principles laid down by their master, Abū Ḥanīfa. Despite the fact that they differ with him on many points of law, they nonetheless follow him in the fundamental principles he established. It is precisely in virtue of their adherence to the imam’s fundamental principles that jurists of this rank are distinguished from other jurists – such as Shāfiʿī – who also differed with Abū Ḥanīfa on individual points of law. Unlike this rank, however, Shāfiʿī’s differences extended even to fundamental principles, but then he is in a different rank altogether.

Third is the rank of *mujtahids* who practiced *ijtihād* in those particular cases that Abū Ḥanīfa did not address. Assigned to this rank, among others, are Abū Bakr al-Khaṣṣāf (d. 261/874),³⁴ Abū Jaʿfar al-Ṭahāwī (d. 321/933),³⁵ Abū al-Ḥasan al-Karkhī (d. 340/951),³⁶ Shams al-Aʿimma al-Ḥulwānī (d. 456/1063),³⁷ Shams al-Aʿimma al-Sarakhsī (d. after 483/1090),³⁸ Fakhr al-Islām al-Pazdawī (d. 482/1089),³⁹ and Fakhr al-Dīn Qāḍikhān (d. 592/1195).⁴⁰ These jurists, incapable of differing with Abū Ḥanīfa over either the methodology and theory of law (*uṣūl*) or positive legal rulings (*furūʿ*), nonetheless solved unprecedented cases in accordance with the principles that the eponym had laid down.

³³ Ibn Kamāl’s classification became highly influential in the Ḥanafite school, and was recorded in a number of widely read works. See Abū al-Wafā’ Muḥammad al-Qurashī, *al-Jawābir al-Muḍīʿa fī Ṭabaqāt al-Ḥanafīyya*, 2 vols. (Hyderabad: Maṭbaʿat Majlis Dāʿirat al-Maʿārif, 1332/1913), II, 558; Tamīmī, *al-Ṭabaqāt al-Saniyya*, I, 33–34; Ibn ʿAbidīn, *Hāshīya*, I, 77–78; Muḥammad Amīn Ibn ʿAbidīn, *Sharḥ al-Manzūma al-Musammā bi-ʿUqūd Rasm al-Muḍīʿ*, in his *Majmūʿ Rasāʾil Ibn ʿAbidīn*, 2 vols. (n.p., 1970), I, 11–12; Abū al-Ḥasanāt ʿAbd al-Ḥayy al-Laknawī, *al-Nāfiʿ al-Kabīr: Sharḥ al-Jāmiʿ al-Ṣaghīr* (Beirut: ʿĀlam al-Kutub, 1406/1986), 9–11. References here are to the text of Qurashī’s *al-Jawābir al-Muḍīʿa*.

³⁴ Zayn al-Dīn Qāsim Ibn Quṭlūbughā, *Tāj al-Tarājim fī Ṭabaqāt al-Ḥanafīyya* (Baghdad: Maktabat al-Muthannā, 1962), 7.

³⁵ *Ibid.*, 8. ³⁶ *Ibid.*, 39. ³⁷ *Ibid.*, 35. ³⁸ *Ibid.*, 57–58.

³⁹ *Ibid.*, 41. ⁴⁰ *Ibid.*, 22.

The fourth rank differs from the preceding three in that it is defined in terms of *taqlīd*, not *ijtihād*. Jurists of this rank are only capable of *takhrīj*, and are thus known as *mukharrijūn*.⁴¹ Their ability to practice *takhrīj* is due to their competence in *uṣūl*, including knowledge of how rules were derived by the predecessors. It is their task to resolve juridical ambiguities and tilt the scale in favor of one of two or more opinions that govern a case. This they do by virtue of their skills in legal reasoning and analogical inference. Karkhī, Rāzī,⁴² and, to some extent, the author of *Hidāya*,⁴³ belong to this rank, which seems a counterpart of the second sub-type advanced by Ibn al-Ṣalāh.

The fifth rank is that of *aṣḥāb al-tarjīḥ* who are also described by Ibn Kamāl as *muqallids*. Characterized as *murajjihūn*, they are able to address cases with two or more different rulings all established by their predecessors. Their competence lies in giving preponderance to one of these rulings over the other(s), on grounds such as its being dictated either by a more strict inference or by public interest. Abū al-Ḥasan al-Qudūrī (d. 428/1036)⁴⁴ and the author of *al-Hidāya*, Marghīnānī, for instance, are listed as belonging to this rank.

