Justice and Leadership in Early Islamic Courts

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Chapter Four

A Critique of Adjudication: Formative Moments in Early Islamic Legal History

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Who dispenses justice at court? Islamic legal historians have long focused on the single judge (*qāḍī*) as the embodiment of the administration of justice.[1] The judge, however, did not act alone in dispensing justice. A judicial staff supported his work, working from a position subordinate to him.[2] In addition, evading a clearly demarcated judicial hierarchy, the jurisconsult (*muftī*) shaped adjudication in many

1 The *qāḍi*-run courts were not the only courts in early Islamic history, and control over law passed through a variety of hands. Other courts included that of the arbitrator (*ḥakam*), the court of the market inspector (*muḥtasib*), the court of appeals (*maẓālim*), the court of the police (*shurṭa*), and the court of the military judge (*qāḍī ʿaskar*). Similar to the judge, yet in contrast to the jurisconsult, these judicial figures presided over courts, were authorized to terminate cases with sanctioning and binding authority, had authority over enforcement as executive officials, and were appointees of political authorities (except for the arbitrator). Still too little is known about these figures, with the noteworthy exception of the market inspector (*muḥtasib*), about whom see Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2011). Erwin Gräf provides a brief overview of the various courts. See hisis "Gerichtsverfasssung und Gerichtsbarkeit im islamischen Recht," *Zeitschrift für vergleichende Rechtswissenschaft* 58 (1955): 48–78, esp. 60.

On the early Islamic judicial system generally, see Mathieu Tillier, *L'invention du cadi. La justice des musulmans, des juifs et des chrétiens aux premiers siècles de l'Islam (Paris: Publications de la Sorbonne, 2017)*; Mathieu Tillier, *Les Cadis d'Iraq et l'État Abbasside (132/750-334/945)* (Damas: Institut français du Proche-Orient, 2009); Muhammad Khalid Masud, Rudolph Peters, and David Powers, eds., *Dispensing Justice in Islam: Qadis and their Judgments* (Leiden: Brill, 2006); Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001); Irene Schneider, *Das Bild des Richters in der "adab al-qāḍī"-Literatur* (Frankfurt: Peter Lang Verlag, 1990); and Emile Tyan, *L'Histoire de l'organisation judiciaire en pays d'Islam*, 2nd ed. (Leiden: Brill, 1960).

2 Prior to the 2nd/8th century, as Kindī notes, the judge was assisted only by his clerk (*kātib*). Yet, by the second century of Islam, a full court staff emerged, including assistants to aid the judge in a variety of ways. See Abū ʿUmar Muḥammad b. Yūsuf al-Kindī (d. 350/961), *Kitāb al-Wulāt wa-kitāb al-quḍāt*, ed. Rhuvon Guest (Leiden, Brill: 1912), 386.

distinct ways through concurring and dissenting opinions at court.[3]

This contribution focuses on two legal authorities—the *qāḍī* and the *muftī*—who cooperated or competed with each other at court. Fundamental to their relationship is the Islamic principle of *mushāwara*,[4] that is, judicial consultation of experts on legal questions.[5] Islamic legal

3 Khaṣṣāf employs several phrases when referring to the jurisconsult, including the "people of knowledge" (*ahl al-ʿilm)* or "people of jurisprudence" (*ahl al-fiqh).* Mostly, however, he refers to jurists (*fuqahāʾ*)—or, in the singular, jurist (*faqīh*), or a solitary legal expert (*rajul fiqhī wāḥid*)—and in one case he refers to "those who sit with me [the judge]" (*julasāʾī*). Except for the last set of terms, all of Khaṣṣāf's names refer to knowledge and, specifically, to juristic knowledge. See Aḥmad b. ʿUmar Khaṣṣāf (d. 261/874), *Adab al-qāḍī*, in Abū Bakr Aḥmad b. ʿAlī al-Jaṣṣāṣ (d. 370/980), *Sharḥ Adab al-qāḍī*, ed. Farhat Ziadeh (Cairo: American University Press:1978), 37-43, secs. 10–22. Shāfiʿī, on the other hand, speaks of a "consultant" or "jurisconsult" (*mushīr*). See Muḥammād b. Idrīs al-Shāfiʿī (d. 204/820), *Kitāb al-umm*, 2nd ed. (Beirut: Dār al-Fikr, 1983), 6:219, where he discusses judicial consultation under the heading *mushāwarat al-qāḍī*. Neither Khaṣṣāf nor Shāfiʿī use the term *muftī* or *ahl al-futyā* (legal experts who issue opinions) or *fatwā* (the non-binding legal opinion produced in response to judicial consultation requests) in their discussions of judicial consultation. This absence is at first striking given that all three terms were used during the time at which each author wrote to refer to legal experts issuing legal opinions upon request and to the legal opinions, respectively. Moreover, the *muftī* was known as the legal advisor par excellence and operated as an independent legal expert. On Shāfiʿī's use of *ahl al-futyā/muftī* in his *Risāla*, see Joseph E. Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfiʿī* (Leiden: Boston, 2007), 277–94; and Harald Motzki, *Die Anfänge der islamischen Jurisprudenz: ihre Entwicklung in Mekka bis zur Mitte des 2./ 8. Jahrhunderts* (Stuttgart: Franz Steiner Verlag, 1991), 257. Yet, the *fatwā* is typically produced by a *muftī* alone (without the need to be in consultation with a judge) and typically outside of a court, which issues a *ḥukm*—facts that make it unsurprising that these authors do not mention the term *fatwā*. See Shihāb al-Dīn al-Qarāfī, *al-Iḥkām fī tamyīz al-fatāwā ʿan al-aḥkām wa-taṣarrufāt al-qāḍī waʾl-imām* (Cairo: al-Maktab al-Thaqāfī, 1989), trans. Mohammed Fadel, *Criterion for Distinguishing Legal Opinions from Judicial Rulings and the Administrative Acts of Judges and Rulers* (New Haven: Yale University Press, 2017); and Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996).

However, Khaṣṣāf and Shāfiʿī do clearly refer to experts of law who are to be consulted in court cases. Both the *mushīr* and the *faqīh* provided legal advice to the judge and thereby functioned as the "*muftī* at court." The *faqīh* and the *mushīr*, accordingly, were one and the same person. In this essay, I call these actors "legal experts" or "jurists" (*faqīh*s) when they wrote about Islamic law in treatises, and jurisconsults (*muftīs*) when judges solicited their opinions or when they voiced their unsolicited opinions on particular questions of law in court cases, and in adjudication at large. Likewise, I treat their issuing legal opinions (*fatwās*) and participating in the process of judicial consultation (*mushāwara*) on questions related to adjudication as the same.

4 I employ the term *mushāwara* as it is the term that the legal scholar Shāfiʿī used as the title for his section on the judge soliciting advice from the jurisconsult. See Shāfiʿī, *Kitāb al-umm*, 6:219. Similarly, the legal experts whose opinions judges in Andalusia and the Maghreb solicited at the beginning of the 3rd/9th century were officially called *mushāwar*s. See Tyan, *L'Histoire de l'organisation judiciare*, 222. The Muslim-Spanish and Maghribī consilium of jurisconsults, who sat on the bench alongside judges there, will not be discussed here as it was geographically outside of the ʿAbbāsid territory and because legal consultation was not institutionalized in Sunnī legal history outside of Muslim Spain and the Maghreb. On the consilium, see, for instance, Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 89; and Manuela Marín, "Šūrā et ahl al-Šūrā dans al-Andalus," *Studia Islamica* 62 (1985): 25–52; Jacinto Bosch Vilá, "The Administrative History of al-Andalus: An Approach," in *Regierung und Verwaltung des Vorderen Orients in islamischer Zeit 6.5* (Leiden: Brill, 1984).

