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Competing Texts

The Relationship Between al-Mawardi's and Abu Ya'la's al-Ahkam al-sultaniyya

BY

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The **Islamic Legal Studies Program** is dedicated to achieving excellence in the study of Islamic law through objective and comparative methods. It seeks to foster an atmosphere of open inquiry which embraces many perspectives, both Muslim and non-Muslim, and to promote a deep appreciation of Islamic law as one of the world's major legal systems. The main focus of work at the Program is on Islamic law in the contemporary world. This focus accommodates the many interests and disciplines that contribute to the study of Islamic law, including the study of its writings and history.

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Preface

This booklet presents a study of two classical Arabic texts, unique in their genre, that have intrigued scholars of Islamic law and history for some time. The study was initiated by the Islamic Legal Studies Program and undertaken by Dr. Nimrod Hurvitz, Associate Professor at Ben Gurion University, Beer Sheva, while he was a Visiting Scholar at the Program during the academic year 2005–2006.

The *raison d'être* of the two texts, appearing suddenly in the eleventh century one after the other, and the nature of their relationship to each other are two of the field's conundrums. With the documentation we currently have at our disposal, they will remain enigmatic, although it is always hoped that new material will come to light to answer these, and other, historical riddles. But until that day Dr. Hurvitz, with his extensive knowledge of the early Hanbali movement, is one of the best to attempt a hypothesis, since it has always been assumed that the later Hanbali text by Abu Ya'la was simply a copy of the original. With this study Dr.

Hurvitz sheds light on textual style and content, on the context in which the treatises were written, and on the authors' distinct methodologies, and in so doing suggests a new way to view these texts as well as opens up avenues for further discussion.

It gives us great pleasure to publish this study as the eighth booklet of ILSP's Occasional Publications series.

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Associate Director, Islamic Legal Studies Program

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Nimrod Hurvitz

Introduction

In the course of the first five centuries of Islamic imperial and dynastic rule, Muslim elites governed their subjects in accordance with established political principles. Throughout this period administrative posts were created and principles of governance were forged on the basis of accumulating historical experience that was passed on from one generation to the other. During the same five centuries, Muslim scholars assembled a comprehensive body of legal doctrine that regulated many aspects of Muslim daily life and ritual. Yet despite the evolving political order and the developing legal doctrine, jurists did not connect the two. It was only in the first half of the fifth hijri century that two treatises, both known as *al-Ahkam al-sultaniyya* (translated as "ordinances of government" or "constitutional law," henceforth *Ahkam*), addressed public law in a systematic and comprehensive man-

ner.[1] Their authors, Abu l-Hasan ʻAli b. Muhammad b. Habib al-Mawardi (d. 450/1058) and Abu Yaʻla Muhammad b. al-Husayn al-Farra' (d. 458/1066), broke new ground in legal writing when they offered a legal conceptualization of political offices and institutions such as the vizier, the grievances process (*mazalim*), and *hisba*, and addressed these new topics of legal discourse with non-jurisprudential sources as well as reworking existing legal material.[2]

The *Ahkam* were the first works to address in legal terms the military, administrative, economic, and religious offices that made up the top echelons of the regime. They outlined the legal dimension of approximately two dozen of these roles, the scope of their authority, and the procedures that guided the officials performing their tasks. As such they were manuals that sketched the contours of the apparatus that kept the social and administrative order of the community intact. It is important to emphasize that the authors of the *Ahkam* took an interest in the whole system, not just in one discrete part of it. The reading of the texts as put forth in this essay, both in its textual analysis and in its study of the contextual setting, assumes and argues that the authors of the *Ahkam* were promoting a broad and all-encompassing political and

administrative vision because it was the mechanism as a whole that maintained the well-being and interests of the community of believers.

Although both *Ahkam* discuss the legal capacities of a wide array of officials, most modern studies of the texts focus solely on their treatment of the caliph and on a short portion of the chapter that deals with the amirs, that of the *amir al-istila'*.[3] Furthermore, most studies ignore the existence of both *Ahkam*, either by keeping silent about Abu Ya'la's treatise or by dismissing it as a mere copy of al-Mawardi's. By limiting themselves to one topic of only one of the texts, modern scholars have not addressed important questions regarding the composition of these works.

There are two partial exceptions to this historiographic account: the studies of Abu Faris and Little.[4] Both compare the two texts and take a close look at their differences. The more comprehensive of the two is the study by Abu Faris, which deals fully with both texts and notes dozens of differences between them.[5] However, Abu Faris did not pursue the implications of his findings, focusing his attention instead on the quest for the original text, which in his opinion is al-Mawardi's version.[6] The second study—Little's short

article—is limited to the institution of the caliphate. Despite this narrow focus, however, Little makes a number of pertinent observations regarding the discrepancies between the methodology, style, and contents of both texts.[7] Despite the cogency of Little's observations and the potential of his insights, his approach has not been taken up by other scholars. This study will join Abu Faris's and Little's approach in comparing the two texts. However, it will add to Little's study by comparing a number of chapters that have not yet been discussed and it will go beyond the two works by broaching topics that both Little and Abu Faris did not tackle.

This essay will approach the two treatises from three angles. The first provides a textual analysis, the second the context in which the texts were written, and the third the methodology used by the two authors. The textual analysis will begin with an examination of two chapters—the chapter on the *mazalim* process and the chapter on leading the prayer. It will rely on a close textual reading that will map out the discrepancies—variations and doctrinal contradictions—between the two *Ahkam* and also examine their similarities. By untangling the tightly woven collage of words, sentences, and paragraphs, it will expose the

complex textual relationship that exists between the two, one that exhibits both imitation and criticism. A second part of the textual analysis will examine the authors' approaches to legal authority and to *madhhab* politics, or politics within each school of law. Together, the two parts will enable us to characterize how each of the authors builds his legal narrative and how each construes the interface of law and politics.

This textual analysis, which reveals the tensions and contestations of the scholars who wrote the works, serves as a point of departure for analyzing the context in which they wrote. Therefore, on the basis of the textual analysis's findings, this essay offers an interpretation that links the texts and their contexts. Such an approach has already been pursued by several other studies of the *Ahkam*.[8] However, the contextual circumstances that this study will take into consideration differ from the historical factors that previous studies, which focused on the caliph and his political agenda, took into account. This interpretation will bring together two contrasting dynamics: the longstanding tensions between the intellectual trends of al-Mawardi and Abu Ya'la, on the one hand, and their shared interests as members of the same elite, on the other. By merging these seemingly contradictory his-

torical circumstances, it will be possible to shed some light on the texts' internal tensions.

The *Ahkam* were path-breaking legal compositions and the first to articulate the legal doctrine of a gamut of public law issues. What methodologies did these authors utilize when they put into writing the foundations of Islamic public law? Through its textual analysis this study will uncover how al-Mawardi and Abu Ya'la went about assembling this unprecedented doctrine. In its final section, this study will deal directly with a set of questions regarding the methodology each uses.

Copying and Contesting

A glance at al-Mawardi's introduction, which lists the twenty chapters that make up his *Ahkam*, reveals that the chapters can be divided into two broad categories: traditional and innovative. Traditional chapters are made up of topics that had already received a great deal of attention and are therefore well-developed legal discourses. Examples of such topics are *kharaj*, *jizya*, *ghanima*, and *qadi*, all of which had been elaborated upon extensively by numerous earlier jurists in dozens of texts so that anyone picking up the subject again could rely on an established body of doctrine. Innova-

tive chapters cover topics that had not been treated in previous *fiqh* literature, and thus the authors of the *Ahkam* are the first to discuss them in a legal context.[9] Examples of topics not found in pre-fifth-century legal literature are vizier, *mazalim*, and *niqaba*, and therefore anyone who wrote about them entered uncharted legal territory and could set his own course. Thus in terms of originality, the *Ahkam* of al-Mawardi and Abu Ya'la are composed of chapters that, for the most part, either follow a traditional legal discourse or innovate by articulating a new body of legal regulations.

