TH' RECEPTION AND DEVELOPMENT OF MALIKITE LEGAL DOCTRINE IN THE WESTERN ISLAMIC WORLD

by

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Poor text in the original thesis.
SUMMARY

Medinan law is the model upon which the Maghribī courts built their legal systems. The purpose of this study is to examine the introduction of Malikite law into Spain and North Africa, with special attention paid to the way in which the Maghribī jurists contributed to the law.

The study begins with a history of the rôle played by legal scholars, who were the exponents of the Malikite law which became not only the official law of Spain and Ifriqiyya, but also the doctrine accepted by the general populace. The study includes an analysis of the process through which Cordova and Qayrawān absorbed into their judicial institutions the principles of Medinan law. The Maghribī contribution was in expanding the Medinan law; it was a response to unexpected situations arising in Maghribī society, calling for modifications of the strictness of Medinan law. This thesis shows how Maghribī applications of the law to new situations broadened the scope of Malikite law for all the Malikite jurists.
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## ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>AHDE</td>
<td>Anuario de Historia del Derecho Español</td>
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<tr>
<td>AM</td>
<td>American Anthropologist</td>
</tr>
<tr>
<td>CSSH</td>
<td>Comparative Studies in Society and History</td>
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<tr>
<td>EI</td>
<td>Encyclopaedia of Islam</td>
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<tr>
<td>Fatīḥ</td>
<td>Fatḥ al-Ḥāʾīl al-Malik fi-l-fatwā ’alā madhhab Malik</td>
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<tr>
<td>IUPL</td>
<td>International Institute for the Unification of Private Law</td>
</tr>
<tr>
<td>JESHO</td>
<td>Journal of the Economic and Social History of the Orient</td>
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<tr>
<td>Maw</td>
<td>Mawāhib al-Jalīl li Sharḥ Mukhtaṣar Khalīl</td>
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<tr>
<td>Muw</td>
<td>al-Muqaddimāt al-muḥaddidāt li bayān ma’aqtaḍatuh rusūm al-Mudawwana min al-ṣiḥāḥ as-Sal-Sharī‘iyāt</td>
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<td>Muw</td>
<td>al-Muwāfaqāt fi ’uṣūl ad-Dīn</td>
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<tr>
<td>Nayl</td>
<td>Nayl al-ibtiḥāṣ bi qaṭlāz al-Dībāj</td>
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<tr>
<td>RDSO</td>
<td>Rivista degli studi orientali</td>
</tr>
<tr>
<td>RIEEI</td>
<td>Revista del Instituto Egipcio de Estudios Islámicos en Madrid</td>
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<tr>
<td>Riyād</td>
<td>Riyād al-Nuṣūf fi Ṭabaqāt ‘Ulamā’ al-Cayrawān wa Ifriqiyya</td>
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<tr>
<td>RIM</td>
<td>Revue du Monde Musulman</td>
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<tr>
<td>RO</td>
<td>Rocznik Orientalistyczny</td>
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<td>St</td>
<td>Studia Islamica</td>
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<tr>
<td>Tāj</td>
<td>at-Tāj wa-l-ikhlāṣ li Mukhtaṣar Khalīl</td>
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PREFACE

The history of the reception and development of Malikite law from Ifriqiyya to Spain can best be understood in relation to other intellectual and scholarly activities. Similarities in the judicial processes of the two provinces arose out of their geographical proximity, reinforced by a common Medinan culture and the predominance of a group of jurists committed to identical legal doctrines. The geographical proximity of the two provinces was reinforced with such judiciary relevant characteristics as similarity of Medinan cultural experience, predominance of the group of jurists, and similarity of commitment to identical legal doctrine. The high degree of personal contact among the intellectuals of the two provinces and their special relationship with Egyptian Malikism accentuated the similarity in their view of common legal problems.

Although Malikite law was born in Medina and expounded in Egypt, this thesis will not be concerned with the development of Malikite law in those places. Medina, in the first place, was no longer universally recognized as the cultural and religious centre. Kufa, Egypt and Qayrawān superseded her in many cultural and intellectual respects. Egypt, on the other hand, did not remain under the domination of Malikite jurists. Shāfi‘I overthrew the supremacy of Malikism. In this research I shall not stop to consider the rôle of Malikite law in Fez, not because it was unknown, but because during the period we are dealing with, the 3rd and 4th centuries, the Malikite law
in Fez was lacking in originality. The jurists of Fez were either influenced by their Spanish counterparts, so that they took for granted what the Spanish jurists said, or they leaned heavily on what the jurists of Qayrawan said. Moreover, none of these cities had produced the immense body of Malikite legal work that had been produced in Ifriqiyya and Spain.

The reader who glances at the bibliographies at the end of this work will notice that there are more sources quoted from Spain and Qayrawan than from Egypt or Medina.

In the middle of the 2nd/8th century, in consequence of political disturbances and social upheavals, Ifriqiyya and Spain were simultaneously drawn by the attractions of Medinan legal doctrine. A number of Ifriqiyya and Spanish travellers and scholars were the intellectual pioneers; they travelled to the Orient and brought home the law and tradition of Medina. They included not only students and intellectuals, but also merchants, officials travelling in the ruler's or court's service, and pilgrims. They brought back manuscripts, popular legal textbooks, and a love for the canonical law of the city of the Prophet.

In both provinces there are similar factors which created a psychological readiness for the Medinan doctrine, strongly coloured by the impression of Medinan superiority. However, this "readiness" of Western Muslim Society did not result in a sudden break-through, and only later on was a group formed which identified itself with the Medinan law and way of life. Because
of various circumstances it was the Malikite school which became established in the west, and very quickly produced illustrious masters such as the famous cadi of Qayrawān and Yahyā b. Yaḥyā, the chief legal advisors to the Spanish court, who were the most brilliant of jurists in the entire Malikite school.

The foregoing summary indicates the burden of the present study; to review the reception, influence and development of Malikite legal doctrine in the West.

Chapter One, in the first part, and Chapter Four in the second part, contain an account of the formative period of Malikism (law and movement), substantially in accordance with the historical sequence and social phenomena, and they examine the rôle of the jurists. These chapters pave the way for the introduction of the doctrine itself.

The analysis in Chapter Two describes the method of interpretation and how the scope of the law was expanded beyond that which Malik had envisaged. It also explains the interesting and radical view of the Maghribi jurists as to the authority of custom in legal science.

Chapter Three takes into account the judiciary in Aghlabid times, which had a decisive effect on perpetuating the doctrine throughout the succeeding century until the present day.

Chapter Five shows the infiltration of some foreign law, which had a significant effect on the evolution of the Malikite law, but on the other hand formed a departure from the dominant
law. The main theme of discussion in this chapter is the impact of the Orient (Iraq, Egypt, as well as Qayrawān) on the judicial life of Spain.

One of the points which I have tried to establish in Chapter Six, is the unlimited flexibility that Spanish law showed in Court Procedure and legal responsa. The law of liability is the major theme discussed in this chapter.

What I have tried to demonstrate is that the structure of Malikite law was established by a series of scholastic activities and judicial processes which took place in Qayrawān and Cordova, with the consequence that Maghribī law added another dimension to the scope of Malikite law. The Maghribī legal scholars claim our attention because they have had a substantial rôle in shaping and expanding Malik's law for all Malikite jurists in the Islamic world.

Under the increasing complexities of social and commercial life, almost any legal movement could be expected to show some sign of change. For example, the Spanish court, in spite of all its conformity to the Medinan law, challenged the necessity of the existence of pre-relationship to validate the acceptance of testimony.

The legal history, however, proved undeniably that the Malikite jurists of the Maghrib were aware of the effect of the changing times on the growth and development of the law. It was part of the whole spirit of the time that changes in rules of law took the form of a smooth transition from one stage to the
next. This climate of feeling encouraged the Maghribi jurists, not only to produce new laws, but also to mould their master's legal views to fit the current situation. The procedures for bringing a case before the court and for the taking of evidence, certain aspects of the law of torts, and the rôle played by professional jurists, all revealed a further stage in a line of development already under weigh.
INTRODUCTION

Any study of the development of the Malikite in the West (Ifriqiyya and Spain) must include a careful examination of the history of its origin, reception, and dissemination. This history can best be understood in relation to the cultural, political, and social history of this part of the Muslim world.

In this study an attempt has been made to evoke in broad outline the essential facts of the Malikite historical development. In analyzing the doctrinal history of this school we must admit that at the beginning it could hardly be distinguished from any prevailing legal view practiced anywhere in the Muslim world.

The ordinary meaning of "Medinan jurist" has a political as well as a judicial content. This political implication, for instance, appears unmistakably when it was used in contradistinction to the Iraqī jurists in Ifriqiyya.

In order to avoid confusion, it should be understood that the word "Medinan" when used of Malikite jurists in this thesis carries only legal connotations. I use this term to refer to a group or class of intellectuals who had a similar predisposition to specific institution and legal values.

Among the biographical works is the Cudāt Curtuba wa 'Ulāmā‘ Ifriqiyya by Muḥammad b. Ḥarīth al-Khushābī. This useful work deals in several places with political, social, and legal aspects of life in Ifriqiyya and Spain. Ibn Ḥarīth did not attach himself to any legal school, but his independence in
thought and legal views made him admirably qualified to offer unbiased critical points on the courts and jurists of Spain on the one hand and the Malikite and the Ḥanafite in Cayarawn on the other hand.