5 The principle of consultation (*mushāwara*, *shūra,* or *mashwara*) was reflected upon and practiced in both the legal and the political realms. See Roswitha Badry, *Die zeitgenössische*

doctrine encouraged a judge confronted with particular legal uncertainties to consult a *muftī* before issuing a judicial decision.

The related principle of *mushāwara* (consultation) is anchored in the Qurʾān.[6] The Prophet himself is urged in Qurʾānic verse 3:159 to "consult them in the matter; and when you have decided, [to] place your trust in God."[7] Many early jurists came to understand this verse to mean that the judge, even when highly qualified, should seek the advice of a jurisconsult, or legal expert, to aid in adjudication. Seeking advice was considered vital for the sake of seeking the truth.[8]

Scholar of Islamic law Hilmar Krüger calls judicial consultation "an impossibility" (*ein Unding*) from today's perspective.[9] In explaining this critical stance, he refers to the Roman legal principles of *iura novit curia* (the court knows the law)[10] and *da mihi factum, dabo tibi ius* (give me the facts, I will give you the law) as universal principles of adjudication, according to which the application of law in court is the exclusive task and obligation of the judge. A judge seeking consultation from an extrajudicial authority, according to *Krüger*, is violating these two maxims.[11] Given

Diskussion um den islamischen Beratungsgedanken (šūrā) unter dem besonderen Aspekt ideengeschichtlicher Kontinuitäten und Diskontinuitäten (Stuttgart: Franz Steiner Verlag, 1998), esp. 108–34, for examples and an analysis of early Prophetic consultation with the Companions over military tactics, religious rites, and legal and political-administrative concerns. See also Emile Tyan, *Institutions du droit public musulman* (Paris: Sirey 1954-1957), 1:195–98, 396–97, 490; 2:38, 47, 181, 570. Tyan gives a *tour d'horizon* of consultative committees in pre-Islamic times and during the election procedure of the first four caliphs, of scholarly writings on consultation, and of the implementation of consultation practices during later caliphates and sultanates.

For other literature on consultation, especially in the political realm, see Roy Mottahedeh, "Consultation and the Political Process in the Islamic Middle East of the 9th, 10th, and 11th centuries," in *Islam and Public Law: Classical and Contemporary Studies*, ed. Chibli Mallat (London: Graham and Trotman, 1993), 19–27; and Bernard Lewis, "Mashwara," *EI*², 6:724–25.

6 Q. 3:159 and 42:38.

7 Early tafsīr works do not mention adjudication in interpreting verse 3:159. Instead, their authors struggle to address the questions of why God obliged the Prophet to seek consultation, and whether consultation was obligatory or voluntary. See Badry, *Die zeitgenössische Diskussion*, 66–104.

8 Khaṣṣāf, *Adab al-qāḍī*, 40–41, sec. 13.

9 Hilmar Krüger, "Grundprobleme des islamischen Fetwa-Wesens," in *Beiträge zum islamschen Recht III,* ed. Hans-Georg Ebert and Thoralf Hanstein (Frankfurt: P. Lang, 2003), 5–32, esp. 26.

10 On the foundations of the *iura novit curia* rule in pre-modern and modern European legal history, see Peter Oestmann, "Die Grenzen richterlicher Rechtserkenntnis," in Peter Oestmann, *Aus den Akten des Reichskammergerichts: prozessrechtliche Probleme im Alten Reich* (Hamburg: Kovac, 2004), 301–44, esp. 305–31.

11 The phenomenon of judicial consultation is not as exceptional to Islamic law as Krüger suggests, but a comparative study has yet to be completed. Jewish, Roman, Italian, and German legal histories—the last even up until 1870—provide examples of judges or courts reaching out to extrajudicial legal experts. References to comparable consultative practices of courts will be made throughout the study. To mention here only a few: Eva Schumann, "Beiträge studierter Juristen und anderer Rechtsexperten zur Rezeption des gelehrten Rechts," *Jahrbuch*

Krüger's objection to the very possibility of legitimate judicial consultation, should early Islamic adjudication truly be considered a type of "consultative justice"[12] in which not only the judge but also an extrajudicial authority participated in deciding cases? Whose authority in adjudication became decisive: that of the judge or of the jurisconsult? Who ultimately dispensed justice in Islamic adjudication?

To answer these questions, I focus on the so-called "formative period" of Islamic legal history: the early ʿAbbāsid period, from the eighth to the ninth centuries.[13] This period was particularly important for two reasons: First, the judicial system under the ruling ʿAbbāsids became centralized, professionalized, and bureaucratized, thereby strengthening the authority of the office of the judge.[14] Second, legal scholars, often

der Akademie der Wissenschaften in Göttingen (2007), 443–61; Ulrich Falk, *Consilia: Studien zur Praxis der Rechtsgutachten in der frühen Neuzeit* (Frankfurt: Vittorio Klostermann, 2006); Julius Kirshner, "*Consilia* as Authority in Late Medieval Italy: The Case of Florence," in *Legal Consulting in the Civil Law Tradition*, ed. Mario Ascheri, Ingrid Baumgärtner, and Julius Kirshner (Berkeley: The Robbins Collection, 1999), 107–40; Michael Berger, *Rabbinic Authority* (Oxford: Oxford University Press, 1998); Kaius Tuori, "The *ius respondendi* and the Freedom of Roman Jurisprudence," *Revue internationales des droites de l'Antiquité* 51 (2004): 295–337; Andre Magdelain, "Ius respondendi," *Revue historique de droit française et étranger* 28 (1950): 1–22; and Wolfgang Kunkel, "Das Wesen des ius respondendi," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 66 (1948): 423–57. In Germany, the procedure was called *Aktenversendung*, and, from the 16th to the 19th century, German courts were obliged to submit to the (out-of-court) law faculty of a university for the final decision regarding any case in which the principle by which it should be decided was in doubt. See Peter Oestmann, "Aktenversendung," *Handwörterbuch zur deutschen Rechtsgeschichte* (2004), 1, secs. 128–32; Gerhard Buchda, "Aktenversendung," *Handwörterbuch zur deutschen Rechtsgeschichte* (1964), 1:84–87. See also Harold J. Berman, "Religious Dimensions of the Western Legal Tradition," in *The Contentious Triangle: Church, State, and University*, ed. Rodney L. Petersen and Calvin Augustine Pater (Kirksville, Mo.: Truman State University Press, 1999), 281–94, esp. 288. For Berman, the *Aktenversendung* was a particularly striking example of the professorial character of German law. I would argue that all of these examples of judicial consultation, or extrajudicial law-making, demonstrate how scholars ensured that they had a say in adjudication.

12 Carl Heinrich Becker, *Islamstudien: vom Werden und Wesen der islamischen Welt* (Leipzig: Quelle & Meyer, 1924–1932), 2:313. Becker spoke of *Konsultativjustiz* as the *fatwā*-giving practice of the *muftīs* in general. I instead use the term to stress the consultative aspect of adjudication that allows for a built-in critique of the single-*qāḍī* court.

13 This study starts with the beginning of ʿAbbāsid rule in 132/750 and ends in 247/883-4. The year 247/883-4, which marks the end of the early ʿAbbāsid period for this study, is when the title "judge" became honorary, and thus when the role of judge was emptied of many of its competences and activities and was no longer automatically related to the function of adjudication. Instead, justice was dispensed by deputy judges (*khalīfa*s), delegates of the official *qāḍī*. See Nurit Tsafrir, *The History of an Islamic School of Law: The Early Spread of Hanafism* (Cambridge: Harvard University Press, 2004), 37; and Tillier, *Les Cadis*, 124–31, 184. From this time onward, we do not know a great deal about these local judges or deputy judges, and, because no major judicial scandals were reported in the judicial chronicles, it does not seem far-fetched to assume that the local judges adjudicated in line with the locally dominant legal school and customs, and in line with the reasoning of local jurisconsults. No encounters between judge and jurisconsult for the second half of the 3rd/9th century were documented in judicial chronicles.