The sixth is the rank of *muqallids* who distinguish between sound and weak opinions, or between authoritative and less authoritative doctrines (*ẓāhir al-riwāya* and *al-nawādir*). What is characteristic of these *muqallids* is that they, as authors of law books, are careful not to include weak or rejectable opinions. Among the jurists belonging to this rank are the authors of the authoritative manuals (*mutūn*): Aḥmad Fakhr al-Dīn Ibn al-Faṣīḥ (d. 680/1281) who wrote *al-Kanz*,⁴⁵ ʿAbd Allāh b. Mawdūd al-Mūṣīlī (d. 683/1284) who wrote *al-Mukhtār*,⁴⁶ Ṣadr al-Sharīʿa al-Maḥbūbī (d. 747/1346) who wrote *al-Wiqāya*,⁴⁷ and Aḥmad b. ʿAlī Ibn al-Sāʿātī (d. after 690/1291), the author of *Majmaʿ al-Baḥrayn*.⁴⁸ (It is worth noting in passing that Ibn Kamāl identified most jurists who belonged to the fourth, fifth, and sixth ranks in terms of their works, works which represented their contribution to law and which became the yardstick of the quality of their hermeneutical activities. Here, it is

⁴¹ On *takhrīj* and the *mukharrijūn* (= *aṣḥāb al-takhrīj*), see chapter 2, section III, below.

⁴² Probably ʿAlī b. Aḥmad Ḥusām al-Dīn al-Rāzī who died in 593/1196. See Ibn Quṭlūbughā, *Tāj al-Tarājim*, 42.

⁴³ Shaykh al-Islām Burhān al-Dīn ʿAlī b. Abī Bakr al-Marghīnānī (d. 593/1197). For his biography, see *al-Hidāya: Sharḥ Bidāyat al-Mubtadī*, 4 vols. (Cairo: Muṣṭafa Bābī al-Ḥalabī, n.d.), I, 3–9.

⁴⁴ Ibn Quṭlūbughā, *Tāj al-Tarājim*, 7. ⁴⁵ Ibid., 13. ⁴⁶ Ibid., 31.

⁴⁷ Carl Brockelmann, *Geschichte der arabischen Literatur*, 2 vols. (Leiden: E. J. Brill, 1943–49); 3 supplements (Leiden: E. J. Brill, 1937–42), suppl. 1, 646.

⁴⁸ Ibn Quṭlūbughā, *Tāj al-Tarājim*, 6.

significant that they appear in the role of author–jurists as much as they are seen as *mujtahids* or *muqallids*.)

Finally, the seventh rank contains the lowliest *muqallids*, including those who are poorly trained jurists, or who are incapable of “differentiating right from left.”⁴⁹

V

Now let us examine the significance of these typologies within the context of our enquiry. We begin by noting two important anomalies. The first may be found in Ibn al-Ṣalāḥ’s discussion of the first type of his category 2, which, incidentally, he does not label. Jurists of this type are neither founders nor followers, strictly speaking. He explicitly states that this type follows the imam neither in his *madhhab* nor in his methods and legal reasoning (*lā yakūnu muqallidan li-Imāmihī, lā fī al-madhhab wa-lā fī dalīlihī*).⁵⁰ If this is the case, then why should they even be included? The answer, I believe, lies in the unique history of the Shāfi‘ite school, which appears to have been later consolidated by Ibn Surayj by incorporating into the school tradition the doctrines of a number of independent *mujtahids* whose connection to Shāfi‘ī seems tenuous. It should be noted that no trace of this ambiguous type can be found in either the Ḥanafite or the Mālikite typologies we have discussed here. In the latter, its absence is clear since Mālik and his associates are classed as indistinguishable equals in what would have otherwise been Ibn Rushd’s fourth group. In the former typology, the second rank of jurists such as Abū Yūsuf, Shaybānī, and their peers follow Abū Ḥanīfa’s path.