Biographical material must form the essential part of this research, because it constitutes the primary sources of information. Where Spain is concerned I have depended almost entirely on the accounts of Maghrībi historians and authors of biographic dictionaries, among whom were al-Khushanī (d. 361/971), Ibn al-Faraḍī (d. 403/1012), Ibn Bashkuwal (d. 578/1182), Ibn al-Abbār (d. 658/1286), al-Ṣumayyādī (d. 443/1056), al-Gāfī 'Iyāḍ (d. 544/1149), ‘Abd al-Malik Ibn Sa‘īd (d. 562/1166), Līṣān ad-Dīn al-Khaṭīb (d. 776/1375) and al-Maqqarī (d. 1041/1631). As the basis for my treatment of Ifriqiyya, in addition to works of ‘Iyāḍ and al-Khushanī, I made use of the work of Abū al-‘Arabī (333/944), and Ibn Farḥūn (d. 799/1396).

However, despite the fact that these biographical dictionaries are of an anecdotal nature and closer to hagiography, it is undeniable that some of these records are brisk and critical. In general, they help to provide not only a relatively complete and balanced picture of the individual's personality and his career, but also a picture of his social, political and intellectual life. From these biographical dictionaries we learn the salient facts of the lives of the famous Malikite jurists, including places and dates of birth and death, their contributions to jurisprudence and important position held.
Another historian and biographical writer was Abū al-'Arab (d. 333/944). His work was highly regarded in many quarters: an Ifriqiyyan citizen at the time of the opposition between the Iraqīs and Medina jurists on one side and the Fatamids on the other, he was able to give a close description of their struggle and rivalry. His work Tabaqat 'Ulamā' Ifriqiyya wa-Tūnis was a very important source for the reception of Malikite law in Ifriqiyya.

Also of very considerable importance is the work of 6th/century scholar Cūdū 'Iyāḍ, the Tartīb al-Madārij wa taqrīb al-Masālik li ma'rifat Alām madhhab Ḥālik, published in 1965. Though confining itself to the biographies of Malikī jurists, it is an astonishing literary achievement. 'Iyāḍ begins his Tartīb with a momentous introduction covering two hundred pages which explains the impulses which brought about the advocacy of Malikite doctrine. 'Iyāḍ puts forward a semi-rational argument in his introduction to explain why this doctrine appealed to the masses of the Maghrib.

The merit of this work does not lie only in its naming of 1300 famous Malikite jurists, writers, and judges, but also in describing the sources of his material.

My interest in this excellent biographical dictionary is due to the fact that 'Iyāḍ views the material at his disposal with a critical eye. His sympathetic evaluations and comprehensiveness justify 'Iyāḍ's claim that his work was a landmark in the art of compiling biographical dictionaries.
With the help of vast collections made by his predecessors and contemporaries, the Tartīb became the main source in Western Malikite Islam for all the succeeding writers.

In addition to these biographical works, various historical works were consulted. These include al-Bayān al-Mughrib of Ibn ‘Idhārī, al-Mu‘jib of ‘Abd al-Wāḥīd al-Marrākushī, Mucaddima and Ta‘rīkh of Ibn Khālīlūn and al-Kāmil of Ibn al-‘ithīr. Unfortunately these authors were not sufficiently interested in the legal and religious aspects to make a full analysis of the introduction of the Malikite doctrine to Spain and Ifriqiyya. The historical and biographical sources dealt not so much with the acceptance and development of the doctrine as with historical events. In addition to this meagreness of information, their assessment of the facts concerning events connected with the Malikite doctrine or the movement was often unbalanced.

For the most part I ignored the views of historians quoted in works other than Maghribī. When I do mention some of them such as Ibn al-Athīr or Ibn Khallikān or Ibn Khayyāt, it is only to substantiate what a Maghribī writer has said.

In the realm of law, I have relied less on general Malikite legal literature than on the work written by the Maghribīs, except where the case or the legal view is mentioned in non-Malikite works exclusively, such as the Ṭalīm of ash-Shāfi‘ī and the I‘tīm al-Mu‘waddī‘īn of Ibn al-Cayyām.

However it can be seen that the Mudawwana of Saḥmūn, which was unanimously recognized by the courts of both Ifriqiyya and
Spain, remained the basic source of my research. Beside the many legal manuals and texts I have used in this research, I found valuable information in three MSS (BM. Add. Ms. 9543). One of them was Ya'qub b. 'Umar's summary of al-Ahkām al-Kubrā or Nawāzil al-Ahkām compiled by 'Īsā b. Sahl.

The second MS is the Kitāb al-Wathiq of Abū-Īsḥāq Ibrāhīm b. 'Abd ar-Raḥmān. This MS explains the function and the role of the notaries. The work deals with the art of writing documents and procedures, judicial and otherwise, with emphasis on their minute details. It also deals with all kinds of transactions, wills, transfer of property etc. This work describes the technique of legal writing in Malikite legal life which was generally practised in Spain.

The third MS is Kitāb an-Nafaṣṭ of Aḥmad b. Rāshīq al-Murrahī. The manuscript deals with the jurisdiction of the court in respect of imposing the economic liability on a person towards his dependants or even his animals.
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PART I

MALIKITE LEGAL DOCTRINE IN IFRIQIYYA
CHAPTER I

THE RELIGIOUS AND POLITICAL LIFE OF IFRIQIYYA

From the end of the first century A.H., Ifriqiyya was the scene of a series of hostilities and heterodoxical disputes. Kharijite doctrine was prominent among the majority of Berbers. Its tenets were interpreted historically against the background of autocratic rule and Arab national pride, supported by the social phenomenon that the Kharijite trend began as an expression of growing feeling of antagonism towards the ruler. The year 116 shows a popular movement of the Berbers against the rulers, who maltreated the Berbers by trying to levy double tax on the newly converted Berbers.  

With the first decade of the first century, Berbers began to develop their own thinking in reaction to the Arabs' assumption of superiority. Virtually all the Berbers had been subordinated to the Arabs, and the latter, especially those who worked within

1. The Arabic name for Tunisia was Ifriqiyya, an Arabised version of the Latin Africa. According to the Arabic sources the name of Ifriqiyya was extended to cover all the land from east of Barqa to west of Tangier. Bakrî, Mughrib, p.21. Cf. Ibn al-Athîr, Lubâb, 1:63.  
2. For more detailed information concerning Kharijite of Ifriqiyya, see T. Lewicki, "La répartition géographique des groupements Ibâdites dans l'Afrique du Nord au moyen-âge", RO., XXI (1957), pp. 301-43.  
3. Ibn 'Idharî, Bayân, 1:52f; Nâşirî, Istiqa, 1, i7108-14.
the ruler’s class, raised themselves above the natives by their superior rank in conventional social and political life.

The first rebellion in the history of Islamic rule of Ifriqiyya, began in the west and was led by Maysara, a water-carrier of Tangier in 122/740. It swept through the whole of the Maghrib and even spread into Spain. The political resistance of the Kharijite to the central government of the Qayrawan was strong enough to limit the effects of expansionist policies and it frequently forced the governor to withdraw from some territories. The cause and effect of these rebellions has been described by Rolf Reichert: "Many converted to Islam. In spite of their military service, they were considered an inferior caste and obliged to pay tribute. In such well-prepared ground the Kharijites' propaganda thrived easily; in 740 a vast insurrection from Kairouan to the Atlantic Ocean suddenly broke out; with great difficulty the metropolis succeeded in reducing the insurgents (742). The caliphal rule never had been secured."3


3. Reichert, Historical, p.89.
As the new sectarian view took hold among the Berbers, a new assortment of political problems arose to complicate a situation already shaken and complex. The introduction of Kharijite law called into question the prerogative and the legal status of the ruler. It claimed that any Muslim in good standing could become a spiritual guide, or governor, or even Caliph, and that good works rather than racial and family background, were the most important thing in the life of a Caliph, as well as an ordinary man.

The Kharijite view of the equality of Muslim brethren, as related to the Imām, was an inviting alternative for the Berbers, who had been discriminated against and humiliated by the Arabs; it offered self-rule as opposed to subjugation under Arab rule. It drove the Berbers to identify with the Kharijites. This helps to explain why the Kharijite doctrine was ultimately successful. It was harder for the Berbers to resist an idea

2. The doctrine of the Kharijite had been carried to Ifriqiyya by the conquerors most of whose members were Irāqis. When they came to Ifriqiyya, the Muslim conquerors brought with them their religious disputes. The members of the army of the various races learned of the Kharijite ideas, and this spread sectarian ideas in North Africa. The Kharijite emissaries had favourable soil for the sowing of the seeds of their ideas. See Ibn Khaldūn, Tārīkh, vi:110; Ibn ‘Abd-al-Qādir, Tuhfa, 1:26.
which promised them independent recognition and political equality. The consequence of this was their revolt against the de facto Caliph, who not only denied the Kharijite doctrine, but emphasised the Arabian ascendency and right to rule over the Berbers.