This essay will examine both types of chapters—the one on leading the prayer represents an existing body of legal literature, while that on the *mazalim* process represents new legal themes.

A. *Imamat al-salat* ("Leading the prayer")

The opening page and a half of al-Mawardi's and Abu Ya'la's disquisition of the *imamat al-salawat* are nearly identical.[10] Both start by asking who has the authority to appoint the leader of the prayer (*imam al-salat*) and both answer that it is the sovereign. This is followed by a number of related questions, dealing, for example, with the possibility that the prayer leader will not come to the prayer; asking whether two prayer leaders can

be appointed at the same time; and inquiring about what happens if both *imam*s show up for prayer at the same moment.

Although the topic of prayer leadership was quite well developed, the political perspective that al-Mawardi and Abu Ya'la raise had not been worked out in a thorough manner before. In an insightful study of the Friday prayer, Norman Calder points out how al-Mawardi's approach differs from that of his contemporaries al-Shirazi and al-Sarakhsi.[11] Al-Mawardi's *Ahkam*, according to Calder, "includes a nicely distinguished approach to political power."[12] What is more, al-Mawardi's discussion introduces "information which we noted as lacking in Sarakhsi and Shirazi."[13] In other words the *Ahkam* introduce into the discussion of *imamat al-salat* a political dimension that is rare or incomplete in the *fiqh* tradition in which al-Shirazi and al-Sarakhsi wrote.

The grades of similarity between al-Mawardi and Abu Ya'la in their respective chapters on a topic found in existing legal works vary as the authors put together a spectrum of textual amalgams. At times the texts are very similar, with only an occasional variation in word or name (albeit, the differences can be significant). At other times the textual divergences are far

reaching as whole parts of one text are dropped from the other. The most significant difference between the texts on leading the prayer concerns doctrinal conflict.

One example of a slight yet meaningful difference is al-Mawardi's and Abu Ya'la's discussion of the authority of two officials: the *imam* and the *mu'adhdhin*, who calls the community to prayer.[14] The bottom line in both texts is that it is the *imam* who determines both the pace of prayer and the call to prayer. Both texts mention that a problem can arise because the Hanafis—a legal school (*madhhab*) to which the authors are not affiliated—perform the call to prayer differently. With al-Mawardi it is the Shafi'is, his own school of law, who provide his basis for comparison and with Abu Ya'la it is the Hanbalis, his legal community.

This type of textual variation—their reliance on a different group of authorities—often comes up. In a discussion about the necessity to appoint an *imam* for the Friday congregational prayer, al-Mawardi opens with the remark that "the *fuqaha*' disagreed" on this issue.[15] He reports the position of Abu Hanifa and the "*ahl al-Iraq*," who argue that a sovereign-appointed *imam* is essential and that without such an *imam*

the prayer is invalid. He then presents the opposing opinion, attributed to al-Shafi'i "and the *fuqaha*' of the Hijaz," which does not consider the presence of a sultan-appointed representative a condition for the validity of the prayer.[16] In Abu Ya'la's exposition, the same two opinions are mentioned; however, both are attributed to Ibn Hanbal.[17] Thus, what al-Mawardi casts as a classical case of inter-*madhhab ikhtilaf*, Abu Ya'la puts forth as an internal Hanbali disagreement that evolves out of two contrasting opinions of Ibn Hanbal.

Alongside such sections in which the bulk of the wording in the two texts is the same but opinions are ascribed to different scholars, are segments in which al-Mawardi and Abu Ya'la present discussions of a different nature and wording. An example of such a textual breach is the treatment of how many participants are required for a Friday prayer to be valid. Al-Mawardi writes:

> Jurists disagree with regards to the number [of worshippers] that constitutes the *jum'a* (Friday prayer). Al-Shafi'i, may God approve of him, was of the opinion that the Friday prayer was not convened unless there were forty qualified men present—not counting women, slaves, and travelers.

> Al-Shafi'i's disciples disagreed among themselves whether the prayer leader is to be counted as one of the required forty worshippers or not. Some of them were of the opinion that there ought to be forty worshippers, not counting the *imam*. [However,] most of [al-Shafi'i's disciples] approved of counting the *imam* among the forty. Al-Zuhri and Muhammad b. al-Hasan were of the opinion that the [Friday prayer] was convened when it was attended by twelve worshippers, not counting the *imam*. Abu Hanifa and al-Muzani were of the opinion that the [Friday prayer] was convened when it was attended by four worshippers, one of whom was the *imam*. Al-Layth and Abu Yusuf were of the opinion that the [Friday prayer] was convened when it was attended by three worshippers, one of whom was the *imam*. Abu Thawr was of the opinion that the [Friday prayer] was convened with two worshippers, just like other prayers. Malik was of the opinion that there is not a single specified number, but rather that the number ought to be the majority of a town's inhabitants.[18]

Al-Mawardi's exposition of the number of worshippers required for the minimum number to validate the *jum'a* has several interesting features. One of them is that he does not make use of Prophetic *hadith*s nor does he reference the Prophet's Companions. The long list of authorities stretches from the

Followers (*tabi'un*) down to al-Shafi'i's students who died in the middle of the third hijri century.[19] It includes many renowned jurists, most prominent among them the three eponymous founders of legal schools: Abu Hanifa, Malik, and al-Shafi'i. In this context, the omission of Ibn Hanbal or of any Hanbali scholar is glaring. Another interesting point is that al-Mawardi neither presents his own opinion nor a single authoritative Shafi'i position on the matter. He points out that the Shafi'is are divided among themselves as to how many participants constitute a full forum of the *jum'a* prayer and lists a number of opinions. Al-Mawardi's presentation spells out the possibilities, outlines the range of opinions, and remains open-ended.

Abu Ya'la starts his presentation with the question: "Is the *imam* to be counted as one of the worshippers or not?"[20] which is a carbon copy of the wording in al-Mawardi's text (or the other way around). However, from that point on the two discussions are quite different. Abu Ya'la continues:

> There are two transmissions (*riwayatayn*) regarding this question. One of them is that the *imam* is not to be counted (*za'idan 'ala al-'adad*). It is said in a transmission by 'Abdallah [Ibn Hanbal's son]: "The smallest required number for a Friday prayer

with an *imam* is forty men,"[21] implying forty worshippers not counting the *imam*. This is due to the transmission of ʻAbd al-Rahman b. Kaʻb b. Malik on the authority of his father: "Asʻad b. Zarara led them in prayer in Medina and that day they were forty men."[22]

The requirement is forty without the *imam*. As when is said: We ate and we were forty, and because it implies that the leader (*al-matbuʻ*) is not included. Its proof [that the leader is not counted as part of the group is that] the witnesses of a marriage contract do not include the *wali*. It is the same regarding witnesses who appear before a judge, [they too] do not include the judge, even though he belongs to the group.

And the second [transmission] is that the *imam* is counted as one of the forty worshippers. Al-Athram transmitted: "If they are forty, they ought to convene." The same is said in the transmission of al-Maymuni: "If they were forty." And in that of Ibn al-Qasim: "It is required that a community (*jamaʻa*) be comprised of forty men who live in town," meaning the total number is forty (i.e., the *imam* is counted as one of the forty).

The correct position on this matter is what ʻAta' b. Jabir transmitted: "The prevailing practice is that out of every three, one is an *imam*, and that every [group] of forty—and not more than that—constitutes a *jumʻa*." This conveys that the custom (*sunna*) is forty, and if the *imam* is one of

> them, there are forty. And because the number that is required in the community includes the *imam*, the same can be applied to the number required in the *jum'a*.[23]

These discussions regarding what constitutes a Friday prayer illustrate the extent to which the two versions can differ. Although both start with an identically worded question, they offer different answers and a different analysis. Abu Ya'la's discussion is limited to two countering options: either forty worshippers counting the *imam* or forty worshippers not counting the *imam*, meaning a total of 41 participants in the prayer. Al-Mawardi presents more than half a dozen possibilities: 41, 40, 12, 4, 3, 2, and Malik's non-specified number. Abu Ya'la has a limited list because his discussion follows the options that appear in Ibn Hanbal's transmissions (*riwaya*). Just as the Hanbalis discussed the appointment of a sultan-appointed prayer leader on the basis of Ibn Hanbal's two transmissions, they do so again with regards to the number of participants in the *jum'a* prayer. Hence, the variants ascribed to Ibn Hanbal set the contours of the Hanbali discussion. In other words, Abu Ya'la's discussion remains an internal Hanbali exposition, while al-Mawardi's presents a summary of juristic positions that span several legal

schools, as well as the opinions of earlier jurists.

