On Judicial Review in Islamic Law

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Classical Islamic law apparently constitutes an exception to the finding that legal systems in complex societies invariably possess hierarchical appellate structures. The prevailing wisdom among Islamicists for over a half-century has asserted that there are no appellate structures in Islamic law, that the decision of a judge is final and irrevocable, and that a judgment may not be reversed under any circumstances. The exceptional nature of Islamic law has been explained by Martin Shapiro as a function of the absence of hierarchy in the Islamic religious community. In this article, I argue that Shapiro has been poorly served by Islamicist scholarship. On the basis of a reexamination of Islamic legal theory and an analysis of 14th-century Islamic court practice, I demonstrate that a judicial decision was reversible by the issuing judge himself, albeit under limited and precisely defined conditions; that hierarchical organization was a regular feature of Muslim polities; that the court of the chief judge of the capital city served as a court of review for the decisions of local judges; and that Islamic law also developed a unique, nonhierarchical system of successor review. My conclusions will be of interest both to Islamicists and to social scientists who study the relationship between judicial institutions and social organization.

The term *appeal*, as used by Western scholars, refers to a hierarchical judicial structure in which higher courts review the decisions of lower courts and announce general definitions, concepts, and doctrines intended to ensure the consistent application of the law at all levels of the judicial system. Thus defined, the institution of appeal is found in all complex societies, Western and non-Western (Shapiro 1980:629ff.). Although most scholars maintain that appellate structures are designed to attain legal truth and promote justice for the individual, Martin Shapiro recently has advanced the theory that judicial hierarchies also serve the interests of central regimes by reinforcing a ruler's legitimacy among the populace, by reminding subjects that the ruler's authority extends to every corner of the realm, and, most important, by facilitating central

I would like to thank Martin Shapiro, Brinkley Messick, Baber Johansen, Frank Munger, and two anonymous readers for their comments on earlier drafts of this article. All translations of Quran passages are based on A. J. Arberry, *The Koran Interpreted* (New York: Macmillan, 1955).

control over subordinate officials (1981:ix, 49–56, 64, 194). "[A]ppellate institutions," Shapiro concludes, "are more fundamentally related to the political purposes of central regimes than to the doing of individual justice" (ibid., p. 52). From this premise, Shapiro concludes that wherever central governments exist, appellate structures are likely to emerge.

Classical Islamic law stands as a seemingly clear exception to this conclusion. Admittedly, Islamic law did possess certain elements of appeal. An unsuccessful litigant might take his case before the authority responsible for the initial judge's appointment (a kind of trial de novo), but Islamic law never developed a formal, hierarchical structure for this purpose. Beginning in the 9th century, the Abbasids established a special jurisdiction, the *naẓar al-maẓālim* ("investigation of complaints"), headed by the caliph and his agents or by judges appointed expressly for this purpose. One function of this tribunal was to hear the complaints of litigants who alleged that they had been treated unfairly by a qadi (the presiding judge in an Islamic court). The head of the mazalim tribunal had the power to overturn a qadi's decision, and, in this regard, the tribunal might be considered to be an appellate or quasi-appellate institution. But this line of reasoning is discounted by Western Islamicists because the mazalim tribunal existed outside of Islamic law and is therefore viewed as a "secular" jurisdiction that operated alongside the Islamic religious courts. Significantly, the head of the tribunal was not bound by the rules of Islamic law (Nielsen 1985; cf. Tyan 1978: v. 4:374; Weiss 1987: v. 12:125; Schacht 1991: v. 6:2). For over a half-century, the prevailing wisdom among Isalmicists has maintained that there are no appellate structures in Islamic law, that the decision of a qadi is final and irrevocable, that a judge may not change his mind once he has rendered his decision, and that a judgment may not be reversed under *any* circumstances (Juynboll 1927: v. 2:606; Tyan 1978: v. 4:373; Weiss 1978:205; Wakin 1987: v. 10:220; Weiss 1987: v. 12:125).[1]

Relying on Islamicist scholarship, Shapiro (1981) argues that the absence of appeal in Islamic law can be explained in terms of the cultural and institutional distinctiveness of Muslim

[1] Some scholars appear to leave open the possibility that Islamic law possesses either an informal system of appeal or elements of appeal. Schacht (1964:189) may have been alluding to such informal elements when he stated that "there is no means of reversing an unjust judgment, because strict Islamic law does not recognize stages of appeal." Similarly, Fyzee (1974) qualified his remarks about the binding nature of a qadi's judgment in such a way as to suggest that under certain, no doubt extraordinary, circumstances, the decision of a qadi might be reversed on appeal. The qadi's judgment, he wrote, is "decisive, there being ordinarily no appeal from it" (ibid., p. 328). Such qualified formulations beg the question of the exact circumstances in which the decision of a qadi might be reversed; they also suggest that the evidence bearing on the status of a qadi's decision has never quite fit the conclusion that such a decision is irreversible.

society. He concludes that because the Islamic religious community is nonhierarchical, Muslim society has no need for the institution of judicial appeal (ibid., pp. 201–9). He also observes that in those exceptional cases in which "Islamic law and hierarchical government [do] intersect in a relatively stable and long-term way, we do encounter appeal in the Muslim world" (ibid., p. 220). As examples of such exceptions, Shapiro points to the Abbasid and Ottoman Empires, both of which developed hierarchical political structures. The Abbasids developed the mazalim tribunal, while the Ottomans created an Imperial Council, headed at first by the Sultan and later by the Grand Vizier; this council was situated at the apex of a hierarchical judicial structure in which an individual appeal generally took the form of either a trial de novo or a complaint against the unjust act of a lower qadi (ibid., p. 215).

In this article, I argue that Shapiro has been poorly served by Islamicist scholarship on the nature and organization of the qadi's court and that quasi-appellate structures were more common in Muslim societies than he has thought. To this end, I undertake a reexamination of Islamic legal theory in an attempt to demonstrate that the decisions of qadis were in fact reversible, albeit under precisely defined conditions, and that Islamic legal theory provides for a distinctive, nonhierarchical form of appeal, referred to here as *Islamic successor review*, which was well established in medieval Muslim polities. I then analyze the political and judicial organization of a medieval North African dynasty whose organizational structure was typical of that of contemporaneous Muslim dynasties. My analysis suggests that hierarchical organization was a regular feature of Muslim polities and that these polities appear to have developed a rudimentary, *informal* appellate structure in which the court of the chief qadi of the capital city served as a court of review for the decisions of local and provincial judges. In support of this conclusion, I undertake a microhistorical analysis of Islamic court practice in 14th-century Morocco; to the best of my knowledge, this is the first time that the existence of Islamic judicial review has been documented through research on the legal system of a typical Muslim society. Finally, in the conclusion, I suggest that the tendency of Western scholars to associate the notion of *appeal* with hierarchical structures may reflect a cultural bias that obscures underlying similarities between Western and non-Western cultures and their respective legal systems. By situating the notion of *appeal* within the larger category of *judicial review*,[2] I hope to demonstrate that appeal does not always take a hierarchical form, and I propose some prelim-

[2] I use the term *judicial review* here and elsewhere in this article in the sense of one court reviewing another on a question of law, not in the technical sense of "the power of the supreme court to declare a statute or action of government unconstitutional,"

inary, tentative explanations for the distinctive form of Islamic judicial review, paying special attention to the unique relationship that developed historically between Muslim jurists and the state and to the possible role of the urban bourgeoisie in resisting state intervention in its affairs.