The ebb of Ummayyad influence in Qayrawän and the appearance of the Abbaside reign left provincial Berber governments in power, which the rulers of Qayrawän never completely subdued in the country.¹

The appeal of the Kharijite doctrine increased when the Aghlabid rulers centralised the administration of the country in an autocratic way. As they moved to establish an autonomic reign in Qayrawän, the local leadership inside the Abbasids empire which had survived as a result of the failure of the Caliph of Baghdad to police in Ifriqiyya, the Aghlabids further aggravated the Berbers by their outspoken Arab fanaticism. This fanaticism might have been the factor that finally alienated the Berbers from the Arabs.²

The ensuing atmosphere of anxiety and tension laid an obligation on the intellectuals to revive unity and restore the ties of fraternity among the people. They became aware that their deliverance from this chaotic situation lay in reform, and

in advocating the Cur'ān and the Sunna. The scholars realised that the fragmentation, reflected by the growth of all these various trends and sects was, in fact, responsible for this social agony, doing nothing but adding fuel to the fire. The scholars were so opposed to the government and its policies, that they regarded any sort of association with them as heresy. Accordingly, they discouraged the people from having any contact with those whose ideas were known to be heretical. 

The Trip to the Orient

With this in mind, the scholars travelled far and wide in order to find a remedy for the situation and to increase the people's understanding of the Sunna. At that time Medina was known to most of the Muslim intellectuals. Its customs and way of life, because they were an ideal, made travel to Medina desirable. The scholars of Cayrawān considered that the living tradition of Medina was meant for them as a model of the Prophet's practice, the emulation of which would secure them from the perils of heresy.

They went to Medina where they met other scholars. The only scholar they turned to was Mālik who was aware of a need of disciples to carry on his ideas. These scholars were fascinated by him and regarded him as their leader in all matters,
even in matters of everyday life such as dress, eating habits, sitting and manner of speech. In all these he became to the North Africans the ideal example to be followed by Muslims.¹

The scholars were seeking stability, and the reason for this, as has been mentioned, was the fact that the dissimilarities of various sects' doctrines had a profound influence on the political and social disturbances in Ifriqiyya. Under the Aghlabids, Ifriqiyya not only experienced the result of continuous unrest, but was brought in contact with Mu'tazilite thought, introduced by Jund and enforced by some rulers. Yet another feature of the time, which contributed to the development of the Malikite movement and coincided with all these circumstances favourable to the Malikīs, was the constant campaigning of the Aghlabids against Borbers, and the autocratic attitude of the Arab rulers. The very upheaval of social life in Ifriqiyyan society made the Africans receptive to ideas which promised stability and created a sort of atmosphere that was agreeable to the introduction of new concepts and new ideologies.²

1. The statement of 'Iyāq which showed how far the influence of Medina's social life on the minds of Geyrawānīs was "Akhadh Saḥnūn bi madhab ahl al-Madinā", Madārik, I, i:593.
2. See Shābī and Yāfī in their intro. to Abū al-'Arab, Ṭabagat, p.13f. For details about the influence and rōle of the Kharijite and other sects see Julian, History, p.43ff; Abun-Nasr, History, p.75ff.
Thus, the students from Qayrawān and Tunis flooded into Medina to learn from Mālik and to write down in a state of awe all that he said, to collect it and discuss it with great care and precision, and to take it back to their countries where other students would, in turn, come round to them in the mosques and further promulgate the doctrines and teachings of Mālik. Those who were able would go and learn directly from Mālik himself in order to gain a special reputation by so doing, and be included in the high ranks of those who had been Mālik's students.¹

Mālik sensed this admiration and their esteem for him and welcomed them into his classes, giving them special attention when teaching them his thoughts on fīqh.² Some of them were favoured by getting private tuition from Mālik who taught them all that they had previously missed. Mālik was constantly warning them against the vanity of studying heresy and against the sins of false doctrine which may arise from wandering beyond the limits of the path of the prophet. He followed their careers and their beliefs, and correspondence was established with them.³ What Mālik seemed determined to achieve by constant correspondence with his Maghribī students was to place in their hands a set of principles of his doctrine which would be useful

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1. Ibn 'Ashūr, A‘lām, p.23.
2. Some of the Berbers were seen in Medina asking Mālik questions on some judicial matter, Mālikī, Niyyāq, 1:206.
in facing theological and legal problems likely to confront them. 

Malik's Maghribī students were viewed as the charismatic leaders of their tumultuous nation. The eulogistic judgements and teachings of Malik received by the Maghribī students provided them with a sense of considerable moral authority. They behaved with a dignity which accorded with Malikism, increasing its good reputation before the people and especially before the government circle. They were trained to make judicial decisions and fatwas, and to assume the position of jurists. Malikism thus appealed to the Ifriqiyyan people in an unsettled period on many counts: as an instrument by which they could gain social status; as an intellectual alternative; and as an outlet for their hate of other sects who were either extremist or patronized by the Arab ruler.

This then was the situation of Ifriqiyya in the religious field, so far as it is possible to reconstruct it from various materials that one was able to consult. Thus, it became clear that the initial stage in the adoption of Malikite doctrine was a response to the period of insecurity for the unsectarian group; its religious overtones were the reason why the Malikite idea appealed to many discontented elements of society. And this revealed too, that assimilation of Malikite doctrine was not

1. Malikī, Riyāḍ, pp.133-60.
2. See A. Shabbī and N.H. Yaḥyī, in their intro. to Abū al-'Arab's Tabaqāt, pp.13-20.
forced on N. African people either by a decree from the ruler or by intimidation from the advocates of this doctrine. Nonetheless, there was inevitably some sort of pressure, partly ascribed to the influence of Malikite intellectuals and partly to the indefatigable personality of Sağmūn when he was the mufti and cadi of Qayrawān. Whatever these considerations of who was responsible for introducing Mālik's doctrine into Ifriqiyya, there was a prime factor in the transmission of the doctrine that has been overlooked by the writers. The Medinan Traditions and doctrine were already in circulation among Ifriqiyyan students. The Tunisian Khālid b. Abī 'Imrān (d.125/743) raised some legal questions with Medinan scholars and brought to Ifriqiyya a large written collection of the Tradition of Gāsim b. Muḥammad b. Abī Bakr, Sālim b. 'Abd Allāh b. 'Umar b. al-Khaṭṭāb and Sulaymān b. Yāsār. From Medina Khālid received, through correspondence with Yāḥyā b. Saʻīd, knowledge of the Medinan Tradition. Al-Mālikī's statement revealed that Khālid was interested in collecting and gathering as much as possible of the Traditional and legal views of Medinan's scholars. When some of the Medinan jurists were reluctant to answer some of Khālid's legal queries, he threatened to return home and publicize the refusal of these scholars of the

2. Ibid., p.103; Abū al-'Arab, Ṭabaqāt, p.212f.
city of the prophet to make their knowledge available for the benefit of his countrymen.¹

**The Reception of Malik's Doctrine**

The history of Malikite ideas in Ifriqiyya dates from the second half of the second century. Like many schools of thought, the Malikite school was in a rudimentary stage of development; there is not much evidence showing exactly how far it had spread at that time. We chose 150/767 as the year of introduction of Malikite law into Tunisia because 'Ali b. Ziyād was the first Tunisian native to bring the Muwatta' from Malik.² Unfortunately we have no complete description of the process of the diffusion of the Muwatta' and its doctrine.

The means by which this school of thought gained ascendancy was given by Ibn Khaldūn's statement, that from early times, cultural connection with Tunisia and Carawan together with the Pilgrim's Caravan provided a continual transmission of the honoured Medinan legacy and culture.³ It is apparent from the evidence of the sources that the motivation of the students was not only the desire for knowledge, but also the conviction that their mission was to bring back the Medinan way of life that they admired.

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¹ Malikī, Riyyād, 1:103; Abū al-'Arab, Tabaqāt, p.213f.
² Ibn 'Ashur, A'lam, p.25.
³ Ibn Khaldūn, Mugaddima, p.376.
There was yet another factor in the introduction of Malik's doctrine. Egyptian Malikite jurists, Ibn al-Casim, Ibn-Wahb and others gave private instruction to Maghribi students, who then brought back the ideas.

Meanwhile, the fame of Qayrawan's intellectual life drew some of the famous scholars of Syria and Baghdad. The city became one of the centres of devotion and learning of the Islamic world. Because the Muslim conquerors founded Qayrawan partly in order to spread Islam among the Berbers, it roused opposition, and cultural revival was at first sight not promising. But in the subsequent period of time, this city became the centre of the renaissance of Islamic theology and science. In the intellectual life of Qayrawan the mosque of Qayrawan occupies a place of pre-eminent importance. The Jami' was generally recognised as the first in this new Islamic territory, and its intellectual supremacy was manifest not only in its position as the centre of religious gathering, but also in its role and influence on the whole social and intellectual life of Ifriqiyya.

Travel outside Qayrawan became part of a scholar's education. Going abroad to seek knowledge gained popularity. The motive for travelling was to widen the mind, and to find out the remedy

1. See their full names and work in Ibn an-Nadim, Fihrist, p.281f.
2. Knapp, Tunisia, p.41.
3. Ibn 'Idhari, Bayan, 1:19f.
4. Janjani, Qayrawan, 154ff.
for the disunity of the nation. Medina had always been a symbol of stability, known to all Muslims; Qayrawānīs were known for their sagacity and intellect, which made them respectable in the eyes of Medinan scholars.\textsuperscript{1} With the emergence of Jāmi' az-Zaytūnā in Tunis and Jāmi' Sīdī 'Uqba in Qayrawān as centres of legal tradition, the influence and prestige of the Malikites became considerable.