The second anomaly is Ibn Rushd’s inverted classification, which begins with low-grade *muqallids* and ends with *mujtahids* par excellence, despite the fact that these latter, regardless of their legal creativity, ultimately operated within the boundaries of the Mālikite school. By contrast, Ibn al-Ṣalāḥ’s and Ibn Kamāl’s typologies begin with the highest-ranked *mujtahids* and descend to the lowest ranks.

It is undeniable that Ibn Rushd’s inverted classification represents a deviation from the form of juristic taxonomy that dominated Islamic culture. All biographical and semi-biographical works dealing with jurists, theologians, traditionists, and others follow the chronological format, thus rendering Ibn Rushd’s classification all the more anomalous. One possible explanation of this anomaly is the provenance of Ibn Rushd’s typology, which seems to be one of, if not in fact, the earliest. Indeed, the

⁴⁹ Qurashī, *al-Jawābir al-Muḍī‘a*, 559. ⁵⁰ Ibn al-Ṣalāḥ, *Adab al-Muḍī‘ī*, 91.

juristic biographical tradition itself appears to have begun no earlier than a century or so before Ibn Rushd, which makes the argument in favor of his unprecedented typology quite persuasive.⁵¹

Because it is so early, Ibn Rushd's typology manifests a relatively weaker form of loyalty to the school tradition than later became the norm. An inverted typology conceptually and structurally tends to downgrade hierarchical authority, or, at the very least, is not acutely conscious of such an authority. The absence from it of any chronological element amounts to a virtual weakening of the chain of authority that mediates between the founding imam and his followers throughout the centuries. It should not be surprising then that Ibn Rushd does not elaborate a system of authority which is derivative in nature. Instead, the authority which is the focus of his typology is almost entirely hermeneutical. The types he elaborates are independent of each other, and are markedly disconnected in terms of an authoritative structure. Mālik "and his associates" are not introduced as a "group" in his classification, although, admittedly, they are constantly invoked. This omission may have been dictated by the nature of the question he was asked, although it remains true that the founding imam's distinct and prestigious status as advocated by both Ibn al-Ṣalāḥ and Ibn Kamāl is virtually absent from Ibn Rushd's scheme. It suffices to recall here his assertion that "the attributes of the *muftī* which he should fulfill do not change with the changing of times,"⁵² implying that Mālik and his associates as well as all later *muftahids* of the third group (type) are equal in juristic competence.

The temporal proximity of Ibn Rushd to the final crystallization of the law schools, especially of Andalusian Mālikism, was a decisive factor that affected not only the degree to which the taxonomy was made elaborate, but also the historical consciousness that undergirded such a taxonomy. Whereas taxonomic elaborateness and historical consciousness are qualities largely absent from Ibn Rushd's typology, they dominate those of Ibn al-Ṣalāḥ and Ibn Kamāl. Ibn al-Ṣalāḥ wrote more than two centuries and a half after the formation of the Shāfi'ite school in the east, when a historical pattern of developments had by then become fairly clear. By his time, and certainly by Ibn Kamāl's day, historical consciousness of legal evolution, the structure of authority, and hermeneutical activity had become well defined. This consciousness is nearly absent from Ibn Rushd, obvious in Ibn al-Ṣalāḥ, and elaborate in Ibn Kamāl.

Ibn al-Ṣalāḥ's fifth type, which he introduces rather informally – leaving it extraneous to the typology itself – has its equivalent in Ibn

⁵¹ See n. 2, above. ⁵² Wansharīsi, *al-Mi'yār al-Mughrib*, X, 34.

Kamāl's seventh and last rank, a rank not only articulated in a deliberate and conscious manner, but also formally integral to the typology. Furthermore, in what is equivalent to Ibn al-Ṣalāḥ's second type, Ibn Kamāl distinguished two ranks, one able to perform *ijtihād* in individual questions, the other limited to conducting *takhrīj*. In Ibn al-Ṣalāḥ both activities belong to the same type. This leaves us with the following parallels between the Shāfi'ite and Ḥanafite typologies: Category 1 equals rank 1; type 1 (of category 2) equals rank 2; type 3 equals rank 5; and type 4 equals rank 6.