14 The early ʿAbbāsid judicial system became increasingly bureaucratized, featuring division of work, office hierarchy, and levels of graded authority. On ways in which the judiciary thereby

acting in their private capacities, gained increasing prestige, influence, and authority through the work of producing the body of scholarly literature needed to systematize and canonize early Islamic law. Both developments led to the rise of two competing elite personae, each of whom needed to guard his authority vis-à-vis the other. Significantly, no explicit hierarchy was established between the judge and the jurisconsult,[15] although both were already acknowledged socially and governmentally as legal authorities at that time.[16]

These two legal figures could not be more distinct from one another. What set the two apart most was that the judge, as an appointee of the ʿAbbāsid caliph, belonged to the realm of the state in which law was binding, enforceable, and final.[17] The judge acted in cases of litigation—that is to say, when litigants came before him with a request to resolve a legal dispute. The judge articulated the law through a judgment (*ḥukm*). That judgment was then enforceable through the power apparatus of the caliphate—including the police (*shurṭa*)—and was therefore coercive.[18] In contrast, the jurisconsult's articulations of law were not binding. The *muftī* usually issued legal advice when consulted by individuals or by officials of the state (although he could also issue advice without an explicit request). But those individuals or officials were not bound to follow that

enhanced its organizational authority, see Nahed Samour, *Judge and Jurisconsult—Coercive and Persuasive Authority in Islamic Law* (PhD diss., Humboldt University Berlin, Faculty of Law: 2015), 294–398.

15 Under Ottoman rule (15th-20th centuries), while some jurisconsults remained private scholars, the Ottomans introduced the position of state *muftī* (*Shaykh al-Islam*), a state-employed official who watched over the judiciary and adjudication and whose *fatwās* had a law-like effect. See, for example, Colin Imber, *Ebu'suʿud: The Islamic Legal Tradition* (Edinburgh: Edinburgh University Press, 1997); and Ronald C. Jennings, *The Judicial Registers (Şerʿi Mahkeme Sicilleri) of Kayseri (1590-1630) as a Source for Ottoman History* (PhD diss., UCLA: 1972).

16 On the history of judgeship in early Islam, see Tillier, *Les Cadis*; Paul Dannhauer, *Untersuchungen zur frühen Geschichte des Qāḍī-Amtes* (Bonn: s.n., 1975); and Hussein F. S. al-Kasassbeh, "The Office of Qāḍī in the Early ʿAbbāsid Caliphate (132–247/750–861)" (PhD diss., School of Oriental and African Studies, University of London: 1990). The latter was translated into Arabic and published as *al-Sulṭa al-qaḍāʾiyya fī ʿaṣr al-ʿAbbasī al-awwal* (al-ʿAyn, UAE: Zayed Center for Heritage and History, 2001). On the origins of the practice of issuing *fatwās*, see Harald Motzki, "Religiöse Ratgebung im Islam: Entstehung, Bedeutung und Praxis des *muftī* und der *fatwā*," *Zeitschrift für Religionwissenschaften* 2.1 (1994): 3–22, esp. 6–10.

17 As a new centralization policy of the ʿAbbāsids, the judiciary was (largely) appointed by the caliph, rather than being appointed by local governors as had been the case previously. On the ways in which the authority of the judiciary was enlarged by the ʿAbbāsids' efforts to centralize, professionalize, and bureaucratize its state officials, and how those efforts affected the rising authority of the legal scholars, see Samour, *Judge and Jurisconsult,* 294–398.

18 Max Weber, for instance, considered the order of law to be coercive "when it can be externally guaranteed by the chance of (physical or psychological) *coercion* to enforce the observance or punishment in case of violation through a *specific staff* of people" [italics original]. See Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie,* ed. Johannes Winckelmann, 5th ed. (Tübingen: Mohr Siebeck, 1980 [first published 1921–1922]), 17.

advice. Thus the jurisconsult's opinions were not backed by a compulsory enforcement mechanism. Albeit typically part of a patronage system that sometimes included state funding, the jurisconsult was largely perceived by his contemporaries as an independent legal scholar and advisor, rather than as an arm of the state.[19] The jurisconsult's authority was thus, at first glance, entirely based on the persuasiveness of his argument. That said, his persuasion-based authority carried weight because it proceeded from an epistemological exploration of how to derive a sound legal norm from the authoritative texts of Islamic revelation, and epistemic authority was key to Islamic legal legitimacy.[20]

What happened when the coercive authority of the judge encountered the persuasive authority of the jurisconsult at court? Their relationship vis-á-vis one another is barely formalized in the early *adab al-qāḍī* literature of the second/ninth-century relevant texts. Moreover, with little textual descriptions of or instructions for how the judge and jurisconsult were meant to deliberate, we can only speculate as to the form that their dialogue might have taken. Looking at the etymology of the term itself, consultation (*mushāwara*) implies a mutual or reciprocal consultative activity, one involving a joint, possibly symmetrical or bilateral exchange of ideas leading to a decision. Yet, belying this etymological expectation, there is no documentation to imply that, in practice, judicial consultation involved any such back-and-forth movement of thoughts and ideas.[21] Instead, consultation seems to have been a one-way activity: legal experts giving advice to judges, with or without their requests.

With few exceptions, both judges and jurisconsults belonged to the same class of jurists (*fuqahāʾ*) and were increasingly affiliated with a set of emerging schools of law. In fact, caliphs and their chief judges (*qāḍī al-quḍāt*) recruited and accepted recommendations for judgeship positions from among the jurists.[22] Moreover, differences in legal qualifications and in knowledge of Ḥanafī legal thought did not determine the dividing line

19 See, for example, Muḥammad Q. Zaman, *Religion and Politics Under the Early ʿAbbāsids: The Emergence of the Proto-Sunnī Elite* (Leiden: Brill, 1997), 12.

20 On epistemic authority, see Wael Hallaq, "Uṣūl al-Fiqh: Beyond Tradition," *Journal of Islamic Studies* 3, no. 2 (1992): 172–202, esp. 178; and Aron Zysow, *The Economy of Certainty, An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013), 1.

21 Bernhard G. Weiss, "Text and Application: Hermeneutical Reflections on Islamic Legal Interpretation," in *The Law Applied: Contextualizing the Islamic Sharīʿa,* ed. Peri Bearman, Wolfhart Heinrichs, and Bernhard G. Weiss (London: I.B. Tauris, 2008), 374–96, 385.

22 On the early ʿAbbāsid preference for the Medinan school and judges, see Tillier, *Les Cadis*, 149–50; Hallaq, *Origins and Evolution*, 105–06; and Kasassbeh, "The Office of Qāḍī," 77. On the process by which the ʿAbbāsid caliphs' preference shifted to the Ḥanafī school and judiciary, see Tillier, *Les Cadis*, 186; and Tsafrir, *History of an Islamic School of Law*, 21–2, 118.

between judge and jurisconsult.[23] Most judges of the early ʿAbbāsid period, at least in Iraq, had an identifiable legal background. [24]

We therefore could not convincingly argue that the necessity for judicial consultation arose because the jurisconsults, as a class, were more learned than the judges.[25] Instead, the role of extrajudicial authority in consultation reflected an early awareness of the limits of law as text and method. In other words, judges need not have been ignorant lay-people for them to face challenges in interpreting law. In fact, the burden and responsibility of adjudicating the *ius divinum* was a much discussed topic,[26] and, perhaps consultation was thought of as a means of distributing the risks of the judicial process.

