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LEGAL CANONS—IN THE CLASSROOM AND IN THE COURTROOM
OR, COMPARATIVE PERSPECTIVE ON THE ORIGINS OF ISLAMIC
LEGAL CANONS, 1265–1519

INTISAR A. RABB*

LEGAL canons have made a comeback. We can quite firmly put to rest the old lament that legal interpretation is understudied and undertheorized, and with it, the idea that “legal canons” are not a major part of that story.¹ For some thirty years now, since the rise of new textualism, judges and legal academics have closely reexamined the role of legal canons. We now recognize these canons as “established principle[s] . . . of law universally admitted, as being a correct statement of the law, or as agreeable to natural reason.”² And we very frequently see them appear alternately in the varied opinions of self-avowed textualists and non-textualists alike, like so many interpretive tools-turned-rhetorical-

* Professor of Law, Professor of History; faculty director of the Program in Islamic Law at Harvard Law School. This Article is based on the Donald A. Giannella Memorial Lecture given at Villanova University Charles Widger School of Law on October 22, 2020. The author would like to thank Michael Moreland, Melanie Dudley, and the Eleanor H. McCullen Center for Law, Religion and Public Policy at Villanova Law School for the honor of the invitation to present the lecture, as well as the student editors for their good work in publishing this Article that developed from it. This Article takes its main title from an article by Richard Posner that accompanied the rise of new textualism, which features legal canons, as noted *infra* in note 1.

1. See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983). For earlier instances of the old claim and advancement of a slightly new one of chaos, see ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 8 (2012) (first citing MORRIS COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 128 (1933); then citing HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS* (10th ed. 1958)) (asserting that it is no “exaggeration to say that the field of interpretation is rife with confusion”).

2. *Legal Maxim*, BLACK’S LAW DICTIONARY (11th ed. 2019).

weapons to justify opposing outcomes, both in the classroom and in the courtroom.

Notably, this recent “canons comeback” is not a unique feature of American law. It applies to both American law and Islamic law, in ways that may offer comparative insight when considering that the Islamic law context comes with a centuries-long tradition of interpreting law with legal canons. Exploring that history may provide insight for understanding the enduring salience of legal canons and their current comeback, not just in one legal tradition, but two. That history might also aid in grasping the reasons for which interpreters devise and deploy canons in the first place, and of the interpretive reach of legal canons in systems that seem committed to canons in both the courtroom and the classroom.

Before tracing that history, we begin with the familiar—with American law. In the American courtroom, virtually every statutory interpretation case at the Supreme Court of late features “dueling canons,” facing off on the meaning or application of ambiguous laws.³ Did Facebook, before becoming Meta,⁴ feature an “autodialer” that entitles individuals to sue the social media behemoth for unwelcome calls or texts? Writing for a unanimous Court in *Facebook, Inc. v. Duguid*,⁵ Justice Sonia Sotomayor used the *series-qualifier canon* to answer ‘no’ to the autodialer question—thereby saving Facebook from yet another lawsuit, while Justice Samuel Alito concurred separately solely to caution readers to view canons as standards, not rules.⁶ Are fish “tangible objects” that support criminal convictions if destroyed upon investigation for fraud? In *Yates v. United States*,⁷ the late Justice Ruth Bader Ginsburg used no less than seven different legal canons to answer “no” and thus decide against imposing laws against destruction of evidence and other “tangible objects” for the fish-destroying petitioner. An again-concurring Justice Alito added discussion of four canons, and Justice Elena Kagan, in dissent, referenced ten different canons in her failed attempt to uphold the conviction.⁸ Is a jilted wife who poisons her adulterous neighbor in violation of laws that give effect to a treaty banning “chemical weapons?” For an undivided Court in *Bond v. United States*,⁹ Chief Justice John Roberts relied heavily on legal canons, as did Justice Antonin Scalia in his concurrence, to say “no”: the *rule of len-*

3. On dueling canons, see Anita Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 910–1006, 912 (2016); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 396–406 (1950).

4. See *Introducing Meta: A Social Technology Company*, FACEBOOK (Oct. 28, 2021) <https://about.fb.com/news/2021/10/facebook-company-is-now-meta> [<https://perma.cc/4LNF-4XG8>].

5. 141 S. Ct. 1163 (2021).

6. *Id.* at 1168 (Alito, J., concurring).

7. 574 U.S. 528 (2015).

8. *Id.*

9. 572 U.S. 844 (2014).

ity and other canons required the Court to construe the criminal statute narrowly.¹⁰

In the American classroom, law professors have responded to the canons' court-comeback, and now engage in active dialogue with the courts about it. Leading law schools now feature, and sometimes require, courses in legislation and statutory interpretation with a heavy dose of legal canons. Many of the professors who teach those courses and conduct research on interpretation have filled thousands of law review pages in empirical studies attempting to explain or critique the use, function, and constraints or coherence (if any) of the legal canons.¹¹ Moreover, judges too have published articles and books on these very questions.¹² And courts have responded by considering the scholarly literature on legal canons in their statutory interpretation decisions, as have petitioners, respondents, and amici in virtually every recent statutory interpretation case.¹³

Helping to frame the canons comeback in the American classroom and in the courtroom are two opposing approaches that have emerged prominently in the form of two books that elevate some of the hundreds (perhaps thousands) of principles and precedents produced by the methods at play in each. From one side, the late Justice Antonin Scalia and law dictionary-lexicographer Professor Bryan Garner published a treatise on legal canons called *Reading Law* in 2012. Their book presents

10. *Id.*

11. To take just a few leading exemplars, *see, e.g.*, Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275 (2020); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726 (2020) (with Appendix, at 1–43); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667 (2019); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018); Ryan Doerfler & William Baude, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539 (2017); Frederick Schauer, *On the Relationship Between Legal and Ordinary Language*, in SPEAKING OF LANGUAGE AND LAW 35–38 (Lawrence Solan, Janet Ainsworth, & Roger Shuy eds., Oxford 2015); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)); Jane S. Schacter, *Symposium: Statutory Interpretation: How Much Work Does Language Do?: Text or Consequences?*, 76 BROOK. L. REV. 1007 (2011); John F. Manning, *Second Generation Textualism*, 98 CAL. L. REV. 1287 (2010).

12. *See, e.g.*, BRIAN G. SLOCUM, *ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLES OF LEGAL INTERPRETATION* (2015); ROBERT A. KATZMANN, *JUDGING STATUTES* (2014); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (Princeton Univ. Press 1997); Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014), and written before he became a Supreme Court Justice); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010) (written before she became a Supreme Court Justice).

13. For multiple citations to scholarly literature on the history and use of legal canons among other tools of interpretation in judicial opinions and related amici briefs, *see, e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648 (2021); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); *Gundy v. United States*, 139 S. Ct. 2116 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

a vision of textualism and originalism that centers on fifty-seven legal canons accompanied by illustrative cases. The authors suggest that judges should read only the text according to the way the Framers or enacting legislators wrote them, and that legal canons—rather than pragmatics or purpose—can well guide that task.¹⁴

From the opposite side, the doyen of dynamic interpretation, Professor William Eskridge, published his own volume a few years later, in 2016, called *Interpreting Law*. His treatise presents a vision of pragmatic or dynamic statutory interpretation that shows where the legal canons used in the courtroom came from, and he details how most judges actually use those canons. Judges typically deploy canons pragmatically as interpretive tools to fill gaps, allocate power, and otherwise “say what the law is” with respect to purpose or policy-driven factors embedded in the statute itself. The purpose-driven approach has, he argues, originalist bases: it comes from the statutory interpretation approach originally understood as the “mischief rule” (what mischief was the statute trying to address?) and the recognition of equities of the statute.¹⁵

This basic disagreement on interpretation nicely zeroes in on the point of divergence and sums up each approach right in the titles of these battling books: *Reading Law* vs. *Interpreting Law*. *Reading Law* presumes that there is a static, original, public meaning contained in the words of a text and select legal canons, and courts must preserve the status quo unless a legislature decides otherwise. *Interpreting Law* points to dynamic and evolving meanings of the words of a text, alongside a wider set of legal canons as supporting tools for interpreting those texts in ways that seek to meet the purpose or change for which legislation—by definition—was enacted.

Remarkably, this basic disagreement in American law about approaches to statutory interpretation have a comparable precursor in Islamic law, which—lacking a legislature—carved out an even larger role for legal canons than in U.S. law. The American parallel prompts the question about how to best think about interpretation in Islamic law: is Islamic law supposed to be about *reading law* according to the original meaning of texts in ways designed to preserve the status quo (and, for that matter, enlarge the power of judges claiming to rely only on texts)? Or, is Islamic law supposed to be about *interpreting law* according to texts that are supported by contextual clues that point to dynamic and evolving meanings; is it supposed to respond to the “mischief” that motivated divine legislation in ways meant to resolve novel issues in full view of societal

14. SCALIA & GARNER, *READING LAW*, *supra* note 1.

15. WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* (Foundation Press 2016); *see also* William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001); WILLIAM N. ESKRIDGE JR., *DYNAMIC STATUTORY INTERPRETATION* (Harvard Univ. Press 1994).

changes over time and space; and is it about the broad set of legal canons that provide interpretive tools toward that end?

This Article seeks to address such pressing questions about Islamic law by uncovering its history of interpretation at the point of the rise of legal canons in thirteenth-century Egypt and Syria. In the process, it asks: how do we make sense of the juristic approach to either *reading* or *interpreting* Islamic law?

The answer to that question is lodged in history that, I argue, can come to light best under of the lens of legal canons-centered approaches that Muslim scholars historically have used to explain or guide legal interpretation over time. This Article starts with that history at a moment the principles and precedents that guide interpretation in Islamic law were first codified *en masse* as an independent genre of law. That codification emerged from the ashes of Islam's fallen caliphate at Baghdad in 1258. Following the Mongol invasion, a new sultān in Cairo initiated a widespread and fairly well-known reform of the Islamic empire's main judicial system: one chief judge for every major school, or approach, to interpretation. Less well-known is that the scholar-jurists of that sultan's time instituted their own widespread reform of the empire's approach to interpretation: one set of principles for every major area of law—drawn from something like an interpretive common law and thus designed to use principles from the Islamic past to help resolve issues of their changing present. Those jurists called these principles *legal canons* (*qawā'id fiqhīyya*), and used them as interpretive tools to adjudicate cases, to determine the scope of interpretation in legal treatises, and to teach law. The result: a collection of interpretive principles that centered a complex system of *interpreting Islamic law*, in a way that most modern onlookers do not realize exist. Most modern onlookers also fail to realize that modern American courtrooms and Islamic practices in classrooms discussing theories of statutory and constitutional interpretation both echo and offer means to better organize earlier interpretive precedent.

I. INTRODUCTION: THE BACKDROP

We begin in the middle of the thirteenth century. Not long after he took power, a one-time slave soldier by the name of al-Zāhir Baybars radically reformed the judiciary of the reconstituted eastern Muslim empire effectively as the first Mamlūk sultan. The Mongols had decimated the old seat of the Muslim empire in Baghdad in the winter of 656/1258. They had dismantled the Muslim caliphate, and with it, the foundations of systems of law and order. Sultān Baybars had in turn helped defeat the Mongols in 658/1260, and immediately seized the throne.¹⁶ To solidify

16. See also Amalia Levanoni, *The Mamlūks in Egypt and Syria: The Turkish Mamlūk Sultanate (648–784/1250–1382) and the Circassian Mamlūk Sultanate (784–923/1382–1517)*, in *THE NEW CAMBRIDGE HISTORY OF ISLAM—VOLUME 2: THE WESTERN ISLAMIC*

his hold on power and territory, he first re-installed a caliph whom he “represented,” fought the Crusaders, and imposed various economic measures to secure his army and revenue.¹⁷ His focus was political legitimacy and power through the symbolic use of the caliph and the use of force.¹⁸ Having established both over the first five years of his reign, he then turned to domestic affairs and questions of religious legitimacy and law.¹⁹ He began with some tentative reforms in 1262. But it was not until 663/1265 that he ordered a major judicial overhaul.²⁰

The common view among historians is that, the structural reforms altered a long-standing institutional “symbiosis” that scholars credit with guaranteeing a functioning system of Islamic law and governance.²¹ What is this symbiosis? Scholars of Islamic law use this term to refer to the idea that religious and political legitimacy in early Islamic societies, beginning as early as the seventh century, relied on a balance between government leaders and scholars of Islamic law. In that old system, the going view is that jurists had the *religious* or *epistemic* authority to define law and mediate popular religion in judge-staffed courts; and the sultan had the power to appoint judges and enforce court decisions. In that same scheme, scholars understand the juristic and judicial opinions to make up the stuff of Islamic law (*sharī‘a*)—seen as an authoritative and enduring expression

WORLD, ELEVENTH TO EIGHTEENTH CENTURIES 237–84 (Maribel Fierro ed., Cambridge Univ. Press 2010); SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ (Brill 1996); NASSER O. RABBAT, THE CITADEL OF CAIRO: A NEW INTERPRETATION OF ROYAL MAMLUK ARCHITECTURE (Brill 1995); CARL F. PETRY, THE CIVILIAN ÉLITE OF CAIRO IN THE LATER MIDDLE AGES (Princeton Univ. Press 1981).