The transformation of Ifriqiyya into a centre of Malikite intellectual activity and the rôle of those who first introduced the doctrine and ideas of Mālik b. Anas and the Medinan way of life deserve special attention, as we have seen in the previous statements that Pilgrims and visitors to Medina learned the religious sciences, and adapted them to their own community. Among those intelligentsia-travellers, there were those who became largely responsible for the spread of this doctrine in N. Africa. Those jurists were, as we shall see from their intellectual careers, benefited from the considerable moral sanction and advantage that the law of Medina, as expounded by Mālik, conferred on them. Once they returned to their home (Ifriqiyya), they behaved in a dignified and impressive manner. To maintain and cultivate their own authority in the eyes of Ifriqiyyan natives, they accepted the judicial charges of the

\textsuperscript{1} The intelligence of the people of Qayrawān is praised in the words of Mālik in Ad-Dabbāgh, \textit{Ma‘ālim}, ii:33; and 'Iyāq, \textit{Madārik}, I, ii:431.
ruler. Many people admired their exemplary lives.

No doubt the major factor in establishing Malik's ideas and law in Tunis lies in the demonstrable influence which 'Ali b. Ziyād at-Tunisî (d. 183/799) had, and his insistence that the Muwatta' become part of the religious life of Tunis and Cayrawân. He was born in Tripoli and moved to Tunis where he received his education and did his early judicial practice. He travelled widely, and this gave him an opportunity to study with the prominent scholars of his time: al-Layth b. Sa'd (d.175/791), Sufyān ath-Thawrî (d.161/777) and Malik b. Anas (d.179/795). With Malik b. Anas, 'Ali showed exceptional talent and made rapid progress in collecting his master's fatāwā. In 150/767 'Ali returned to Tunis and undertook the teaching of the Muwatta'. As a teacher 'Ali engaged in both lecturing and compiling. His activity profoundly altered the legal thought of N. Africa. And by his valuable work Khayr min zinatihi, he became a leading figure in the interpretation of Malik's legal viewpoint.¹

In the Jami' of Cayrawân he began evolving his own ideology. Most of the jurists of N. Africa flocked to his circle inside the mosque. His major aim was to train his students in the rule and judiciary application of Medinan law. Among those who were trained by him were Sahnûn b. Sa'id, al-Bahlûl b. Râshid

¹. Ibn Farḥūn, Mīmār, p.192f; Malikî, Riyâd, 1:153ff.
and Asad b. al-Furat. His fame is based on two criteria: his impressive achievement which was attributable to his devotion; the second was his initial role in introducing the Muwatta' of Malik and the Jami' of Sufyân.\(^1\)

Another jurist who had studied under Malik and enjoyed a high reputation and gained an influential post in Qayrawan was 'Abd Allâh b. Ghânim d. 196/311. In 171/783 the Caliph of Baghdad assigned Ibn Ghânim to an important post as the cadi of Qayrawan, which involved him in the administration of justice and gave him equal authority with the governor.\(^2\) His involvement in the administration of the law provided him with an opportunity to impose Malikite doctrine. In his dispensation of justice he relied heavily upon Malik's fatwâs. While Ibn Ghânim used Malikite opinion in judging cases which influenced the development of this ideology, he was also busily engaged in corresponding with Malik for opinions on particular legal issues.\(^3\)

It was during the nineteen years of his office in the court of Qayrawan that Ibn Ghânim, through his authority, made his

\(^1\) Madârik, I, i:326, cf. Malikî in his Riyâḍ, i:151 attributed this statement to Abû al-'Arab. Unfortunately nothing on this point occurs in his published Tabaqât.


\(^3\) Abû 'Uthmân was the name of the jurist who used to carry Ibn Ghânim's letters to Malik. See Madârik, I, ii:485. 'Iyâḍ said "wa kân Abû 'Uthmân rasûl Ibn Ghânim ila Malik". Ibid.
views widely known and was a major force in creating a climate favourable to the reception of new ideas. During that time many large districts were set aside by law as government property. In order to assert his authority, he had to destroy the system of ḥima. He abolished the private holding of land and declared that it belonged to the community.

He was, of course, not alone in committing himself in writing, teaching, lecturing to Mālik's ideas; others were engaged in the same activities. Because of their superior training and concentration on their legal profession, these jurists (Ṣalīḥ b. Ziyād, Ibn Ghānim and al-Bahlūl) contributed greatly to the successful adoption of the Medinan law. By this time an important group of N. African jurists joined to form the Malikite movement and continued to keep up their fame by various activities in social and religious circles. As a result, the Malikī school began to grow. This school, or rather Medinan jurists in general, were able to establish a potential Party inside an autocratic government, that of the Aghlabids.

The Irāqī School

The Irāqī school which arose in Ifriqiyya long before the rise of Mālikism was above all the work of two men: 'Abd Allāh b. Farrūkh (d.176/792) and Asad b. al-Furāt. The former had

1. ḥima is a place recognised as private property mostly for grassland. Ibn Manẓūr, Līsān, Vol. IX, xviii:217.
become acquainted with Abū Ḫanīfa's responsa when he was in Iraq. Ibn Farrūkh Irāqī's idea gained ground amongst the population of Cāyrawān. During his life were laid the foundations of the Irāqī School subsequently enforced through the Aghlabid rule. In the last decade of the second century and the beginning of the third century, the period was characterised by the advent of such proficient lawyers as Asad b. al-Furāt, al-Caḡī Abū Miḥriz (d. 214/829) and Sulaymān b. Imrān. These jurists trained the succeeding generation of jurists and imbued them with the tenets of their Hanafite ideology. The first step they took to maintain their superior influence was an attempt to reduce Malikite popularity. They appointed Abū Miḥriz the Irāqī jurist along with Asad, the heads of court of justice, to counteract the growing Malikite movement. The Aghlabid policy against Malikite jurists was based on emotional appeal. It was claimed that the court should use only Hanafī doctrine in all its judicial cases. Malikite legal doctrine was not recognized by the Aghlabids, but because the Malikite jurists worked among the common people rather than with the aristocracy, they enjoyed great popularity. It was for this reason that they incurred the jealousy and antagonism of the Hanafīs as well as the authorities, who became alarmed at their increasing power and influence. Therefore, the sources of such resentment and dislike among the

2. Ibn 'Idhārī, Bayān, 1:97.
Aghlabids as well as the \( \text{Hanafis} \) are easy to understand. When Ziyādat Allāh usurped the power of his brother, the \( \text{Hanafis} \) were flourishing and enjoyed close connections with the ruler and his army. A legal rift appeared between the two schools because Ziyādat Allāh allowed for divergent interpretation of certain legal questions or political decisions.\(^1\)

This general policy of the Aghlabids, besides having its deleterious effects on the legal and social relationships between the two groups, inevitably caused suspicion among those who attributed all their social trouble to the \( \text{Mu'tazilite} \) elements in the army. In addition to which there was a deeply rooted hostility toward everything \( \text{Iraqi} \), and a strong and lasting antipathy towards \( \text{Hanafi} \) law which, during Aghlabid rule asserted itself as the law of Ifriqiyya.

The \( \text{Malikites} \) at this time had to curb their activities for they were politically isolated and faced the challenge of \( \text{Hanafite} \) criticism. With the growing menace of the \( \text{Mu'tazilites} \) to the future of the Medinan doctrine, it had become clear that the \( \text{Malikites} \) faced two traditional enemies: the \( \text{Mu'tazilite} \) and the \( \text{Hanafite} \).\(^2\)

Asad's Contribution to the Law

In the last decade of the second century A.H., the legal studies of \( \text{Iraqi} \) and Medinan schools revived. The Aghlabids

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1. 'Iyād, Madārik, I, ii, 482-84.
adopted Iraqi law in their court when they appointed Abū Mihriz, a great rational jurist, as Ibn Ghānim's successor.

Coincidentally, Asad b. al-Furūt arrived from the East with the first Malikite written law. And this is more or less the earliest established work in N. Africa of pure Malikite legal formation. Asad enjoyed great success with his book, presumably because of the lack of written documents at the time. Therefore the study of Asad's work and the impact of his Asadiyya on the minds of N. Africa's intellectuals is useful for gaining a proper perspective. This work contributed greatly to the successful adaptation of Malikite law to the society composed of predominantly Hanafite followers; it also established the principle of Iraqi jurisprudence as the basis of Qayrawān jurisprudence.

The author of this work, according to the sources, was born at Harrān in 142/759. While yet a child, Asad moved with his father into Ifrīqiyah. When he was five years old, Asad learned the Qur'ān by heart. He then went to Tunis where he spent his childhood and adolescence. At this time, 'Alī b. Ziyād (d.183/799) set for himself the task of promoting Malikite ideology. Taking advantage of the opportunity to study with Ibn Ziyād, Asad commenced upon judicial studies, and studied the Muwatta' of Malik b. Anas. Thus when Asad was twenty-nine or thirty years old, he was a man well equipped to make some important contribution to the law, and he felt a passionate interest in Malik's opinions.