The two texts do not differ with respect to their legal positions since al-Mawardi does not argue for a single, preferred answer. The difference between them lies in the nature of their discussions. Abu Ya'la puts forth a narrow, yet in-depth exposition of Hanbali opinion while al-Mawardi gives a more elaborate number of opinions which he treats superficially by simply stating the positions. Part of Abu Ya'la's attempt to understand the exact meaning of Ibn Hanbal's positions requires that he make an interpretative effort with regard to both Ibn Hanbal's transmissions and those of his companions (*sahaba*). These efforts on Abu Ya'la's part have to do with his attempt to arrive at a position of his own while al-Mawardi is satisfied with an enumeration of other jurists' opinions. Hence, in this part not only is the text very different, but al-Mawardi and Abu Ya'la seem to play by different rules and have different purposes in mind.

Alongside topics that are discussed by the two authors in a distinctly different manner are topics that receive more space from the one author than from the other. Such a textual discrepancy is found in the discussion of wages given to *imam*s and *mu'adhdhin*s.[24] For Abu Ya'la, as well as for other Hanbalis, this was an

issue that caused moral discomfort, but it caused no qualms among the Shafi'is and accordingly al-Mawardi allots little thought to this topic before moving on. The opinion—and literal sentence— that al-Mawardi and Abu Ya'la have in common reads as follows: "Such an *imam* [who was appointed by a sultan for his mosque] and his *mu'adhdhin* are allowed to accept a salary (*rizqan*) for the work they did leading and calling to prayer, [to come] from the treasury, out of the portions that belong to the public welfare."[25] At this point al-Mawardi adds that Abu Hanifa prohibited such a transaction, and then he advances to another topic—the mosques that ordinary inhabitants build. By contrast, Abu Ya'la expounds more fully, underscoring the dilemma Hanbalis had with wages given to men in religious posts by apologetically remarking "because this is not by way of fee (*bi-ujra*) for the prayer and the call to prayer. It is solely the established right of the treasury."[26]

Abu Ya'la's moral discomfort is revealed by his subsequent attempt to distinguish between the terms *rizq* and *ujra*. *Rizq* implies a salary which sum is set by the government and is given to its employees. *Ujra* probably meant a payment made by individuals, often without a set price and therefore involving negotiation

and haggling.[27] After making this distinction, Abu Ya'la relates two reports concerned with the issue of receiving a salary from the government for the task of calling believers to and leading them in prayer. One report is about the vizier 'Ali b. Isa, which simply relates that he gave a salary (*rizq*) to prayer leaders. The other tells of the tenth-century Hanbali jurist, Abu Bakr al-Khallal, who prayed behind men who received an *ujra*.[28] After these two narratives, neither of which does much to clarify what is permitted or prohibited, Abu Ya'la reports about the different transmissions of Ibn Hanbal. In the chapter *al-Imama*, compiled by Abu Bakr al-Khallal, there were five transmissions according to which Ibn Hanbal forbade praying behind someone who accepted *ujra*. However, in another chapter there was one transmission in which Ibn Hanbal was asked whether people should continue praying behind such an *imam* or go to tribal mosques, and he answered that they should stay in the *masjid al-jami'*.[29]

Abu Ya'la's lengthy exposition reveals Hanbali moral sensitivities and sensibilities rather than a clear legal position. Yet from our perspective, which focuses on the *Ahkam*'s process of composition, the fact that Abu Ya'la's moral qualms find their way into the exposition illustrates that liberties were taken to

address concerns that the other might ignore. Such dissimilarities reveal that despite the texts' similarities, each of the authors diverged from the general line of argument to introduce issues that he considered highly significant.

There are large segments of al-Mawardi's version of the *Ahkam* that also do not appear in Abu Ya'la's. An example of such a divergence is the discussion of praying for rain during periods of drought (*istisqa*').[30] Both authors start with the appointment of prayer leaders for extraordinary prayers, such as those for an eclipse (*khusuf*) and for rain (*istisqa*'), and after presenting similar positions, they pose the question of the validity of a plea for rain without the full prayer, answering that it is permitted.[31] Both authors rely on a story about the Prophet in which an Arab asks him to help break a drought and the Prophet complied. At this point their versions diverge. In Abu Ya'la's account these are the last words of the chapter on leading the prayers. Al-Mawardi, however, continues the story about the Prophet, according to which the Prophet's plea for rain was so successful that it induced a flood and he was then asked to save them from being drowned. At this point the Prophet is described as laughing and asking who can recite poetry

to celebrate the moment. ʻAli b. Abi Talib recited poetry, followed by a tribesman from Kinana, and both were complimented by the Prophet. Al-Mawardi's account covers an entire extra page, yet adds nothing to the legal reasoning that led to his position validating the plea without prayer.

It is unclear why Abu Yaʻla stopped relating the story when he did. However, his omission of poetry is a feature that typically distinguishes his version of the *Ahkam* from that of al-Mawardi: while al-Mawardi inserts an occasional poem, Abu Yaʻla consistently omits them.[32]

Al-Mawardi's discussion of prayers does not stop with the prayer for rain. He continues on to discuss another type of prayer, the *daʻwa al-sultan*, which implores God to help the ruler.[33] This topic does not come up in Abu Yaʻla's treatise at all. Al-Mawardi allows that it is not obligatory to participate in this prayer, but he suggests that people take part in it so as to avoid being suspected of insubordination. Abu Yaʻla's omission of the prayer calling upon God to help the ruler is telling. It is probably related to the Hanbali ambivalence towards the caliphs, to whom they were loyal but often had little respect for.

So far, the examination of these two chapters has

touched upon different writing styles, legal reasoning, and the use of legal authorities. To complete the picture we need to address difference of opinion regarding legal doctrine. In the chapter on leading the prayer, the only doctrinal disagreement between the two has to do with the right of an iniquitous individual (*fasiq*) to lead prayer. Al-Mawardi opines that he can serve as an *imam*, but cannot be appointed to that position.[34] In other words, if it so happens that an iniquitous individual leads a prayer it is legitimate; however, he cannot be appointed to the position of *imam* and lead prayers on a regular basis. By contrast, Abu Ya'la does not make a distinction between coincidental and regular leadership in prayer, and he prohibits any form of leadership in prayer by an iniquitous individual.[35] These contradicting views about the permissibility of *fussaq* to lead prayers are part of a more general disagreement between the Hanbalis and the Shafi'is regarding the integration of *fussaq* in the Islamic social fabric, one in which the Hanbalis usually adopt a more exclusionist position.

The two authors' chapters on leading the prayer are a tangled textual mixture in which some parts bear great resemblance to each other and others are completely different. Much like their textual entanglement, the ideas and attitudes of these two chapters

shift between agreement and subversion. To begin with, most of the legal doctrine is nearly identical; in some instances it is in answer to a different issue and on one occasion it diverges. Such a degree of doctrinal agreement is rare in Islamic law, which is replete with disagreements known as *ikhtilaf*. The doctrinal resemblance is all the more surprising when we take into consideration how consistently each author ignored the other's *madhhab* founder. The mutual omission of each other's *madhhab* founder is a significant indication of the tension and competition between the two legal schools. However, this rivalry shows itself in different ways as well. Whereas al-Mawardi does not favor the Shafi'i school and chooses to present a number of legal opinions that were elaborated by scholars of several schools, Abu Ya'la blatantly ignores other legal traditions and cites only the Hanbalis several hundreds of times.