Where relationships of authority were not formalized into prescribed procedures, we must sift through and analyze more indirect markers of authority. I will attempt to address a number of questions raised by the Islamic principle of judicial consultation, the most important of which are: How did the autonomy of the judge relate to the authority of the

23 On the legal educational background of the early ʿAbbāsid judges and their training in the nascent schools of law, see Samour, *Judge and Jurisconsult,* 340–47. Others, however, argue that that the dividing line between judge and jurisconsult is, in fact, knowledge, and that the judge turned to the jurisconsult as the more knowledgeable party. See, for example, Krüger, "Grundprobleme des islamischen Fetwa-Wesens," 26; and Schneider, *Das Bild des Richters*, 108.

A study of the qualifications required for judges shows that Ḥanafīs allow for exceptions to be made for the level of legal knowledge of the judge compared to the *muftī*. Having said this, Ḥanafī legal texts of the formative period still maintain that the judge is to master the disciplines of law, and additionally require the skills of interpretive reasoning (*ijtihād*). Therefore, it cannot be said, for the formative period, that the *muftī* solved, or attempted to solve, new and difficult cases, while the *qāḍī* merely applied the solutions in his court. See Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 76.

24 Josef van Ess, *Theologie und Gesellschaft im 2. und 3. Jahrhundert Hidschra. Eine Geschichte des religiösen Denkens im frühen Islam* (Berlin: W. de Gruyter, 1992), 2:124; Baber Johansen, "Wahrheit und Geltungsanspruch: Zur Begründung und Begrenzung der Autorität des Qadi-Urteils im islamischen Recht," in *La Guistizia Nell'Alto Medieovo (Secoli IX-XI)*, ed. Centro Italiano di Studi sull'Alto Medioevo (Spoledo: Presso la Sede del Centro, 1997), 988, 991. Tillier, *Les Cadis*, 191.

25 While it is correct that the ʿAbbāsid judiciary included lay-judges, they seem to have been relatively uncommon. The overwhelming majority of judges enjoyed a legal education. Biographical works and the *akhbār al-quḍāt* genre capture the educational lineage and the learned engagement of judges, along with recording significant legal questions. See, e.g., Muḥammad b. Khalaf Wakīʿ (d. 306/918), *Akhbār al-quḍāt* (Cairo: Maṭbaʿat al-Saʿāda 1947-50), 3:150, 168. Masud, Peters, and Powers confirm that there was no lack of qualified jurists for the office of judge during the early ʿAbbāsid period. See their *Dispensing Justice in Islam: Qadis and their Judgments*, 10. In contrast, on the knowledge possessed by the *qāḍī*s during the first two centuries of Islamic legal history, G.H.A. Juynboll argues that some knew the law (*fiqh*) poorly because of their minor knowledge of *ḥadīth* and instead trusted their common sense. See Gautier H. A. Juynboll, *Muslim Tradition* (Cambridge: Cambridge University Press, 1983), 94.

26 On the anxieties of adjudication, see, for example, the compilation of *ḥadīth*s in Wakīʿ, *Akhbār al-quḍāt*, 7–21. See also Baber Johansen, "Truth and Validity of the Qadi's Judgment: A Legal Debate among Muslim Sunnite Jurists from the 9th to the 13th Centuries," *Recht van de Islam* 14 (1997): 1–26; and Baber Johansen, "Wahrheit und Geltungsanspruch," 975–1074, 1056–59.

jurisconsult?[27] What happened in cases of conflict, that is, when the legal reasoning of the judge diverged from that of the jurisconsult?

First, I will give a normative account of how early jurists conceptualized judicial consultation, based upon the writings of the Ḥanafī scholar Aḥmad b. ʿUmar al-Khaṣṣāf (d. 261/874) and Muḥammad b. Idrīs al-Shāfiʿī (d. 204/820), eponym of the Shāfiʿī school. Second, I will turn to the historical encounters between the judge and the jurisconsult, primarily as captured by judicial chronicles. I will then conclude by classifying the potential relationship between the judge and jurisconsult according to the categories of cooperation, confrontation, and cooptation. Overall, I argue that judicial consultation was conceptualized and practiced as a "critique of adjudication."[28] Adjudication here goes beyond the very process of dispute settlement and includes the make-up of the judicial system as a whole, including the set-up of the judiciary.

Normative Encounters: The Jurisconsult as Guide or Constraint to the Judge?

One of the first legal scholars to write on adjudication was Khaṣṣāf, whose *Adab al-qāḍī* (*Etiquette of the Judge*) can be considered the main extant source on the normativity of judicial consultation in the Ḥanafī school of law during his time.[29] Khaṣṣāf spatially described a court setting (in a mosque) and affirmed the presence of jurists placed next to the judge to advise him in complicated cases:

> On his arrival in the mosque the *qāḍī* would salute the audience, offer two or four units of prayer [*rakʿas*], and

27 The question of how autonomy and authority relate to one another still haunts today's leading legal philosophers. Wolff has prominently argued that legitimate authority and moral autonomy are logically incompatible. See Robert Paul Wolff, *In Defense of Anarchy* (New York: Harper and Row, 1970). For refutations of Wolff, see Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009), 26–27; and Scott J. Shapiro, "Authority," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford: Oxford University Press, 2002), 282–439, esp. 385. For an attempt to reconcile autonomy and authority see Thomas May, *Autonomy, Authority, and Moral Responsibility* (Dordrecht: Kluwer Academic Publisher, 1998), 127.

28 Duncan Kennedy, *A Critique of Adjudication: Fin de siècle* (Cambridge: Harvard University Press, 1997). Kennedy claims that an essential aspect of the practice of adjudication is the denial of choice and agency that the judge inescapably faces in reaching a decision and in crafting the reasons that support it. In contrast, early Muslim source materials show a profound awareness of the burden created by the indeterminacy of law—that is to say, the risk of making a "wrong" decision and the consequences that would ensue, in this life and in the Hereafter. Judicial consultation thus becomes an attempt to distribute the risks of judicial error.

29 Khaṣṣāf's brief passages are followed by the comments and clarifications of legal scholar Jaṣṣāṣ. I am following the careful demarcations between the two authors provided by the editor Farhat Ziadeh. Given the limitations of this study, I directly reference Jaṣṣāṣ's commentary only once here.

> ask God to grant him success and guide him towards the right path, so as to enable him to uphold the truth and save him from transgression. After that, he would sit facing the Kaʿba [in Mecca]. Court chamberlains would stand in front of him, at such a distance that they might hear the *qāḍī*'s conversation with the litigants. The *qāḍī* placed his portable archive (*qimṭar*) entailing the court files on his right-hand side. The clerk sat near him, at such a distance that the *qāḍī* could watch his performance, while the deputy judge stood in front of him and called the litigants in turn. The guard would stand near him. The *qāḍī* allowed the jurists (*fuqahāʾ*) […][30] to be seated near him, so that it would be easier for him to consult them on complicated legal issues. The two litigants would sit side by side in front of them.[31]

This passage offers insight into the *who*, *when*, and *under what circumstances* of judicial consultation. The single judge was surrounded by a consilium of jurists. These jurists sat in immediate proximity to the judge in order to be consulted by him, and thus the single judge's authority encountered the collective authority of the jurists. As for *when*, consultation was performed during the course of litigation. As for *under what circumstances* consultation ought to have been performed, Khaṣṣāf adds: "If the legal scholars (*ahl al-fiqh*) are present in the city, the judge should consult them."[32] He provides no further qualification as to the facts, law, or degree of difficulty of the cases requiring consultation. The mere presence of jurisconsults in the city sufficed to require a judge to solicit their counsel. In other words, Khaṣṣāf's recommendation for consultation was not qualified, possibly because of his awareness that interpretation takes place no matter how supposedly clear or ambiguous the text or the facts.