17. See JACKSON, *supra* note 16, at 51; RABBAT, *supra* note 16, at 97–98 (describing Baybars’s appointment to the caliphate an ‘Abbāsīd fugitive—whom he named al-Mustansir Billeh II; he had survived the Mongol massacre at Baghdad and was appointed with the stipulation that he delegate his political authority to Baybars over Egypt and Syria as well as the eastern provinces of the Hijāz, Yemen, and all future conquests). For discussion of Baybars’s administrative innovations, see RABBAT, *supra* note 16, at 99; P. M. HOLT, THE AGE OF THE CRUSADES: THE NEAR EAST FROM THE ELEVENTH CENTURY TO 1517 90–99 (Longman 1986).

18. On the significance and fall of the caliphate, see HÜSEYİN YILMAZ, CALIPHATE REDEFINED: THE MYSTICAL TURN IN OTTOMAN POLITICAL THOUGHT (Princeton Univ. Press 2018); MONA HASSAN, LONGING FOR THE LOST CALIPHATE: A TRANSREGIONAL HISTORY (Princeton Univ. Press 2016); HUGH KENNEDY, WHEN BAGHDAD RULED THE MUSLIM WORLD: THE RISE AND FALL OF ISLAM’S GREATEST DYNASTY (Da Capo Press 2005).

19. See Sherman A. Jackson, *The Primacy of Domestic Politics: Ibn Bint Al-A‘azz and the Establishment of the Four Chief Judgeships in Mamluk Egypt*, 115 J. AMER. ORIENTAL SOC’Y 52 (1995).

20. See JACKSON, *supra* note 16, at 51.

21. See, e.g., *id.* at xviii; Yossef Rapoport, *Royal Justice and Religious Law: Siyāsah and Shari‘ah under the Mamluks*, 16 MAMLUK STUDS. REV. 72 (2012); *Levanoni*, *supra* note 16, at 242; Yaacov Lev, *Symbiotic Relations: Ulama and Mamluk Sultans*, 13 MAMLUK STUDS. REV. 1 (2009); ROBERT IRWIN, THE MIDDLE EAST IN THE MIDDLE AGES: THE EARLY MAMLUK SULTANATE 1250–1382 (S. Ill. Univ. Press 1986); see also INTISAR A. RABB, DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION, AND ISLAMIC CRIMINAL LAW (Cambridge Univ. Press 2015).

of divine will; and we understand royal decrees to form executive policies (*siyāsa*) that could sometimes dictate the institutional structures in which the jurists and judges operated. The executive policies were authorized and legitimate so long as they ensured order and otherwise were perceived as serving the public interest.²²

In this conventional scholarly account, any executive-led structural changes affected the *form* of this old symbiosis but did not radically alter the *functions* of Islamic law.²³ That is, the common view is that executive policies and political-governmental structures did not alter the basic processes of interpreting Islamic law. I beg to differ. No one to date has deeply interrogated whether and how structural changes affected interpretations of Islamic law, the balance of power between the jurists and judges on the one hand and government and military officials on the other in their long-enduring symbiosis, and therefore the extent to which structural changes helped judges and jurists define values or allocate power *through interpretation*.²⁴

It turns out, I argue, that the interpretive developments in Islamic law were just as conspicuous as the structural ones for informing definitions of law and governance, and were no less affected by the sultan's reform. I show how by exploring the case that ostensibly led to the reform, discuss the legal canons that emerged in the wake of it, and then examine the ways in which those legal canons form a type of interpretive precedent that are key—in familiar ways to American lawyers—to interpreting Islamic law.

II. THE CASE: *HEIRS OF AMĪR NĀSĪR V. HEIRS OF QĀDĪ BADR AL-DĪN AL-SĪNĀRĪ*, 663/1265 CAIRO, SULTĀN BAYBARS PRESIDING

As noted, the judicial reform began with a case. Each week, Sultān Bayar's held court at the Dār al-ʿAdl: the “Palace of Justice” that he had constructed just outside the Citadel in the empire's capital city of Cairo.²⁵ He used to sit with his top military officials alongside the single chief judge of the realm, a Shāfiʿī judge by the name of Ibn Bint al-Aʿazz. This was the royal court, which handled “extraordinary” cases involving government officials, public law matters of crime or taxation, and special dis-

22. WAEL HALLAQ, *SHARĪʿA: THEORY, PRACTICE TRANSFORMATIONS* 201–09 (Cambridge Univ. Press 2009). For further debates about the sometimes blurred line between *siyāsa* and *sharʿa*, when speaking about religious and political authority *see, e.g.*, KHALED ABOU EL FADL, *REASONING WITH GOD: RECLAIMING SHARĪʿAH IN THE MODERN AGE* (Rowman & Littlefield, 2017); FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA* (Brill, 2000); Mohammad H. Fadel, *Adjudication in the Maliki Madhhab: A Study of Legal Process in Medieval Islamic Law* 79–91 (unpublished dissertation, UMI 1996).

23. *See, e.g.*, JACKSON, *supra* note 16, at 96; SHARĪʿA, *supra* note 22, at 201–09.

24. One exception is Yossef Rapoport, who nevertheless does not explore the rise and logic of legal canons in that process. *See* Rapoport, *supra* note 21, at 75.

25. *See generally* RABBAT, *supra* note 16.

pensions or pardons that went beyond the ordinary questions of law that the chief judge and his deputy judges addressed.²⁶ But the chief judge sat beside the sultan at this special royal court nonetheless, to give input on an Islamic law interpretation of each case.

On one occasion, in the year 1265, two litigants sought resolution of a matter that was ostensibly a private dispute about trusts and estates. But the case turned out to have been about much more than the underlying legal question. It implicated the very status of the institutional elite classes under the Mamlūks, as well as of the proper scope for interpretation of Islamic law. It was the high status of the litigants—representatives of a deceased a judge and of a high-ranking military official—that landed this case in the royal court.

A. *The Story of the Case*

The facts of the case and the direct legal issue at hand were fairly straightforward. The daughters of a military leader, Amīr Nāṣir, were heirs to his estate. They claimed to have bought a large house from a judge, the late Qāḍī Badr al-Dīn al-Sinjārī, while he was still alive.²⁷ But when that judge died, *his* heirs claimed that when he was alive, he had instead converted the property in question into a charitable trust (*waqf*) and bequeathed it to them. So the basic question was: who was entitled to the property or its proceeds: the heirs of the judge or the heirs of the military officer?

Problems of potential judicial bias, rather than the legal issue itself, soon revealed themselves. A senior military official present at the royal court, the prominent emir, Jamāl al-Dīn al-Aydughī, raised objections. The basis of his claim is not entirely clear from the sources. Nevertheless, those sources at least suggest that the problem was twofold: first, a decision for the heirs of the judge would privilege members of the judiciary above members of the military. As a representative of the military elite, he had to ensure that the military men's material needs and interests were met. Doing so also made pragmatic good sense: if soldiers and officers were to fight for him, they had to have an income—which typically came from landed property and estates. Second, a decision for the heirs of the judge was likely only plausible because of the chief judge's acrobatics in Islamic legal interpretation: the military officer surmised that the chief judge had likely interpreted the classical Islamic law of *waqfs* in a way that exploited some loophole in order to enable the heirs of the judge to even make their claim.

The sultān turned to the chief judge, not so for his legal opinion about the case, but for his response to the senior military officer's criti-

26. Jackson, *supra* note 19, at 54, 64.

27. *Id.* at 54; Jørgen S. Nielsen, *Sultān Al-Zāhir Baybars and the Appointment of Four Chief Qādis, 663/1265*, 60 *STUDIA ISLAMICA* 167 (1984).

cism. The sultān asked the chief judge: “Is this how the judges (*qādīs*) are?”²⁸ Chief judge Ibn Bint al-A‘azz responded with a vague platitude that will seem commonplace to lawyers today—indicating that there are complicated factors in every case—and further indicated that the *waqf* holders, who were heirs to the late judge, would prevail in some measure in every scenario:

Your Highness, there are complications in everything.
What is the situation here? Asked the Sultān.

If the *waqf* is confirmed, the heirs reimburse the buyers.
And if the heirs have nothing? Asked the Sultān.
The *waqf* is confirmed, replied the qādī, and the buyers receive nothing.²⁹

Put differently, the chief judge had advised that the proper way to proceed would be for the heirs of the judge either to reimburse the heirs of the military official for the alleged sale if indeed a *waqf* and sale could be confirmed, and to maintain control over the *waqf* if they if they had no monies with which to reimburse the heirs of the military. Essentially, his solution was to form a presumption in favor of conferring the property on the judge’s heirs and not on the heirs of the military officer.³⁰ This was a fine point of interpretation: *waqf over sale* and *possession over claims of ownership*—both reflecting two well-known legal canons, or presumptions. These presumptions favoring the heirs of the judge, could only be overcome by clear testimonial evidence: typically two witnesses or a document of sale (even if there was no documentation of the *waqf*), which the chief judge had already rejected on grounds that the military men’s testimony was unreliable.³¹

The sultan pressed the chief judge: well, what would happen if the parties could not locate evidence of formation of a *waqf*? The thought seemed to be that the property would likely go to the military officer’s heirs. This same sultan had early-on instituted a policy requiring that the heirs of *mamlūk* soldiers—even if not military men themselves—were to inherit their decedent family member’s estates.³² He, after all, had an army to feed, literally; and transfer of military property to their families would sustain one of the most important parts of his military empire, which had been founded by slave-soldiers like himself. But the controversy over the situation suggested that the military officer’s heirs would not prevail outright under any circumstances that the chief judge had out-

28. Jackson, *supra* note 19, at 54.

29. *Id.* (translating a passage from the Mamlūk historian TAQĪ AL-DĪN AL-MAQRĪZĪ, I KITĀB AL-SULŪK LI-MA‘RIFAT DUWAL AL-MULŪK 538–539 (Maṭba‘at Dar al-Kutub al-Miṣriyya 1936)).

30. *Id.* at 54; Nielsen, *supra* note 27, at 170.

31. Jackson, *supra* note 19, at 54.

32. *Id.* at 51.

lined. That is, the judge's heirs were to reimburse the emir's heirs if the sale was improper and still receive the proceeds from the trust, or else the judge's heirs were to keep the proceeds from the property sale even if not specifically bequeathed to them.³³ Either way, the judge's heirs would take something.³⁴

The sources are less clear on the outcome—whether the judicial or military heirs kept most of the property—and instead highlight the military men's objections that led to a change in the judicial structure. It is reasonable to assume that the judge's heirs won, and that the military men were prompted by what they saw as an unfair victory for the judge's heirs justified by the Shāfi'ī law that the chief judge applied exclusively in the courts.³⁵

For the Mamlūk-era chroniclers recounting the story of this case, the point of this story is not what actually happened. Instead, they focused more on questions of the scope of judicial power concentrated in a single chief judge, and the exclusivity of relying on a single school of law despite the presence of multiple schools that may have given alternate outcomes. They attributed to Amīr Aydughdī the exasperated retort in the aftermath of the case, “Oh Qādī, you may have your Shāfi'ī *madhhab*; we shall appoint a qādī from each of the schools of law”—a declaration that the sultan took seriously.³⁶ All in all, for the historical chroniclers of the time, this case represented the acute incident that sparked Sultān Baybars's major judicial reform.

B. *The Reform*

The major reform came in the wake of that case. Sultān Baybars reformed the judiciary in several ways, but the main one was that he weakened the power of the single chief judge—who applied only the laws of the Shāfi'ī legal school—and distributed judicial responsibilities to Islam's other three mainstream legal schools. He appointed one chief judge for every major approach to Islamic law at the time, that is, for every major school of law (*madhhab*); and made the Shāfi'ī judge first among equals in coordinating between them. To put that in modern terms: Chief Judge Ibn Bint al-ʿazz had become the John Roberts of his day, that is, if we too

33. *Id.* at 54; Nielsen, *supra* note 27, at 169–71.

34. *See* Nielsen, *supra* note 27, at 170, who gives this reading.

35. For a similar case from a cache of documents found in the sanctuary at the Dome of the Rock from fourteenth-century Jerusalem, see Donald S. Richards, *Glimpses of Provincial Mamluk Society from the Documents of the Haram Al-Sharif in Jerusalem, in THE MAMLUKS IN EGYPTIAN AND SYRIAN POLITICS AND SOCIETY* 51–52 (Michael Winter & Amalia Levanoni eds., Brill 2004). For further studies of documents from this cache, see HUDA LUTFI, *AL-QUDS AL-MAMLŪKIYYA: A HISTORY OF MAMLŪK JERUSALEM BASED ON THE ʿARAM DOCUMENTS* (K. Schwarz 1985).

36. Jackson, *supra* note 19, at 54 (citing Escovitz, *Four Chief Judgeships*, at 529; Nielsen, *Sulʿān al-Zāhir*, at 170).

had a system of appointing one originalist, pragmatist, textualist, etc.—one judge for every major interpretive approach or ‘school’ of law.

To be sure, the case may have a contributing cause, but it was not the only thing prompting the reform. The sources show that the sultan had initiated changes to the judiciary even before this case. Three years prior, in 1262, the sultan had directed the chief judge to appoint three jurist-scholars from the other Sunnī schools as deputy judges: the *Hanafi* jurist ‘adr al-Dīn Muhammad b. ‘Abd al-Haqq, the Mālikī jurist Sharaf al-Dīn ‘Umar al-Subkī, and the *Hanbalī* jurist Shams al-Dīn Mu‘ammad b. Ibrāhīm.³⁷

But after the case, the sultan realized that merely deputizing judges was insufficient to curb the chief judge’s exercise of outsized power in all manner of cases.³⁸ Looking backward, it was the famed ‘Abbāsīd caliph Hārūn al-Rashīd (d. 193/809) who had first established a chief judgeship centuries earlier in Baghdad, and expanded his powers over the ordinary judges affiliated with varied regional schools.³⁹ Sultān Hārūn al-Rashīd had been operating from a position of strength.