B. *Mazalim* ("Redress of wrongs")[36]

The second type of chapter, which deals with topics that have not been discussed previously by jurists, is constructed from non-legal materials. The following analysis and comparison of al-Mawardi's and Abu Ya'la's *mazalim* chapter will reveal some of the features

of how such texts were composed.

The overall structure of al-Mawardi's and Abu Ya'la's *mazalim* chapter is very similar, although occasionally Abu Ya'la omits (or al-Mawardi adds) segments of varying lengths. Both start with a description of the traits that an administrator of the *mazalim* ought to possess.[37] In essence these characteristics can be boiled down to an imposing presence and integrity. Interestingly, neither mentions knowledge of the law or intellectual abilities.

Following their comments on the administrator of the *mazalim* and his appointment, al-Mawardi and Abu Ya'la present an historic overview of the institution's development.[38] Both mention the same figures: the Prophet in Medina, 'Ali b. Abi Talib, 'Abd al-Malik b. Marwan (the first to review complaints about wrongdoings), 'Umar b. 'Abd al-'Aziz (the first to set up a post for a *mazalim* official), and a number of Abbasid caliphs.[39] In addition to the account of the appearance of this institution, al-Mawardi and Abu Ya'la present a similar narrative of moral decline. Both authors claim that the Muslims were on their best ethical behavior during the era of the four Rightly-Guided caliphs and that afterwards matters deteriorated.

Despite the similarities of structure in the first

part of the chapter, the authors do differ in the manner in which they write about these historic events, particularly with regard to the caliphs' actions. Abu Ya'la's historical account is abridged and he omits several lines from each caliph's mention. The difference between the two texts is accentuated when they write about the pre-Islamic period. Both start this section with a brief remark about the Persians, but whereas al-Mawardi adds a page and a half about the Arabs in the pre-Islamic period, Abu Ya'la ignores the topic altogether. Al-Mawardi's account culminates with a reference to Muhammad, who witnessed the Pact of the Honorable when he was twenty-five years old. Al-Mawardi comments on the fact that at that age Muhammad was not yet a prophet, but he concludes by stating that the mere presence of Muhammad at that event transformed it into a legal precedent. These pre-Islamic episodes, including Muhammad's presence during the signing of the Pact of the Honorable, go unmentioned by Abu Ya'la.

In both texts the history of the *mazalim* procedure is followed by a discussion of the administrator's jurisdictions, a comparison between the *mazalim* court and the ordinary court of law, and a long presentation of the procedures that the administrator should fol-

low. Thus, the structure of the chapters is very similar and the texts are often identical. The two chapters also resemble each other in the scarcity of references to previously-written legal texts and to sacred texts such as the Qur'an and Sunna.

Although the *mazalim* chapters are organized similarly and large parts of the texts are identical, they do contain two significant differences. One has to do with the style of legal writing and the other with the level of partisan *madhhab* loyalty, as seen earlier. Stylistically, al-Mawardi and Abu Ya'la differ in the use they make of non-legal sources such as historical narratives and poetry. Al-Mawardi's *mazalim* chapter, for example, contains nine instances in which he begins his exposition with a legal prescription and follows it with a story about an Abbasid or Umayyad caliph that buttresses his legal opinion.[40] In five out of the nine historical accounts he includes a number of lines of poetry. An example is when he writes that an administrator of *mazalim* is required to supervise the conduct of government officials, and to emphasize the necessity of their executing their tasks in the most honest manner possible, he follows with a story about 'Umar b. 'Abd al-'Aziz who noted, in one of his first public speeches, that he heard that some officials

expect bribes before they perform their work. ‘Umar warns that he plans to punish such conduct.[41]

Whereas al-Mawardi adds an historical illustration to his legal statements, Abu Ya‘la writes his opinions in a terse legal manner, omitting historical references.[42] Abu Ya‘la is consistent in his approach and leaves out all nine historical references that al-Mawardi includes.[43] In light of Abu Ya‘la’s consistency, it would seem that these omissions are not random abridgements but principled reservations about the explicit use of non-legal materials.

It should be noted that all nine historical accounts that al-Mawardi includes in this chapter refer to caliphs. It is possible therefore that Abu Ya‘la’s omission of these accounts reflects his disquiet with the moral and legal stature of caliphs, while al-Mawardi’s inclusion of them reflects, as noted above, a respectful approach that does not match the Hanbali view of that institution. Although the Hanbalis tend to be fastidiously obedient to the caliphs, their loyalty often goes hand in hand with deep suspicion of the integrity of specific caliphs and of courtly conduct in general. It may well be that this ambivalence comes across in Abu Ya‘la’s depiction of the caliphs. While he presents the caliphs as meriting near total obedience, he does

not view them as moral paragons who possess ethical stature and as a consequence ought to serve as legal exemplars.

To conclude the textual study of the four chapters, it should be emphasized that the approach taken in this comparison does not concern itself with the question which of the two *Ahkam* was the original. Although the question as to which author was the original and which the imitator, i.e., the riddle of textual influence, is an interesting and important question for understanding the process of the texts' composition, the present state of our knowledge does not allow us to answer it in a definitive manner. As a consequence, this study has focused on the similarities and dissimilarities of the two texts, on *what* was copied and not *who* was copied. This is an intertextual approach that maps out commonalities and discrepancies.[44] It assumes that the second author was creative and was advancing an agenda by the way he manipulated the original text. On the basis of a careful study of what the two *Ahkam* share and where they differ, be it in legal doctrine, style or construction of authority, it is

possible to delineate the two strategies of legal writing that each of the authors devised as follows.

The most salient feature of al-Mawardi's writing is its consistency. In both chapters—on leading the prayer and on *mazalim*—he presents the opinions of three legal schools and ignores the fourth, the Hanbalis.[45] In his presentation of those opinions he usually avoids stating his preference.[46] It is for the most part an unbiased exposition of a range of legal opinion rather than an opportunity to showcase the Shafi'i doctrine. Another aspect of his writing that runs through both chapters is the use of non-legal material, mainly norms of governance and historical precedents. Although al-Mawardi makes more use of non-legal material in the *mazalim* chapter, his chapter on leading the prayer also includes a few references to historical precedents.

Abu Ya'la's writing is not consistent. In the chapter that deals with leading the prayer, he makes every attempt to highlight Hanbali doctrine.[47] He barely mentions other jurists and their opinions, citing only Hanbali rulings and, in certain instances, internal Hanbali debates. By contrast, the chapter on the *mazalim* contains relatively few references to Ibn Hanbal, and nearly none to internal Hanbali debates. Instead there are references to non-Hanbali jurists,

mainly Malik b. Anas. It can be said that Abu Ya'la utilizes two different approaches in writing his *Ahkam*. In chapters that treat a long tradition of legal discussion, he relies solely on Hanbali legal solutions and ignores all the rest. In chapters that deal with topics that have little or no doctrinal foundation, he barely mentions Ibn Hanbal or the Hanbalis.

In summary, then, the *mazalim* chapters resemble each other while the leading the prayer chapters do not. In the latter, which are typical of "traditional," discourse-based chapters that rely on existing and well-developed legal doctrine, al-Mawardi and Abu Ya'la quote different legal sources and attempt to achieve different aims. Al-Mawardi relies on three out of four legal schools (leaving out the Hanbali school) and aspires to present an open-ended description of legal options. Abu Ya'la, on the other hand, relies almost solely on the Hanbali school and aims to enhance the Hanbali legal tradition. In the *mazalim* chapter, on the other hand, both authors rely heavily on existing norms of governance as their main source for legal doctrine, but differ in the way they present their use of these sources. Whereas al-Mawardi openly relies on historical anecdotes that tell of caliphal policies and events, Abu Ya'la does not use such stories to buttress

specific legal opinions.