When judge and jurisconsult concur in their reasoning, the judge should adjudicate according to the jointly established consensus.[33] However, "when they disagree in their opinions, he shall judge according to what he thinks corresponds more closely with the truth."[34] Moreover, in cases of disagreement, a judge can request advice from jurists outside of his own city:

30 Khaṣṣāf also mentions other "trustworthy persons" (*qawm min ahl al-thiqa waʾl-amāna*) sitting next to the bench. It remains unclear whether his reference is to professional witnesses (*ʿudūl*), clerks, local nobility, specially skilled experts or some other class of person. Khaṣṣāf, *Adab al-qāḍī*, 85–86, sec. 80.

31 Ibid.

32 Ibid., 42, sec. 17.

33 Jaṣṣāṣ, *Sharḥ Adab al-qāḍī*, 42, sec. 17: "When they arrive at concurring opinions, the judge shall adjudicate accordingly because judge and jurisconsults have jointly established consensus. If the problem at hand required an individual effort of legal reasoning (*ijtihād*) and consensus (*ijmāʿ*) was arrived at, the joint result shall not be violated."

34 Khaṣṣāf, *Adab al-qāḍī*, 42, sec. 18.

> If the jurists (*fuqahāʾ*) of the city have consensus of opinion concerning an issue and the judge has a different opinion, the judge should not hasten in making his decision. He should get the opinion of other legal scholars in writing and request their counsel. Then he should arrive at his best possible opinion and act accordingly.[35]

This passage adds additional complexity to the questions of the *who* and *when* of judicial consultation as described above. When judicial consultation required non-local legal scholars, it could be done in writing and thus would have to take place outside of both the spatial and temporal boundaries of the judicial session.

Khaṣṣāf is careful to assert the autonomy of the judge. He concedes that: "when there is a problem and he consults with one legal scholar, he can follow the scholar's opinion, in case the judge has no opinion on this matter."[36] In the absence of his own opinion, the judge should incorporate that of the jurisconsult into his judicial opinion, while still making the final decision his own. Even in cases

> when the expert he is consulting is better at legal reasoning (*afqah*) than the judge, yet the judge can discern (between the two possible positions of) the problem, he is to deliberate himself (*naẓara*) ... [and] judge according to what is closer to what is correct.[37]

Khaṣṣāf is particularly adamant about maintaining the judge's autonomy when he says: "the judge shall not issue a verdict that he considers wrong, even when the [consulted] jurists (*fuqahāʾ*) are of [that] opinion."[38] In other words, the arguments of the jurisconsults, no matter how persuasive, never exempt the judge from deliberating for himself as to whether those arguments are correct. The final judgment is to emanate from the judge's authority, and thus the final judgment must be his. Of course, the jurisconsult's opinion should guide the judge in his effort to "correspond more closely with the truth."[39] Joint deliberations were, after all, considered better than solitary ones,[40] and consultation thus helped ensure the quality of a decision.[41] However, extrajudicial authority was meant to remain non-binding, persuasive at most, while the judge remained fully autonomous over the decision-making process and his decisions were meant to be

35 Ibid., 42, sec. 19.

36 Ibid., 42, sec. 20.

37 Ibid., 43, sec. 21.

38 Ibid., 44, sec. 23.

39 Ibid., 42, sec. 18.

40 Ibid., 42, sec. 17.

41 The quality of the decision is measured by "coming closest to the truth." Ibid., 42, sec. 18.

binding. Ḥanafīs therefore preferred to see the jurisconsult as a guide to the judge and consultation as means of joint deliberation rather than joint decision-making.[42]

Shāfiʿī's discussions of judicial consultation in his *Kitāb al-Umm* are initially similar: The jurisconsult was to guide the judge in his adjudication; judicial autonomy permitted the judge to seek the jurisconsult's opinions; and the ultimate decision was to be made by the judge. Significantly, though, Shāfiʿī takes a more restrictive approach to the role of the jurisconsult in the adjudicative process in cases in which he feared that the judge would engage in judicial legislation. His passage "on judicial consultation" (*mushāwarat al-qāḍī*)[43] starts with the following qualifications of the judicial advisor:

> I recommend that the judge consult with someone who is knowledgeable about the Qurʾān, *Sunna*, and customary traditions (*āthār*), as well as the jurists' doctrines; someone who knows [the rules] of analogy; and someone who does not violate the text and meaning [of the Qurʾān and *Sunna*]. These criteria will only be found in someone who masters the Arabic language. Even when [an expert] combines all of these criteria, [the judge] should consult him only if he is evidently pious and [only if] he seeks the truth.[44]

According to Shāfiʿī, the extrajudicial advisor had to possess thorough knowledge in a number of subjects so that he would remain true to the wording of Islam's authoritative legal texts. He considered exhibitions of piety further confirmation that the advisor possessed the requisite level of integrity to provide opinions to judges.[45]

All these qualifications were intended to mitigate one specific fear: that anyone involved in the judicial process might "violate the text and meaning [of the Qurʾān and *Sunna*]." Any interpretive action, advice sought, or judgments made were not to violate the authoritative texts or their meaning. As Shāfiʿī reiterates:

> [The judge] should not accept (*yaqbal*) the advice of such a person in a case, unless he assures [the judge] that his advice is based on a binding transmission [of text], meaning the Qurʾān, *Sunna*, consensus, or analogy on the basis of one of the [first] two. Even then he is to accept the advice

42 Jaṣṣāṣ, *Kitāb aḥkām al-Qurʾān*, (Cairo: Salafīya, 1335/[1916-7]) 2:49–50; and Badry, *Die zeitgenössische Diskussion*, 78.

43 Shāfiʿī, *Kitāb al-umm*, 6:219.

44 Ibid.

45 Farhat Ziadeh, "Integrity (*ʿAdālah*) in Classical Islamic Law," in *Islamic Law and Jurisprudence: Studies in Honor of Farhat J. Ziadeh*, ed. Nicolas Heer (Seattle: University of Washington Press, 1990), 73–93, esp. 73.

> only when he fully comprehends it, has fully persuaded himself of it, and can follow [its reasoning].[46]

In this way, Shāfiʿī appeals to the judge's own faculties of comprehension, and cautions him to adopt the jurisconsult's opinion only when the judge himself is convinced of the sound reasoning substantiating the advice. The judge himself then decides whether to incorporate his advice.

Concerned about issues of authenticity and multiple interpretations, Shāfiʿī continues:

> Additionally, he shall, even when he has in this way understood the advice, only then adopt it when he has asked him about a further interpretation. If there is no other interpretation, or when [the juristic opinion] has to do with a tradition about whose transmission (*naql*) no disagreement exists, he shall accept the advice. If, however, the Qurʾānic text offers two interpretations, or if the tradition is transmitted in different ways, or if the wording of the *Sunna* allows for different interpretations, he should then act in accordance with one of the interpretations only after he has found evidence in the Qurʾān, *Sunna*, consensus, or analogy showing that the opinion he chose as the basis for his decision is binding and more adequate than the one he left out.[47]

Here, Shāfiʿī is cautious about the fine line between legal conformism (which he rejects) and interpretation.[48] He advises the judge to seek persuasive arguments in the legal opinions of others, presumably due to implicit acknowledgment of the epistemological challenge of "discovering" the law, encountered by even the most learned jurist. According to Shāfiʿī, the judge was required to seek legal advice *only when* he was unable to reach a decision in especially difficult cases, in particular, when authoritative sources and legal traditions offered no textual answer.[49]

Shāfiʿī then continues by extending this caution to the use of analogy:

> [The judge] should approach analogy similarly. He is to then base his decision on analogy only when it is more suitable than Qurʾān, *Sunna*, or consensus, or when it is more suitable than the opinion he left out. He is forbidden from diverting from this [method] and saying: "I consider this to be more juristically preferable (*istaḥsantu*)." Because if he dares to say, "I consider this to be more juristically

46 Shāfiʿī, *Kitāb al-umm*, 6:219.

47 Ibid.

48 Ibid.

49 See also Hallaq, *Authority*, 77.

> preferable," he will also permit himself to make religious law (*yusharriʿ fī al-dīn*).[50]

Here, Shāfiʿī, much more so than Khaṣṣāf, sets guidelines for accepting advice: Advice must be based on binding transmission; law must be derived from authenticated sources; and analogy must be based on scriptural text. (In contrast, Khaṣṣāf's description of the necessity of judicial consultation is noticeably free of such guidelines.) The primacy of text is highlighted in Shāfiʿī's understanding of the generation of law—a point that is crucial to understanding his legal methodology more generally. His emphasis on textualism over rationalism or equity (*istiḥsān*) was also a common basis of critique from Shāfiʿī and among adherents of his school against Ḥanafīs.