Further comparison shows that Ibn al-Ṣalāḥ's category 1 and the first type of category 2, and Ibn Kamāl's ranks 1 and 2, are equivalent to what would have been Ibn Rushd's fourth group, although this must remain a matter for speculation. This is so because Ibn Rushd appears to deny the founding fathers any special characteristic, arguing in effect that later *mujtahids* are no less qualified than these were. Admittedly, later *mujtahids* are found to be affiliated, yet their *ijtihād* can often differ from that of the masters of the schools. With this affiliation in mind, Ibn Rushd's third group would then be equivalent to Ibn al-Ṣalāḥ's types 1 and 2. The second group is even less qualified, encompassing Ibn al-Ṣalāḥ's types 3, 4, and possibly 5. The first group would then be equivalent to Ibn al-Ṣalāḥ's type 5, with the difference that Ibn Rushd does not see them as entitled to issue *fatwās*.

Perhaps the most salient feature of these typologies, especially the Shāfi'ite and Ḥanafite varieties, is that they sketch the diachronic and synchronic contours of Islamic legal history generally, and the development of the respective schools in particular. They sketch this history in terms of the authority and scope of hermeneutical activity, two separate domains that are nonetheless intimately interconnected. Interpretive activity may be more or less authoritative, and its scope may also be wide or narrow. But in Islamic legal history they stand in a relationship of correlation, for higher hermeneutical authority brings along with it a wider range of interpretive activity. The most absolute form of these two domains was the lot of the founding imams. As time went on, increasing numbers of jurists were to claim less and less competency in these domains. Indeed, diminishing returns in both authority and hermeneutics went hand in hand with an increasing dependency on former authority, although to a lesser extent on earlier *corpora* of interpretation. Synchronically, therefore, the function of these typologies is not only to describe, justify, and rationalize juristic activities of the past but also, and more importantly, to construct the history of the school as a structure of authority which is tightly interconnected in all its constituents. The structure that emerges is

both hierarchical and pyramidal. In synchronic terms, then, the achievement is represented in the creation of a pedigree of authority that binds the school together as a guild.

Diachronically, the typologies justify the tradition in which the *muftīs* were viewed as founders of law schools as well as the sustainers of a continuous activity that connected the past with the present. But the connection was also made in concrete terms. The hermeneutics of one type or rank represented a legacy to the succeeding type and rank, a legacy to be accepted, articulated, elaborated, and further refined. The process began with absolute *ijtihād*, passing through more limited *ijtihād*, descending to *takhrīj*, and then ultimately *tarjīh* and other forms of interpretive activity. Participating at each of these stages was a group of identifiable jurists. Ibn Kamāl, for instance, recognized particular jurists as belonging to each of the ranks he proffered.

The typologies also function on the synchronic level, for they at once describe and justify the activities of *muftīs* both at and before the time that each typology, as a discursive strategy, came into being. For Ibn Rushd, the three groups he recognized were still active in his time; this is not only clear but indeed demonstrable, for Ibn Rushd himself was a supreme *mujtahid* in his own right.⁵³ To the exclusion of the first category of his typology, and perhaps the first type of the second, Ibn al-Ṣalāḥ's scheme also justifies and describes the range of juristic activities that prevailed during his time. Ibn Kamāl's typology, on the other hand, is more diachronically bound, and thus seems on the surface to be less susceptible to synchronic justification. Nonetheless, as in the case of Ibn al-Ṣalāḥ, ranks 5 to 7 did exist at all times subsequent to the formative period, and 3, and 4 could have conceivably existed at any time. Only ranks 1 and 2, being foundational, are unique, and thus represent a phenomenon that cannot be found repeated in later centuries.