School Partisanship v. Open-Ended Disagreement

In this subsection the results of the detailed study of the *mazalim* and *imamat al-salat* chapters will be placed alongside broader inquiries into the two texts. Throughout the rest of the chapters of al-Mawardi's *Ahkam*, he often cites two or more opinions on any given legal question. Although he cites al-Shafi'i more often than any other jurist, Abu Hanifa and Malik feature prominently in his version of the *Ahkam*. A rough assessment of the number of times these three jurists are mentioned shows that al-Shafi'i's opinions (or those of his students) are cited over 80 times, Abu Hanifa's over 50 times, and Malik's over 40 times.[48] The only other jurist cited more than a dozen times is the Hanafi Abu Yusuf. These numbers indicate that although al-Mawardi preferred to draw upon the Shafi'i tradition, he did not exclude the Hanafis and Malikis.

Not only does al-Mawardi cite the opinions of non-Shafi'i jurists, he often places them on a par with Shafi'i opinion, in some instances leaving Shafi'i opinion out of the presentation altogether. An example of al-Mawardi's treatment of Shafi'i and other opinions

as equally authoritative is his exposition of prayer leaders in Friday and feast prayers:

> As for prayer leaders on Friday and the holidays, the tendency in the Shafi'i *madhhab* is to view the *qadi*s as the most deserving, whereas the tendency in the *madhhab* of Abu Hanifa is that the *umara*' [political and military leaders] are most worthy of the role.[49]

Here, as in numerous other instances, al-Mawardi does not express a preference among the different opinions he presents.

An example of al-Mawardi omitting Shafi'i opinion altogether is found in his presentation of a debate over what is to be expected from a Muslim who commits apostasy and afterwards repents. Al-Mawardi cites both Malik's position ("After their repentance they are obliged to perform such duties as prayer and fasting, which they neglected during the period of apostasy, because before they apostatized they knew about these obligations") and Abu Hanifa's contradictory opinion ("They are not obliged [to perform missed duties] because their status is like that of a non-believer who converted to Islam"),[50] but then moves to another topic, so that the reader never learns what

the Shafi'i position is regarding this question, much less what al-Mawardi thinks about it.

As the numbers above reveal, al-Mawardi refers to the contesting legal opinions of the three eponymous *madhhab* founders (al-Shafi'i, Malik, and Abu Hanifa) several dozen times each. By juxtaposing their legal opinions over and over again, often without expressing his own preference or opinion, he puts forth an open-ended approach underscoring *ikhtilaf* (divergence). Its underlying principle is that the body of Islamic jurisprudence (*fiqh*) is made up of a vast number of debates and that most of the opinions expressed in these disagreements are equally authoritative and deserve equal respect. However, by mentioning each of the three founders of the three schools of law several dozen times each and nearly ignoring the fourth, i.e., Ibn Hanbal (cited only twice in the whole *Ahkam*), al-Mawardi is expressing his animosity or disrespect for the Hanbali *madhhab*.

Abu Ya'la's approach to the Islamic legal tradition and *madhhab* politics cannot be more different, since he uses his *Ahkam* as a showcase for the Hanbali legal tradition and ignores the other three. This is demonstrated quite clearly in the discourse-based chapters, in which he mentions the opinions of Ibn

Hanbal several dozen times. It is safe to assume that the overall number of times that Abu Ya'la cites Ibn Hanbal add up to several hundred. Alongside these citations of Ibn Hanbal, Abu Ya'la gives the opinions of three well-respected Hanbali scholars from the fourth hijri century—al-Khiraqi, Abu Bakr al-Khallal, and Ghulam al-Khallal—nearly forty times.[51] Along with the references to Ibn Hanbal's disciples, Abu Ya'la often mentions the titles of their books.

Thus Abu Ya'la's version of the *Ahkam* is a clear case of partisan scholarship in which he attempts to bolster the prestige of the Hanbali *madhhab* at the expense of the other schools. When all of Abu Ya'la's references to the opinions of al-Shafi'i, Abu Hanifa, and Malik are counted, they add up to approximately one dozen total.[52] In other words, Abu Ya'la does not treat the *Ahkam* as a collective project made up of the collected opinions of major jurists, but rather as a limited Hanbali project. For Abu Ya'la, the source of authority is the Hanbali *madhhab* to the exclusion of the other three.

In order to keep the *Ahkam* within the confines of Hanbali discourse, Abu Ya'la devised several stratagems that enable him to present numerous cross-*madhhab* debates as if they were disagreements within

the Hanbali *madhhab*. He does this by ignoring the well-known opposing opinions of major jurists (such as the eponymous founders of the legal schools, whom al-Mawardi often quoted) and limiting himself to citing the opinions (often more than one opinion) of Ibn Hanbal on any given matter. For example, when discussing the rules of sexual intercourse outside of marriage (*zina*) Abu Ya'la states that sexual intercourse with animals is a case of *zina*. However, he then cites two transmissions ascribed to Ibn Hanbal, only one of which corroborates his statement. The second, which contradicts the first, is as follows: "There is a transmission on the authority of Ahmad [Ibn Hanbal] stating that sexual intercourse with animals is not *hadd* but *ta'zir*."[53] Since *zina* is one of the five *hadd* offenses against God as enumerated in the Qur'an, Ibn Hanbal's second transmission effectively removes sexual intercourse with an animal from the category of *zina*. These are clearly conflicting opinions, each of which has advocates outside of the Hanbali *madhhab*. In al-Mawardi's version of the *Ahkam*, the second opinion—sexual intercourse with an animal is not *zina*—is attributed to Abu Hanifa.[54] By ascribing both of the opinions to Ibn Hanbal, Abu Ya'la succeeds in avoiding quoting non-Hanbali jurists and maintaining

the semblance that the Hanbali *madhhab* has elaborated all of the known, widely accepted opinions.

The ascription of multiple transmissions to Ibn Hanbal is by far the most common means used by Abu Ya'la to present the Hanbali school as an intellectually self-contained legal community. However, in some instances he chooses to depict the internal Hanbali discourse through expositions of disagreement among Ibn Hanbal's disciples. For example, in the presentation of various issues related to slander, the following question is posed: "If a dead person is slandered, does [his or her] heir have the right to demand the punishment (*hadd*) for slander?"[55] Abu Ya'la states that there was difference of opinion and then cites Abu Bakr (Ghulam al-Khallal), who opposes giving the heir the right to demand the *hadd*, and al-Khiraqi, who argues that if the mother of a free Muslim is slandered, he has the right to demand the *hadd*.[56] The disagreement over the rights of a son of a deceased parent who is slandered comes up in al-Mawardi's *Ahkam* also.[57] Al-Mawardi's position is similar to that of al-Khiraqi, both of them agreeing that the son has the right to prosecute the slanderer. Al-Mawardi adds an opposing opinion, which he ascribes to Abu Hanifa, that is similar to that of Abu Bakr, according to which the son does not have

the right to prosecute the slanderer. Again, what appears in al-Mawardi as a cross-*madhhab* disagreement is construed by Abu Ya'la as a disagreement between Ibn Hanbal's fourth-century disciples.