Significantly, Shāfiʿī insists that neither the judge nor the jurisconsult is to engage in "judicial activism"—meaning here unconstrained judicial law-making—which for him risks violating or replacing revelation. This rejection of judicial activism is in line with his understanding of legal theory, and juristic reasoning in particular, whereby he argues for a more text-based approach to law. While Shāfiʿī begins the section with "I recommend (*uḥibbu*)," he finishes it with "I require him (*amartuh*)."[51] Shāfiʿī thereby shifts from recommendation to obligation over the course of his discussion of the role of the jurisconsult.[52] More precisely, Shāfiʿī seems to be positioning the status of judicial consultation *between* recommendation and binding command. Shāfiʿī law therefore conceived of the jurisconsult not only as a guide to the judge, but also as a source of constraint upon him. Shāfiʿī feared that in cases not settled by text, consensus, or analogy, the judge himself might create religious law (or, as we saw in Shāfiʿī's formulation above, "*yusharriʿ fī al-dīn*"). The jurisconsult serves to reduce the possibility of this kind of judicial activism and can therefore be a force of judicial constraint.

Normatively, the function of judicial consultation is tightly connected to a methodology for deriving Islamic law. The methodology

50 Shāfiʿī, *Kitāb al-umm*, 6:219.

51 Ibid. Shāfiʿī also uses the phrase "I recommend" with reference to the Qurʾānic *shūrā* verse. See Shāfiʿī, *Kitāb al-umm*, 7:86; Badry, *Die zeitgenössische Diskussion*, 94; and Zafar Ishaq Ansari, "Islamic Juristic Theology before Šāfiʿī: A Semantic Analysis with Special Reference to Kūfa," *Arabica* 19 (1972): 255–300, 296, where Ansari refers to the pre-Shāfiʿī use of the formula *aḥabbu ilayya/ilaynā* (recommended/preferred) instead of *mandūb* (recommended).

52 Irene Schneider also argues that Shāfiʿī himself and the later Shāfiʿī jurist Māwardī (d. 450/1058) speak of consultation as partly recommended and partly obligatory; but she also notes that it was regarded exclusively as an obligation. See Schneider, *Das Bild des Richters*, 193, 223. On Shāfiʿī potentially considering consultation a recommendation only, see Badry, *Die zeitgenössische Diskussion*, 93–94. On the normative character of judicial consultation and Shāfiʿī's ambivalent wording as an example of the complex nature of authority, see generally Samour, *Judge and Jurisconsult,* 140–47, 161–64.

of Islamic jurisprudence depicts the jurisconsult as a guide or constraint on the judge.[53] The jurisconsult's role was to guide the judge (especially for Ḥanafīs), but also to restrain him given the subjectivity of adjudication (especially for Shāfiʿīs). Nevertheless, in both conceptions, the autonomy of the judge was to remain intact, despite the jurisconsult's authority. In fact, failure to consult in the process of reaching a legal decision was not a reason for revision or annulment, and a judgment issued without prior judicial consultation was still regarded as valid.[54]

Judicial Encounters: Cooperation, Confrontation, Cooptation

I will now complement the above normative constructions of judicial consultation with historical encounters between the judge and the jurisconsult. The normative discussion above highlighted the role of the jurisconsult as a guide versus as a source of constraint. In the historical discussion below, I will organize instances of encounters between judge and jurisconsult according to the themes of cooperation, confrontation, and cooptation.

Cooperation

When Bakkār b. Qutayba was appointed judge by the ʿAbbāsid caliph al-Mutawakkil in 246/860 and sent from Basra in Iraq to Egypt to become a judge there,[55] he researched potential local jurisconsults in advance by asking the following of his judicial predecessor Muḥammad b. Abī Layth:

> "I am a stranger, and you have gotten to know the lands [in Egypt], so advise me on whom I can consult (*ushāwiruh*) and whom I can trust." Muḥammad b. Abī Layth mentioned two men: Yūnus b. ʿAbd al-Aʿlā and Mūsā b. ʿAbd al-Raḥmān b. al-Qāsim.[56]

The sources record that Judge Bakkār requested both men's counsel and

53 The phrasing "guide or constraint" is taken from Duncan Kennedy, who explores the rule of law as guide for or constraint upon the contemporary American judge. He posits that the judge is, paradoxically, free and bound simultaneously. See Duncan Kennedy, "Judicial Ideology," *Utah Law Review* 3 (1996): 785–825, esp. 816; and Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Education* 36 (1986): 518–62.

54 The possibility of judicial review was contingent upon the authoritative texts being violated. See Shāfiʿī, *Kitāb al-umm*, 6:220; and, more generally, David S. Powers, "On Judicial Review in Islamic Law," *Law and Society Review* 26 (1992): 315–41.

55 Kindī, *Kitāb al-Wulāt*, 477.

56 Ibid., 506. The chronicle itself states that the authenticity of this statement is doubtful, as Muḥammad b. Abī Layth had left Egypt in 241, five years before al-Bakkār had arrived in Egypt. See ibid., 507. But whether the new and the old *qāḍī* really met in Gaza, and whether Bakkār really asked for a jurisconsult, is only of secondary importance. The fact that Yūnus did in fact advise Bakkār in ongoing litigation does not seem to be disputed.

accepted each in ongoing judicial affairs.[57]

Judge Bakkār's choice of jurisconsults seemed to have been based on whom he believed knew the local law and customs and whom he believed he could trust. In general, trust (*thiqa*) between judge and jurisconsult seems to have been an important criterion for the judge to choose the jurisconsult.[58]

Digging into the biographical, educational, and intellectual background of the persons involved, it becomes even clearer why Bakkār, who was from Iraq and a renowned scholar adhering to the Ḥanafī school, would have benefited from the advice of Yūnus b. ʿAbd al-Aʿlā and ʿAbd al-Raḥmān b. al-Qāsim in Egypt. There are three reasons: First, both were legal scholars; second, both were locals of Egypt; and third, both were particularly knowledgeable in Mālikī law and thereby represented the locally dominant legal school.[59] Judicial consultation from two Mālikī scholars would allow judge Bakkār to complement his own legal knowledge base, which was founded in Ḥanafī and Baṣran law.