Islamic Legal Theory Reconsidered

In its classical, fully elaborated form, Islamic law (*sharīʿa*) is held to represent God's plan for the proper ordering of all human activities. Certain aspects of this plan were revealed to Muhammad from 610 to 632; within a generation after Muhammad's death in 632, these revelations had been collected into the Quran, considered by Muslims to be the literal word of God. Other aspects of the shariʿa are contained in a second material source, narrative reports (*aḥādīth*, sing., *ḥadīth*) that embody the model behavior (*sunna*) of the Prophet and his Companions. These reports, transmitted orally at first, were assembled into six authoritative collections during the 9th century. Together, the Quran, which deals with only a relatively small number of legal issues, and the hadith literature, which is quite extensive, supplied the raw material for much of Islamic law. But these two sources proved inadequate to the needs of a dynamic and changing society. The remainder of the shariʿa was discovered by the jurists, who derived from the Quran and the hadith the solutions to new problems, challenges, and issues, using precisely delineated techniques of reasoning, particularly complex rules of analogical or syllogistic reasoning (*qiyās*). Those solutions that received the unanimous endorsement of Muslim jurists constitute a consensus (*ijmāʿ*) that is binding on the entire community.

In the last quarter of the 8th century, individual jurists began to record their opinions and their analyses of the law, based on their understanding of the Quran and the hadith and on their use of qiyas. Four scholars who attracted a wide following of influential disciples gave their names to the four major schools of law (*madhhab*s) in Sunni Islam: the Maliki school, named after Malik b. Anas (d. 795); the Hanafi school, after Abu Hanifa (d. 767); the Shafiʿi school, after al-Shafiʿi (d. 820); and the Hanbali school, after Ahmad b. Hanbal (d. 855). Subsequently, individual jurists extended the emerging legal doctrine by writing handbooks, commentaries on the works of the eponymous founders, comprehensive lawbooks, and specialized treatises. The practical elaboration of the system continued for several generations, and it was not until the beginning

nor in the sense of "the determination by a court of the lawfulness of an administrative regulation or decision."

of the 10th century that it was fully achieved. By that time, Islamic legal doctrine had come to be embodied in a vast corpus of commentaries and lawbooks (Wakin 1986: v. 7:487–89). It is to these authoritative sources—the Quran, the hadith, and the doctrinal lawbooks—that we now turn in an attempt to determine the position of Islamic legal theory regarding the status of a judicial decision.

Only a few verses in the Quran can be related to the question of the reversibility or nonreversibility of a judicial decision. Chapter 5 ("The Table"), v. 45, reads, "Whoso judges not according to what God has sent down—they are the unbelievers." Possibly this verse suggests that a judge who issues a decision contradicting the teaching of a Quranic revelation will be punished (presumably by God in the Hereafter), but it does not say or even indicate that an erroneous judgment is reversible.[3] Of greater relevance is the Quranic reference to the wisdom of David and Solomon in a context relating to judicial decisions. Chapter 21 ("The Prophets"), vv. 78–79, reads: "And David and Solomon—when they gave judgment concerning the tillage, when the sheep of the people strayed there, and We bore witness to their judgment; and We made Solomon to understand it, and unto each gave We judgment and knowledge." Muslim commentators naturally have sought to determine the nature of the "understanding" awarded to Solomon and the manner in which it differed from that awarded to David. In an exegetical report attributed to a Companion of the Prophet, Ibn ᶜAbbas (d. 687), we are told that the verse refers to a case in which a person let his sheep roam freely at night, resulting in the destruction of his neighbor's crops and orchards. The case was brought to David, who ruled that a permanent exchange of property should take place: The destroyed field should be given to the owner of the sheep, and the productive sheep should be given to the owner of the field. When the original owner of the sheep approached Solomon and informed him of David's judgment, Solomon overturned the earlier decision, ruling that the exchange of property was to be temporary and was to remain in effect only until such time as the owner of the sheep had restored the field to its former level of productivity. In the interval, the landowner was entitled to whatever wool, milk, and offspring the sheep might produce (Tabari 1954–68: v. 17:50–54). This exegetical report constitutes a potential precedent—albeit a literary one—for the notion that the judgment of one authority may be nullified by another.[4]

[3] Ghulam Murtaza Azad (1987:100–101) finds in this verse support for the idea that a judicial decision that is repugnant to the teachings of Islam may be set aside.

[4] Cf. Bukhari (1966–73: v. 5:388), where the following version of the story is related on the authority of Abu Hurayrah:

There were two women, each of whom had a son. A wolf came along and

That judgments were in fact reversible emerges clearly from the written instructions that reportedly were dispatched by the second caliph, ʿUmar b. al-Khattab, to his governor in Iraq, Abu Musa al-Ashʿari.[5] The earliest extant copies of this letter can be found in Arabic literary texts produced during the first half of the 9th century. In 1910, the Orientalist Margoliouth published a critical edition, translation, and commentary of a version of the letter preserved in Ibn Qutaybah's *Kitāb ʿuyūn al-akhbār* [The Sources of Narrative Reports].[6] His translation of the relevant passage in the letter reads: "If you have given judgment, and upon reconsideration come to a different opinion, do not let the judgment which you have given stand in the way of retraction; for justice may not be annulled, and you are to know that it is better to retract than to persist in injustice" (Margoliouth 1910:311–12; cf. Bayhaqi 1968: v. 1:135, 150). According to Margoliouth (1910:319), Ibn Qutaybah's text is to be understood as meaning that "any judgment is liable to be altered on reconsideration"—a notion that he finds to be "fraught with danger to society."[7] ʿUmar's letter clearly affirms that a judicial decision is reversible—indeed, that it is reversible by the issuing judge himself—and the letter was cited by some later jurists as a precedent for that notion. Two inheritance cases that reportedly were decided by ʿUmar himself appear to recognize the principle of reversibility. In the first case, the Caliph was asked to decide an inheritance dispute involving competition between germane and uterine siblings. At first, he excluded the germane siblings. On rehearing the case, however, he reversed himself, ruling that both sets of siblings should share in the division of the estate on a basis of equality. Similarly, ʿUmar is reported to have reversed himself in an inheritance dispute regarding the entitlement of a grandfather (Ibn Qudama 1964: v. 10:143).

A judicial decision also might be reversed by a second

took the son belonging to one of them. One woman said, "He took your son." The other said, "No, he took yours." The women brought their case to David, who ruled in favor of the older woman. Subsequently, they passed by Sulayman b. Dawud and informed him [of the decision.] He said, "Bring me a knife so that I may divide the child between you." The younger woman cried out, "Don't do that—may God have mercy on you—the child belongs to her." At that, Sulayman ruled in favor of the younger woman.

[5] ʿUmar appointed Abu Musa (d. 664) as governor of Basra in 638 and as governor of al-Kufa in 642–43 (*The Encyclopaedia of Islam*, 1954–, s.v. "al-Ashʿarī, Abū Mūsā"; Tabari 1879–1901: v. 1:2388, 2529, 2678ff.).

[6] The authenticity of ʿUmar's letter has been questioned by several Western scholars, beginning with Margoliouth 1910 (cf. Tyan 1960:77–80; Serjeant 1984:65–79). With the exception of Ibn Hazm (1928-34: v. 1:59), most Muslim scholars accept the letter as genuine. See, e.g., Hamidullah (1969:343ff.), and Guraya (1972:159–85). The question of authenticity is irrelevant to our concern with the role played by the letter in the development of Islamic legal doctrine.