Another means by which Abu Ya'la creates the impression that the Hanbalis have discussed among themselves the full range of questions and answers that appear in the *Ahkam* is by making mention of Hanbali analogical reasoning (*qiyas*). In a discussion of officials' salaries, the following appears: "If the salary is neither specified nor unspecified, can he claim a fee for his work? The *qiyas* of the *madhhab* is that if he is known to receive a salary for his work, then he deserves to be paid a similar sum. [However,] if it is not common knowledge that he receives a salary for this work, then he is not paid."[58] Abu Ya'la does not specify how this *qiyas* was constructed nor who the jurists were who arrived at this opinion, but in writing "the *qiyas* of the *madhhab*," Abu Ya'la informs the reader that the Hanbalis had their own internal discourse and that in some instances a collective intellectual effort, and not the opinions of Ibn Hanbal or any of his renowned disciples, led to the formation of a *madhhab* position.[59] Such a depiction portrays the Hanbali jurists as a dynamic group of scholars who develop their own line

of thought and arrive at shared positions.[60]

Lastly, there are at least a dozen cases in which Abu Ya'la's and al-Mawardi's legal positions contradict each other. One example concerns their positions on drinking wine for medical reasons. Whereas al-Mawardi argues that it is permitted to drink wine when it serves as a remedy for an illness, Abu Ya'la prohibits such conduct.[61] After stating that the person who consumes an alcoholic beverage under the pretext of medicine ought to be punished, Abu Ya'la cites Ibn Hanbal, who refers to a *hadith* in which the Prophet states explicitly that wine is not a medication. Another example of doctrinal disagreement elicits a rare reference to the Shafi'is on the part of Abu Ya'la: "He [Ibn Hanbal] approved of distributing (*sadaqa*) among the warriors who receive booty (*ahl al-fay'*), in contrast to the doctrine of the Shafi'is (*ashab al-Shafi'i*), who do not permit it."[62]

When we compare the two *Ahkam* as concerns school partisanship, it is clear that al-Mawardi's animosity toward the Hanbalis, which can be detected in the text, does not lead him to indulge in Shafi'i propaganda. By

contrast, Abu Ya'la engages in an aggressive effort to enhance the stature of the Hanbalis. Abu Ya'la's agenda is to present the Hanbali *madhhab* as a self-reliant, intellectually powerful, and independent community that follows the course of its leadership and is capable of producing its own literature. It is at this point that the enigma of the two texts becomes most acute, as their relationship becomes very complex and includes both imitation and criticism. In the next section a partial explanation for this complexity will be offered.

Text and Context

The complex textual relationship studied above is a reflection of the complexities of the context in which al-Mawardi and Abu Ya'la operated. Just as the texts both resemble and differ from each other, the context in which they were written includes shared and conflicting interests. A clue about their shared interests is found in al-Mawardi's introduction where he writes that the text was composed to serve the leaders of the community (*wulat al-umur*) who found it too difficult to study their rights and obligations because such information was spread throughout numerous texts.[63] With this remark al-Mawardi reveals for whom the *Ahkam* was written and how he hopes to help in their

quandary. Thus, in writing the *Ahkam* al-Mawardi intended to place at the disposal of the regime's top echelon a manual that explains the legal dimension of their work. Al-Mawardi's thoughts about his readership and his attempt to aid them in their work will enable us to uncover an important aspect of the context in which he wrote.

Before presenting this study's interpretation of the context in which the two *Ahkam* were written, it is necessary to present a critical assessment of the present state of scholarship on the topic. The first Western scholar to study the context of the *Ahkam* was H. A. R. Gibb, who concentrated on al-Mawardi and focused on the political dynamics of the period.[64] Gibb argued that the caliph asked al-Mawardi to write the *Ahkam* as part of "his struggle with the Buwaihid amirs."[65] He also observed that such a request came as part of a sustained effort to restore Abbasid rule.[66] This analysis suffers from two shortcomings. First, Gibb's explanation is inappropriately narrow. It views a text that covers enormous political and administrative ground in twenty chapters through the limited angle of one of its chapters. It assumes that the motive behind the whole treatise hinges upon the alleged interest of one political actor, the caliph—hence ignoring the

author's efforts to present a wide spectrum of political actors and their well-orchestrated political system. One wonders what would be the point of writing elaborate disquisitions on different administrative positions if the sole purpose of the *Ahkam* was the rehabilitation of the caliph. Although the caliph was a crucial political actor, and it is very likely that al-Mawardi would have preferred to see his authority restored, it would seem a distortion to present the composition of the whole text through the narrow lens of the caliph's political interests.

The second problem is that Gibb's assertions regarding the caliph's interests are in stark contrast to the fact that the *Ahkam* text weakens the legal position of the caliph and strengthens that of his main political rival, the *amir al-istila*' or "amir by conquest."[67] In other words, when al-Mawardi wrote about the *amir al-istila*' as a legitimate participant in the Islamic political system, he did not serve the political interests of the caliphs, but rather that of their usurpers. Even though Gibb did not address this internal contradiction, he seems to have been aware that the *Ahkam* did not promote the interests of the caliphs when he noted that the text vindicated the existing historical situation in which the caliph had lost a great deal of

his authority to the *amir al-istila*'. Such writing, Gibb argues, led al-Mawardi to undermine "the foundations of all law" and in so doing bring "the juristic theory of the caliphate…crashing to the ground."[68] Clearly then, since al-Mawardi includes in his treatise segments that weaken the caliph's legal position, the treatise as a whole cannot be understood to enhance the caliph's political interests. Gibb's efforts to link the text to a limited political context and to have as purpose the immediate and specific interests of the caliph as the reasons behind the composition of the *Ahkam* are not very convincing.

Let us return to al-Mawardi's comment about his readership and examine what it can tell us about the context in which he composed the *Ahkam*. Al-Mawardi's introduction indicates that the *Ahkam* was written for members of the ruling elite in order to facilitate their understanding of the offices they held. The *Ahkam* is thus not a document meant to advance the political interest of one office holder (such as the caliph) but rather to describe all the officials who attended to the public interests of the community. Therefore, the real protagonist of the *Ahkam* was the system as a whole and not any discrete part of it.

To these conspicuous features of the text we

ought to add that both al-Mawardi and Abu Ya'la were well-connected judges who had access to courtiers and caliphs and were therefore part of the ruling elite themselves. As members of this ruling elite it is most probable that they embraced its self-image and conformed to its ideology, which basic premise was that they, the community's political, administrative, military, and religious leadership, carried on their shoulders the responsibility of its well-being and impeccable moral nature. The *Ahkam* is a document that was composed by members of the establishment for members of the establishment about the roles of the establishment.

With this observation as our point of departure, we should take a close look at a certain aspect of the *Ahkam*'s context, which I believe will improve our understanding of the text itself. One of the most prominent historical developments of that period was the constant changing of the ruling elite. An example of such a shift in the political system was the centuries-long decline of the caliph and the rise of other political actors in his place. Such far-reaching alterations coupled with numerous less conspicuous developments brought about profound changes in the political system and in its ability to attain its most important purpose: the upkeep of an Islamic com-

munity. As a way of adjusting the law to the evolving political norms, al-Mawardi and Abu Ya'la wrote a manual detailing how these office holders ought to attend to their affairs in the new political environment. Furthermore, alongside al-Mawardi's and Abu Ya'la's shared motive was their common affiliation in the ruling circles that led to their espousing very similar legal ideas and solutions. Indeed, so much so that one of them felt comfortable enough to copy large parts from the other's text.

However, as this and other studies have demonstrated, the two tracts differ from each other with regards to authorities whom they cited and the construction of legal arguments, particularly when they relied on non-legal sources. These textual discrepancies are hardly a coincidence and they reflect a second and different dimension of the *Ahkam*'s context. A clue to this contextual aspect appears in Abu Ya'la's introduction to the *Ahkam*, in which he states that in the past he has addressed the issue of supreme leadership (*imama*) in a text known as the *Mu'tamad*.[69] In that earlier text Abu Ya'la writes, "I debated with various [members of certain] trends of theologians (*madhahib al-mutakallimin*) and furnished a reply to what they argued." He explains that in this text he has

decided to drop the argumentative elements and to add other aspects that are related to the *imam*. Abu Ya'la's comments suggest that there was an ongoing debate between the *mutakallimun* and the scholars of Abu Ya'la's ilk as to the political leadership of the Islamic community.

Abu Ya'la's remark is one of numerous indications that both his and al-Mawardi's affiliation with the caliphal circle does not mean that they were part of a unified group of scholars and officials who agreed on every aspect of law or politics. In fact, Islamic intellectual tradition was replete with debates, polemic literature, and stirring ideological confrontations, some of which were taken to the streets and evolved into violent clashes between the followers of the different sects and movements.[70] It is these intellectual contestations and disagreements, in which the Hanbalis (Abu Ya'la's *madhhab*) and the *mutakallimun* (al-Mawardi's intellectual companions) confronted each other, that are the background to the discrepancies that appear in the two versions of the *Ahkam*. The critical and polemical features of the two texts constitute another link in the long sequence of debates between these two intellectual trends. This history of controversy explains why both authors choose to ignore the founders of

each other's *madhhab*, to emphasize different moral issues, and to express themselves through different styles of legal writing.