In contrast, by Mamlūk times, the protracted Mongol invasions and other internal problems in administration created a situation of weak government and strong judges. The jurists and judges did more to bind the Muslims together than did a strong centralized government; they were seen as the legitimate exponents of Islamic law; and the chief judge had gained enormous power and popular support as a result. In fact, there wasn’t tremendous separation between epistemic power of the judge and the force-backed power of the sultān’s cabinet: before the Mamlūks, chief judge Ibn Bint al-A‘azz exerted great power as both vizier

37. *Id.* at 53 (citing MAQRĪZĪ, KITĀB AL-SULŪK, *supra* note 29, 1:472; IBN ‘ABD AL-ZĀHIR, AL-RAW‘ AL-ZĀHIR 182 (‘Abd al-‘Azīz al-Khuwaytir ed., Riyadh 1976); Nielsen, *supra* note 27, at 169 (citing IBN KATHĪR, BIDĀYA, 13:234; MAQRĪZĪ, SULŪK, 1:472, and noting that the Hanbalīs—given their small numbers—were not full deputies but instead were charged with overseeing registry of contracts as *‘āqids*).

38. Jackson, *supra* note 19, at 53.

39. Regional schools gave way to official schools, that—like the ‘anafī school did starting in the ninth century—received state patronage. *See, e.g.*, NURIT TSAFRIR, THE HISTORY OF AN ISLAMIC SCHOOL OF LAW: THE EARLY SPREAD OF ‘ANAFISM (ILSP/Harvard Univ. Press 2004); Maribel Fierro, *Proto-Malikis, Malikis, and Reformed Malikis in Al-Andalus*, in THE ISLAMIC SCHOOL OF LAW: EVOLUTION, DEVOLUTION, AND PROGRESS 57–76 (ILSP/Harvard Univ. Press, 2005). For an earlier history of more varied law schools, see MATHIEU TILLIER, L’INVENTION DU CADĪ: LA JUSTICE DES MUSULMANS, DES JUIFS ET DES CHRÉTIENS AUX PREMIERS SIÈCLES DE L’ISLAM (Publications de la Sorbonne 2017); MATHIEU TILLIER, LES CADIS D’IRAQ ET L’ÉTAT ABBASSIDE (132/750–334/945) (Institut Français du Proche-Orient 2009). Less studied is the extent to which judges developed and applied regional precedents that sometimes differed in application from the more general laws of local jurists. For a preliminary study in the context of property law, see Intisar A. Rabb, *The Curious Case of Bughaybiḡha, 661–883: Land and Leadership in Early Islamic Societies*, in JUSTICE AND LEADERSHIP IN EARLY ISLAMIC COURTS 23–46 (Intisar A. Rabb & Abigail Krasner Balbale eds., ILSP/Harvard Univ. Press 2017).

and chief judge under the prior (Ayyūbid) regime.⁴⁰ So jurists generally, and this judge and jurist in particular, had enormous power and legitimacy alike.

So by the time our case unfolds in 1265, Sultān Baybars was already primed to make reforms that would weaken the power of the chief judge. Thus it is clear that the case was only a proximate cause or pretext for a desired set of reforms. In its aftermath, the sultan in fact imposed three significant changes on the structure of the judiciary. I have already mentioned the first: he elevated the deputies to chief judges so that a representative from each school presided alongside the Shāfiʿī chief judge.⁴¹ Second, the sultan required judges to impose the majority opinion of their schools, divergence from which was grounds for removal from the judgeship.⁴² Third, he used the courts, as did judges themselves and ordinary petitioners, to secure desired outcomes by directing certain cases to school-affiliated courts with legal norms in line with the petitioners' own preferences.⁴³

C. *The Significance and Aftermath*

Sultān Baybars's reform of the judiciary is the most debated episode in the history of courts in the Islamic world since the 'Abbāsīd caliph Hārūn al-Rashīd first introduced the office of chief judge almost five hundred years earlier. Medieval sources mark the event as momentous, with chroniclers from that period offering a number of explanations. Some suggest that the sultān's desire to overturn the case of the disputing heirs was the sole cause of the reform, and others point to factors involving migration, school partisanship, and foreign wars. Contemporary legal historians have offered their own interpretations of these sources, assessing the explicit claims in the medieval sources against evidence of the major political, social, and legal developments of the time. But all told, legal historians in this field agree that domestic-facing factors prompted a need for the judicial restructuring in ways that altered the balance of power between various institutions, and formed a new symbiosis between them. They focus on the institutions themselves and the ways in which the legal schools expanded or contracted in interactions with one another and with the sultan's government. But none have paid close attention to the legal canons that emerged as a new genre precisely that time, as a result of the reform. That is the untold—but all important for the history of interpretation—story of the aftermath of the reform, to which we will not turn.

40. Nielsen, *supra* note 27, at 172.

41. Jackson, *supra* note 19, at 53.

42. Yossef Rapoport, *Legal Diversity in the Age of Taqlīd: The Four Chief Qādis under the Mamlūks*, 10 ISLAMIC L. & SOC'Y 210, 216 (2003).

43. *Id.* at 221–26.

III. COURTS AND CANONS IN ORDINARY TRIBUNALS, 1265–1350

One way of understanding the effects of the judicial reform on Mamlūk-era Islamic law is to examine its effects on the operation of the courts. In the wake of the reform, the courts saw *new roles for the chief judges* and their aides, they saw significant changes to the *scope of their own jurisdiction* in various subject areas (think: tax courts for some schools, and family courts for others), and—importantly—they orchestrated tremendous changes in Islamic law as represented in the creation and use of an entirely new genre of legal literature: *collections of legal canons*.

A. *Judicial Roles: The Chief and his Aides*1. *The Chief Judge: Limited Judicial Powers*

As for judicial role, the chief judges of each school enjoyed powers to define jurisdiction and legal doctrine in their respective schools of law.⁴⁴ Sulṭān Baybars's new quadruple judiciary had achieved its main aim: reducing the Shāfi'ī chief qāḍī's outsized power and tasking judges with a more straightforward administration of Islamic law.⁴⁵ Prior to the reform, the Shāfi'ī chief judge was able to review other judges' decisions, all of whom were technically his deputies, through a process of registration (*tasjīl*), before entering them into the judicial register (*diwān al-hukm*) for enforcement.⁴⁶ That he could use registration to confirm or reject other judges' rulings was typical of an earlier, hierarchical judiciary of one chief and many deputies—the latter operating with derivative authority from the former.⁴⁷ Moreover, with his prior positions spanning executive and judicial arenas, the Shāfi'ī chief judge had presided over a large volume of cases, and could readily dismiss any deputy judge who had not been appointed by the sultan directly.⁴⁸

The reform's elevation of deputy judges to chiefs from the three other schools, appointed directly by the sultan, brought about a system of two

44. JOSEPH H. ESCOVITZ, *THE OFFICE OF QĀḌĪ AL-QU'ĀT IN CAIRO UNDER THE BAHRĪ MAMLŪKS 131–72* (Klaus Schwarz Verlag 1984); see also PETRY, *supra* note 16, at 231–41.

45. ESCOVITZ, *supra* note 44, at 131.

46. Jackson, *supra* note 19, at 59–61. For a general description of early judges' preservation practices, see Wael Hallaq, *The "Qāḍī's Diwān (Sijill)" before the Ottomans*, 61 BULLETIN SCHOOL ORIENTAL & AFRICAN STUDS. 415–436 (1998) (recording a sample registration form document in the Appendix).

47. ESCOVITZ, *supra* note 44, at 61–62; Jackson, *supra* note 19.

48. ESCOVITZ, *supra* note 44, at 175 (on viziers); Jackson, *supra* note 19, at 61–63 (citing writings on *tasjīl* by Shihāb al-Dīn al-Qarāfi (d. 684/1285), Ibn al-ʿAṭṭār (d. 724/1323), Ibn Rāshid (d. ca. 731/1330), Ibn Farhūn (d. 799/1396), and an opinion in the *Fatāwā Sulṭān al-ʿUlamā' al-ʿIzz b. ʿAbd al-Salām*, by the leader of the Shāfi'ī school at the start of Mamlūk rule, affirming the position that chief judges were permitted to overrule the opinions of their deputies). Jackson notes that Hanafis such as ʿAlā' al-Dīn al-ʿarābulī (d. 844/1440) opined that a principal judge was obliged to enforce the rulings of a deputy even if it went against his own school. *Id.* at 62

types of judges for each school: multiple principals (chief judges) and deputies (ordinary judges).⁴⁹ Many came from the core of shaykhs—those who headed religio-academic institutions, especially the *madrasa*.⁵⁰ Chief judges earned the title of *shaykh al-Islām*, and it was a regular occurrence for deputies to hold titles of shaykh and judge simultaneously.⁵¹ The authority with which the deputy judges acted derived epistemically from their educational acumen and operationally from their respective chief judges, who could reserve the right to review deputies' opinions only within their own schools.⁵² The leading chief judge could no longer reject or overrule decisions that were properly formulated according to the majority opinion of each school. His docket thus shrank in number and subject matter, and his ability to dismiss judges became more limited.⁵³

More generally, the Shāfi'ī chief judge was charged with ensuring that the quadruple judiciary functioned properly, along three main axes.⁵⁴ First, he was to enforce valid judgments from all schools—which Ibn Bint al-A'azz had previously refused to do.⁵⁵ As Mamlūk-era legal historian Yossef Rapoport put it, “ironically, it was now the responsibility of the Shāfi'ī Chief Qāḍī to see to the correct observance of Mālikī or Ḥanbalī law.”⁵⁶ Second, the chief judge was to help designate—in tandem with royal decrees from the sultan—appropriate tribunals in which certain cases could be brought.⁵⁷ To better accord with executive or judicial preferences, the chief could refer cases involving certain matters to courts whose school's laws aligned with a particular executive policy or preference.⁵⁸ Third, and essential to ensuring the first two duties, the chief was to ensure adherence to royal decrees requiring that each court follow the *majority* rulings of their respective schools—given the internal diversity of opinions within each school.⁵⁹ It is this third duty, I argue, that had the

49. JACKSON, *supra* note 16, at 65.

50. See PETRY *supra* note 16, at 221 (noting that the term covered the heads of Sufi khānqāḥs and hospices as well, for which shaykhs exercised “legal responsibility for a spiritual community”). On the operation of the *madrasas*, see further JONATHAN P. BERKEY, *THE TRANSMISSION OF KNOWLEDGE IN MEDIEVAL CAIRO: A SOCIAL HISTORY OF ISLAMIC EDUCATION* (Princeton Univ. Press 1992).

51. See PETRY, *supra* note 16, at 221.

52. JACKSON, *supra* note 16, 65.

53. Rapoport, *supra* note 42, at 226.

54. *Id.* at 217.

55. JACKSON, *supra* note 16, at 145.

56. Rapoport, *supra* note 42, at 217 (also noting that: “While serving as Shāfi'ī Chief Qāḍī in Damascus, Taqī al-Dīn al-Subkī prohibited a Ḥanbalī deputy from dissolving a marriage (*faskh*) in a manner that was considered weak by the majority of Ḥanbalī jurists. Al-Subkī also refused to uphold the rulings of a deputy by the name of Ibn Bukhaykh (d. 749/1347–8), a student of Ibn Taymiyya, after the Ḥanbalī Chief Qāḍī could not confirm that Ibn Bukhaykh's judgments were in accord with established Ḥanbalī doctrine.”).

57. *Id.*

58. Examples are outlined *infra* Part III.B, notes 120–150 and accompanying text.

59. Rapoport, *supra* note 42, at 217. For a description of his other duties and of his dress, see A'MAD B. 'ALĪ AL-QALQASHANDĪ, *SELECTIONS FROM 'UBH AL-A'SHĀ* BY AL-

most far-reaching effects over the form and content of Islamic law expressed in each school: the schools came to detail or “codify” their *substantive legal doctrines* and *interpretive principles* in new works of legal canons.⁶⁰

2. *Legal Canons Definitions*

So what *are* legal canons? Legal canons are succinct statements of interpretive principles that express varied conceptions of law and its values, and they are designed to aid in applying laws to specific facts. To be sure, legal canons did not emerge after Baybars’s reform. Most of these canons existed before the Mamlūks, first announced in works of *ḥadīth*, *fatwās*, and narratives of judicial decisions, among other works of law and history. Jurists of the Mamlūk era mostly identified the legal canons from prior cases and works of law. For the first time, en masse and school-by-school, they collected them as independent works put in dialog with one another in lockstep with the dialogues on substantive law and court cases.

Now, how do Muslim jurists define legal canons?⁶¹ For them, Islamic legal canons are interpretive principles reflecting changing conceptions of Islamic law and its values, as they developed over time and space. Scholars of Islamic law, both medieval and modern, typically define these legal canons narrowly, as “*text-based principles used to apply general Islamic laws to particular cases.*”⁶² A broader notion that I have argued accounts for their sometimes extratextual origins and functional use shows canons also to be “interpretive tools [that judges and jurists use] to *construct Islamic law’s institutions . . . and to promote certain values or policies* over others.”⁶³ For example, a famous “universal” legal canon articulates a general policy—applicable to many areas of Islamic law—that the law should inflict or allow “no harm and no retaliatory infliction of harm.” Judges could use this *no harm canon* to evaluate contested individual and executive actions, against community values or individual rights, as they collectively defined

QALQASHANDI, CLERK OF THE MAMLUK COURT: EGYPT: “SEATS OF GOVERNMENT” AND “REGULATIONS OF THE KINGDOM”, FROM EARLY ISLAM TO THE MAMLUKS 153–55 (Heba El-Toudy & Tāriq Jalāl ‘Abd al-Hamīd eds., Routledge 2017).