[7] Margoliouth observes that a reading of the text attributed to Jahiz, Mubarrad, al-Mawardi, and Ibn Khaldun favors the sense that "precedents are not to be binding."

judge who is a contemporary of the issuing judge, a position that is attributed to several prominent early jurists. Abu Hanifa allowed the reversal of a judgment in a case in which the object of a sale had not been specified, as required by the law; his pupil, al-Shaybani (d. 805) allowed the reversal of a judgment in a case that had been decided on the strength of a single witness and an oath; Malik held for the reversibility of a judgment issued in a case relating to preemption; Shafiʿi allowed the reversal of a judgment that contradicted an explicit text of the Quran. Both Abu Thawr (d. 854) and Dawud al-Zahiri (d. 884) held for the obligatory reversal of any judgment that was based on a mistake (*khaṭa'*), a position that they supported with reference to ʿUmar's instructions to Abu Musa al-Ashʿari; this position reportedly had been previously affirmed by Malik with respect to judgments that he himself had issued (Ibn Qudama 1964: v. 10:142–43).

Some of the reversals mentioned in the sources would be described by Western jurists as reversals on appeal. For example, one hadith set in the lifetime of the Prophet recounts the story of four Yamanis from different tribes who set out in search of a lion. The lion fell into a well. One of the four tribesmen also slipped into the well, catching hold of a second tribesman; the second tribesman caught hold of a third; and the third caught hold of a fourth. All four men perished. The question arose as to which tribe was responsible for the blood-money and in what amount. When the tribes began to fight among themselves, the matter was brought to the attention of ʿAli, who issued a judicial decision. The case was later reviewed by the Prophet, who approved of ʿAli's decision. The implication, however, is that ʿAli's decision was reversible by a higher authority (Wakiʿ 1947: v. 1:95–97; cited in Azad 1987: 99).[8] In a report set in the period after the Prophet's death, ʿAli overruled a judgment that had been issued by Shurayh (d. after 697) in a case relating to the inheritance of siblings on the ground that it contradicted an explicit Quranic text (Ibn Qudama 1964: v. 10:144).[9]

When we turn to the fully formed doctrine of the law schools, we find an increasing emphasis on the notion that a

[8] Muhammad's competence in this case may have been due to his unique status as a prophet. Thus, one might argue that this case does not constitute a precedent for judicial reconsideration.

[9] A countervailing line of thought holds that a judgment may not be reversed. The classical jurists find support for this position in historical precedents established by Abu Bakr, ʿUmar, and ʿAli. Thus, ʿUmar reportedly refused to reverse judgments that Abu Bakr had issued, despite the fact that he disagreed with him; and ʿAli reportedly refused to reverse judgments that ʿUmar had issued, again despite the fact that he disagreed with him. In one instance, the people of Najran reportedly asked ʿAli, after he had become Caliph, to reverse a judgment that had been issued by ʿUmar. But ʿAli refused, saying, "Woe is you! ʿUmar was rightly guided, and I shall not reverse a judgment issued by ʿUmar" (Ibn Qudama 1964: v. 10:143).

qadi's decision is binding *in principle*. The classical position teaches that a judge's decision, when based on the proper legal texts and fulfilling the necessary procedural conditions of judgment, is binding and may not be reversed (al-Khassaf 1978: 338; cf. Ramli 1974: v. 2:25, 66, 90, cited in Johansen 1991). It should be noted, however, that this formulation leaves open the possibility of reversing a decision that fails to meet these conditions. The specific conditions or circumstances in which a judicial decision may be reversed are discussed by the 9th-century Hanafi jurist, al-Khassaf, in his treatise on judicial administration, the *Kitāb adab al-qāḍī*. In a chapter devoted to a later qadi's responsibility in dealing with a decision issued by an earlier qadi, al-Khassaf notes that a judicial decision is binding in principle. To this principle, al-Khassaf adds two significant qualifications: First, he states that a decision may be reversed if the pronouncing judge was not legally competent to pass judgment, as, for example, if he was a sinner, had been punished for unlawful slander, or did not possess the requisite qualities of moral uprightness. (An Anglo-American jurist would refer to these as jurisdictional grounds for appeal.) Second, he states that a judicial decision may also be reversed if a judge who was legally competent nevertheless engaged in the improper use of independent reasoning (*ijtihād*), that is, if his judgment contradicts a Quranic text about whose plain meaning there is universal agreement, a report on the authority of the Prophet that has been widely transmitted (*sunna mutawātira*), or the consensus of Muslim jurists. (An Anglo-American jurist would interpret this to mean that an appeal will be considered if it raises a question of law but not if it raises a question of fact, a principle that is found in legal systems possessing strong and generous traditions of appeal; Shapiro 1981:37–49; cf. Karlen 1963.) Thus, if a judge is not legally competent or if a legally competent judge engages in the improper use of independent reasoning, his judgment may be nullified by another judge; this was the common doctrine of all the major law schools, including the Shiʿis.[10] Conversely, the general position of all the schools seems to have been that a judgment issued by a competent judge that is based on sound ijtihad may not be reversed under any circumstances (al-Khassaf 1978:339).

[10] For views of other Hanafis, see al-Marghinani (n.d.: v. 2:141, 144–45): a previous judicial decision may be reversed if it is repugnant to the doctrine of the Quran, sunna, or consensus of the jurists. For Shafiʿis, see al-Mawardi (1971–72: v. 1:685), where the author refers to the conditions in which a judicial decision may be reversed (*nuqiḍa bihi ḥukmuhu*). For Hanbalis, see Ibn Qudama (1964: v. 10:142ff.): If a judgment issued by another judge is brought to his attention, the [second] judge may not reverse the [earlier] judgment unless it contradicts an explicit statement (*naṣṣ*) found in the Quran, sunna, or consensus. For Shiʿis, see Hilli (1969: v. 4:75–76): a succeeding qadi may reverse the judicial decision of his predecessor if he finds some error in the earlier decision.

Al-Khassaf's discussion of the circumstances in which a judicial decision may be reversed is important because it signals the existence in Islamic law of an institution that I shall refer to as *Islamic successor review*. Certain procedures relating to successor review are discussed by the 13th-century Hanbali jurist Ibn Qudama. Specifically, he addresses the question of how a succeeding judge is to treat the judgments issued by his predecessor. In the absence of evidence to the contrary, the general presumption (*ẓāhir*) is that the former judge was qualified to hold office and that his judgments were valid and correct. The new judge is therefore under no obligation to investigate his predecessor's rulings, but he nevertheless has a discretionary right to do so, either in response to a request by a defeated litigant or on his own initiative. In the event that he exercises this right, the primary factor that must be considered is the jurisdictional issue of whether the former judge was qualified to hold office. If it can be determined that he was not qualified to hold office, then his judgments are unsound and may be treated as if they do not exist. In that case, the succeeding judge must examine all his predecessor's rulings and determine which are legally sound and which are not. Those judgments that he determines to be sound are allowed to stand because justice has been served, willy-nilly, and nullification would serve no purpose. Those judgments that he determines to be unsound, including those that were based on the former judge's attempt to exercise his independent reasoning, are to be nullified (Ibn Qudama 1964: v. 10:144).[11]

If the former judge was qualified to hold office, only those of his judgments that can be demonstrated to have been in conflict with a clear text of the Quran, a prophetic sunna, or a juristic consensus are subject to reversal. Here Ibn Qudama reiterates the crucial principle previously announced by al-Khassaf that there can be appeal on questions of law but not on questions of fact. To this principle Ibn Qudama adds a further qualification based on a distinction that Muslim jurists draw between public and private claims:[12] A judgment relating to a public claim—in which category he includes the manumission of slaves and divorce—must be overruled by the succeeding judge on his own initiative, even if the defeated litigant does not demand its reversal; a judgment relating to a private claim may be reversed by the succeeding judge but only in response to a request from the defeated litigant (Ibn Qudama 1964: v.