1. Abū al-'Arab, Tabaqūt, p.163; Ibn Farḥūn, Dībam, p.93.
2. 'Iyāq, Madārik, I, ii:460.
At that time Malik b. Anas, the leader of Medinan jurists, was at the very height of his career. This Imam, who was born in 93/711 at Medina, and died there in 179/795 is undoubtedly better known for his famous composition of al-Muwatta', than he is for his ideas. In 172/788, Asad decided to make direct contact with the author of Muwatta'; and he set off to Medina. Very soon Asad became acquainted with Malik, who taught him his principle of law and recited to him his Muwatta'. However, the relationship with Malik was not of long duration. The reason was explained by Rizzitano, that this was on account of the excessive tendency of the disciple - instigated among other things by his fellow students - to reduce the teacher to engage upon arguments wider and more subtle than those contained in the prescribed text. So much so that one fine day Malik, under the incessant goading of the insidious questions posed to him by the youth, "Asad" singled him out with the words "stop, oh Maghribine! If you prefer the ra'y go off to 'Iraq."¹

Asad was already a student of Ibn Farrukh (d.175/791) who received over 10,000 Hanafi legal verdicts from Abu Ianifa (d.150/357) and was the first to promulgate this ideology in N. Africa.² This shows that there was some inclination in Asad's mind towards the Iraqi school. The rational school of Iraq at

2. 'Iyad, Madarik, I, 1:340; Abd al-Wahhab, Al-Imam al-Maziri, p.22.
this time was marked by extraordinary prominence in intellectual
life and especially in the legal field.

At Kufa Asad had the opportunity of meeting the most
qualified exponents of the juridical school of Abū Ḥanīfa amongst
whom were the famous Abū Yūsuf and Muḥammad b. al-Ḥasan ash-
Shaybānī\(^1\) (d.189/805). Because of his keen interest in ṭaḥfī, Asad
continued communication with the Iraqi scholars. Soon after his
arrival in Kufa Asad committed himself to the process of enlarging
his mental horizons, and he became a frequent audience of Abū
Yūsuf (d.182/798) and Muḥammad b. al-Ḥasan ash-Shaybānī's (d.189/
805) lectures. The intimate friendship between the disciple
and his teachers bore rich fruit. The value of the scholarly
study of Ḥanāfī's juridical school, as Asad felt, was the
guarantee of his popularity and that would be a beneficent thing.\(^2\)

His teacher was pleased with Asad's talents and performance,
so he provided him with the opportunity to study with him at
night, putting Iraqi ideology in the perspective of ever widening
knowledge. Asad wrote down what ash-Shaybānī dictated to him;
in this way some seventy chapters of legal questions were compiled.
His compilation was an attempt to assemble data concerning legal

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1. For ash-Shaybānī's biography see Ṣafadī, al-Māfī, 2:333f.
2. After Asad returned from the East a man asked him: "The ideology
of which one of these schools (meaning Medinan and Iraqi) would
you advise me to follow?" Asad replied. "If you want Allāh's
merciful salvation follow Mālik's idea, but if you desire to
gain public and worldly benefits then you should advocate Abū
Ḥanīfa's works." See 'Īyāq, Madārik, I, 11.478.
systems based on principle that Abū ʿIyālīs had established. In doing so he made far greater use of Shaybānī's sources. Asad was happy with his collection, yet he was certain that the value of his collection would be realised only if it was integrated with the Malikite legal system.¹

Asad left Kufa with the ambition to adjust his material to the Malikite legal form. Nevertheless, Asad found that his knowledge, especially in ṭal'ī and qiyyās, had substantially increased, his aim in studying legal subjects had become clear, and he understood how to proceed to become a faqīh. Asad set out to find a qualified scholar who could help him realize his aim. Egypt was thought of as the centre of the Malikite school, and it was accessible because it was the last stop before reaching Cāyrawān. In Egypt, Asad's new master, Ibn al-Qāsim (d.191/606), had won a great reputation for his advocacy of Maliki fiqh.² Asad appreciated being able to discuss his rationalist legal questions with this famous jurist. He attended Ibn al-Qāsim's lectures. The teacher was pleased by the perceptive questions posed to him by such a young man who was so interested in juridical problems. Asad showed Ibn al-Qāsim his large collection of ʿIyālīs mašā'īl and requested him to restate those questions in the Malikite form.³ The procedure was explained by Emīl Amār as follows: "Asad asked a question and

¹ 'Iyālī, Mada'rik, I, ii:469.
² Suyūṭī, Ḥusn, Part 1, p.165.
³ Makhlu'f, Shajara, p.69.
Ibn al-Cāsim replied to it according to the teaching he had received from Mālik. For example, 'What did Mālik think about manumission carried out by a minor?' asked Asad, and Ibn al-Cāsim would reply, 'Mālik was of the opinion that...'. In this way all Mālik's opinions were set down in writing, recording the numerous questions which arose from a legal system which lumped everything together under one system; religious, moral, civil institutions.¹

Having conveyed Mālik's opinions, Ibn al-Cāsim went on to add his own much more important contribution. Asad frequented the house of Ibn al-Cāsim who favoured him with private sessions. The arguments that were the basis of those significant meetings were gathered in seventy writings and from them was born the Asadīyya.²

Asad's work emerged in its Malikite form as something unique and had a sensational effect on legal practice and theory. It played a vital rôle in instructing and informing the jurists of Qayrawān, and it supplied a valuable account of Malikite ideology. When Asad returned to Qayrawān, in 181/787,³ the circumstances of the time tended to shift emphasis to the importance of the Asadīyya. He commenced his teaching at Qayrawān and his work was widely read throughout the country, and was generally considered the greatest work ever to have so wide a popular appeal.

3. Abū al-'Arab, Tabaqāt, p.166.
But this famous Āasādiyya could not pass without challenge.

Among the jurists attending Asad’s lectures there were ardent and influential advocates of both schools. The most brilliant jurist who frequented Asad’s lectures on Āasādiyya was Saḥmūn b. Sa‘īd. Saḥmūn, an outstanding member of the Ṭālīkītē school, requested Asad to lend him his Āasādiyya so as to transcribe it and make his own copy. The sources record that Asad refused to give his copy to Saḥmūn. The latter managed, by some means, to deceive the author, who was unaware of Saḥmūn’s manoeuvre to get his copy.¹ Asad, when it was too late, discovered this act of plagiarism and debarred Saḥmūn, who had already transcribed almost all the text except the last chapter. According to Rizzitano Saḥmūn had succeeded in transcribing the remaining part of the manuscript and was able to complete it shortly afterwards with the help of a relation who asked Asad’s permission to make a copy of the very chapter that Saḥmūn lacked. The learned sage, who would never have suspected such a sly trick, gave his consent though not before warning the stranger not to pass it on to anyone else. Of course, this was exactly what he did so that Saḥmūn was thus able to fill in the missing part. This placed him in the best position to challenge and refute all Asad’s revision of the Āasādiyya.² Asad could not tolerate Saḥmūn’s plagiarism.

It has been said that Asad’s swing away from Ṭālīkītē doctrine to the Ǧaḥāfīsīs was a sort of reaction to Saḥmūn’s rivalry.

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¹ Mālikī, Riyād, 1:179f.
However, whether one accepts the conversion of Asad's doctrine into Irāqī as a necessary defensive strategy against the growing dominance of Malikite doctrine represented in Saḥnūn or as a reaction to his rival's mischief, there is no evidence confirming either view.

**Saḥnūn's Contribution to the Law**

Any discussion of the legal thought in the field of Malikite jurisprudence, inevitably leads to the thought and personality of Saḥnūn b. Saʿīd. It has been asserted as a historical fact that Saḥnūn, the greatest Malikī jurist that Qayrawān knew, laid down the foundations of Malikite jurisprudence in that part of the Muslim world.

His first name is 'Abd as-Salām; and Saḥnūn, in fact, is his well-known laqab. His birth was imprecisely recorded, as is the case with many leading figures in Muslim history, but there is evidence that it occurred in 160/777; there has been little of interest recorded about his early life and nothing is known of his childhood. Like most of his contemporaries, he was much influenced in his doctrine and way of thought by his teachers: 'Alī b. Ziyād, al-Bahlūl b. Rāshid and Ibn Ghānim.

At the age of 17 he first began his studies abroad. As he devoted most of his time to mastering Malikite law he spent much time in Egypt, where he did much of his studying. He returned to Qayrawān a little before Asad b. al-Furāt commenced his *Asādiyya*.

1. Makhluṭ, Shajara, p.69f.
In spite of the lengthy list of the names of intellectuals who influenced Saḥnūn, mentioned by 'Īyāḍ,¹ there is little evidence to either support or deny Saḥnūn's orthodoxy before the arrival of his rival, Asad. Presumably the decisive event which shaped Saḥnūn's ideals was his counter-attack on Asad's ʿIraqī ideology, meeting what he thought to be Asad's challenge to Ḥālidism.

As the Asadiyya was the first complete canonical work to appear in Qayrawān, it brought forth wide response, and Saḥnūn was among the first to congratulate Asad. To begin with, Saḥnūn was cordial towards Asad, but as jealousy and mistrust naturally led to rivalry, the relationship with Asad quickly deteriorated. As a result, Saḥnūn became anxious to gain the prestige which would make him invulnerable to his rival. To achieve his aim, Saḥnūn managed to get a copy of Asadiyya, and soon set out to revise the Asadiyya with its real author, Ibn al-Ǧāsim.² In fact it is not far-fetched to suppose that Saḥnūn's motive in revising the Asadiyya was a genuine desire to contribute to Medinan law as Asad had done for ʿIraqī law, or perhaps his motive was to provide the exact authentic ʿAlīki law, a law which would restore the text of this work to the strict sense of Medinan jurisprudence.