60. For further discussion of legal canons works, see *infra* notes 127–32 and accompanying text.

61. This Section draws on my lengthier introduction to legal canons in Intisar A. Rabb, *Interpreting Islamic Law through Legal Canons*, in ROUTLEDGE HANDBOOK OF ISLAMIC LAW 221–54 (Khaled Abou El Fadl, Ahmad Atif Ahmad, & Said Fares Hassan eds., Routledge 2019).

62. See, e.g., YA‘QUB B. ‘ABD AL-WAHHĀB BĀ ‘USAYN, AL-QAWĀ‘ID, AL-FIQHIYYA: AL-MABĀDI‘, AL-MUQAWWIMĀT, AL-MA‘ĀDIR, AL-DALĪLIYYA, AL-TĀ‘AWWUR 22 (Maktabat al-Rushd 1998) (*al-amr al-kullī yan‘abiq ‘alayhi juz‘iyyāt kathīra tufham a‘kāmuḥā minhā* (quoting Tāj al-Dīn Ibn al-Subkī)). Cf. NECMETTIN KIZILKAYA, LEGAL MAXIMS IN ISLAMIC LAW 15-25 (Brill 2021) (collecting and evaluating definitions of legal canons); Wolfhart Heinrichs, *Qawā‘id as a Genre of Legal Literature*, in STUDIES IN ISLAMIC LEGAL THEORY (Bernard Weiss ed., Brill 2002).

63. Rabb, *supra* note 61, at 221.

them, violation of which would constitute “harm.”⁶⁴ A contract law norm stipulates that “Muslims must honor contractual conditions.” This *contractual condition canon* similarly announced the value that the collective juristic community placed on commerce and private contract.⁶⁵ A famous and widespread canon of criminal law, which I have elaborated elsewhere at length, requires judges to “avoid criminal punishments in cases of doubt.”⁶⁶ Jurists and judges alike defined the ambit of this *doubt canon* to signal values in presuming innocence, requiring clear statements of criminal laws before punishment (in analyses resembling the modern legality principle) and narrowing the institutional authority to legitimately define crime and punishment as they sought to stymie excessive punishment in the ordinary courts in light of the rampant punishment in executive courts.⁶⁷

Numbering in the thousands (or tens of thousands?), these and other Islamic legal canons arose and were implemented during Islam’s founding period, long before jurists began recording them in separate treatises under the new Mamlūk system.⁶⁸ Founding period legal canons spanned the gamut of questions of Islamic law, as they continued to do, and they appeared in a wide range of sources for Islamic law and judicial practice: works of substantive law, legal theory, judicial procedure manuals, biographical dictionaries, historical chronicles, literary works, and more.⁶⁹

All in all, medieval Muslim jurists viewed these canons, I argue, as a kind of *interpretive precedent*: a shorthand for persuasive statements of law that did not need the backing of or grounding in a specific text or single case to be authoritative. They were authoritative because they encapsulated the collective wisdom of many cases and controversies over time. Importantly, Mamlūk scholars after the reform collected these canons school-by-school, and they saw in these canons tools that could play a new pedagogical and judicial function under the new structure following the

64. See MECELLE [OTTOMAN CIVIL CODE] OF 1869, ART. 29 (*Lā ‘arar wa-lā dirār*); see also MUHAMMAD ŠIDQĪ B. A‘MAD BÜRNÜ, I MAWSÜ‘AT AL-QAWĀ‘ID AL-FIQHIYYA 32 (Dār al-Risāla al-‘Ālamiyya, 3rd ed. 2015); NĀ‘IR MAKĀRIM-ŠHĪRĀZĪ, AL-QAWĀ‘ID AL-FIQHIYYA 16, 25 (Madrasat al-Imām ‘Alī ibn Abī Ṭālib 2005); ‘UBĤĪ MAḤMAŠĀNĪ, FALSAFAT AL-TASHRĪ‘ 237–39 (Dār al-‘Ilm lil-Malāyīn, 5th ed. 1980). Of many monographs on this canons, see, e.g., MUHAMMAD BĀQIR AL-ŠADR, LĀ ḌARAR WA-LĀ ḌIRĀR (Dār al-Šādiqīn 2000); ĪHĀB ḤAMDĪ GHAYTH, AL-QĀ‘IDA AL-DHAHABIYYA FĪ AL-MU‘ĀMALĀT AL-ISLĀMIYYA: LĀ ḌARAR WA-LĀ ḌIRĀR ‘INDA AL-ḤĀFIẒ IBN RAJAB AL-ḤANBALĪ (Dār al-Kitāb al-‘Arabī 1990).

65. See BÜRNÜ, *supra* note 64.

66. See RABB, *supra* note 21, at 4 and *passim*.

67. See *id.* at 185–228.

68. See *id.*

69. See Intisar A. Rabb & Bilal Orfali, *Islamic Law in Literature: Some Contributions from Qādi Tanīkhī*, in TRADITION AND RECEPTION IN ARABIC LITERATURE: ESSAYS DEDICATED TO ANDRAS HAMORI 189–205 (Margaret Larkin & Jocelyn Sharlet eds., Harrassowitz 2019).

reforms. Through citation and use of these canons, jurists and judges subtly informed the laws expressed in each school and in the courts.

3. *Types of Canons*

In attempt to cover both medieval and modern internal approaches as well as historical-interpretive approaches, my own work outlines a scheme of five categories of legal canons: substantive, interpretive, procedural, governance, and structural canons.⁷⁰ The first two categories track the classical, internal divisions of substantive and interpretive canons. *Substantive canons* often restate basic general principles of Islam's substantive law (*fiqh*), and further provide guidance about the majority rule within a particular school on varied questions of law that are typically disputed even within a single school.⁷¹ As labeled by medieval and subsequent jurists, substantive canons comprise the universal, general, and specific canons.⁷² *Universal legal canons* are the five principles on which all schools agree, both Sunnī and Shi'ī, to provide guide posts for any substantive law question:

1. Harm is to be removed: *al-ḍarar yuzāl*.
2. Custom is legally authoritative: *al-ʿāda muḥakkama*.
3. Hardship requires accommodation [of strict legal rules]: *al-mashaqqa tajlibu al-taysīr*.
4. Certainty is not superseded by doubt: *al-yaqīn lā yazūlu bi'l-shakk*.
5. Acts are to be evaluated according to their aims: *al-umūr bi-maqāṣidihā*.⁷³

General legal canons form the bulk of the substantive canons category, and they often restate settled norms in areas as disparate as ritual law, commercial law, and criminal law. A general canon can restate a “declaratory” legal ruling, which speaks to the validity of a transaction or status relationship.⁷⁴ An example is the commercial law canon that stipulates

70. See RABB, *supra* note 21.

71. See Rabb, *supra* note 61, at 228–30.

72. See *id.* at 228.

73. See, e.g., MUHAMMAD AL-HUSAYN ĀL KĀSHIF AL-GHITĀ', 1 TAHRĪR AL-MAJALLA 129–32, 139–42, 153–6 (Muḥammad Mahdī al-Āṣifī & Muḥammad al-Sā'idī eds., al-Majma' al-Ālamī lil-Taqrīb Bayna al-Madhāhib al-Islāmiyya 2001–2) (providing critical commentary on Mecelle articles 2, 4, 17, 19 and 36); ABŪ 'ABD ALLĀH MUHAMMAD b. MUHAMMAD AL-MAQQARĪ, QAWĀ'ID 198–212 (Ahmad b. 'Abd Allāh b. Hamīd ed., Jāmi'at Umm al-Qurā 1980); IBN NUJAYM, 1 AL-ASHBĀH WA'L-NAZĀ'IR 17–19 (Muhammad Muṭfī al-hāfiz ed. 1983); AL-FĀDIL AL-MIQDĀD AL-SUYŪRĪ, NAḌAD AL-QAWĀ'ID AL-FIQHIYYA 'ALĀ MADHHAB AL-IMĀMIYYA 90–114 ('Abd al-Laṭīf al-Kūhkamarī Mahmūd al-Mar'ashī ed., Maktabat Āyat Allāh al-'Uzmā al-Mar'ashī 1982–3). For other divisions, see, e.g., JALĀL AL-DĪN AL-SUYŪTĪ, AL-ASHBĀH WA'L-NAZĀ'IR 35, 201, 299, 337 (Muhammad al-Mu'taṣim billāh al-Baghdādī ed., Dār al-Kitāb al-'Arabī 1998); MAKĀRIM-SHĪRĀZĪ, *supra* note 64, 1:26–7 (outlining five categories).

74. For the distinction between declaratory legal rulings (*ahkām waḍ'īyya*) and injunctive legal rulings (*ahkām taklīfiyya*), see ROY P. MOTTAHEDEH, LESSONS IN

that “a defective condition does not void a contract.” This canon helps judges and jurists opine on contracts as if they are complete, even if there is doubt about whether each contractual element is fulfilled.⁷⁵ Or, a general canon can restate an “injunctive” law, which details the obligation, prohibition, or some other normative status for a particular act—namely, on a scale of obligatory, encouraged, permissible (legal), discouraged, or prohibited (illegal). For example, an *intoxicant canon* states that “every intoxicant is prohibited.”⁷⁶ As the Qurʿān only explicitly prohibits wine, this canon guides a judge or jurist in determining the legal status of non-wine intoxicants and might lead them to the conclusion—as it did for all but early Ḥanafī jurists—that a beer-like drink called *nabīdh* is prohibited.⁷⁷ Finally for this substantive canons group, *specific legal canons* (also referred to as *ḍawābīṭ*) are subject-specific restatements and presumptions of majority positions that qualify the general canons. For example, a *paternity canon* specifies that, in paternity disputes, “the child belongs to the marital bed.”⁷⁸ To be sure, Islamic family laws provide that sexual intimacy is legal only within the confines of marriage, and Islamic criminal law lays out penalties for fornication and adultery. Yet, there are times when evidence of either will be lacking or for which one party will raise some doubt. In such instances, this canon operates as a presumption that helps judges resolve paternity claims with respect to the known marital relationship of the mother of the child, notwithstanding any dispute.⁷⁹

Interpretive canons guide jurists on how to parse foundational texts when devising legal rulings, and they help both judges and jurists interpret the law and the facts when issuing opinions on novel legal questions in response to individual petitions or court cases. This category includes textual canons, source-preference canons, and extrinsic-source canons.⁸⁰ *Textual canons* instruct judges and jurists on how to interpret the Qurʿān,

ISLAMIC JURISPRUDENCE (English Translation of *Duʿīs fī ʿilm al-uṣūl* by Muḥammad Bāqir Aṣ-Ṣadr) (Oneworld 2003).

75. See, e.g., MUḤAMMAD ḤASAN AL-BUJNŪRDĪ, 4 AL-QAWĀʿID AL-FIQHIYYA 189 (Mahdī al-Mīhrīzī & Muḥammad Ḥusayn al-Dirāyṭī eds., Dalīl-i Mā 2003–4) (*al-shart al-fāsid laysa bi-muḥṣid lil-aqd*).

76. See, e.g., BŪRNŪ, *supra* note 64, at 38 (*kull muskir ḥarām*). Cf. BUJNŪRDĪ, *supra* note 75, at 5:307 (*kull muskir mā ʿi bi ʿ l-aṣāla fa-huwa najis*).

77. See RABB, *supra* note 21; NAJAM HAIDER, THE ORIGINS OF THE SHĪʿA: IDENTITY, RITUAL, AND SACRED SPACE IN EIGHTH-CENTURY KŪFA 139–141 (Cambridge Univ. Press 2011) (discussing *nabīdh* and other intoxicating substances).

78. See, e.g., Elizabeth Urban, *The Identity Crisis of Abū Bakra: Mawla of the Prophet, or Polemical Tool*, in THE LINEAMENTS OF ISLAM: STUDIES IN HONOR OF FRED MCGRAW DONNER 121–149 (Paul Cobb ed., Brill 2012); Uri Rubin, “Al-Walad li-l-Firāsh”: On the Islamic Campaign against “Zinā,” 78 STUDIA ISLAMICA 5 (1993). For further references to and discussion of this “paternity canon,” see RABB, *supra* note 21, at 119 nn. 54–55, 353–54 and accompanying text.

79. Almost a dozen scholars have commented on the origins and applications of this canon—most recently in HARALD MOTZKI, HADĪTH: ORIGINS AND DEVELOPMENTS, xiv (Ashgate 2004). For other references see Rabb, *supra* note 61, at 248–49 n.74.