[11] According to a certain Abu al-Khattab, all the unqualified judge's rulings should be nullified, willy-nilly, including those that were correct, because all his judgments are to be treated as if they do not exist. This is reportedly the position of the Shafi'is (Ibn Qudama 1964: v. 10:145).

[12] The text refers to *ḥaqq allāh* ("a claim of God") and *ḥaqq ādamī* ("a claim of men"). On these terms, see Johansen 1981:289ff.

10:144; cf. Bruno 1935–45:170–72; Ibn Abi Dam 1975:125–29; al-Ansari 1988:205–15).

Our examination of Islamic legal theory demonstrates that the actual position of Muslim jurists on the subject of the reversibility of a judicial decision is at variance with that of most Western Islamicists (the reasons for this discrepancy will be addressed below). Two points should be underscored. First, Islamic legal doctrine teaches that a judicial decision is in fact reversible by the issuing judge himself or by one of his contemporaries, albeit under limited and precisely defined circumstances. The principle of reversibility finds support in the hadith literature; in the extant versions of ʿUmar b. al-Khattab's written instructions to his governor in Iraq; in statements attributed to prominent early jurists; and in the fully formed doctrine of the law schools. In principle, a judgment may be reversed if the issuing judge lacks proper jurisdictional authority or if he engages in the improper use of independent reasoning by issuing a judgment that is in conflict with the Quran, sunna, or consensus. Second, Islamic legal doctrine points to the existence of a system of successor review that operated according to the following principles: (1) the review jurisdiction belonged to a successor judge who presumably was of the same or higher rank as the issuing judge; (2) the ground for reconsideration was limited to questions of law and excluded questions of fact; (3) the review jurisdiction was discretionary to the successor judge. Significantly, Islamic successor review differs from Western systems of appeal in that it is not organized according to hierarchical principles.[13]

Judicial Practice in Morocco, ca. 1250–1500

The Growth of Central Government

Having determined that Islamic legal theory allows for the reversal of a judicial decision by the issuing judge or his contemporary *and* for a system of successor review, we turn now to Islamic judicial practice as manifested under the Marinid dynasty of Morocco (1269–1465). The choice of time, place, and dynasty is conditioned by three considerations. First, the period in question fills the gap between the downfall of the Abbasids and the rise of the Ottomans, the two Muslim regimes that Shapiro concedes were characterized by hierarchical organization. Second, the general characteristics of judicial administration in Maliki North Africa have been well studied (Brunschvig 1947; Hopkins 1958; cf. Arié 1973). Third, this

[13] It should be noted that successor review included, in addition to the review of a previous judge's judicial decisions, the review of the status of prisoners in the jails and that of guardians and trustees.

general picture can now be substantiated on the basis of several well-documented court cases from 14th-century Fez that recently have come to light (Powers 1990a, 1990b). Before turning to the Marinids, however, it may be helpful to sketch the outlines of Morrocan history from the time of the Arab conquests to the 14th century, paying special attention to the gradual development of centralized political structures.

Beginning in the latter part of the 7th century, successive waves of conquest brought Arab tribesmen to North Africa, setting in motion a series of political, social, economic, and religious changes that transformed the character of the region. Following a relatively brief period during which Morroco formed part of first the Umayyad and then the Abbasid empires, a series of independent Muslim dynasties came into existence. The first such dynasty was that of the Idrisids (789–926), who controlled northern Morocco on the strength of a tribal coalition held together by religious symbols and the mediating function of religious leaders. The remainder of the country was controlled by smaller principalities and tribal federations. Together, these regimes have been likened to "islands of kingly rule in a sea of independent Berber peoples" (Lapidus 1988: 372). Gradually, the entire country was Arabicized and Islamicized, and the indigenous Berber peoples were integrated into a new, urban-based, Islamic civilization. The formation of a unified Moroccan state was the achievement of the Almoravids (1056–1147), a coalition of Berber peoples who, under the religious leadership of ʿAbdallah b. Yasin, embarked on a campaign of conquest that resulted in the creation of an empire that spanned the northern Sahara, most of Morocco, and much of Muslim Spain. The ensuing commercialization and urbanization of Morocco provided the foundation for a succession of unified Moroccan regimes.

By the middle of the 12th century, the Almoravid state was on the decline. Meanwhile, a new religious movement had been founded in southern Morocco by the religious scholar, Muhammad Ibn Tumart, who sought to restore the Islamic community to the condition that it had been in during the lifetime of the Prophet. Declaring himself to be the *mahdī* or infallible leader sent by God, Ibn Tumart instituted a new form of government that superimposed a religious hierarchy on a tribal society: Under his authority, the government included a council of 10 disciples that in turn was advised by an assembly of 50 delegates; together, these two bodies exercised control over the tribal chiefs and their followers who joined the movement. Ibn Tumart's successor, ʿAbd al-Mu'min (r. 1130–63), who conquered Morocco, intervened in Spain, and invaded Algeria and Tunisia, continued the hierarchical form of government instituted by his predecessor by developing a military aristocracy

(composed of Berber clients, black slaves, and urban auxiliaries), a religious administration, and a small household civil bureaucracy. It is generally agreed that by the middle of the 13th century, Morocco had been transformed from a region composed of numerous Arab and Berber principalities into a centralized state with a distinct territorial identity (Hopkins 1958; Lapidus 1988:372–75).

The Almohads were succeeded by the Marinids, a Berber dynasty of the Zanata group that captured Meknes (1244), Fez (1248), Sijilmasa (1255), and the capital city of Marrakesh (1269). The subsequent history of the Marinids can be divided into two periods of approximately equal length. The first phase (1269–1358) was characterized by military success, urban expansion, and political stability. The second phase (1358–1465) was characterized by the slow erosion of political structures, territorial retraction, and internal divisions. By the end of the second phase, the balance of power between the state and tribal forces had reverted to the tribes. Under the Marinids, Fez replaced Marrakesh as the capital and seat of administration. The Marinid sultan, who claimed the title of "Prince of the Muslims" (*amīr al-muslimīn*), was the supreme leader of the country who played an active role in the exercise of governmental affairs. The sultan was assisted by a vizier or chief minister, who, in turn, was responsible for a series of functionaries who headed the following offices: finance, the chancellery, the mint, the market, the police, the navy, and the administration of justice (Shatzmiller 1989:571–74).