In 188/803 Saḥnūn went to Egypt and there studied with leading Malikite jurists, who emphasized the importance of the

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2. Makhlūf, Shajara, Appendix, p.120.
opinions and sayings of Malik. While in Egypt, he also succeeded in persuading Ibn al-Qasim to re-dictate the text of the Asadiyya. He begged him to adhere strictly to what he had heard from the mouth of Malik; he did not want his transcription to be any less than absolutely orthodox; only such careful adherence to the words of Malik could invalidate Asad's views.\textsuperscript{1} When he was preparing this new edition of the Asadiyya, Sahmūn was also in search of an appropriate title for his edition which would distinguish it from Asad's. He collected and amended the copy and the title given to it was the Mudawwana.\textsuperscript{2} When the work of revision was finished, Ibn al-Qasim entrusted Sahmūn with a letter, in which he instructed the author of Asadiyya to make his own revision uniform with that of Sahmūn.\textsuperscript{3} In this revision, al-Mudawwana, the rational view of Asad was rejected and greater stress was laid on principles peculiar to Madinan ideas.

Sahmūn went back to Rayyān in 191/806 with his master's letter to Asad, ordering him to collate his text with that of Sahmūn and to keep as the authoritative text only what conformed to the second edition. The information concerning Asad's response to Ibn al-Qasim's order is a matter of considerable doubt, and it is open to question whether one can place a great deal of confidence on it. All sources agree on Asad's refusal

\textsuperscript{1} Rizzitano, "Asad b. al-Furat," RDSO, XXXVI (1961), 234.
\textsuperscript{2} 'Iyāḍ, Madārik, I, 11:472.
\textsuperscript{3} Tanbuktī, Nāyīl al-Ibtihāj, p.192.
to accept Ibn al-Cāsim's direction, but they differ among themselves on the reasons for his refusal. Ibn Khallikān reported that Asad was ready to subject himself to the will of Ibn al-Cāsim and thought reluctantly of obeying his teacher's injunction, but his pupils pointed out that if he did so, he would tarnish the authority of his work and he himself would then be taken to be a mere disciple of Saḥmūn.¹ 'Iyāḍ, on the other hand, reported that Asad was outraged by Ibn al-Cāsim's order, and told Saḥmūn to inform Ibn al-Cāsim that he himself had made Ibn al-Cāsim very popular. Asad justified his refusal on legal grounds, maintaining that all the legal decisions on the text of Asadīyya were agreed between "himself and Ibn al-Cāsim." If Ibn al-Cāsim changed his mind, that would not weaken the terms and authority of their previous accord.²

However, the first impulse of Asad was to seek a justifiable basis for maintaining his own views. In finding justification, Asad consulted a group of his students, who encouraged their master to reject the order. From then on Asad turned to the ӀrāqĪ school as 'Iyāḍ said "wa māl Asad ba'd hādhā ilā madhhab Abī Ḫanīfa."³

It is surprising to learn that when the Mudawwana was introduced into Qayrawān in 191/838, the Malikite jurists started criticising Asad and his work. They attacked Asad's work for its

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1. Ibn Khallikān, Wafayāt, 1:367.
3. Ibid., p.473.
foreign origin, its fundamental deviation from the Sunna.
Their argument was based more on skepticism than on reason. Because of his work, Saḥnūn became the indisputable leader of the Malikite group.¹

Saḥnūn's work earned him the title "the muftī of al-Cayrawān". His numerous disciples from both Spain and the whole of N. Africa were active around the end of the third Islamic century, and showed considerable originality of thought.²

As Saḥnūn had possessed a copy of the Asadiyya, he was able to launch a severe criticism upon the text. Although there was not much understanding of the nature of the dispute between the two rivals, most Malikite followers rushed to a passionate support of Saḥnūn's criticism. The sources mentioned that the Asadiyya had found an unfavourable reception among the Malikites. The supporters of Asad's rational view did not allow the opinions of the Malikites to go unchallenged. Consequently a bitterly controversial refutation soon appeared.³ At this time Malikite jurists began to propagate various accusations concerning the Irāqīs. The doctrine of createdness of the Qur'ān was considered the prime cause of the long hostility. As the Aghlabids were loyal to the 'Abbāsids, the impact of al-Ma'mūn's miḥna on the issue of the createdness of the Qur'ān was reacted to in

1. 'Iyāq's estimation of Saḥnūn's students reached about 700.
2. Ibid., cf. Madārik, I, ii:473.
Cayrawān. There were shared beliefs among the Ḫanafīs and the Muʿtazilites, the former always being accused of collaboration with Muʿtazilites against the Malikite.\(^1\) Saḥnūn himself could not escape the miḥna.\(^2\) Indeed, this age seems to have been the period of rivalry. The concurrent existence of the two legal schools of different trends created an atmosphere of rivalry which tended to slow the progress of each. But the result was not as expected. In fact the conflict gave rise to a polarity in Malikite legal development. The consequence of the conflict resulted not only in producing a new understanding of Medinan law, but also in taking advantage of its rival's creative imagination and assimilating it into their legal practice. The two schools adopted contrasting criteria of legal interpretation. Traditionally, the Malikite jurists tried to find legal answers in the Prophet's tradition and in the customs and practice of the people of Medina for the questions posed by legal cases. The ḤaḍīthIs adopted Abū ʿĀmayr's doctrine. The Malikites, on the other hand, perceived in the subtleties of the Ḥaḍīth law (whose members comprised the intellectual portion of the nation) a power which needed cultivated minds to handle it properly. This view was clearly part of the heritage from the master of Ḥaḍīth (Saḥnūn) in his instructions to his son Muḥammad.\(^3\)

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2. Khushanī wrote a section in his 'Ulamā' mentioning the name of the Cayrawānī dedicated legal scholars who underwent persecution. Ibid., pp.295-303.
Almost all the cities in Ifriqiyya have their own Malikite mufti, but perhaps none of them occupied a place in their legal culture and jurisprudence equal to Saḥnūn's in the Malikite law, for he succeeded in establishing the Malikite identity.

Asad's prestige became inviolable once he was appointed as a chief justice of Ceyrawān along with Abū Miḥrīz. Both of them were Ḥanafīs, and it was the first time in Muslim legal administrative history that there were two judges in one city. In this atmosphere, Saḥnūn found himself unable to challenge the growing influence of the Irāqīs. To escape direct confrontation, Saḥnūn devoted much of his time to the task of propagandising and teaching his Mudawwana, which dominated the legal thought of his time.

Saḥnūn was a central figure in the development of Malikite thought. Students were attracted to his work which was most effective in presenting the legal problems and mechanisms of legislation. This Mudawwana is the fundamental work, the basis of systematic jurisprudence among Malikites; it was significant in his day and for the succeeding generations. His Mudawwana soon made him famous in Spain, and was the most important factor in orienting the whole of North Africa's intellectuals towards change. Saḥnūn's influence on the jurists was almost comparable to that of Malik in Medina.

1. Malikī, Riyād, i:185.
2. 'Iyāq, Madārik, I, ii:592.
CHAPTER II

LAW: ITS STRUCTURE AND METHODOLOGY

Formation of the Law

The first two decades of the third century were the formative period in which the essential features of Malikite law were worked out. The historical development of Malik's legal doctrine, in which the juristic activities of the Maghribi became evident, was through responso Malik pronounced to his disciples on different occasions, as well as collective and individual opinions of the Medinan jurists and Malik's colleagues.

In speaking of the formative period we do not suggest, however, that this period of the third century indicates in any sense the evolution of legal awareness in Maghribi law. It should be noted that the history of law in Ifriqiyya cannot be considered as a single stage or period of development.

Law in this part of the Muslim world developed through its history which is divided into various periods, each distinguished by certain notable characteristics.

The first period of development of the law was during the days of the introduction of the Muwatta', which was accepted by the majority of Ifriqiyyan legalists as a guide for understanding Malik's judicial views. At this time independent legislation was occasionally provided for a solution of a particular, isolated problem.
Al-Maliki related that Sakan as-Sa‘ihsi was reported to have said once he was uncertain of the legality of his own earnings. He earned his income from making bridle chains of copper. He plated them with gold and sent them to bilad as-Sudan, a negro territory, where they were sold as pure gold bridles. As he was a man of some scruples, Sakan went to al-Bahlul b. Rashid to find out his opinion as to whether it was fraudulent trade or not. But al-Bahlul could find no answer from any legal text at his hand. So he recommended Sakan to another jurist, Ibn Farrukh al-Farisi (d.176/792) who was renowned for his reasoned deductions. Ibn Farrukh’s answer was that if those Sudanis were under a peace treaty, then he must give up his job or not cover the chain with gold because it constituted fraud.

The second period began with the time of the composition of the Mudawwana; at this time, the Maliki jurists, especiallySa`mûn, made important contributions to the genesis of Malikite law. Sa`mûn, like other adherents before and after him, held

1. His full name Abu al-Hajjaj Sakan b. Sa`id as-Sa‘ihsi. No date has been given to his death. See Abû al-‘Arab, Tabaqat, p.193.
2. Ibn Farrukh was a disciple of both Malik and Abû Hanîfa, and the Riyâd indicates that he depended mostly on Malik’s opinion, but sometimes he opted for Abû Hanîfa’s view. Malikî, Riyâd, 1:110.
3. Ibid., p.117.
the principles of Medinan jurisprudence to be authoritative. It cannot be claimed that Sahnun alone was responsible for the more vigorous support of the Medinan law that was an obvious characteristic of his legal procedure in the court. But it seems true to say that he referred to and applied this doctrine far more than any of his contemporaries.