80. See Rabb, *supra* note 61, at 231–34.

hadīth, and other texts from Islam's early founding period. For example, the *literal meaning canon* simply instructs interpreters to “adopt the literal (or ordinary) meaning over the figurative unless there is an indication to do otherwise.”⁸¹ *Source-preference canons* help judges and jurists choose which of multiple, conflicting sources that address the same legal question to prioritize. For instance, one canon instructs on privileging “foundational texts over interpretive rules” and another places “priority on custom over contract.”⁸² Each of these canons directs interpreters to the source that they should consider to the exclusion of the conflicting source. *Extrinsic-source canons* refer to extratextual sources—that is, general presumptions and tie-breakers—that help jurists avoid absurd results or no results at all might otherwise arise from applying the plain texts literally.⁸³ These sorts of canons give form to the equitable principles that appears in Sunnī jurisprudential manuals, such as the consideration of public interest, equity, or custom (*maṣlaḥa*, *istiḥsān*, and *ʿurf*, respectively). Consider, for example, the canon stipulating that there is “no bar on changes in legal rulings with changes in the times,” which is meant to allow jurists to update the law to accommodate social-cultural or structural-economic changes that typically fall outside of the four corners of legal analysis, all things being equal.⁸⁴

Related to, and sometimes conflated in the sources with, the first two categories are *procedural canons*. These canons are well-recognized principles of judicial administration and cover canons of evidence, judicial procedure, and judicial conduct.⁸⁵ The quintessential *evidentiary canon* that governed proceedings in all ordinary courts stipulates that “the burden of proof is on the claimant and the respondent may swear an oath of denial.”⁸⁶ Some *judicial procedure* canons restated norms in an era in which matters of personal status—which posed essential jurisdictional and substantive law questions in medieval Islamic courts—affected evidence and outcomes. Generally read as limiting the application of non-Muslim testimony, one such canon provides that “non-Muslim testimony is accepted for cases only involving non-Muslims.”⁸⁷ *Judicial conduct canons*, perhaps the least developed of this group, regulate the behavior of judges and specify, for example, when a judge may be required to consult an expert

81. See, e.g., TASHKIRĪ ET AL., *supra* note 58, at 28–31.

82. See, e.g., BÜRNÜ, *supra* note 64, at 39; MAHMASANI, *supra* note 64, at 225–26; TASHKIRĪ ET AL., *supra* note 58, at 425–75.

83. On presumptions and tiebreakers, see generally Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661 (2010); ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 14, at 153.

84. See MASHMASĀNĪ, *supra* note 64, at 233; BUJNŪRDĪ, *supra* note 75, at 9.

85. Rabb, *supra* note 61, at 234–36.

86. See MECELLE, *supra* note 64, art. 76 (*al-bayyina ʿalā al-muddaʿi waʿl-yamīn ʿalā man ankar*).

87. See, e.g., MUḤAMMAD B. KHALAF B. HAYYĀN WAKĪʿ, *AKHBĀR AL-QUʿĀT* 481 (Saʿīd Muḥammad al-Lahhām ed., ʿĀlam al-Kutub 2001).

jurist on a complex case or when a judge can be removed from his position “for cause.”⁸⁸

More than the others, the last two categories of *governance canons* and *structural canons* explicitly reflect the varied mechanisms deployed for regulating or updating relations between institutions of law and governance. *Governance canons* apportioned institutional responsibilities among the principal actors in societies like that of the Mamlūks when there was no known constitution or law to do so definitively.⁸⁹ One clear example is a canon that places jurisdiction in the executive tribunals to resolve contested issues of criminal law: “it is for the imām to determine the extent of discretionary penalties in proportion to the severity of the crime.”⁹⁰ Another canon provides a default rule that allocates private wealth to the public-executive treasury, for inheritance cases in which a judge can find no will: “whoever dies with no will and no heirs [i.e., intestate], his money goes to the public.”⁹¹ For their part, *structural canons* provided vehicles for judges to deploy interpretation to allocate judicial power and to affirmatively frame the boundaries of the juristic-religious as distinct from political institutions. A prime example is the *finality canon*—which stipulates that “a decision based on a judicial interpretation cannot be reversed simply by a different interpretation.”⁹² This canon is structural because judges use it to pronounce that a court that has opined on a case, as a structural matter in a regime of multiple courts, has the final say.

Without a top-down mandate recognizing or requiring them, these legal canons nevertheless played a tremendous role in Islamic legal interpretation, common-law style, since its inception in the seventh century.⁹³ From Islam’s founding period through the tenth century, the earliest available sources show that judges and jurists regularly cited and used legal canons in decision making, even when they could not trace them back to Islam’s texts.⁹⁴ In fact, so insistent and assured of the validity of these legal canons were the jurists and judges using them that they sometimes converted them *into* foundational texts—even where clear evidence was lacking, and sometimes to the chagrin of their more textualist peers. That is, with the ascendancy of textualism as *the* accepted method in the tenth century, many scholars later attributed a prophetic source to core

88. See *infra* note 122 and accompanying text (reporting Ibn Farḥūn’s stipulations for judicial conduct).

89. See Rabb, *supra* note 61, at 236–37.

90. See BÜRNÜ, *supra* note 64, at 1:52–53.

91. See *id.* at 1:52.

92. See MECELLE, *supra* note 64, art. 16 (*al-ijtihād tā yunqad bi-mithlih*).

93. One is reminded of Richard Posner’s observation to his opening salvo in the modern U.S. canon wars; namely, that the canons are here to stay. See Posner, *supra* note 1, at 801. Cf. John F. Manning, *Legal Realism and the Canons’ Revival*, 5 GREEN BAG 2d 283-295 (2002).

94. See Rabb, *supra* note 61, at 227.

legal canons.⁹⁵ To be sure, some legal canons are reported in *ḥadīth* collections of prophetic statements and in Qurʿānic verses.⁹⁶ But they appear much more widely in *fiqh* treatises, historical chronicles, and other sources of Islam's first three centuries in ways show their ubiquity in interpreting Islamic law without always (much less often, in the earliest periods) referring to a textual source.⁹⁷

B. *Origins of Legal Canons as Judicial Norms: In Madrasas and Courts*

Medieval Muslim jurists seem to have first recognized a need for or value in systematizing and examining the legal canons independently in the tenth and eleventh centuries in Baghdad, Central Asia, and Andalusia—such that it would be inaccurate to suggest that the impetus to systematize legal canons first occurred to Mamlūk jurists. The earlier scholars operated in an era of a different sort of systematization: of substantive law, jurisprudence, and for that matter, theology, grammar, and literary anthology. Concerning legal canons during that period, they wrote introductory works about them in fits and starts in most of the Sunnī schools.⁹⁸ But with the changes to the legal system under the Mamlūks—the judicial reform and entrenchment then systematization of four schools of law within it—legal canons as a separate and important genre took on a life of their own.

After the judicial reform, the literature on legal canons expanded exponentially to meet the new needs of judges and jurists in the new Mamlūk judiciary. With the structural changes in 663/1265, the “regime of legal pluralism” had the potential for descending into chaos—that is, if judges from one legal school were to operate without respect to their counterparts in others and had no methods for handling conflicts of laws.⁹⁹ Judges needed guidance on the substantive laws and procedures applicable in their own courts, as well as that of other schools. This need spurred leading jurists to write voluminous works setting out to record

95. The dispute about textualism and method accompanied the authenticity-interrogation and systematization of works of *ḥadīth*, substantive law (*fiqh*), and jurisprudence (*u'ūl al-fiqh*). RABB, *supra* note 21, at 56–59, 243–57. For further discussion of their varied origins, see Rabb, *supra* note 61, at 222–27.

96. Rabb, *supra* note 61, at 222.

97. *Id.* at 222; RABB, *supra* note 21, at 48–59.

98. Pre-Mamlūk collections include ABŪ AL-HASAN AL-KARKHĪ (d. 340/952), *USŪL*, published with ʿUBAYD ALLĀH B. ʿUMAR AL-DABŪSĪ (d. 430/1039), *TAʿSĪS AL-NAZAR* (Dār Ibn Zaydun & Cairo: Maktaba al-Kulliyat al-Azhariyya, n.d.); ʿABD AL-WAHHĀB AL-BAGHDĀDĪ (d. 476/1083), *AL-MAJMUʿ WAʿL-FURŪQ* [OR, *AL-FURŪQ AL-FIQHIYYA*] (Jalāl ʿAlī al-Qadhdhāfi al-Juhanī ed., Dār al-Buḥūth 2003); and IBN AL-LAḤḤĀM AL-BAʿLĪ (d. before 510/1116), *QAWĀʿID* (ʿAbd al-Karīm al-Fāḍilī ed., al-Maktaba al-ʿAsriyya 1998), along with a few other collections that are reported in early bibliographical sources but no longer extant; see also RABB, *supra* note 21, at 348–57, 243–57; Rabb, *supra* note 61, at 227.

99. Talal Al-Azem, *A Mamluk Handbook for Judges and the Doctrine of Legal Consequences* (*Al-Mūgab*), 63 *BULLETIN D'ÉTUDES ORIENTALES* 205 (2015).

debates and ultimately to restate applicable laws: especially new manuals of substantive law, judicial practice, and constitutional theory of the type that Shihāb al-Dīn al-Qarāfi had penned. Along the same lines, and even more urgently, jurists of that period also inaugurated a new genre of legal canons literature: as restatements of norms that had arisen in the judicial manuals or in courts. These canons provided instruction for jurists-in-training and guidance to judges on the proverbial bench needing to both implement majority-rule intra-school norms and operate with respect to inter-school norms in the Mamlūk system of legal pluralism.¹⁰⁰

1. *Leading Schools: Shāfi'ī and Mālikī Innovation*

I'll focus on two schools to illustrate the life they took on. To illustrate the life that some of these canons took on, this section focuses on the two schools that led the charge in legal canons-oriented interpretation in a new regime of legal pluralism. Shāfi'ī contributions to the new wave of legal canons literature was by far the most extensive of any other legal school during the Mamlūk period—which stands to reason given their place of prominence in the *madrasas* and judiciary alike. Jurists within that school produced no less than six prominent works of legal canons that came to be of enduring relevance to Islamic law, even beyond the Shāfi'ī school.¹⁰¹

Unsurprisingly too, it was 'Izz al-Dīn b. 'Abd al-Salām—the influential jurist, one-time Ayyūbid chief judge, and teacher of the first Mamlūk chief judge—who helped lay the groundwork. Although Shāfi'ī use of legal canons had long preceded him,¹⁰² his is the first known, extant work of legal canons of his school: *Qawā'id aḥkām fi maṣāliḥ al-anām* (*Legal Canons on Rulings in the Best Interests of the People*), also known as *al-Qawā'id al-kubrā* (*The Larger Work on Legal Canons*) in contrast to his shorter work on the same theme, *al-Qawā'id al-ṣuḡrā*.¹⁰³ In summary terms, his work col-

100. *Id.* at 205. On Qarāfi's works, including an analysis and translation of his work on "constitutional jurisprudence," by Sherman Jackson and Mohammad Fadel, respectively, see *infra* notes 107–113.

101. These core works include al-'Izz b. 'Abd al-Salām, *al-Qawā'id al-kubrā*; Ibn Wakīl (d. 716/1317), *al-Ashbāḥ wa'l-nazā'ir*; Ibn al-'Alā' (d. 761/1317) (attempting to systematize the work by Ibn Wakīl); Tāj al-Dīn al-Subkī (d. 771/1370), *al-Ashbāḥ wa'l-nazā'ir*; Zarkashī (d. 794/1392), *al-Manthūr fi tartīb al-qawā'id al-fiqhiyya*; and Suyūfī (d. 911/1505), *al-Ashbāḥ wa'l-nazā'ir*.

102. Although Shāfi'ī himself had included legal canons in his *fiqh* treatises, the *Umm* and the *Risāla* (see RABB, *supra* note 21, at 52–53), the first extant collections related to legal canons seems to be Shihāb al-Dīn Maḥmūd b. Aḥmad al-Zanjānī (d. 656/1258–9)'s *Kitāb Takhrij al-furū' 'alā al-uṣūl*—which might be counted both as a work of “legal distinctions” and as a work of legal canons because he draws connections between *fiqh* rulings (*furū'*) or particular cases (*juz' iyyāt*) and their governing principles in the *uṣūl*, *dawābiṭ* and *qawā'id* literature to define differences between the Ḥanafī and Shāfi'ī madhhabs. See BÜRNÜ, *supra* note 64, at 1:105.

103. For more on his life and writings, see Mariam Sheibani, *Islamic Law in an Age of Crisis and Consolidation: 'Izz al-Dīn Ibn 'Abd al-Salām and the Ethical Turn in Medieval*

lected legal canons under the headline of a single principle: that all Islamic laws are “legislated” for the best interests of the people and to avoid harm (*jalb al-masālih wa-dār’ al-mafāsīd*).¹⁰⁴ On his own account, all of *sharī‘a*, in the most expansive reading of Islamic law, is reducible to this formulation. His purpose in writing the book was to clarify those interests as they manifest in various laws to facilitate their execution, as well as to provide guidance on handling acts of disobedience or violations of the law.¹⁰⁵ For him, were people to closely to examine Qur’ānic verses, for example, they would conclude that any command is an encouragement to an act or outcome that accrues to the benefit of the people, or a warning against any act that would be to their detriment.¹⁰⁶ He thus attempted through this work to define the scope of human or public interest (*maṣlaḥa*), typically a marginal or extralegal topic typically regarded as within executive authority, to be instead squarely within the jurists’ purview to define Islamic law. He also noted a hierarchy of legal canons by which this public interest could be achieved best.¹⁰⁷ Notably, he wrote before or during Sulṭān Baybars’s takeover of power and the judicial reform; and his appeal to this principle seemed an elevation of *sharī‘a* above politics: he made no mention of the shifting political winds at the time. Nevertheless, he found staunch followers in his students who would expand the work, as they sought to provide a basis for the legitimacy of this expanded range of Islamic law in a newly restructured system—regardless whether explicitly mentioned—on public-interest grounds that the jurists could now assert the prerogative to define. If Ibn ‘Abd al-Salām sought to write a manual that set a standard for adjudication, he had a ready student in Ibn Bint al-A‘azz to enforce it—taking it from scholarly treatise to judicial opinion.¹⁰⁸

Ibn ‘Abd al-Salām’s most immediate influence, aside from Chief Judge Ibn Bint al-A‘azz (who left no written record) was the prominent Mālikī scholar and his student Shihāb al-Dīn al-Qarāfi (d. 684/1285). Together with students from diverse schools of law, Qarāfi had studied under Ibn ‘Abd al-Salām at the prestigious Ṣālihiyya Madrasa in Cairo, as had his teacher before him, the Mālikī scholar Sharīf al-Karakī (d. 688 or

Islamic Law 212–337 (Dec. 2018) (unpublished Ph.D. dissertation) (on file with the University of Chicago).