The Organization of Justice under the Marinids

By the middle of the 13th century, the judicial administration of North Africa (Morocco, Algeria, and Tunisia) and Muslim Spain (Andalusia) formed a single pattern with only minor variations (Bruno 1935–45; Brunschvig 1947: v. 2:113–53; Hopkins 1958:112–32; Arié 1973:277–99). The supreme authority of the Marinid state was the sultan, who, as the recognized leader of the Muslim community, was responsible for the exercise of justice. In theory, the sultan might hear any case. In practice, he would delegate his judicial authority to the chief judge of the capital city (*qāḍī al-jamāᶜa*, literally, "judge of the community" or, perhaps, "judge of general jurisdiction").[14] The chief judge was an important member of the state bureaucracy, and his office came to be seen as the crowning jewel in a

[14] The *qāḍī al-jamāᶜa* exercised powers of judicial administration similar to those of the *qāḍī al-quḍāt* in the Muslim East, the only significant difference being the former's obligation to consult with legal experts (muftis) before rendering a decision. On the formation and development of the office of *qāḍī al-quḍāt*, see Schacht 1970:547–48, 556; Tyan 1978:373–74.

career of public service. Because of his prestige and importance, the chief judge constituted a potential threat to the power and authority of the sultan, a threat that was balanced by the sultan's right to dismiss the chief judge at any time. In addition to the chief judge, the capital city also had a judge with specific jurisdictional responsibility for marriages (*qāḍī al-manākiḥ*). The latter was in fact a deputy of the chief judge, and his office eventually became a stepping-stone to that of the chief judgeship—although again, this was a practice that was resisted by the sultan (Brunschvig 1947: v. 2:113–19; Arié 1973:278–81).[15]

Outside the capital, local judges sat in each town or locality that was subject to the sultan's authority, as, for example, Ceuta, Tangier, Salé, Meknes, Marrakesh, and Tlemcen. These provincial judges were appointed (and could be dismissed) directly by the sultan, usually acting in consultation with the chief judge and other important religious functionaries of the capital city. Provincial judges tended to move from one town to another during the course of a judicial career, although some held office in a single locality for relatively long periods of time. The activities of the provincial judges appear to have been supervised by the chief judge of the capital, who instructed them in their duties, exercised disciplinary powers over them, supervised their conduct and made inquiries regarding their character, and, perhaps, examined their judicial decisions (Brunschvig 1947: v. 2:118–22; Arié 1973:278).

In both theory and practice, every judge constituted a single court that was competent to deal with all matters envisaged by Islamic law except those specifically delegated to special judges. In the first centuries of Islam, the duty of the judge had been limited to the resolution of disputes between litigants. Over time, additional functions were added. These extrajudicial functions included supervision of the property of insane persons, orphans, bankrupts, and incompetents under the care of guardians; of bequests, endowment revenues, and marriages of women who have no guardian; of public roads and buildings; and of various court personnel (Ibn Khaldun 1958: v. 1:455). It appears likely that each judge possessed a rudimentary territorial competence that included the town in which he sat and its surrounding areas, although these jurisdictions were not defined (Brunschvig 1947: v. 2:125; cf. Bruno 1935–45).

[15] A 17th-century source mentions two additional judges in the capital city of Tunis: one who had specific jurisdiction over property transactions and contracts (*qāḍī al-mu'āmalāt*); and another who was responsible for determining the appearance of the new moon (*qāḍī al-ahilla*). But neither one of these jurisdictions is mentioned in sources written before the end of the 15th century (Brunschvig 1947: v. 2:119). Arié (1973:285) mentions that in towns of Nasrid Spain, minor litigations were handled by a secondary judge (*ḥākim* or *ṣāḥib al-aḥkām*), while in the villages, such matters were handled by a lower judge (*musaddid*) with limited competence.

The chief judge of the capital city held court in the prayer hall of the Friday mosque or in one of the adjoining rooms. Provincial judges held court in their private residences, although some large towns designated a public building for that purpose. The judge was assisted by a small number of court personnel: one or more judicial advisors and a secretary who sat on either side of him; a court crier; and agents, appointed by the litigants, who presented the testimonies of professional witnesses in support of their client's case.

The only significant limitation on the swift execution of justice was the judge's obligation to consult with a legal expert (*mufti*) in difficult cases. On receiving such a query, a mufti would issue a jurisprudential opinion (*fatwā*), either orally or in writing, a practice that became a norm under the Marinids (Brunschvig 1947: v. 2:126–28; cf. Arié 1973:286–87). As early as the middle of the 12th century, a rudimentary, three-level hierarchy of knowledge appears to have developed among muftis: At the top of this hierarchy were those jurists whose mastery of jurisprudence qualified them to derive solutions to new cases from the recognized sources of law; a middle category included those jurists who could distinguish between opinions that were in conformity with Maliki doctrine and those that were not; the bottom level included those jurists who were mere memorizers of Maliki doctrine (Wansharisi 1981–83: v. 10:30–35). During the second half of the 14th century, the office of mufti came under the control of the state, and muftis began to play an increasingly active role in the administration of justice. By the end of the century, many muftis were appointed by the government, with the result that their power, authority, and prestige gradually came to exceed that of qadis. Most muftis operated within the confines of a single town, but a particularly distinguished mufti might receive requests for fatwas from other towns, regions, and countries (Brunschvig 1947: v. 2:138–41; Arié 1973:291–92).

The sultan's delegation of his judicial authority to the chief judge of the capital and to provincial judges served to promote the theoretical claim that there was a single judge and single source of authority for the entire Muslim community. Commenting on this theoretical structure, Brunschvig makes a series of observations that are directly relevant to the central concern of this essay. He notes that as a consequence of the theory of judicial unity, "the chief judge of the capital came to be recognized as occupying the summit of the judicial hierarchy [*la hiérarchie judiciare*]." He further indicates that although Islamic law does not recognize any formal system of appeal, "it does, in certain cases, allow for the reversal of a judicial decision by the pronouncing judge himself or by one of his successors." And he concludes by noting that Islamic law's provision for the re-

consideration of a dispute before a second judge is "something that does not differ greatly from an appeal [*ce qui ne diffère pas beaucoup d'un appel*]" (Brunschvig 1947: v. 2:125, 129–30). It is curious that these observations, which are fully consistent with Islamic legal theory, somehow failed to attract the attention of subsequent generations of Islamicists, who repeatedly stress the binding and irreversible nature of an Islamic judicial decision (Schacht 1964:189; Fyzee 1974:328; Tyan 1978:373; Weiss 1978:205; Shapiro 1981:195; Wakin 1987: v. 10:220; Weiss 1987: v. 12:125. For an earlier statement of this position, see Juynboll 1927: v. 2:606b).[16]

Microhistory

Having considered the general structure of judicial organization in the Marinid dynasty, we shift from the level of macrohistory to that of microhistory by considering three specific examples of litigations that occurred in 14th-century Morocco. These three examples demonstrate the manner in which Islamic judicial review operated in practice.

[16] It is interesting to observe that the position which holds that the decision of a qadi is binding and may not be reversed under any circumstances is at variance with the position of an earlier generation of scholars. In 1910, Amedroz published a long article devoted to Islamic judicial procedure in which he cited several examples of judicial decisions executed in the 9th century that were later reconsidered and overruled by other judicial authorities. Amedroz (1910:775–76, 785–87) observed that Islamic law did not recognize the notion of *res judicata* and that the Muslim body politic did not favor the notion of *finis litium*. Twenty years later, Reuben Levy (1931: v. 1:385) acknowledged that in practice "the successor of an unjust ḳāḍī did, on occasion, reverse his judgments." Subsequently, a minor paradigm shift seems to have occurred among Islamicists, as the very existence in Islamic law of important mechanisms for the reversal of a judicial decision was lost from sight. On paradigm shifts in the study of Islamic law, see Crone 1987:1–17; Powers 1989.

It should be noted that some time before his death in 1969, Schacht had prepared a draft version of the entry *maḥkama* ("Islamic court") that was to appear in the second edition of the *Encyclopaedia of Islam*. This draft, which was discovered among Schacht's papers in Oxford, was later prepared for publication by Aharon Layish (personal communication, 20 March 1992). The entry was published only in 1991 (v. 6:1–3), nearly a quarter-century after it had been written. In it, Schacht expanded on his statement in his *Introduction* (1964:189) that "strict Islamic law does not recognize stages of appeal" by identifying three informal elements of appeal (he calls them "higher instances"): first, the mazalim jurisdiction—the ruler's right to respond to complaints about the judges appointed by him; second, the judge's *shūra*, which constituted a kind of "unofficial court of appeal"; and, third, the right of a succeeding judge to nullify a judgment issued by his predecessor ("every judgment of a ḳāḍī could be annulled by any of his successors, a possibility that led to an endless duration of some law-suits")—that is, what I have called *Islamic successor review*. But Schacht treats these three possibilities for "the revision of judgments" as instances in which Islamic judicial practice had deviated from legal theory, which, he argues, makes no provision whatsoever for the reversal of an earlier judicial decision. In any event, had this entry been published closer to the year in which it had been prepared, it is possible that the above-mentioned paradigm shift might not have occurred.