This section of the study suggests that the complex textual situation whereby both *Ahkam* situate large identical segments alongside explicit and implicit criticism of each other parallels the complex contextual situation in which the two authors belong to the same elite yet at the same time are the leaders of movements that have been confronting and contesting each other for centuries. Thus, it seems that context can explain both their resemblance and their polemics. The textual similarities are a consequence of a shared experience and vision that were part of the worldview of members of the elite; while the differences between the texts as well as their polemic tone were a consequence of their affiliations with two legal and theological movements that were in a perpetual state of strife. It was only natural to continue to express their disagreements and competition over intellectual prestige by emphasizing different moral perspectives and styles of legal writing, and by highlighting the founders of their respective legal schools.

Concluding Remarks

Despite their differences, al-Mawardi and Abu Ya'la agreed on the fundamentals of Islamic public law and its methodology. It is the latter of the two that will concern us now. One of the most important contributions that the authors of the *Ahkam* made to Islamic legal writing was to transform norms of governance into legal doctrine. This study shows that in nearly half of the chapters (dubbed the "innovative" chapters), both authors treated political and administrative practices as materials of Islamic public law. Although they did not always resort to the same style of writing (al-Mawardi gives specific historical examples while Abu Ya'la tends to limit himself to general legal statements), both considered the ruling elite's policies as an important and legitimate source of legal doctrine. Since they inserted the principles of political customs and newly formed institutions into the doctrine of public law, large parts of the *Ahkam* are, in fact, historical practice or narratives that have undergone transmutations and have been fashioned to fit the mold of legal conceptualization and terminology.

Such an approach reflects the authors' underlying methodological assumption that public law is a body of flexible legal doctrine that can be altered when

historical circumstances warrant such an adjustment. For example, al-Mawardi's and Abu Ya'la's recognition of the usurping governor as a legitimate political office illustrates how public interest and necessity overrode past norms and generated a new division of power within the Islamic ruling elite. By writing about the usurping governors as legitimate members in the Islamic power structure, they demonstrate that when it serves a public interest, Islamic legal doctrine could undergo drastic change. This methodological approach is not stated explicitly in the *Ahkam*. However, by presenting historical surveys and pointing to the first or second centuries A.H. as periods during which new institutions were set up, the authors take the stand that political and administrative practices change over time and with them their doctrine. By recognizing and accepting the evolving nature of these offices and institutions, they are indicating that very little of public law is rigid and unchangeable. This is hardly surprising. The very fact that al-Mawardi and Abu Ya'la rely on history—historical narratives— when they discuss these offices and institutions indicates that they assume they are products of human machinations. If an institution is set up by humans, its principles are neither infallible nor eternal and can therefore be adjusted to

fit the needs of other generations. The only limits that ought to be imposed on such transformations are that they do not conflict with laws that appear in Islam's holy texts. Thus, the underlying methodological assumption of the *Ahkam* is that if a new legal regulation is not in conflict with a God-given law, it can be integrated into the doctrine of public law and be put into practice.

The manner in which al-Mawardi and Abu Ya'la integrate historical and contemporary political practice into the legal narrative of Islamic public law reveals an interesting partnership between rulers and scholars. The influence of rulers on the formation of law in general and public law in particular has been a topic of discussion by modern-day historians of Islamic law. Schacht, for example, has written that rulers' regulations and policies have contributed to legal doctrine in the area of public law.[71] With our present state of knowledge, this observation seems accurate. However, in order to understand the nuances and fine details of the partnership between the rulers and scholars, it is necessary to make many in-depth studies of texts and historical circumstances. This study of the *Ahkam* offers one such study in which we can trace one form of this division of labor. The relationship as

portrayed in the *Ahkam* reveals that the rulers decided on policies and the jurists transformed these norms of governance into legal doctrine. The rulers are not law-makers—they are not depicted as possessing the religious authority to write and formulate law. Rather, they are policy-makers who deal with the business of running their empire. According to this vision of the ruling elite, it was the jurist-scholar alone who had the authority and knowledge to choose from among the ruler's numerous patterns of governance whatever he considered appropriate for the doctrine he wished to articulate. In a nutshell, the rulers supplied the raw material and the scholars forged a body of public law out of it.

Endnotes

[1] The research for this project was initiated by and undertaken at the Islamic Legal Studies Program, Harvard Law School, in the academic year 2005-2006. I would like to thank Frank Vogel, Peri Bearman, and the (rest of the) Program's staff for their hospitality. Different drafts were read, commented upon, and edited by Dina Hurvitz, Haggai Hurvitz, Peri Bearman, and Aron Zysow. I would like to thank all of them for spending time and commenting on these drafts.

Al-Mawardi, *al-Ahkam al-sultaniyya* (Dar al-Kutub al-'Ilmiyya, 1985). For one of several translations into English, see Wafaa H. Wahba, *The Ordinances of Government* (Garnet Publishing Ltd., 1996). Abu Ya'la, *al-Ahkam al-sultaniyya* (Mustafa al-Babi al-Halabi, 1966). For an overview of the development of public law, see Frank E. Vogel, *Islamic Law and Legal System. Studies of Saudi Arabia* (Brill, 2000), 178-221.

[2] For biographical information about al-Mawardi, see *EI*2, "al-Mawardi" (C. Brockelmann); on al-Mawardi's life, works, and the reception of the *Ahkam*, see Hanna Mikhail, *Politics and Revelation* (Edinburgh University Press, 1975), 59-68. Studies of al-Mawardi's ideas abound. The foundational works are by H. A. R. Gibb, "Some Considerations on the Sunni Theory of the Caliphate," in Stanford J. Shaw and William R. Polk (eds.), *Studies on the Civilization of Islam* (Beacon Press, 1962), 141-50. Also, in the same volume, H. A. R. Gibb, "Al-Mawardi's Theory of the Caliphate," 151-65. A comprehensive study of the historical context in which al-Mawardi operated is Henri Laoust, "La Pensée et l'action politiques d'al-Mawardi (364-450/974-1058)," *Revue des Études Islamiques* 36, 11-92. For a reference to his life in a biographical dictionary, see 'Abd al-Wahhab Ibn 'Ali al-Subki, *Tabaqat al-shafi'iyya al-kubra* (Dar Ihya' al-Kitab al-'Arabiyya, 1990), vol. 5, 267-85. For biographical information about Abu Ya'la, see *EI*2, "Ibn al-Farra'" (H. Laoust). For a study of one of his works, see Wadi Z. Haddad, *Kitab al-Mu'tamad fi usul al-din* (Dar El-Machreq, 1974). For

an overview of his life and work, see pp. 13-28. A full study of his life and work can be found in Muhammad ʻAbd al-Qadir Abu Faris, *al-Qadi Abu Yaʻla al-Farra' wa-kitabuhu al-Ahkam al-sultaniyya* (Mu'assasat al-Risala, 1400/1980). For a reference to his life in a biographical dictionary, see Abu l-Husayn Ibn Abi Yaʻla, *Tabaqat al-hanabila* (Cairo, 1371/1952), vol 2, 193-230.

3 A number of examples are Gibb's two articles mentioned in above note; A. K. S. Lambton, *State and Government in Medieval Islam* (Oxford University Press, 1981); E. J. Hanne, "Abbasid Politics and the Classical Theory of the Caliphate," in B. Gruendler and L. Marlow (eds.), *Writers and Rulers. Perspectives on Their Relationship from Abbasid to Safavid Times* (Reichert Verlag, 2004). There are also a number of studies that have treated the *Ahkam* as quarries of information about different legal and political institutions.