104. IBN ‘ABD AL-SALĀM, *AL-QAWĀ’ID AL-KUBRĀ [AKA QAWĀ’ID AL-AḤKĀM FĪ MAṢĀLIH AL-ANĀM]* (Nazīh Kamāl Hammād & ‘Uthmān Jumu‘a Dumayriyya eds., Dār al-Qalam 2000), *passim*. For further discussion, see BURNŪ, *supra* note 64, at 105; MAQQARĪ, *AL-IQAWĀ’ID* 134 (Aḥmad b. ‘Abd Allāh b. Hamīd ed., Jāmi‘at Umm al-Qurā 1980) (editor’s notes).

105. IBN ‘ABD AL-SALĀM, *AL-QAWĀ’ID AL-KUBRĀ*, *supra* note 104, at 14.

106. *Id.*

107. See Mariam Sheibani, *Innovation, Influence, and Borrowing in Mamluk-Era Legal Maxim Collections*, 140 J. AM. ORIENTAL SOC’Y, 927, 935 (2020).

108. Mamlūk chroniclers point to this jurist as responsible for appointment of his student, the judge—either by requesting the appointment from Baybars or by responding to the sultān’s consultation to suggest it. JACKSON, *supra* note 16, at 66.

689/1290–91).¹⁰⁹ Qarāfi himself had never served as judge, even though the Ṣālihiyya Madrasa was a “feeder” school for the judiciary—perhaps because he was preoccupied more with teaching and writing than judging, or perhaps because he lacked the political acumen to secure a judgeship.¹¹⁰ Indeed, he left a significant written legacy. Qarāfi wrote the book *Anwār al-burūq fī anwāʾ al-furūq*, more commonly referred to as *Furūq* (“Legal Distinctions”), as a legal canons treatise that came in response to and with heavy reliance on Ibn ‘Abd al-Salām’s work.¹¹¹ He wrote that treatise following completion of his two major works that laid the groundwork for the legal canons book. The first was his take on institutional relations and legal authority, his statement of “constitutional jurisprudence,” *al-Ihkām fī tamyiz al-fatāwāʾ an al-ahkām*. Published in the midst of Baybars’s judicial reforms, in it, he attempted to detail the scope of legitimate authority for issuing judicial decisions and for the executive or discretionary orders issued by sultans and their deputies. The specific impetus for the book was Ibn Bint al-A‘azz’s exclusionary policies, and Qarāfi’s work may well have guided the “corporate” tenor of the legal schools’ subject-matter jurisdiction that characterized the period following the judicial reform.¹¹² The second book was his magnum opus on all aspects of Mālik substantive law, *al-Dhakhīra fī furūʾ al-Mālikiyya*.¹¹³ He saw his work on legal canons, *Furūq*, as an extension of his previous two major works and as a way to facilitate the projects of reading and interpreting Islamic law.

In his introduction to *Furūq*, Qarāfi explains that he incorporated the legal canons peppered throughout his *Dhakhīra*, and organized them to better aid the jurist or judge approaching interpretive questions. Whereas the legal canons before had been “scattered across the many chapters on substantive law (*fiqh*), [in the *Furūq*] each legal canon [has] its own chapter because individual rulings (*furūʾ*) are based on them.”¹¹⁴ It “occurred to him,” he says, almost as if by coincidence and as if he did not notice that his teacher Ibn ‘Abd al-Salām had done similarly, to collect the canons into a single work, provide a summary and explanation of

109. For his biography including the extent of his tutelage under Shāfi‘is, see JACKSON, *supra* note 16, at 5–9; see also Sheibani, *supra* note 107, at 933.

110. JACKSON, *supra* note 16, at 14–15.

111. Qarāfi gave his book three alternative names: *Anwār al-burūq fī anwāʾ al-furūq*, *Kitāb al-Anwār wa l-anwāʾ*, and *al-Qawāʾid al-sunniyya fī al-asrār al-fiqhiyya*—the first of which stuck. SHIHĀB AL-DĪN AL-QARĀFĪ, *KITĀB AL-FURŪQ: ANWĀR AL-BURŪQ FĪ ANWĀʾ AL-FURŪQ* (‘Alī Jumu‘a & Muḥammad Aḥmad Sirāj eds., Dār al-Salām 2001), at 11. For a detailed comparison of Qarāfi’s borrowing, see Sheibani, *supra* note 107, at 933–34.

112. See JACKSON, *supra* note 16, at xix–xxi, xxvi, 12–16.

113. For a discussion of his two prior works, see QARĀFĪ, *FURŪQ*, *supra* note 111, at 8, 10. On the *Tamyiz*, see JACKSON, *supra* note 16, at 16–19; MOHAMMAD H. FADEL, *CRITERION FOR DISTINGUISHING LEGAL OPINIONS FROM JUDICIAL RULINGS AND THE ADMINISTRATIVE ACTS OF JUDGES AND RULERS* [translation of *Al-Ihkām fī tamyiz al-Fatāwāʾ an al-ahkām wa-tasarrafāt al-Qādi wa l-Imām* by Shihāb al-Dīn al-Qarāfi] (Yale Univ. Press 2017).

114. QARĀFĪ, *FURŪQ*, *supra* note 111, at 8.

each, and spell out the principles underlying its resultant rulings to better aid jurists or judges trying to make decisions about Islamic law in individual cases.¹¹⁵ For Qarāfi, legal canons are a core part of Islamic law's interpretive methodology—so much so that he called it the second branch of jurisprudence (*uṣūl al-fiqh*) and declared that anyone trying to interpret laws *without* the aid of legal canons would fail; they would find themselves unable to operate according to principle or to navigate seeming contradictions that could be resolved with a better understanding of Islam's interpretive foundations and tools.¹¹⁶ Accordingly, he uses the *Furūq* ("Distinctions") to collect some 584 legal canons to aid those charged with interpreting the law: the term "distinctions" merely refers to seemingly divergent cases of legal canons (*al-furūq bayna al-qawā'id*).¹¹⁷

Ibn 'Abd al-Salām's (d. 660/1262), *Qawā'id al-aḥkām fi maṣāliḥ al-anām* proved to be of enduring relevance in its own school as well.¹¹⁸ Shāfi'is following him wrote over three dozen treatises, commentaries, and summations of legal canons during the Mamlūk period alone.¹¹⁹ At least six

115. *Id.* at 8–9.

116. *Id.* at 6–7.

117. *Id.* at 11. For further discussion of definitions of legal canons and legal distinctions, see KIZILKAYA, *supra* note 56, at 25; ELIAS G. SABA, HARMONIZING SIMILARITIES (Walter de Gruyter 2019); *see also* Sheibani, *supra* note 107, at 933; Khadiga Musa, *Legal Maxims as a Genre of Islamic Law: Origins, Development, and Significance of al-Qawā'id al-Fiqhiyya*, 21 ISLAMIC L. & SOC'Y 325, 325–65 (2014).

118. Recent years have seen at least four editions of this work published: (1) IBN 'ABD AL-SALĀM, QAWĀ'ID AL-AḤKĀM FĪ MAṢĀLIḤ AL-ANĀM (Nazih Kamāl Hammād & 'Uthmān Jumu'a Damīriyya, eds., 2nd ed. 2007); (2) A 2000 edition by the same editors and press; (3) IBN 'ABD AL-SALĀM, QAWĀ'ID AL-AḤKĀM FĪ MAṢĀLIḤ AL-ANĀM (Tāhā 'Abd al-Ra'ūf Sa'd ed., 1968); (4) IBN 'ABD AL-SALĀM, QAWĀ'ID AL-AḤKĀM FĪ MAṢĀLIḤ AL-ANĀM (n.d.).

119. These works include a commentary on al-'Izz Ibn 'Abd al-Salām's work by a much later author Bulqīnī al-'Asqalānī (d. 805/1403), *Fawā'id al-ḥusāmih 'alā Qawā'id Ibn 'Abd al-Salām* (not extant), and several summaries of his work published variously as *al-Qawā'id al-ṣughrā*, *al-Fawā'id fi ikhtisār al-maqāṣid*, *Mukhtaṣar al-Fawā'id fi aḥkām al-maqāṣid*, or *al-Fawā'id fi mukhtaṣar al-Qawā'id* in 1988 and 1996. The period immediately after al-'Izz Ibn 'Abd al-Salām saw a continuous string of works throughout the Mamlūk period: Abū al-Faql Muḥammad b. 'Alī b. al-Ḥusayn al-Khallātī (d. 675/1277–8), *Qawā'id al-shar' wa-dawābiṭ al-aṣl wa'l-far'*; Nawawī (d. 676/1278), *al-Uṣūl wa'l-dawābiṭ* (also called *K. al-Qawā'id wa al-dawābiṭ fi uṣūl al-fiqh or Dawābiṭ al-fuṣūl*) (listing some nine matters about which jurists disagree); Ibn al-Wakīl (d. 716/1317), *al-Ashbāh wa al-nawāzīr or al-nazā'ir* (discussing twenty-seven legal canons), 'Alā'ī (d. 761/1317), *al-Majmū' al-mudhhab fi qawā'id al-madhhab*—followed by a series of commentaries and summaries of it, including his own, *Mukhtasar Qawā'id al-'Alā'ī*, that of Sarkhadī (d. 792/1390), *Mukhtasar al-Majmū' al-mudhhab*, Hiṣnī (d. 829/1426), *al-Qawā'id*—and Ibn al-'Alā'ī's, *al-Ashbāh wa'l-nazā'ir fi fuwā'id al-fiqh al-Shāfi'ī*—again followed by a number of commentaries: Ibn al-Hā'im (d. ca. 810/1412), *Tahīr al-qawā'id al-'Alā'iyya wa-tamhīd al-masālik al-fiqhiyya* and his *al-Qawā'id al-manzūma* (with its own commentary by Qabāqabī (d. 901/1496–7)), and Ibn Khaṭīb al-Dahsha (d. 834/1431), *Mukhtasar Qawā'id al-'Alā'ī wa tamhīd al-Asnawī*. The prominent scholar Tāj al-Dīn al-Subkī, Ibn al-Subkī (d. 771/1370) who wrote *al-Ashbāh wa al-nazā'ir* and his famous contemporary Asnawī (d. 772/1370), wrote several additional works: *al-Tamhīd fi istikhraj al-masā'il al-furū'iyya min al-qawā'id al-uṣūliyya*, *Matāli' al-daqa'iq fī tahīr al-jawāmi' wa al-fawā'id*, *Nuzhat al-nawāzīr fī riyaḍ al-nazā'ir*, and a work also called *al-Ashbāh wa al-nazā'ir*—which

Shāfi'ī works following Ibn 'Abd al-Salām's model were to become of enduring importance, not only among Shāfi'īs but in Islamic law writ large. The interest in and importance of the field continued through the end of Mamlūk rule: the prominent Shāfi'ī jurist Suyūṭī (d. 911/1505), too, wrote a version of *al-Ashbāh wa'l-nazā'ir* (a common title for legal canons treatises from this period) that stands as a go-to source to this day. And even before, their influence on other schools was extensive.