Case 1

The first case deals with a prolonged legal dispute over a family endowment that had been established at the end of the 13th or beginning of the 14th century. Our source contains 28 legal documents issued in the period between the years 1316 and 1389. We can reconstruct the history of the two families involved in the dispute over the course of six generations and follow the various members of these families in and out of the courts as they contested entitlement to the endowment revenues. The dispute involved a garden that a certain Abu al-Qasim b. Bashir had designated as an endowment for the perpetual use of his son and the latter's lineal descendants. The original endowment deed, which is not extant, probably contained a clause stipulating that if the line of agnatic descendants came to an end, entitlement was to pass to the founder's cognatic descendants. The beneficiaries leased the garden to cultivators whose payments generated a modest yearly income. Control of the endowment revenues was contested by members of the two aforementioned families, who were related to one another by ties of marriage. The documents identify the litigants as merchants, craftsmen, and religious functionaries, that is, as members of the urban bourgeoisie.

The dispute over control of the endowment revenues falls into three stages between 1316 and 1389. Having analyzed this case in detail elsewhere (Powers 1990b), I will focus here on the second stage, between 1376 and 1381, at which time the issue of judicial review was raised. In 1376, the surviving endowment beneficiaries included three members of the fifth generation of lineal descendants: Muhammad II al-Awsi, his brother (unnamed), and his cousin, ᶜAisha II. With the deaths of his brother and of ᶜAisha II, al-Awsi acquired exclusive control of the endowment. However, his brother's children argued that they now qualified as beneficiaries of the endowment and that their father's share should have passed directly and immediately to them rather than to their uncle. The dispute was brought before the qadi Abu ᶜAbdallah b. Abi al-Sabr (my inability to identify this judge in the biographical dictionaries suggests that he was a relatively unimportant local judge). The qadi ruled against the plaintiffs on the ground that the founder had formulated the endowment deed in such a way as to indicate that a succeeding generation would acquire the status of endowment beneficiary only after all members of the previous generation had died; thus, children do not share the revenues together with their fathers or uncles.

Dissatisfied with the judge's decision, the plaintiffs wrote to the mufti, Ahmad al-Qabbab[17]—who, in all likelihood, was the

[17] Abu al-ʿAbbas Ahmad b. Qasim b. ʿAbd al-Rahman, known as al-Qabbab (d.

chief mufti of Fez at the time—and asked him to reexamine the judgment. Al-Qabbab complied with their request but determined that this particular judgment was not reversible because it did not raise a question of law. Invoking a modified version of the principle previously announced by al-Khassaf and Ibn Qudama, he explains: "After contemplating the aforementioned document and becoming aware of everything that the qadi Abu ʿAbdallah b. Abi al-Sabr [has] ruled, [my] reply is that rulings of qadis may be challenged, reconsidered, and reversed only if they contradict a consensus, an authoritative text, or a *qiyās* [*a fortiori* inference].[18] But [Ibn Abi al-Sabr's] ruling concerning the aforementioned document is not of this [nature]." In other words, the review process was stymied because an error of law had not occurred. The mufti continues by advising the defendant, al-Awsi, that he might legitimize his exclusive entitlement to the endowment by swearing an oath in which he confirmed the soundness of testimony given by one of the witnesses to the creation of the endowment (Wansharisi 1981–83: v. 7:487; Powers 1990b:243).

A second document in our source contains an important detail that corroborates our assertion that the activities and rulings of local judges were supervised by the chief judge of the Marinid capital. Al-Awsi took the fatwa, not to the issuing judge, but rather to the chief qadi of Fez, ʿAbdallah b. Muhammad al-Awrabi,[19] before whom he swore the required oath in the presence of witnesses in September 1376. After the oath had been sworn, the chief qadi awarded al-Awsi exclusive control of the endowment, specifying that his judgment *confirmed* the judgment that had been issued previously by Ibn Abi al-Sabr (Wansharisi 1981–83: v. 7:487–88; cf. Powers 1990b:244). It stands to reason that if the chief judge had the power to confirm the decision of a local judge, he also had the power to overturn such a decision. For a possible example of the latter phenomenon, we turn to our second case.

Case 2

In the middle of the 13th century, the cloth merchants of Salé found themselves burdened with new taxes demanded by the government, and they devised a scheme to ease the burden of the additional taxes. Before buying material from a weaver,

1376 or 1377) served at one point in his life as chief qadi and mufti of Fez. For biographical details, see Ibn Farhun 1932:41; Ahmad Baba 1932:72–73; Qarafi 1983:55, no. 20; Makhluf 1975:235, no. 845.

[18] It should be noted that unlike other schools of Islamic law, the Malikis include *qiyās* in the list of authoritative sources that may not contradicted, thereby increasing the scope of judicial review wherever Maliki law applied.

[19] Abdallah b. Muhammad b. ʿAbdallah al-Awrabi al-Fasi (d. 10 Feb. 1381). See Ahmad Baba 1932:149.

a cloth merchant would contribute one dirham to a common purse whose contents would be used to defray the taxes. The cloth merchants compensated for the extra dirham they had to pay for every purchase by offering the weavers one dirham less than they would have otherwise. The weavers protested, arguing that the cloth merchants were being forced to contribute the dirham against their will and demanding that the dirhams collected by the merchants be given to them instead of to the government. The case was brought before the judge in the provincial town of Salé, Saʿid-ʿUqbani,[20] who ruled that the procedure in question was voluntary and therefore legal. Having been frustrated at the provincial level, the weavers requested a fatwa from the Fasi mufti, Ahmad al-Qabbab, with whom the first case has already acquainted us (again, I assume that al-Qabbab was the chief mufti of the capital). Al-Qabbab determined that the merchants should be prevented from paying the dirhams and that the weavers were entitled to whatever revenues had been collected in the past (Wansharisi 1981–83: v. 5:297ff.; Amar 1907–8: v. 12:490–92).

Unfortunately, our source does not reveal the outcome of the case, about which we can only speculate. Viewed in light of our analysis of Marinid judicial organization and the evidence of the previous case, it is likely that the plaintiffs took the fatwa to the chief qadi of Fez and asked him to overturn the provincial judge's decision. If so, then Islamic law would have possessed an *informal* appellate structure in which the chief qadi of the capital city, acting in concert with the chief mufti, exercised supervisory control over the activities of lower courts, including the right to confirm the decision of a lower court or to overturn it for an error of law. It is also possible, however, that the plaintiffs returned al-Qabbab's fatwa to the provincial judge and asked him to reconsider the case. In that event, the Islamic appellate structure would have operated by sending a question of law "upward" to the chief mufti and subsequently returning it to the local judge in the form of an advisory opinion: The fatwa served as a signal to the issuing judge that he should consider overturning his original decision (by a kind of trial de novo); but it did not have any binding force and might be accepted or rejected at the judge's discretion. Further research no doubt will clarify which of these two procedures prevailed.