At this time, Cayrawan was one of the major cultural centres and a very important commercial city. Jurists and scholars were busily at work turning out definitive legal and theological works on all imaginable subjects. Various causes may be assigned to the literary development, especially in the field of law. Changes in economic and social conditions demanded new legal structures which would correlate them to the existing society. It was a period of intensive legal activity; first the production of new creative works, then the introduction of new foreign laws and finally the application of radical interpretations of some rules of law.

However, this period of legal renaissance in Malikite law could not be claimed to have originally developed in contrast with Medinan law, because the essential result was the extension and formulation of Malik's accomplishments in a form designed to accommodate the changes in society, a necessary revision if

1. For a general description of this city, cf. Bakri, Mushrib, pp.22-33.
2. Janjani's Cayrawan, pp.129-53 contains an important section on Cayrawan's economical and cultural life.
Malikism was to continue as a vital force.

During the first period of the reception of the Malikite law, that is from around 150/767 to 190/805, the Muwatta' of Malik, while not in force in any Ifriqiyyan courtroom, still commanded high respect among Ifriqiyyan judges and jurists. At the time of the codification of the law (the collection of Malik's responsa by Sa`dun) the law of Muwatta' had already established the authority of Malik.

During these years the conflict between the Malikite jurists and the Jundites jurists over the legality of certain points was a cause of the lasting animosity between the members of these groups. As a consequence of the vehement debate between the two groups, there developed two distinct theories which treated subsequently the rational view of the Jundites and the

1. A case in point was the instance of the legality of drinking "nabīdīh", a weak wine that was not very intoxicating. In the presence of the Amir Ziyādat Allah, Abū Mihriz allowed drinking of nabīdīh but Asad declared that it was illicit. Asad cited from his As-Summiyyāt, Book of Poison, the passage where it is stated that the munassaf is permitted because Khurāsānī grapes are rich in honey and poor in water and become fatter when half of their juice is evaporated. And that is the reason why the Irāqīs allowed their adherents to drink nabīdīh. The juice of other grapes was not permissible because it was up to two-thirds sugar and therefore was more intoxicating. Malikī, Riyāḍ, 1:184.

2. This rivalry began as an emphasis of different views and later became a political rivalry. Before 180/796 al-Bahlūl refused to receive Abū Mihriz (d. 214/629) who had come to pay him a visit, because he had not changed his mind on the question of ra'īy. See 'Īyāḍ, Madārik, I, 1,337.
Traditional doctrine of Medina. Nevertheless, the advocates of these two doctrines shared the perception of themselves as part of the spectrum of their predecessor's doctrine. Their zeal against heresy was the main factor that unified them as a political force against the ruling class.

In any event, it was in the interest of the authorities to emphasise the differences between the two movements, to prevent them from becoming a political threat. Sometimes the autocratic government turned one party against the other by actions such as the government nomination of Sulaymān b. Imrān for the post of chief justice of Qayrawān in 240/854; but later on they replaced him with Ibn Tālib, a Malikite jurist. In 275/888 the governor sacked him with a false accusation, replacing him with Ibn ʿAbdūn, a Ḥanafī jurist who was very antagonistic towards Malikite jurists.¹

The Malikite jurists of the Maghrib played the most important rôle in expounding the law. In order to appreciate the achievement of those jurists, it is necessary to glance at political and cultural circumstances that contributed to the legal structure of Ifriqiyya. At the time of the power of the Aghlabid dynasty (184/800 – 296/408) the ruling class were always by doctrine and practice absolutist in their acts, but their views were moderated by the pressures of opinion, administrative

¹ Khushanī, ʿUlamaʾ, p.306f; Ibn ʿIdhārī, Ṣayān, 1:121.
usage and the growing influence of intellectual groups.¹

Within the Aghlabid period during its era of power, the Malikite legal doctrine developed through the fluctuations of success and failure. The Malikite jurists maintained, throughout the third century, their position with respect to some of the Aghlabid rulers, such as Muḥammad I and his son Aḥmad and Ziyādat Allāh II (from 226/840 to 250/864).² In this period Malikite law never lost its predominant place in the judicial life of Ifriqiyya. Talbi's discussion of the reform which had been introduced at this time explains the rôle and the impact of law on the structure of government and society. He said that from the first half of the third century through to the fourth, the Sunnite fāmiha (the Malikite jurists) had established, in an already very elaborate form, a whole system governing life, government, and social organization, capable of translating into worldly practice the Islamic ideal - therefore eminently fair and obligatory for all, for its sources were in the Prophet Traditions. If the ruler would not work towards the practical realization of the system offered by the jurists he could not in effect count on the jurists' loyal collaboration and their constant support.³

It is true that the use of the Muwatta' proves the importance

1. Makhlus, Shajara, Appendix, p.120. cf. Ibn 'Idhārī, Bayān, 1:109f & 120f.
3. Talbi, L'Imirat, p. 236.
of Malikite law at this time. It is also clear that the Muhäwana distinguished law from Tradition, which was widely applied by the legal profession as well as in court procedure.

Saḥnūn enunciated his own conception of Malikite law by prescribing legal criteria and standards which were the means of achieving the Malikite legal practice. To give weight to Malik's opinions, Saḥnūn concluded each chapter of his Muhäwana with Tradition he had found in the recension of the Mawäta of Ibn Wahb. To be more certain of his knowledge and thus establish his authority, Saḥnūn made his journey to Egypt where his views were refreshed and confirmed through the direction of Malik's immediate disciple, 'Abd ar-Rahmān b. al-Cāsim. Saḥnūn then restated the text in a way that made the Muhäwana usable within the context of the Međinan Law and flexible enough to allow for development.

Although it is usual to regard the act of editing as inferior to the act of original compilation, Malikite jurists in general have acknowledged the importance of Saḥnūn's edition of Asadiyya, with its new title Muhäwana, in the formation of legal structure; the edition was perfectly in tune with Malik's opinion. Despite his work which was an imitation of Asad, the object of Saḥnūn's edition was to resolve uncertainties in the text of Asadiyya and to bring its contents into line with Malik's ideas.

1. Mawāhib, Intro., to Mawāhib, 1:34.
2. Tanbuktī, Kayl, p.192.
In this work, the realm of law was divided into that pertaining to the original work of the Asadiyya, identified with Iraqi rationalism and that which transformed. There is no doubt that Saḥmūn and other Malikite leading figures were familiar with the major works of their Iraqi contemporaries. They had a better understanding of the forms of the Ḥanafīs' legal literature than most of their fellows in Spain and made use of their basic approach and their way of thinking.

The bulk of the Malikite legal works are in fact interpretations of the Mudawwana. Minute investigation of the text of Malik's Muwatta' and his decisions and dictums, preserved in the Mudawwana, was called for, and far-fetched interpretations were sometimes needed to derive law from these sources.

For a period Malikite legal rules remained faithful to the religious precepts of their counterparts in the prestigious legal tradition of Medina. The classic work of Saḥmūn and the version of Muwatta' were admired and discussed. Jurists, judges and jurists consults directed their efforts towards the understanding and elaboration of these works. They were discovering rules and constructing a harmonious system. However, when a judge or jurist wished to understand the text of Muwatta' or Mudawwana, he had to employ certain methods of investigation and interpretation for the results of his enquiry to be valid.

The methods of interpretation and classification to be employed for the construction of the formulas for using Malikite law are presented in these main legal works. Jurists adopted the
Iraqi viewpoints contained in the Ḥudawwana. A great change took place when those jurists introduced the Iraqi methods into the study of Malikite works. For the text was no longer directly consulted by this method, which assumed that the real understanding of the works began with the comprehension of the interpretive technique employed by the Imām, and not with adherence to the literal meaning of the texts. By this method, the jurists were no longer required to concentrate on literary text and evidence, but were free to speculate about the solutions to legal questions. This shift in the technique of explanation from literal to free interpretation, made the Malikite legal literature identical to the Iraqi to the extent that it included the results of the jurists' own value-judgements. The object of the Iraqi method, as ʿIyāḍ noted, was to make the legal cases themselves through evidence and analogy the basis on which to build the details of law. The other jurists who had not been influenced by this sort of revision of the application and meaning of Malikite law concerned themselves with the word and meaning of the text. Their aim was to identify the meaning of words and ideas of uncertain application; in criticizing the method of the Iraqi, they pointed out the contradictions and inconsistencies which could be attributed to the Imām through his other works, as Muwatta' for example, or even in different passages of the single work which contradicted each other.  

1. Naqqārī, Azhār, 111:22.  
2. Ibid., p.22f.
Since the diversity of expositions, commentaries, and glosses were written by famous jurists of undisputed authority, the courts could pick freely from any of the sources which suited them to support their pronouncements.

The flourishing of the study of jurisprudence towards the beginning of the third century is, undoubtedly, a momentous period in the legal history of Ifriqiyya. The influence which Saḥnūn and his Mudawwana exerted on the development of law and legal literature was all pervasive. Throughout the history of Ifriqiyya (now Tunisia), except the few years of Fatimid rule,¹ the Mudawwana was the only authority for not only the entire legal life of Ifriqiyya, but also that of Spain; it affected not only the courts, but also the practice of jurists of various backgrounds and nationalities.