4 Muhammad ʻAbd al-Qadir Abu Faris, *al-Qadi Abu Yaʻla al-Farra' wa-kitabuhu al-Ahkam al-sultaniyya* (Mu'assasat al-Risala, 1400/1980); Donald Little, "A New Look at *al-Ahkam al-Sultaniyya*," *The Muslim World* 64 (January 1974), 1-15.

5 Abu Faris, 499-515.

6 Abu Faris, 521-23.

7 Little, "New Look," 9-12.

8 See Gibb's two articles mentioned in n. 2. The most comprehensive study is Laoust's long *EI* article cited also in n. 2.

9 Al-Mawardi, *al-Ahkam al-sultaniyya*, 4 (henceforth Mawardi). Since the structure of both works is very similar, the same observations can be made about Abu Yaʻla's *Ahkam*.

10 Mawardi, 127-28; Abu Yaʻla, 94-5. They differ only twice, when Abu Yaʻla inserts Ibn Hanbal's opinions: Abu Yaʻla, 94.

11 Norman Calder, "Friday Prayer and the Juristic Theory of Government: Sarakhsi, Shirazi, Mawardi," *Bulletin of the School of Oriental and African Studies* 49 (1986), 35-47.

12 Ibid., 35.

13 Ibid., 44.

14 Mawardi, 128; Abu Yaʻla, 96.

15 Mawardi, 130.

16 Mawardi, 130.

[17] Abu Ya'la, 97.
[18] Mawardi, 131.
[19] It should be noted that such a long list of authorities is unusual in al-Mawardi's *Ahkam*.
[20] Abu Ya'la, 101.
[21] This reference appears in 'Abdallah, *Masa'il al-Imam Ahmad b. Hanbal*, ed. Zuhayr al-Shawish (Beirut: al-Maktab al-Islami, 1401/1981), 124. In the *masa'il* 'Abdallah constructs this sentence in the form of a question, i.e., he starts the remark with the word *Kam*. Ibn Hanbal's reply is "forty men." Abu Ya'la dropped the interrogative particle and added Ibn Hanbal's reply, forming a statement that is labeled "the transmission of 'Abdallah." On pp. 126-27, 'Abdallah asks about the number of worshippers in the *jum'a* prayer and Ibn Hanbal consistently replies that it is forty.
[22] Reference to this event appears in 'Abdallah, *Masa'il*, 120. According to Ibn Hanbal, this was the first *jum'a* prayer in Islam and the group of worshippers was forty in number. Ibn Hanbal was adamant that this would remain the minimum number of worshippers in *jum'a* prayers.
[23] Abu Ya'la, 101-02.
[24] Abu Ya'la, 98; Mawardi, 129.
[25] Abu Ya'la, 98; Mawardi, 129.
[26] Abu Ya'la, 98.
[27] These meanings of *rizq* and *ujra* are suggested by the editor of the text, M. H. Fiqqi: 98 n. 1.
[28] Abu Ya'la, 98.
[29] Ibid.
[30] Mawardi, 133-35; Abu Ya'la, 107-08.
[31] On the *istisqa'* and *khusuf* prayers, see Mawardi, 133-34; Abu Ya'la, 106-08.
[32] This comparison was already made by Abu Faris, 506.
[33] Mawardi, 135.
[34] Mawardi, 129.
[35] Abu Ya'la, 97.
[36] Mawardi, 97-119, translation, 87-106; Abu Ya'la, 73-90.
[37] Mawardi, 97; Abu Ya'la, 73.

[38] Mawardi, 97-100; Abu Ya'la, 74-5.
[39] Mawardi, 98; Abu Ya'la, 74-5.
[40] Mawardi, 99-100, 101-03 (five such instances),106-07, 113-14, 115-16.
[41] Mawardi, 101.
[42] Abu Ya'la, 76.
[43] Or, if Abu Ya'la's text was the original, al-Mawardi added these nine references to Abu Ya'la's bare legal statements.
[44] The similarities between the two *Ahkam* suggest a case of plagiarism. For a study on plagiarism (*sariqa*) in poetry and how to approach it in a manner that yields more than a moral verdict, see W. Heinrichs, "An Evaluation of *Sariqa*," *Quaderni di Studi Arabi* 5-6 (1987-88), 357-68.
[45] For a similar observation, see Abu Faris, 505.
[46] Mawardi, 107, 113, 114.
[47] Abu Ya'la, 80, 85, 86; cf. Abu Faris, 505-06.
[48] Wahba's translation, index, 286-301.
[49] Mawardi, 38.
[50] Mawardi, 69 and 70, respectively.
[51] A partial listing is: (Khiraqi) Abu Ya'la, 46, 103, 115, 137; (Abu Bakr al-Khallal) Abu Ya'la, 98, 156, 157, 283; (Ghulam Khallal) Abu Ya'la, 48, 56, 57, 73.
[52] References to al-Shafi'i in Abu Ya'la: 131, 238, 243. Two more references are made to al-Istakhri, who is presented as a Shafi'i: 282, 295; four to Abu Hanifa: 170, 238, 243, 270; and four to Malik: 80, 85, 86, 238.
[53] Abu Ya'la, 264.
[54] Mawardi, 279.
[55] Abu Ya'la, 271.
[56] Abu Ya'la, 271.
[57] Mawardi, 286.
[58] Abu Ya'la, 249.
[59] It should be pointed out that the Hanbali position, in its exact wording, appears in al-Mawardi and is ascribed to Abu l-Abbas Ibn Surayj: al-Mawardi, 263.
[60] There are at least six cases of such a use of *qiyas*. Abu Ya'la, 26, 29, 241, 249, 277, 288.

[61] Mawardi, 285; Abu Ya'la, 269.

[62] Abu Ya'la, 138. This is an accurate description of Shafi'i doctrine that is found in Mawardi, 163.

[63] Mawardi, 3.

[64] H. A. R. Gibb, "Some Considerations on the Sunni Theory of the Caliphate," 141-50; and "Al-Mawardi's Theory of the Caliphate," 151-65 (full references in n. 2, above).

[65] Gibb, "Al-Mawardi's Theory," 153.

[66] Gibb, "Al-Mawardi's Theory," 152. The most comprehensive study of this issue is Laoust; other scholars who agree with Gibb are A. K. S. Lambton, *State and Government in Medieval Islam*, 83, 88-89; and E. J. Hanne, "Abbasid Politics and the Classical Theory of the Caliphate," 50, 52 (for full references to all three authors, see n. 2, above); also P. Crone, *God's Rule* (Columbia University Press, 2004), 223.

[67] On the *amir al-istila'*, see Mawardi, 39-41; Abu Ya'la, 37-8.

[68] Gibb, "al-Mawardi's Theory," 164.

[69] Abu Ya'la, 19. For Abu Ya'la's writing on the *imama*, see *Kitab al-Mu'tamad fi usul al-din* (Dar al-Mashriq, 1974), 222-55.

[70] There are numerous works that study the intellectual and political tensions of the Islamic world in the fourth and fifth centuries A.H. The most prolific scholar on this topic was G. Makdisi: see, for example, G. Makdisi, "The Sunni Revival," in D. H. Richards (ed.), *Islamic Civilization, 950-1150* (Oxford, 1973), 155-68; and G. Makdisi, *Ibn 'Aqil: Religion and Culture in Classical Islam* (Edinburgh University Press, 1997). Chapters and references to this phenomenon appear in such studies as D. Ephrat, *A Learned Society in a Period of Transition* (State University of New York Press, 2000), 85-93.

[71] J. Schacht, *Introduction to Islamic Law* (Oxford, 1966), 15, 24, 54. See also F. Vogel, *Islamic Law and Legal System*, 189 (full reference, n. 1, above), who writes about the "[ruler's] powers of legislation" in the areas of "administrative, fiscal, and penal law-making…." For a different view of caliphal influence, see W. B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge, 2005), 179, who argues that the caliphal main form of influence was "as sunnaic exemplars."