Case 3

The first two cases that we have considered contain preliminary evidence suggesting that Muslim polities did in fact develop an informal, rudimentary appellate structure. Our third

[20] Abu ʿUthman Saʿid b. Muhammad al-ʿUqbani al-Tilimsani al-Tajibi (d. 1408), who, during a period of about 40 years, served as chief qadi of Bougie, Tlemcen, Salé, and Marrakesh. See Makhluf 1975:250, no. 904.

case conclusively demonstrates the existence in Islamic law of Islamic successor review, a distinctive, nonhierarchical form of appeal.

In the year 1329, a woman named Fatima bint Muhammad al-Hasani created a family endowment for the perpetual use of her son and his descendants. In the endowment deed Fatima stipulated exhaustive instructions for the transmission of entitlement to the endowment revenues from one generation of descendants to the next. The interpretation of these instructions nevertheless became the focus of a protracted dispute among the founder's descendants. Our source enables us to reconstruct the genealogy of the founder's descendants over the course of four generations and a half-century (for details, see Powers 1990a:302–4). A generation or so after the creation of the endowment, the second set of beneficiaries became embroiled in a dispute over entitlement to its revenues. The dispute pitted Abu al-Qasim b. Muhammad against his two cousins, Ahmad b. Yaʿqub al-Lamti and his sister, Fatima. Abu al-Qasim was an agnatic grandson of the first beneficiary, whereas Ahmad and Fatima were cognatic grandchildren. Although the distinction between agnates and cognates is relevant in determining entitlement to endowment revenues, of even greater importance in this case is the fact that Ahmad's and Fatima's respective mothers (who were daughters of the initial beneficiary) had both died *before* establishing a claim to the endowment. The facts of the case raised a new legal issue: If a qualified female beneficiary dies before establishing a claim to endowment revenues, is it permissible to transfer her unrealized entitlement to her sons and daughters? This question apparently had not been addressed previously in any doctrinal lawbook. The starting point of the judicial decisionmaking process was therefore the indeterminacy of the law.

In the first stage of the conflict, we observe a series of muftis performing their primary function of discovering God's law. The case was referred to a succession of jurisprudents who sought to enlarge the legal doctrine so that it might be applied not only to the case at hand but to other cases as well. In their effort to discover God's law, the muftis transformed into abstract legal concepts whatever nonlegal considerations may have generated the dispute; and they analyzed the interaction of these concepts with the founder's stipulated descent strategy. The most important step in the process of judicial discovery was the search for the "occasioning factor" (*ʿilla*)[21] that would justify the application to a present, undecided case of a legal rule fundamental to a prior, decided one. The process of

[21] On this term and its translation as *occasioning factor*, see Weiss (1992). I am grateful to Professor Weiss for allowing me to read sections of the book typescript prior to its publication.

identifying an appropriate judicial precedent was gradual and took several unexpected twists and turns.

The first mufti to whom the dispute was referred, Abu ʿAli al-Wansharisi,[22] apparently could not find a suitable judicial precedent in any recognized legal source. Then, sometime before the year 1370, the dispute was referred to a second mufti, Ahmad al-Qabbab (again!), who identified the principle of *representation*[23] as the relevant legal concept in this case and cautiously advanced as a possible judicial precedent for this principle a case that he had encountered in a 9th-century doctrinal lawbook written by the Alexandrian jurist, Ibn al-Mawwaz.[24] Although this precedent supported the claim put forward by Ahmad and Fatima, they appear not to have taken immediate action. Shortly after the issuance of al-Qabbab's fatwa, a second fatwa, issued jointly by six different muftis in the year 1370, corroborated the soundness of the judicial precedent that he had identified. Al-Qabbab's fatwa and the joint fatwa of 1370 acknowledged the right of Ahmad b. Yaʿqub al-Lamti and his sister Fatima to a share of the endowment revenues. But a fatwa is not binding, and it appears that Abu al-Qasim continued to exercise exclusive control of the endowment revenues.

Five years later, the dispute shifted from the level of considered legal opinion (*futyā*) to that of judicial decision (*qaḍà'*).[25] In the year 1375, Ahmad and Fatima brought their dispute with Abu al-Qasim before the chief qadi of Fez, Muhammad b. Ahmad al-Fishtali.[26] On September 5 of that year, al-Fishtali issued a judicial decision. Significantly, in specifying the basis of his decision, the judge entirely ignored the judicial precedent that had been identified by al-Qabbab and subsequently corroborated in the joint fatwa of 1370. Instead, al-Fishtali exercised his independent reasoning, advancing an alternative and, ostensibly, decisive precedent for the principle of representation, a precedent that he had discovered in a fatwa issued at the beginning of the 12th century by the distinguished Cordovan jurist, Ibn Rushd.[27] Al-Fishtali cited Ibn Rushd's fatwa

[22] Abu ʿAli al-Hasan b. ʿAtiyya al-Wansharisi (1325–ca. 1388). See Makhluf 1975: 238, no. 853.

[23] On the principle of representation in Islamic law, see Coulson (1971), index, s.v. "Representation." See also *Black's Law Dictionary* (1979), s.v. "Representation."

[24] Abu ʿAbdallah Muhammad b. Ibrahim, known as Ibn al-Mawwaz (d. 882 or 894). See Makhluf 1975:68, no. 72; Toledano 1981:64, n. 51.

[25] On the relationship between legal opinion and judicial decision, see further Qarafi 1989.

[26] Abu ʿAbdallah Muhammad b. Ahmad b. ʿAbd al-Malik al-Fishtali al-Fasi (d. 1377), author of an important work on legal formularies. See Ahmad Baba 1932:250, 265–66; Makhluf 1975: 235–36, no. 847; Toledano 1981:83, n.142.

[27] Abu al-Walid b. Rushd (d. 1126), the grandfather of Averroes. See Ibn Rushd 1987: v. 1:21ff.; Lagardère 1986:148–53; Makhluf 1975:146, no. 439.

and argued that the case embedded therein was directly analogous to the case at hand; for this reason, it was permissible to transfer to the latter the principle of representation that had been established in the former. He therefore ruled in favor of the plaintiffs, Ahmad and Fatima.

Dissatisfied with al-Fishtali's judgment, Abu al-Qasim initiated a challenge. The death of al-Fishtali in 1377 and his replacement as chief qadi of Fez by ᶜAbdallah b. Muhammad al-Awrabi[28] provided Abu al-Qasim with an opportunity to recover exclusive control of the endowment. Abu al-Qasim bided his time until May 1380, when he brought his case before al-Awrabi, asking him to reverse his predecessor's judgment on the grounds that, first, the court decision of 1375 had been based exclusively on the analogy to the Ibn Rushd fatwa; and, second, that the analogy was in fact invalid because of an important difference between the two cases, a difference that had not been taken into consideration. (Although it is not stated in our source, we assume that Abu al-Qasim employed the services of a mufti.) After consulting with his judicial advisors, al-Awrabi ruled in favor of Abu al-Qasim, awarding him exclusive control of the endowment revenues. Al-Awrabi characterized his judgment as an interim measure that was to remain in effect only until such time as the case might be reviewed.