The typologies may also serve as a description of the range of activities of a single jurist. The more accomplished the jurist, the greater the number of activities, across two or more types, in which he might have been involved. No doubt jurists operated within a system of authority, which means that *taqlīd* constituted the great majority of the cases with which they had to deal. But jurists of high caliber, such as Ibn al-Ṣalāḥ himself and Nawawī (as well as al-ʿIzz Ibn ʿAbd al-Salām [d. 660/1262] and, later, Taqī al-Dīn al-Subkī [d. 756/1355]) did deal with less common, rare, and difficult cases which required juristic competence of a more sophisticated, *ijtihādīc* type. Such jurists (including Ibn Kamāl

⁵³ See n. 11, above.

and Shaykh al-Islām Abū al-Su‘ūd [d. 982/1574]) did function at several levels. In Ibn al-Ṣalāḥ’s classification, these latter operated as type 2 through 5, and possibly even type 1 jurists. In Ibn Kamāl’s typology, they operated on the level of ranks 3–7. This multi-level functioning is partly attested by Ibn Kamāl’s citation of names as examples of jurists who represented certain ranks. Marghīnānī, for instance, is cited as active at ranks 4 and 5, and Karkhī at ranks 3 and 4. We can easily assume that in Karkhī’s case, he mastered all ranks between, and including, 3 and 7.

Karkhī’s case is also instructive insofar as it demonstrates the interplay between *ijtihād* and *taqlīd*, both of which here acquire a multiplicity of meanings. For the *ijtihād* associated with rank 3 (the *mujtahid* in individual cases) is qualitatively different from that required in rank 4, and this, in turn, is to be differentiated from its counterparts in ranks 1, 2, and 5. Similarly, *taqlīd* operates on several levels. Ibn Kamāl’s second rank is bound by *taqlīd* to the imam, but the quality of the *taqlīd* found there is entirely unlike that found, for instance, in rank 4, and certainly unrelated to that which ranks 6 and 7 practice. Thus, while *ijtihād* succeeds in maintaining a positive image, even in the middle ranks, *taqlīd* is, on one level, clearly a desirable practice in the higher ranks and an undesirable one in rank 7. Ibn al-Ṣalāḥ’s informal fifth type also shares the same negative image, although Ibn al-Ṣalāḥ seems more charitable than Ibn Kamāl.⁵⁴ I say “on one level,” because the level on which *taqlīd* is considered negative is one which is defined in terms of intellectual competence, accomplishment, and learning. On another level, *taqlīd* maintains a positive meaning, even in the lowest of ranks and types. This is the meaning of affiliation to the *madhhab*, a relationship in which the jurists of all ranks and types make a commitment to learn its doctrines, improve on them when possible, and defend them at all times. Adherence to the *madhhab* and an active defense of it constitute, respectively, the minimal and maximal forms of loyalty, and both represent varying levels of positive forms and meanings of *taqlīd*.

The positive senses of *taqlīd* transcend the province of *taqlīd* itself as narrowly defined, for if *ijtihād* has a positive image, it is ultimately because of the fact that it is backed up by *taqlīd*. To put it more precisely, except for the category (or type) of the imam, *ijtihād* would be an undesirable practice if it were not for *taqlīd*, for this latter perpetuates *ijtihād* which is quintessentially a creative, independent, and therefore

⁵⁴ It is in the sense where it is applied by jurists of the lower ranks that *taqlīd* was condemned. See chapter 4, section I, below.

positive activity. The only way the imams could have been conceived as establishing their schools was through absolute *ijtihād*, and if *ijtihād* were to continue to operate in the same absolute fashion in the absence of *taqlīd*, then there would have been no schools but a multitude of independent *mujtahids*. Thus it was *taqlīd* with respect to the imams' *ijtihād* that guaranteed the survival of the four schools, and, therefore, loyalty to them. *Taqlīd* was a necessary agent of mediating authority, and it was therefore a quality that permeated all types and ranks, except, of course, the first.⁵⁵

It follows, therefore, that these typologies present us with a variety of layers of juristic activity, each of which involves the participation of one or more types of jurists. The elements we have identified are as follows:

- (1) *Ijtihād*, which was, to varying degrees, the province of all jurists except those of the lower-middle and lowest ranks. In chapter 4 we shall encounter cases of *taqlīd* that bordered, if not encroached upon, the province of *ijtihād*. But equally importantly, we shall attempt to demonstrate, in chapter 2, that even the *ijtihād* of the founders, presumably absolute and wholly creative, fell short, in the final analysis, of such high and idealistic expectations.
- (2) *Takhrīj*, a creative activity that involves a limited form of *ijtihād* whereby the jurist confronts the already established opinions of the imam and those of his immediate *mujtahid*-followers, not the revealed texts themselves. This activity, which resulted in a repertoire of new opinions, engaged jurists of the higher ranks, mostly those who came on the heels of the imams and of the early masters, but also, to a limited extent, a number of later jurists. The reasoning involved in *takhrīj* and its role in the early formation of the schools will be taken up in the second half of chapter 2.
- (3) *Tarjīh* and all other forms of making certain opinions preponderant over others is an activity that engages, once again, the middle types, excluding the founders and the lowest rung of jurists. As we shall see in chapters 5 and 6, this activity was responsible for determining the authoritative opinions of the school at any stage of its history. This determination, which was to change from one period to another, was in turn itself instrumental in effecting legal change.
- (4) *Taqlīd*, which is the province of jurists of all types and ranks, except, presumably, the first. For the sake of our analysis, we shall look at this activity as consisting of mainly two functions, depending on which sort of jurist is making use of it. The first is the function of maintaining authority within the *madhhab*, or, to put it differently, of maintaining loyalty. In this activity, jurists of the lower echelons are usually involved. The second function is that of defending the *madhhab*, an activity that engages the attention of the jurists belonging to the middle ranks and types. The founders and eponyms, by

⁵⁵ However, we shall in due course be compelled to question this theoretical postulate.

definition, had supposedly⁵⁶ no tradition to defend, while the lowest-ranking jurists were deemed intellectually and juristically incapable of putting forth a defense of the doctrines of their *madhhab*. In chapter 2 we shall challenge the typological assumption that ascribed to the founding imams such absolute originality. On the other hand, in chapter 4 we shall likewise show that *taqlīd* of the lowest form also involved defense of the *madhhab*.

- (5) *Taṣnīf*, the activity of the author–jurist which characterizes all ranks and types except the lowest. This activity is not explicitly articulated in the typologies, but constitutes, nonetheless, a major feature in them. It is obliquely mentioned in ranks 4, 5, and 6 of Ibn Kamāl’s typology, and in type 3 of Ibn al-Ṣalāḥ’s. But it is assumed that all other higher ranks and types partook in the activity of writing. The author–jurist, therefore, emerges as a significant player in the field of juristic hermeneutics, whether as an absolute *mujtahid*, limited *mujtahid*, or even as a *muqallid* of the middle types. In chapter 6 we shall show the central role that the author–jurist played in sanctioning and formalizing legal change.

These typologies also enable us to identify four major players: the *muqallid*, the *muftī*, the *mujtahid*, and the author–jurist (*muṣannif*). None of these functions, as we have seen, constitutes an independent entity existing in complete isolation from the others. Indeed, each of these functions represents an activity that encroaches, at one level or another, upon the rest. The *muqallid* can be, though not in every case, by turns a *muftī*, a *mujtahid* of sorts, and an author. By the same token, a *mujtahid*, except theoretically in the case of an imam, can be a *muqallid*, and is always a *muftī* and, nearly always,⁵⁷ an author. The *muftī* can be a *muqallid*, an author, and a *mujtahid*. Similarly, the author can be a *muqallid*, a *mujtahid*, and a *muftī*, often at one and the same time.

Markedly absent from these typologies and from the discourse that informed them (with the partial exception of Ibn Rushd’s) is the *qāḍī*. In chapters 3 and 6 we shall attempt to address the import of this omission when we discuss the hermeneutics which the *qāḍī*’s function involved.

⁵⁶ See chapter 2, section II, below.

⁵⁷ Among the four imams, Aḥmad Ibn Ḥanbal was the only one who was not an author–jurist. Shams al-Dīn Ibn Qayyim al-Jawziyya, a Ḥanbalite himself, acknowledges that Ibn Ḥanbal “disliked writing books” (*wa-kāna raḍīya Allāhu ‘anhu shadīda al-karāhiya li-taṣnīfi al-kutub*). See his *F’lām al-Muwaqqi’ in ‘an Rabb al-‘Ālamīn*, ed. Muḥammad ‘Abd al-Ḥamīd, 4 vols. (Beirut: al-Maṭba‘a al-‘Aṣriyya, 1407/1987), I, 28. However, all Ibn Ḥanbal’s immediate followers engaged in writing, as was the case with the followers of the other imams. See the last part of section II, chapter 2, below.