For their part, Mālikī jurists had a long prior history of legal canons jurisprudence, supported by political patronage where their school dominated elsewhere. In the Islamic West, Mālikīs had long engaged in debating and deploying legal canons. Muhammad b. Hārith al-Khushanī (d. 361/981), included legal canons in his *Uṣūl al-fuyū'ā fi al-fiqh 'alā madhhab al-Imām Mālik*, and it is regarded as the first Mālikī work of legal canons.¹²⁰ Further, Qāḍī 'Iyād (d. 544/1149) wrote a book called *al-Qawā'id*, and Ibn al-Hājib wrote *Mukhtaṣar al-muntahā al-uṣūlī*, both of which are regarded as works of legal canons.¹²¹ In the Islamic East, 'Abd al-Wahhāb al-

attracted the aforementioned commentaries by Ibn Khaṭīb al-Dahsha (d. 834/1431) and Ṣarkhadī (d. 792/1390) (who treated his book together with that of Ibn al-'Alā'). A short time later, Badr al-Dīn Muḥammad b. Abī Bakr b. Sulaymān al-Bakrī (d. after 772) wrote *K. al-Istighnā' (or al-i'tinā') fi al-furūq al-istithnā'*, and Sharaf al-Dīn al-Ghazzī (d. 799/1397) wrote *al-Qawā'id fi 'l-funū'*. In the same generation, the prominent scholar Zarkashī (d. 794/1392), wrote *al-Manthūr fi tartīb al-qawā'id al-fiqhiyya*, which sparked commentaries by 'Abbādī (d. 947 or 941/1540-1), *Sharḥ Qawā'id al-Zarkashī* and by Sha'rānī (d. 973/1565), *al-Maqāṣid al-saniyya fi al-qawā'id al-fiqhiyya* [or *al-shar'iyya*]; Zarkashī also wrote his own gloss on *Qawā'id al-'Alā'ī* and a work by the name of *al-Qawā'id fi al-funū'* or *al-Qawā'id wa'l-dawābiṭ fi al-fiqh*. Ibn al-Mulaqqin al-Andalusī (d. 804/1401) later wrote his version of an *al-Ashbāh wa'l-nazā'ir* volume, and Muḥammad b. Muḥammad al-Ghazzī (d. 808/1405-6) wrote *Asnā al-maqāṣid fi taḥrīr al-qawā'id*. Subsequent works included Fīrūzābādī al-Shīrāzī (d. 817/1415), *Qawā'id al-ahkām*; Hisnī (d. 829/1426) and Ibn Khaṭīb al-Dahsha (d. 834/1431)'s commentaries on Ibn al-'Alā's work (see above); as well as Shuqayr al-Maqdisī (d. 876/1471-2), *Nazam al-dhakhā'ir fi 'l-ashbāh wa'l-nazā'ir*. The last, and most prominent, Shāfi'ī scholar after Ibn 'Abd al-Salām to author an influential work on legal canons came at the end of this period: Suyūṭī (d. 911/1505) in his *al-Ashbāh wa'l-nazā'ir*—which attracted commentaries by Ibn al-Ahdal al-Yamanī (d. 1035/1625), *al-Farā'id al-bahiyya fi al-qawā'id al-fiqhiyya*; Fāsi al-Mālikī (d. 1096/1685), *al-Bāhir fi ikhtisār al-Ashbāh wa'l-nazā'ir*; Nā'inī al-Imāmī (d. 1133/1720-21), *Hāshiyā 'alā al-Ashbāh wa'l-nazā'ir*; Abū Bakr b. Abī al-Qāsim al-Ahdal (d. 1053/1643-4), *al-Farā'id al-bahiyya* (which itself provided the basis for the commentary by 'Abd Allah b. Sulaymān al-Jurhazī al-Yamanī (d. 1201/1787-8), *al-Mawāhib al-saniyya 'alā al-Farā'id al-bahiyya*, a supercommentary by Muḥammad Yāsīn b. 'Isā al-Fādānī al-Makkī (d. 1376/1957-8), *al-Fawā'id al-janiyya ḥāshiyat 'alā al-Mawāhib al-saniyya*, and a gloss by 'Abd Allāh b. Sa'id Muḥammad 'Abbādī al-Laḥjī al-ḥaḍramī, *Idāh al-Qawā'id al-fiqhiyya*. The next available work on legal canons—that did not in some way rely on Suyūṭī's work—was not until Damliji (d. 1234/1819), *Sharḥ al-qawā'id al-khams*.

120. See, e.g., Maqqarī, *supra* note 96, at 128 (editor's notes); 'ALĪ AḤMAD AL-NADWĪ, *AL-QAWĀ'ID AL-FIQHIYYA* 189 (Dar al-Qalam 1998).

121. Qāḍī 'Iyād (d. 544/1149)'s work was published in 1993 as *Tartīb al-madārik wa-taqīb al-masālik li-ma'rīfat al-'ālam madhhab Mālik* (M. Bencherifa ed., Wizārat al-Awqāf wa'l-Shu'ūn al-Islāmiyya 1983). There is one known commentary from the Ottoman period: Ibn al-Uqayṭī (d. 1001/1592-3), *Sharḥ Qawā'id al-Qāḍī 'Iyād*, still in manuscript form. See Maqqarī, *supra* note 96, at 128 (editor's notes).

Baghdādī (d. 476/1083) wrote *al-Majmūʿ waʿl-furūq*—a reference to the type of legal distinctions between legal canons that Qarāfī would popularize.¹²² These prior works preceded and informed Qarāfī's *Furūq*, allowing him to claim that he was building on a firm Mālikī legacy, even as he was influenced by the leading Shāfiʿī jurist of his time.¹²³ Following him were several works of legal canons, mostly in the western Islamic world.¹²⁴ Yet by far, Qarāfī's *Furūq* remains the most well-known canons collection among Mālikīs of his time and in the eastern Islamic world, and afterward is rivaled perhaps only by books authored by Maqqarī and Wansharīsī, both of whom wrote from the Islamic West.

That Shāfiʿī and Mālikī contributions were so plentiful was a product of a number of factors, and when compared to the relative paucity of their peers, begs the question: How and why were Shāfiʿīs and Mālikīs so important to the establishment of the new legal canons era? Several factors played a role, but there is one that I wish to emphasize aside from political patronage and prior history.

I suggest that the Mamlūk judicial reforms that brought on forum shopping from above and below in the courts, in a new system of legal pluralism, demanded clarity of both substantive and interpretive norms. The clarity demanded implicated legal canons and created a new function for them. That is, legal canons provided an acceptable escape valve to the pressure cooker of some of the rigidities of the new judicial structures. Case referral from one school's court to another would not always do the trick, especially among the Shāfiʿīs, who espoused an otherwise rigid textualist orientation. Recall that it was the first Shāfiʿī chief judge's

122. Muhammad al-Rūkī published an edition of this work as *al-Qawāʿid al-fiqhiyya min khilāl Kitāb al-Ishrāf ʿalā masāʾil al-khilāf lil-Qāḍī ʿAbd al-Wahhāb al-Baghdādī al-Mālikī* (Dār al-Buḥūth lil-Dirāsāt al-Islāmiyya wa-Iḥyāʾ al-Turāth 2003). It contains some 96 legal canons, including the 5 universal canons, 57 substantive legal canons, 4 interpretive canons, and 30 additional “mixed” canons.

123. It has been published independently by Markaz al-Dirāsāt al-Fiqhiyya waʿl-Iqtiṣādiyya (Muḥammad Aḥmad Sirāj & ʿAlī Jumūʿa Muhammad eds. 2001); and together with *Hāshiyat ʿUmdat al-muḥaqqiqīn* by Ibn al-Shāṭṭī in his *Idrār al-shurūq ʿalā anwāʾ al-furūq* and on the margins of *Tahdhīb al-furūq waʿl-Qawāʿid al-saniyya fi al-asār al-fiqhiyya* by Muhammad ʿAlī b. al-Shaykh Ḥusayn (Dār al-Maʿrifa 1970). Several Mamlūk-era Mālikī scholars commented on his work, most notably, Abū ʿabd Allāh al-Baqqūrī (d. 707/1307–08), *Tartīb Furūq al-Qarāfī* or *Mukhtasar Qawāʿid al-Qarāfī* (al-Milūdī b. Jumūʿa & al-Ḥabīb b. Ṭāhir eds., Muʿassasat al-Maʿārif 2003)—as a summary and rearrangement of Qarāfī's collection, with some of his own editions and commentary; and the Muftī of Mecca, Muḥammad ʿAlī b. Husayn al-Mālikī (d. mid-8th/14th century), *Tahdhīb al-Furūq*.

124. See Ibn Juzayy al-Gharnāṭī (d. 741/1340), *Qawānīn al-ahkām al-sharʿiyya wa-masāʾil al-furūq al-fiqhiyya* (unpublished manuscripts: Rabat Ms. 160; Fez/Qar. Ms. 835; Cairo² Ms. 489 with the title *al-Qawānīn al-fiqhiyya fi talkhīs madhhab al-Mālikīyya*; Tunis Ms. 1341/4); Ibn al-Hājj al-ʿAbdarī (d. 737/1337–8), *Kitāb al-Qawāʿid* (partially edited in a dissertation) (on file with Jāmiʿat Umm al-Qurā in Mecca as Abū ʿabd Allāh al-Maqqarī (d. 758/1357), *Qawāʿid* (Aḥmad b. ʿAbd Allāh b. Ḥamīd ed., Jāmiʿat Umm al-Qurā 1980)); IBN GHĀZĪ AL-MIKNĀSĪ (d. 901/1496), *KITĀB AL-KULLIYYĀT AL-FIQHIYYA WAʿL-QAWĀʿID* (Muhammad Abū al-Ajfan ed., n.d.).

refusal to accommodate interpretations from the other schools that led to the establishment of the quadruple judiciary.¹²⁵ This new system and new focus on clarifying Islamic law and its interpretive principles would manifest in a sizeable role for legal canons in definitions of Islamic law. Tellingly, for example, Shāfi'īs and Mālikīs were the only jurists in the new system to promote the notion of “interpretive doubt” in criminal law applications of the *doubt canon*, which recognized that any ambiguity arising from interpretations of law seen valid in one school was to be recognized to avoid liability in any other school.¹²⁶ In these and other circumstances, their need to accommodate interpretations from schools outside of their own led to their incorporation of a regime of legal pluralism—including interpretive principles exemplified by legal canons.¹²⁷

2. *How Did Legal Canons Operate?*

How did legal canons operate in concrete terms? We saw them in the chief judge’s advisory opinion in the case that inaugurated the judicial reform. Were he in an ordinary court of Islamic law (rather than the sultān’s court), he would have followed certain rules that made heavy use of legal canons (and he drew on that context in offering his advice). In the ordinary courts, once the court session started, the judge was to proceed with examining the claims and evidence. Importantly, the *evidence canon* typically governed. As noted, that canon stipulates that the “petitioner bears the burden of proof, and the respondent to swear an oath of denial once a claim is proved.”¹²⁸ This canon required that, before looking at the evidence, the judge had to first determine who was the petitioner in order to determine what evidence each party would be required to proffer.¹²⁹ Once a judge had assigned to one litigant the status of petitioner, it meant that the petitioner had to make out a *prima facie* case before the judge would turn to the respondent. But that determination itself was a matter of interpretation, which rested on other legal canons or presumptions. Recall from the case that the chief judge pointed to the presump-

125. Rapoport, *supra* note 42; JACKSON, *supra* note 16.

126. See RABB, *supra* note 21, at 205. Ibn ‘Abd al-Salām was the first to expand on the categories of doubt in his *Qawā’id*, *supra* note 104, at 2:279–80 in a legal canons work; he was preceded in substantive law works by Abū Ḥāmid al-Ghazālī (d. 505/111), *al-Wasīṭ fī al-madhhab* (Aḥmad Maḥmūd Ibrāhīm & Muhammad Muhammad Tāmīr eds., Dār al-Salām, 1997), 6:443–44; ‘Abd al-Karīm al-Rāfi‘ī (d. 623/1226), 11 *al-Muḥarrar fī al-fiqh al-Shāfi‘ī* 145–47 (Muḥammad Ḥasan Ismā‘īl ed., Dār al-Kutub al-‘Ilmiyya 2005); and Nawawī (d. 676/1277), 7 *Rawḍat al-tālibīn* 306–12 (‘Ādil Ahmad ‘Abd al-Mawjūd & ‘Alī Muhammad Mu‘awwad eds., Dār al-Kutub al-‘Ilmiyya 1992). For further discussion see RABB, *supra* note 21, at 205 n.80.

127. RABB, *supra* note 21, at 205, 212–17.

128. See, e.g., WAKĪ‘, *supra* note 87; MUWAFFAQ AL-DĪN IBN QUDĀMA, AL-MUGHNĪ ‘ALĀ MUKHTAṢAR ABĪ AL-QĀSIM AL-KHIRAQĪ 11 404 (‘Abd Allāh b. ‘Abd al-Muḥsin al-Turkī & ‘Abd al-Fattāḥ Muḥammad al-Ḥulw eds., Hajar 1986).

129. See ABŪ ISHĀQ IBRĀHĪM B. ‘ALĪ B. MUḤAMMAD AL-YA‘MURĪ IBN FARḤŪN, TABṢIRAT AL-ḤUKKĀM I 105–08 (Jamāl Mar‘ashlī ed., Dār al-Kutub al-‘Ilmiyya 2001).

tions of *waqf over sale, possession over claims of ownership*—unless evidence was available to prove otherwise. That meant that, had that case been litigated in his court (rather than that of the sultan), the judge's heirs would have won by operation of these two legal canons. They claimed that their father had formed a charitable trust before his death—which would make them prevail. Moreover, by operation of the legal canon that the chief judge was implicitly referencing, *qā'idat al-yad* (the possession canon—which is itself contested), their possession of the property until the father's death would prevail over claims of ownership. This made any party arguing to the contrary the petitioners. By operation of the evidence canon, the judge would impose on the petitioners a heavy burden of evidence to prevail. It was all but assured, it seems, that the judge's heirs were destined to win. This was so by virtue of the judge interpreting the various texts and legal canons that formed the law and achieved the outcomes to which he was partial.

Islamic legal canons operated (or deliberately did not operate) in other significant ways in the aftermath of the judicial reform. The reform gave subject-matter jurisdiction to particular schools for particular types of cases: for example, criminal laws where officials wanted to secure a conviction typically went to Mālikī courts, and family laws to Hanbalī courts. Legal canons operated in each according to the judges and jurists of that school's adoption of certain legal canons over others.