On the strength of al-Awrabi's judgment, Abu al-Qasim resumed exclusive control of the endowment. Subsequently, Ahmad b. Yaᶜqub al-Lamti died, leaving five children and—we may reasonably conjecture—a legacy of bitterness directed at his cousin, Abu al-Qasim. Meanwhile, Fatima and her five nieces and nephews bided their time. In early April 1390, ten years after al-Awrabi's judicial decision, she asked to have that decision reconsidered by yet a third chief qadi of Fez, ᶜAbdallah b. ᶜAbd al-Rahman al-Sanhaji (another jurist I am unable to identify). After consulting with his judicial advisors, al-Sanhaji ruled in favor of the plaintiffs on the strength of three considerations: (1) the opinion of his advisors; (2) his own examination of the case; and (3) the fatwa of al-Qabbab.[29]

Within the relatively short span of 15 years, the family's dispute found its way into the courtroom of three different chief qadis of Fez: in 1375, al-Fishtali ruled in favor of Fatima and Ahmad; in 1380 al-Awrabi nullified this decision, ruling in favor of Abu al-Qasim; and in 1390, al-Sanhaji nullified the decision of his predecessor, ruling in favor of Fatima and her deceased brother's children. No statement in our source suggests that these nullifications and reversals were unusual or extraordinary. On the contrary, the available documentation cor-

[28] On him, see above, note 19.

[29] Al-Awrabi's judicial decision did not put an end to the litigation. On the subsequent history of the dispute, see Powers 1990a:318–25.

roborates our hypothesis regarding the existence of a system of successor review in Islamic law.

Conclusion

Our analysis of Islamic legal theory, judicial organization, and court practice suggests that Islamic law is less anomalous with regard to the institution of appeal than has been thought. We have determined that Islamic law allows for the reconsideration of a judicial decision by the issuing judge himself under limited and precisely defined conditions; we have pointed to evidence suggesting that the court of the chief judge of the capital city functioned as a court of review for the decisions of local and provincial judges (a point on which further research is required); and we have determined conclusively that Islamic law developed a system of successor review in which a judge might reconsider and overturn a judgment issued by his predecessor if it could be demonstrated either that the predecessor had lacked jurisdictional authority or that a particular judgment was not in conformity with Islamic law. If we add to these processes the subordination of both provincial judges and the chief judge of the capital city to the head of the mazalim court (Nielsen 1985), we begin to discern the outlines of a rudimentary structure comprising at least three levels: provincial courts, the court of the chief judge, and the mazalim court. The distinctive characteristic of Islamic judicial review is its relative *informality*, the wide opportunity that it gives to the individual to negotiate with the judicial authorities and to manipulate the system to one's personal advantage (cf. Rosen 1984), and the instrumental role the mufti played in the review process.

The determination that Islamic law allows for the reconsideration of a judicial decision dispenses with the need to provide either a cultural or an institutional explanation for the "absence" of appeal in Muslim societies. Shapiro's (1981:201–9) assertion that Islam is a religious community in which hierarchical organization and control are largely absent misses the point because it is based upon an arbitrary distinction between religious and political structures. Whether or not the Islamic religious community was organized hierarchically, hierarchical structures were no less characteristic of premodern Muslim societies than they were of other societies. Although our focus here has been on the Marinid dynasty of Morocco, it should be pointed out that the organizational structure of the Marinid state was not exceptional, but rather was modeled on that of the Seljuq empires of Iraq and Iran and the Mamluk empire of Egypt (Lapidus 1988:364). One can point to a continuous line of hierarchically organized political regimes in the Muslim

world, from North Africa to India and from the 9th century to the 19th. To these political hierarchies one may add a thick web of both religious hierarchies (Wansharisi 1981–83: v. 10:30–35; Cole 1988) and social hierarchies (Messick 1988).[30] We therefore predict that researchers who devote their attention to the judicial organization of individual Muslim dynasties will discover that those dynasties possess the type of judicial review, or a variation thereof, that characterized the Marinid dynasty of Morocco. There is at present only one such study with which I am familiar. On the basis of his examination of Hanafi doctrinal textbooks and collections of fatwas, Baber Johansen concludes that the qadi's judgment was not final in either the Ottoman period or in the *pre-Ottoman, classical Islamic period*; he identifies four sets of circumstances in which a judgment may be reversed and observes that Ottoman muftis developed new arguments and procedures to facilitate the continuation of the judicial process after the initial qadi's judgment (Johansen 1990:15–17).

What does require explanation is the cultural distinctiveness of Islamic judicial review, that is, Islamic law's allowing for the reconsideration of a judicial decision without erecting any *formal*, hierarchical structure for that purpose. Three considerations may be relevant to this issue. First, Islamic law is both universal and personal: it does not recognize any territorial distinctions or national boundaries, and it applies to individual Muslims wherever they live, inside or outside of the Abode of Islam (Wakin 1987: v. 7:485). A second consideration is the peculiar nature of the relationship between Muslim jurists and the political authorities. Udovitch (1985) has observed that one of the distinctive features of Islamic law is its intermediate, ambiguous relationship to the state and to those who control the institutions of political power. Although qadis were appointed and dismissed by caliphs and sultans and were dependent on the state to enforce their decisions, the body of law that they administered had been created by the jurists themselves and was in no sense legislated by the political authorities. This ambiguous relationship was the result of an early historical compromise whereby the Umayyad and Abbasid caliphs left the jurists free to develop and elaborate Islamic legal doc-

[30] Khuri (1990:11, 19) recently has argued that there is something about the very notion of hierarchy that is alien to Arab societies and that Arabs consistently have failed to develop "a clear and lasting pyramidal structure of government," a "failure" that he attributes to the Arabs' alleged perception of reality as "a series of non-pyramidal structures, a matrix composed of discrete units inherently unequal in value." In Khuri's view, Arab societies are organized in complex systems of interlocking networks composed of dyadic structures that unite leaders and their followers, structures that he likens to a wheel without a rim or to a constellation of stars (ibid., pp. 13, 24, 114–15). This approach suffers not only from its disregard for the historical record but also from its formulation in terms of national character.

trine, while the jurists, in turn, "tacitly ceded practical control of large segments of social and political life" to the political authorities. One important consequence of this compromise was that it allowed Islamic courts to operate *outside* the restraints and influences of political power (ibid., p. 461). The distance that was created between the central government, on the one hand, and the jurists and judges, on the other, may account for the informal and structurally inchoate nature of judicial review in Islamic law. Third, to the relationship between the jurists and the state an additional element may be added, namely, the urban populace that had an interest in limiting state intervention in its affairs. The conflicting interests of the state and the Muslim masses were often mediated by the jurists, and since most jurists were members of the urban bourgeoisie, they may have been predisposed toward the self-governing interests of their own social class and against the interventionist interests of the state. This dynamic may have played a role in case 2, in which the chief mufti of Fez held in favor of the cloth merchants of Salé in their struggle to resist new taxes that had been imposed by the Marinid government—although further research is needed to substantiate this point.

Finally, the present study suggests that scholars who pursue cross-cultural, comparative legal studies should take care not to formulate their analyses in terms of the experience of Western nation states. In the present instance, the term *appeal* is a culturally bounded notion that reflects a particular relationship between the individual and the state and an acceptance of a *formal* hierarchy that do not exist in all cultures.[31] The cultural boundedness of this term may account for the tendency of Western Islamicists writing in the second half of the 20th century to ignore evidence, in both Islamic legal theory and judicial practice, of the reversibility of a judicial decision. The resulting secondary literature, in turn, misled Shapiro, causing him to treat Islamic law as an anomaly among the major legal systems of the world, when in fact Islamic law allowed for a process which was functionally equivalent to appeal but which took a different institutional configuration: Islamic successor review. Once the existence of Islamic successor review is recognized, Islamic law ceases to be an exception.

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[31] It should be noted, however, that hierarchical systems of appeal have been identified in Imperial China, Tokugawa Japan, among the Norman and Angevin kings, and in 18th- and early 19th-century Russia (Shapiro 1980:634–36, 645, 652).

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