Consider the following example. Cases of dispute between Ḥanafī judges and Mālikī jurisconsults show that, regarding cases of *waqf* (endowments), in particular, Ḥanafī-Mālikī differences could prove very

57 Bakkār solicited Mālikī jurisconsult Yūnus's advice in a famous inheritance case that went back and forth between Ḥanafī and Mālikī judges over generations, as well as in a number of unspecified cases. This inheritance case became known as the "house of the elephant" and is treated in part here, as well as being revisited as a case of appeal later in the text. See ibid., 472–75, 502. See also Ibn Ḥajar, *Rafʿ al-iṣr*, 124, in Kindī, *The Governors and Judges of Egypt*, ed. and trans. Rhuvon Guest (Leiden: Brill, 1912), 501–614. For a French translation of Ibn Ḥajar's treatment of this case, see Mathieu Tillier, *Vies des cadis de Miṣr, 237/851-366/976: extrait du Rafʿ al-iṣr ʿan quḍāt Miṣr d'Ibn Ḥaǧar al-ʿAsqalānī* (Cairo: Institut français d'archéologie orientale, 2002), 51.

58 Often, when judges arrived at a city to which they were newly appointed, they requested assistance on requesting advice from people they knew they could trust. See, for example, Wakīʿ, *Akhbār al-quḍāt*, 3:130; and Tillier, *Les Cadis*, 399–400. Later, the importance of trust as a criterion for choosing consults increased, especially in the political realm. See Badry, *Die zeitgenössische Diskussion*, 145, although she does not provide further references. It was not considered necessary for the questioner to assess a potential *muftī's* scholarly reputation himself. Instead he based his choice on publicly-available information regarding not only the individual's qualifications in terms of knowledge or teaching, but specifically regarding *fatwā*-giving. Researching and evaluating such information was not discussed as a required preparatory step before approaching a jurisconsult, since *muftī*s were typically well-known within their local communities. See Muhammad Khalid Masud, Brinckley Messick, and David S. Powers, eds., *Islamic Legal Interpretation: Muftis and their Fatwas* (Cambridge, Mass.: Harvard University Press, 1996), 21.

59 Yūnus b. ʿAbd al-Aʿlā (d. 264/879) was an expert in *ḥadīth* and a Mālikī jurist who taught Mālik's seminal legal work *al-Muwaṭṭaʾ* in Egypt. See Ibn al-Nadīm b. Isḥāq (d. ca. 380/990), *al-Fihrist* (Beirut: Dar al-Maʿrifa, 1978), 234; Nawawī (d. 676/1271), *Tahdhīb al-asmāʾ waʾl-lughāt* (Cairo: Idārat al-Ṭibāʿa al-Munīriyya, 1927), 2:284; and Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* (Leiden: Brill 1997), 80–81, 191. ʿAbd al-Raḥmān b. al-Qāsim (d. 191/806) was a disciple of Mālik b. Anas who spread Mālikī teachings in Egypt and the Maghreb. See Qāḍī ʿIyāḍ (d. 544/1149), *Tartīb al-madārik wa-taqrīb al-masālik li-maʿrifat aʿlām madhhab Mālik*, ed. Aḥmad Bakīr Maḥmūd (Beirut: Maktabat al-Ḥayāt, 1967), 3:245.

sensitive.[60] After all, the law of *waqf* addressed property related to the public welfare and well-being of a city, making protest against Ḥanafī *qāḍī*s adjudicating in Mālikī Egypt common.[61] Take, for instance, judge Ismāʿīl b. al-Yasāʿ, the first Iraqi and first Ḥanafī *qāḍī* of Egypt,[62] who was reproached by the famous jurisconsult Layth b. Saʿd (d. 175/791)—a student of Mālik b. Anas—"for not protecting the property of Muslims in support of endowments,"[63] and who got the caliph to remove the judge Ismāʿīl from office in Egypt. In this case, questions of endowment property (*waqf*), law school affiliation (here, the Ḥanafī-Mālikī divide), and the dynamics between center and province (Iraq and Egypt) are key to understanding how legal personae at court constructed authority and legitimacy vis-à-vis one another.

Moreover, these same questions are key to showing how such encounters could turn into critique as Mālikī scholars in Egypt confronted Ḥanafī adjudication whenever it targeted the very foundations of the economic order. This is a critique of adjudication addressing judicial activism—meaning the willingness to change or evolve the law in ways that upset existing patterns of economic and social advantage.[64]

Judge Bakkār, in all likelihood, anticipated this kind of critique and reached out to local legal scholars to consult with them, that is, as a means to initiate and consolidate cooperation between judge and jurisconsults across acute divides of school and geography. This consultation must have led to successful adjudication, because Bakkār served as judge for twenty-four years—a long period by any standard.

Confrontation

Consultation did not always result in cooperation. Instead, it could lead to confrontation between judges and jurisconsults. The following example shows how judges and jurisconsults fought over patterns of social ordering. Judge Khālid b. Ṭāliq was appointed judge in Basra under the reign of the third ʿAbbāsid caliph, al-Mahdī.[65] This case involved a group of jurisconsults who first watched and recorded the mistakes of the judge, then collectively

60 Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad b. ʿAlī (d. 463/1072), *Taʾrīkh Baghdād, aw Madīnat al-Salām* (Cairo: Maktabat al-Khānjī, 1931) 14:282; and Kindī, *Kitāb al-Wulāt*, 371–73, 390–92.

61 Al-Khaṭīb al-Baghdādī, *Taʾrīkh Baghdād*, 14:282; and Kindī, *Kitāb al-Wulāt*, 371–73, 390–92.

62 Kindī, *Kitāb al-Wulāt*, 371–73; see also Tsafrir, *History of an Islamic School of Law,* 96.

63 Kindī, *Kitāb al-Wulāt*, 372.

64 See Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940," *Research in Law and Sociology* 3 (1980): 3–24, 5.

65 Khalīfa b. Khayyāṭ al-ʿUṣfurī (d. 240/854), *Taʾrīkh*, ed. Suhayl Zakkār (Damascus: n.p., 1967-8), 2:289; and Wakīʿ, *Akhbār al-quḍāt*, 2:123.

moved to have him removed from his position. In this case, their criticism was specifically directed at Judge Khālid's application of the law of witness testimony—namely, its application to questions of the necessary number and trustworthiness of witnesses needed to provide valid evidence or the criteria necessary for a valid agent (*wakīl*) to appear in court on behalf of a litigant in case of the latter's sickness.[66] In another case, the facts were laid out as follows:

> One of the examples they have in their records [against him] is that one known witness came to his court along with three witnesses whom he [the judge] did not know. One witness said: The one witness was considered sound, and the three [unknown] witnesses replaced one [trustworthy] witness. He [the judge] then issued the judgment based on their testimony.[67]

Although at the time this case was decided, there was still diversity and uncertainty on questions surrounding the law of testimony,[68] the jurisconsults' critique of the judge functioned as a constraint on the judiciary. Through it, they attempted to ensure the "correct" application of the Islamic law of testimony as they understood it (possibly as determined by their respective school affiliations). The jurisconsults constrained the judge through critique, that is, by "watching out for infractions and slips," and thus illustrated the rivalry and checks that could exist between local jurists and judges.[69]

The jurisconsults' opinions constituted critique because the Islamic law of testimony determined who was or was not considered a trustworthy witness, and deviations from it could target and disturb the hierarchical pattern of social relations.[70] In this case, the jurisconsults' confrontation with the judge had dire consequences for him: their critique eventually led to the caliph removing the judge from office. The jurisconsults' critique could thus become a serious threat to the position of the judge.

66 Wakīʿ, *Akhbār al-quḍāt*, 2:128.

67 Ibid., 2:127.

68 See Ibn Ḥajar, *Rafʿ al-iṣr*, 127, in Kindī, *Kitāb al-Wulāt*, 388; Wakīʿ, *Akhbār al-quḍāt*, 1:146, 293, 331; 2:11, 276, 416; 3:117; and Muhammad Khalid Masud, "A Study of Wakīʿ's (d. 306/917) *Akhbār al-Quḍāt*," in *The Law Applied: Contextualizing the Islamic Shariʿa*, eds. Peri Bearman, Wolfhart Heinrichs, and Bernhard G. Weiss (London: I.B. Tauris, 2008), 116–27, esp. 123.