We can see the consequences of this per-court-subject-matter jurisdiction clearly in high-profile blasphemy and other criminal cases. Mālikī judges presided, as in the famous case by which Shahid I—the famous Shī'ī jurist who was executed in the late fourteenth century. The Shāfi'ī chief judge—now working with the sultān—would often use his power to refer certain high-profile capital cases to Mālikī courts, because Mālikīs espoused doctrines that would allow capital punishment without a period for repentance. They did so through adopting some legal canons and rejecting others (such as the *doubt canon* that was rejected in the blasphemy case). All other schools privileged that canon and therefore could not support a capital conviction.

Shāfi'ī chief judges routinely handed over blasphemy cases in which they wanted to secure the death penalty to Mālikī courts. Yossef Rapoport detailed several cases in the eighth/fourteenth century, from 701–797 AH. Of the twenty-six known blasphemy cases during that period in Cairo and Damascus plus its outskirts, Mālikī courts handled eighteen of them—all leading to execution; the four cases that resulted in acquittals were handled by three Shāfi'ī judges and one Hanafī judge.¹³⁰

130. Rapoport, *supra* note 42, at 224 (Table 1). For further discussion of some of the trials, see Stefan H. Winter, *Shams al-Dīn Muḥammad Ibn Makki "Al-Shahīd Al-Awwal" (d. 1384) and the Shī'ah of Syria*, 3 MAMLŪK STUDS. REV. 149 (1999); Lutz Weiderhold, *Blasphemy Against the Prophet Muhammad and His Companions (sabb al-rasūl, sabb al-sahābah): The Introduction of the Topic into Shāfi'ī Legal Literature and its Relevance for Legal Practice Under Mamlūk Rule*, 42 J. SEMITIC STUD. 39 (1997).

3. *The Scope of Islamic Legal Canons*

What are we to make of all this? Put simply, the reforms facilitated three main changes in interpreting Islamic law—the first two of which Rapoport has noted. First, they led to increased predictability of legal outcomes through majority rule at the same time that they ensured flexibility of forum within a pluralistic legal system.¹³¹ Second, they allowed executive officials (and, occasionally, the collective of jurists) to express and implement certain policy preferences.¹³² And third, and this is what is new, they led to developments in an early type of codification of legal canons in Islamic law to fuel the new system. Judges (and other parties) needed jurists to specify the majority substantive laws (legal rulings) as well as the interpretive principles (legal canons) governing each court. When experts in Islamic legal history discuss this period, they make it clear that we know a lot about the increased activity in works of substantive law—both encyclopedic-*fiqh* books and summary restatement-*mukhtasars*—during that period to fuel those efforts.¹³³ They have yet to chart the vast landscape of legal canons that emerged at the same time in the same vein, for the same reasons. My broader work attempts to map that landscape, a project over a historical and geographic span so vast that it calls for data scientific tools for mapping.

* * *

Legal canons were not new under the Mamlūks. All in all, their prevalence both before and after the advent of the judicial reforms of the thirteenth century shows as much. But legal canons *as an independent genre* of authoritative principles of interpretation for each court and the explosive growth of legal canons were new. Expansive writings on legal canons grew out of the judicial reform and took shape as a common law of interpretive precedent. Drawing on judicial practice, leading jurists compiled voluminous compendia of canons and carefully placed them in hierarchies of importance. As with the *mukhtasar* that provided restatements of each school's substantive laws, the legal canons compendia provided restatements of each school's interpretive norms alongside its substantive norms. These same compendia served as manuals for legal pedagogy

131. Rapoport, *supra* note 42, at 77.

132. *Id.* at 228 (“By authorizing qādīs from different schools to follow their doctrine on specified points of law, the state indirectly intervened in a variety of social and economic interactions. In the field of family law, for example, one can almost reconstruct a government policy in a sphere that has often been considered to be completely beyond the reach of a pre-modern Islamic state. This policy included supporting stipulations in marriage contracts in favor of brides, allowing deserted wives to dissolve their marriages, providing divorcees with marital support during their waiting period, and marrying off minor orphans.”).

133. See *id.* at 216, 226. Cf. Mohammad H. Fadel, *The Social Logic of Taqlid and the Rise of the Mukhtasar*, 3 ISLAMIC L. & SOC'Y 195 (1996).

and—to pupils who became judges—once again, for judicial practice. To be clear, the legal canons were not the direct output of an executive-imposed structure, as was the judicial reform. Nor were they taken to be jurist-defined content, as was the substantive law. Rather, they were dynamic tools for interpretation. Jurists and judges played a role in constructing these canons, common-law style, especially in areas involving interpretation and procedure. They did so in response to ongoing cases and controversies.

Generally, the history of cases from this period illustrate the complex institutional dialectic that followed Sulṭān Baybars's judicial reform and the accompanying growth of legal canons. The case that led to the reform itself shows—rather counterintuitively—that the executive recognized the jurists' power over defining the law and the judges' power in implementing it. This is counterintuitive because one might correctly suppose that one impetus for the reform was to weaken the power of the singular Shāfi'ī chief judge on the bench and for the sultan to assert more control. But the sultan's method of doing so fit squarely within the ambit of his executive power over judicial appointments as a part of administrative or public law (*siyāsa*), rather than in the legal definition and interpretation of Islamic law as state or jurist-defined law (*sharī'a*). Yet, subsequent cases show how courts became sites of contestation among jurists competing to define law and religious “orthodoxy,” and how judges in the new structure could secure or avoid outcomes from the use of certain courts and certain legal canons. In ways that changed over time.

More specifically, this history shows that Shāfi'īs and Mālikīs drew on prior tradition once circumstances in Mamlūk rule pushed them to further systematize or “codify” these legal canons as school norms. Ibn 'Abd al-Salām's and Shihāb al-Dīn al-Qarāfi's works on legal canons were particularly significant to Mamlūk Islamic law because they inaugurated a much broader trend that helped support the new teaching and judicial systems. Following them was a veritable explosion of legal canons literature across all schools, including in both Sunnī and Shī'ī communities. The presence and prevalence of legal canons alongside substantive law, read against the backdrop of issues of law and society in the new Mamlūk system, suggests that one cannot understand Islamic law and its accompanying structures without the legal canons.

IV. CONCLUSION

This Article began with an observation that legal canons had made a comeback, in the classroom and in the courtroom. This recent comeback arose in American law as well as in Islamic law in roughly the same period—that is, over the last thirty or so years.¹³⁴ And this Article has sought

134. The following discussion is adapted from my book chapter on *Interpreting Islamic Law*, *supra* note 62, at 221–54.

to contextualize that rise in the Islamic world through uncovering the history of interpretive practices that featured a thirteenth-century rise of legal canons as a genre of Islamic law.

Strikingly, the scholarly attention to Islamic legal canons in today's classroom has come in direct contrast to a judicial decline in the modern courtroom in some twenty-nine Islamic constitutional states. For that reason, Muslim scholar-jurists who are aware of the existence and value of legal canons have increasingly emphasized their importance for understanding Islamic law historically and perhaps adjusting Islamic laws to contemporary times. In Sunni circles, most modern developments have tended to emerge from scholars of Mālikī and Hanbalī law.¹³⁵ More recently, Shāfi'īs and Hanafīs have turned to the study of legal canons as well.¹³⁶ In Shi'ī circles, contemporary jurists have started to re-examine the legal canons highlighted in the eighteenth and nineteenth centuries (given their return to the rationalist approaches to legal interpretation) with increased vigor in the twentieth and twenty-first centuries.¹³⁷ And minoritarian schools have turned to the study of legal canons as well, including Ibādīs and those interested in intra-school and inter-school com-

135. For Mālikīs, Muḥammad al-Rūkī wrote *al-Qawā'id al-fiqhiyya min khilāl Kitāb al-Ishrāf 'alā masā'il al-khilāf lil-Qādī 'Abd al-Wahhāb al-Baghdādī al-Mālikī* (Dār al-Qalam 1998). Other important Mālikī works include: SA'DANĀ B. A'AL SĀLIM, TAYSĪR AL-MARĀJI' WA'L-MADĀRIK LI-QAWĀ'ID MADHHAB AL-IMĀM MĀLIK: QIRĀ'Ā ḤADĪTHA FĪ QAWĀ'ID AL-FIQH AL-MĀLIKĪ (Dār Yūsuf b. Tāshifin wa-Maktabat al-Imām Mālik 2007); 'ĀDIL B. 'ABD AL-QĀDIR B. MUḤAMMAD WALĪ QŪTA, AL-QAWĀ'ID WA'L-ḌAWĀBIḤ AL-FIQHIYYA AL-QARĀFIYYA: ZUMRAT AL-TAMLĪKĀT AL-MĀLIYYA (Dār al-Bāshā'ir al-Islāmiyya 2004); and 'ABD ALLĀH AL-HILĀLĪ, AL-TAQŪ'ID AL-FIQHĪ 'INDA AL-QĀDĪ 'ABD AL-WAHHĀB AL-BAGHDĀDĪ AL-MĀLIKĪ: AL-QAWĀ'ID AL-FIQHIYYA AL-MUMAYYAZA LI-FIQH AL-MĀLIKĪYYA NAMŪDHĀJAN (Maṭba'at Ānfū 2004). In Hanbalī law, the seventeenth to nineteenth centuries run of legal canons literature ended with a Ḥanafī jurist, Ahmad b. 'Abd Allāh al-Qārī (d. 1359/1940), who wrote a commentary on the *Mecelle* according to the Hanbalī school called *Majallat al-aḥkām al-shar'iyya 'alā madhhab al-Imām Ahmad b. Hanbal*. Perhaps having had their interest piqued by this intervention, Hanbalī jurists then published several works on legal canons, including Sa'dī's (d. 1376/1956–7), *Risāla fī al-qawā'id al-fiqhiyya, al-Qawā'id wa'l-uṣūl al-jāmi'a wa'l-furūq wa'l-taqāsim al-badī'a al-nāfi'a* and his *Tarīq al-wuṣūl ilā 'ilm al-mā'māl bi-mā'rifat al-ḍawābiḥ wa'l-qawā'id wa'l-uṣūl*. More recently, al9, Nāsir b. 'Abd Allāh b. 'Abd al-'Azīz al-Maymān published *al-Kulliyāt al-fiqhiyya fī al-madhhab al-Hanbalī* (n.p., 2003–4).

136. Sa'īd al-Shāwī recently published a work on legal canons in Shāfi'ī law entitled *Maqāsidiyyat al-qawā'id al-fiqhiyya min khilāl Kitāb Qawā'id al-aḥkām fī islah al-anām li-'Izz al-Dīn b. 'Abd al-Salām* (Dār al-Kalima 2015). Likewise, Muḥammad 'Umaym al-Hisān al-Mujaddidī published *Qawā'id al-fiqh* with some 426 Ḥanafī canons (n.p. 1986), and Muṣṭafā Maḥmūd Azharī published a commentary on an earlier Ḥanafī text on legal canons, *Sharḥ Qawā'id al-Khādīmī* (Dār Ibn al-Qayyim 2013).

137. For a few of the more notable works, see, e.g., MUḤAMMAD AL-HUSAYN ĀL KĀSHIF GHITĀ' (d. 1373/1954), TAHRĪR AL-MAJALLA (al-Majma' al-'Ālamī 2001) (a commentary on the Ottoman Civil Code, the *Mecelle*); MUṢṬAFĀ MUḤAQQIQ DĀMĀD, QAWĀ'ID-I FIQH (Markaz-i Nashr-i 'Ulūm-i Islāmī 2000); HASAN AL-BUJNŪRDĪ (d. 1395/1975), AL-QAWĀ'ID AL-FIQHIYYA (Hādī 1998); MUḤAMMAD FĀDIL LANKARĀNĪ, AL-QAWĀ'ID AL-FIQHIYYA (Mīhr 1995); MUḤAMMAD KĀZIM AL-MUṢṬAFĀWĪ, AL-QAWĀ'ID: MĪ'ĀT QĀ'IDA FIQHIYYA MA'NAN WA-MADRĀKAN WA-MAWRĪDAN (Mu'assasat al-Nashr al-Islāmī 1991–2).

parison within Islamic law.¹³⁸ Moreover, in almost every country with a Muslim presence, whether Muslim-majority or not, legal canons play a sizeable role in jurists' opinions (*fatwās*), which, are issued by non-state-affiliated experts on Islamic law to offer religious guidance to ordinary people.¹³⁹

What are we to make of this focus on legal canons in the vexed views of and approaches to interpretation in the Muslim world today? With renewed interest in Islamic law for both scholarly and public purposes, it may be that the history of Islamic legal canons has become as relevant again as essential to understanding Islamic law today as it once was in the past. It may also be essential to developing theories about the practices of an ongoing use of legal canons comparatively in the classroom and in the courtroom for reading and interpreting law.

138. See, for instance, the work featuring a first-time treatises on legal canons in Ibādī law (the majority tradition in Oman and in parts of East and North Africa): MAHMŪD MUṢṬAFĀ ʿABBŪD HARMŪSH, MUʿJAM AL-QAWĀʿID AL-FIQHIYYA AL-IBĀḌIYYA (Ridwān al-Sayyid ed., Wizārat al-Aqwāf wa'l-Shu'ūn al-Islāmiyya 2010); MUṢṬAFĀ B. ḤAMW ARSHŪM, AL-QAWĀʿID AL-FIQHIYYA ʿINDA AL-IBĀḌIYYA (Wizārat al-Aqwāf wa'l-Shu'ūn al-Islāmiyya 2013).

139. For a brief discussion of such developments, see RABB, *supra* note 21, at 317–21.