69 H.A.R. Gibb and Harold Bowen, *Islamic Society and the West: Islamic Society in the Eighteenth Century*, 2nd ed. (London: Oxford University Press, 1957), 122.

70 On the case of the Ḥanafī *qāḍī* Mazrūq being criticized by Egyptian jurisconsults for introducing legal "innovations" into the field of testimony law, refusing the testimony of a person who attended an evening party where frivolous songs were sung, and thereby upsetting Egyptian nobility, see Ibn Ḥajar, *Rafʿ al-iṣr*, 127, in Kindī, *Kitāb al-Wulāt*, 388. The judge changed the laws of testimony regarding who could be a credible witness at court, thereby disrupting the local social order, and was much criticized for it by the local jurisconsults.

What emerges from these two historical cases is that judicial consultation was not only a theoretical topic in normative juristic writings, but also played a role in real struggles of authority, legitimacy, and power between legal personae. In fact, I argue that judicial consultation creates space for critique of adjudication, and that this critique could allow an extrajudicial authority to cooperate with or to confront a judge, and to complement or to criticize his findings. Where legal options were not prescribed by text, jurisconsults were willing to confront (and even threaten) a judge to have their say in adjudication.

Cooptation

To what extent did consultation-as-critique not only allow for cooperation or confrontation, but also sometimes effectively function as cooptation?

Take the example of the Medinan Abū al-Bakhtarī (d. 192/807) who, when he was appointed judge in Medina, was given a list of twenty-seven jurisconsults to assist him in adjudication.[71] It remains unclear by whom he was given the list of names. Judge Abū al-Bakhtarī requested to see all the jurisconsults (*mushīrīn*), and they came to see him. The next day, the judge chose seven of them.[72] While this is not a case of the judge having been unfamiliar with local legal knowledge (with both judge and jurisconsults from Medina), it rather suggests that cooptation worked in the following way: Jurisconsults would be incorporated into the adjudicative system and bestowed with authority over their judicial colleagues *without* even a formalized procedure.

It is important to note that courts in the eastern Islamic world were ordinarily constituted as single-*qāḍī* courts. For most of Islamic legal history, the existence of a single judge was the rule, rather than there being an institutionalized bench of judges.[73] Critique leading to cooptation

71 Wakīʿ, *Akhbār al-quḍāt*, 1:247.

72 Ibid.; Masud, "The Study of Wakīʿ's Akhbār al-Quḍāt," 121.

73 Collective consultation (or the principle of collegiality, *Kollegialitätsprinzip*) historically emerged as part of the shift from single-judge courts to judicial benches, especially with regard to criminal law. On the debate over the single-judge court versus the bench in the *Reichsjustizgesetze* in Germany, see Wilfried Küper, *Die Richteridee der Strafprozessordnung und ihre geschichtlichen Grundlagen* (Berlin: de Gruyter, 1967), 305–12. The history of judicial benches in the United States was also related to criminal offenses and started in the seventeenth century. See Susan C. Towne, "The Historical Origins of Bench Trial for Serious Crime," *The American Journal of Legal History* 26, no. 2 (1982): 123–59. On the principle of collegiality as a way to control judicial arbitrariness, see Regina Ogorek, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert* (Frankfurt: V. Klostermann, 1986), reprinted in Regina Ogorek, *Aufklärung über Justiz* (Frankfurt: Klostermann, 2008) 2:153, 333–34.

On the advantages and disadvantages of the single judge versus the bench, see Heike Jung, *Richterbilder: Ein interkultureller Vergleich* (Baden-Baden: Helbing and Lichtenhahn, 2006),

would then be an outcome of the relative strength of coopting judges over a coopted group of jurisconsults. The degree of alignment of their interests in effecting adjudication was typically high, and the vigor with which the jurisconsults were prepared to pursue those interests to affect adjudication was striking, too. All this speaks for cooptation as an effect, not necessarily by design. Consultation then could be, in effect, cooptation, even though jurisconsults might not have willingly agreed to be coopted.

The relationship between judge and jurisconsult could proceed differently depending on social and institutional circumstances. On the one hand, a judge soliciting consultation could help win over the solicited jurisconsults to the judge's cause. When a judge asked a jurisconsult for advice, and, even more so, when he heeded that advice, the process could improve the social standing of the jurisconsult. On the other hand, by consulting certain jurisconsults, the judge could also shield himself from the censure of other jurisconsults who may have disagreed with his decision. This function of cooptation led to a strengthening of the role of the advice-seeking judge, and, sometimes, I argue, to a joint identity of judge and jurisconsult among the legal elite.

Advice-seeking could also be a way of calling for reliability and loyalty. Being able to rely upon the support of jurisconsults would have been particularly important to a judge when adjudicating delicate topics, as the judgment would need to be accepted by the population. Judicial consultation thus also provided extrajudicial validation of adjudication, securing legitimacy when cases were legally, or possibly politically, controversial. This broader community support, in turn, helped ensure peace through justice, which was necessary for the judge to remain in office. Yet, if a judge did not seek the advice of jurisconsults, he risked inciting their opposition, and, eventually, possibly motivating them to call for his removal, as in the case of Judge Khālid above.

The fact that judicial consultation was not institutionalized, as it was in Muslim Spain, and was instead practiced *ad hoc* actually contributed to the potential for cooptation. The choice of whom to consult was not predetermined, and therefore a large number of potential jurisconsults could be integrated into the informal system.[74] In principle, a judge could solicit the opinion of *anyone* qualified to exercise legal reasoning (*ijtihād*). In fact, the process by which judges could choose to request the advice of jurisconsults most likely to offer convenient opinions might be called

90; Thierry Le Bars,"Juge unique/Collégialité," in Loïc Cadiet, *Dictionnaire de la Justice* (Paris: Presses Universitaires de France, 2004), 683–85, 683; and Carl Schmitt, *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis*, 2nd ed. (Munich: Beck, 1968), 72–75.

74 Similarly, with respect to the Prophet's flexible (rather than rigid) circle of consultants, see Badry, *Die zeitgenössische Diskussion*, 72.

"jurisconsult forum shopping." Being able to request counsel at any time, rather than having to return to an always-present advisory committee, proved useful in preventing immanent dissent.[75] Instead, anyone whom the judge did not wish to have as his critic, or who could endanger the judge's socio-political position, could be incorporated into the judicial decision-making process, as the case of Judge Bakkār shows.

CONCLUSION

Judicial consultation served as a mechanism by which the authority of different legal personae at court was created, negotiated, and reinforced—as well as a mechanism by which critique was enacted or absorbed. I have argued that judicial consultation ensured that legal scholars had a say in adjudication through a framework of joint adjudication. In other words, the judge was not the only one to comment on or determine the law at court. Not only could the jurisconsults critically augment or even undermine the power of the judge, but they could also steer the course of adjudication. The jurisconsults' critique provided an important means by which to share the judge's burden of adjudication, and it was sometimes instrumental in regulating, ordering, and potentially controlling adjudication. At the very least, judicial critique through consultation ensured the existence of alternatives at court.

Ultimately, judicial consultation is a testament to the fact that judges and jurists alike, possess an acute sensitivity for uncertainty in Islamic law, and that critique of those *on* the bench by those *off* the bench was considered necessary, even as it was also feared. In response to this fear, the flexibility to choose from among a broad community of potential jurisconsults functioned as a means of integrating and binding extrajudicial legal personae to the judicial system. The texts of the early ʿAbbāsid period provide narratives on key moments in Islamic judicial history to begin building a genealogy of judicial critique for Islamic legal history.

75 Ibid., 71.