The doctrine of Mālik was partially known before this period. ‘AlI b. Ziyād (d.183/799) who had the honour with bringing the first copy of Muwatta into Ifriqiyya, is said to have delivered his lecture on this work long before the appearance of the Mudawwana.² But this discovery of the Muwatta was rather the effect than the cause of the revival of the study of the Medinan law.

1. It cannot be assumed that all traces of the Malike law absolutely disappeared, at the time of the rule of the Fatimid dynasty in Ifriqiyya. But it must be allowed that the judicial law (court law) of the Malikes fell into complete disuse as a necessary consequence of the mass inquisition of the Malikes by the Shi‘ite rule. See Ibn ‘Idhārī, Bayān, 1:185ff.
2. Ibn Farbūn, Dībāj, p.192f; Mālikī, Riyāḍ, 1:158.
In the preceding discussion reference was made to the arrival in Tunis and Qayrawân of a number of students who certainly would have heard of Malik and introduced into Ifriqiyya the legal doctrine of Medina. But at the same time there can be no doubt that the essential part of juridic structure was present previous to the introduction of the Muwatta'. The accounts of historians and biographers, however, suggest that Malikism and its ideas were influential enough at this time to receive some attention. The image conveyed by the earlier Maghribi writers1 is that of independent scholars who derived their own legal doctrines from Medinan sources as well as those of the Irāqī.

In this period, before the appearance of the Mudawwana, one cannot assume the complete assimilation of the Medinan law. The legal system of the court is not very easy to trace. And the evolution of Malikite jurisprudence in Qayrawân was, in part, the result of the endeavour, both theoretical and practical – to apply the doctrine of Malik. A history of Ifriqiyyan-Malikite law must begin with the compilation of the Mudawwana. Ifriqiyyan jurists had followed the precepts of this text. Glossators, and other commentators, illustrated and expanded the rules that are scattered throughout the text.

In theory, the Mudawwana filled in all the gaps left by the legal code of Ifriqiyya. No judge or jurist could refuse to consult the Mudawwana on the grounds that there were no provisions

1. Such as Abū al 'Arab in his Tabaqāt, and al-Mālikī in his Riyād.
for a particular case. The consequence was that the jurist and judge who must give legal advice and decisions, had to find their answer in the text of the Mudawwana. What happened if, in fact, no recorded decision appeared to cover the point in question was that the judge or jurist had to search for decided cases similar to the case in question. By a process of analogy and comparison with legal precedent, the jurists and judges were able to decide all cases. They drew from cases decided in the Mudawwana, one which was most similar in ratio legis to the case before them. A relevant example would be the case of a crime committed by a wife against her husband, who was poisoned by the wife with the consequence that he contracted leprosy. The jurists after a long argument could at first reach no conclusion; then after consultation of the Mudawwana, the jurist, Ahmad b. Ja'far al-Hawārī (d. 319/931) found an analogical case in which the victim suffered damage to his appearance (his teeth became discoloured after a physical attack) and the judge ordered compensation to the value of the loss, based on appearance. Similarly, the case was finally decided on the basis of the damage to the physical appearance of the husband, and the wife was ordered to pay compensation for this damage.

With regard to the Mudawwana, the Maghribī legal administrators regarded it as the source of their legal structure, but they were inclined to look upon the Muwatta' as a more

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2. Ibn Farḥūn, Dībaʾ, p.34.
dependable source for opinions. Ibn Rushd reports that the general view was that after the Cur'an there was no work on jurisprudence more authoritative than the Muwatta', and that after the Muwatta' there was no book in this field more useful than the Mudawwana. In jurisprudence, the Muwatta' occupied the same position as the book of Sibawayh in the field of grammar, and the book of Euclid in mathematics. The place of the Mudawwana in jurisprudence was comparable to that of the first sura of the Cur'an in ritual prayer; this sura is such that it is by itself sufficient for prayer, and any other sura is not sufficient without the first sura. So was the Mudawwana the basis for legal interpretation.

A study of the Malike law of the Maghrib revealed the influence of Malik's classical work and response at every stage. With the passage of time, the Maghribi jurists encountered newly arising problems of growing complexity. With the increasing number and use of judicial institutions, and with the pressure of a mass of problems arising from unprecedented social and commercial expansion, there was bound to be some confusion and differences of opinion over the use of the original legal sources (the texts of the Muwatta' or the Mudawwana).

Spanish and Egyptian legal literature began to command respect in Ifriqiyya. And the jurists of Cayrawān were certainly becoming familiar with the law and procedure of these two parts of Muslim world, all the more so because first of all,

1. Ibn Rushd, Muq, p.27.
there was constant intercommunication among them because of the strategic position of Cayrawān (that is its geographical location half-way between Spain and Egypt) and secondly, this period of Malikite history saw an unprecedented growth in the judicial activities of these two regions. Thus we notice that al-.BADGH and al-MUSTAKHRAJA, which were famous Spanish legal works, became widely known among the Cayrawānīs. Moreover, Cayrawān enjoyed the prestige of having among its inhabitants the only transmitter of al-BADGH, Yūsuf al-Maghāmī, who remained the last jurist actually to have received this work from its author 'Abd al-Malik b. Ḥabīb.¹

As the Ifriqiyyan jurists were beginning to employ such imported works in their private and public profession, it is not surprising that they began to depend on them upon occasion in the Court. Ibn Ṭālib (d.275/888) a prominent cadi of Cayrawān, used to give his judgement on a parchment and concluded it with saying "I passed this verdict in accordance with Ashhab or Ibn al-Gāsim and so on..."²

The great achievement of Malikite Ifriqiyyan law was marked by the recognition of distinctions which were outside Ifriqiyyan law, absorbed into Malikite law under its general provisions. The progress of the law may be shown by abundant examples of its successful response to the demands of everyday life.

¹. Ibn Farḥūn, DĪBĀʾI, pp.352-356.
². 'Iyāḍ, Madārīk, II, 1:206.
The Egyptian and Medinan jurists made no distinction among the various kinds of uncertainties or faults in contracts. Sale and hire of one specific thing was generally allowed to be one contract. But Saḥnūn refused to allow this generality. For example, if material was bought and an agreement was also made that the material would be made up into a dress, Saḥnūn regarded the buying of the material and the making of the dress as two separate contracts, even though both actions were undertaken by the same people.¹

The great achievement of this period was the codification of most of Mālik's responses. These responses were collected, and assumed such authority that they acquired the legal weight of a binding force. For example the Mudawwana, the responses of Mālik, was the first legal opinion, and it was followed by legal treatises and commentaries which discussed actual as well as hypothetical cases. Mālik's thought had always represented traditional form, but during the great period of the Malikite legal works, discussion was more concerned with Mālik's ideas than it was with the mechanical observance of the Master's thoughts. Much of the legal thought of the Spanish and Ifriqiyyan jurists sought to transform Medinan law. Some of these jurists managed with the help of metaphor and rational interpretation to show some of the contrasts possible in interpretations of Mālik's own judicial ideas.²

¹. Ḥaṭṭāb, Maw, v:396.
². 'Iyāḍ, Madārik, II, i:74 & 145.
Recognition of Custom

Given the crucial role of custom in the development of the law, it was appropriate that custom should have received particular attention in the formulation of legal procedure. Custom, for example, might be called upon to explain what was ambiguous, yet it was never allowed to control a positive rule of law or to interfere with terms already fixed by law. However, in all cases relating to the interpretation of contracts, custom was one of the very first factors which had to be ascertained. The jurists took into account the changeability of custom which in consequence led to the change of the law based on it.

It was not necessary that a custom should have its origin in the time of the prophet or his Companions to give it a valid legal status. Any custom, although it was new, that was generally prevalent in the Muslim community had the force of law. The moral obligations implied in daily practice, derived from custom, were the primary factor determining whether or not the obligations were thought of as binding and legitimate. What was assimilated and recognised by the Maghribi jurists became extra-Malikite legal practice, by conversion into a new mode of Malikite legal expression.

Every country accepts certain norms as law, specifying those norms as having particular legal value and obligation usually not subject to question or alteration. As historical scholarship.

became more articulate, jurists came to see more clearly that the legal system and rules were not only revealed laws, but also the result of historical processes of combination and fusion. The importance of such historical processes made itself apparent with the extension of the Muslim community, the development of administration and commerce, and the acceptance of foreign treaty agreements.

The use of customary law and the awareness of its importance gave rise to a revaluation of legal concepts, widening the scope and basis of the legal framework. Judges, lawyers, jurisconsults, and muhtasibs, in their dealings with legal and judicial issues, were not necessarily confined by their function, to specific norms and customs of certain people or towns; but they had to take into account the application of the custom of the state in which the case they were judging took place.¹

The flexibility which the Malikites allowed themselves by employing 'urf in law made them successful in determining what would otherwise have been static cases of law. Shāṭibī went further in assuming that 'urf could limit a text by saying that if a man swore an oath not to enter a building, he will have broken it by entering a mosque; but general custom did not include mosques in the category of buildings, therefore the man would not have broken his oath by entering a mosque.² Al-Carāfī (d.684/1285) one of the prominent leaders of the Malikites said

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¹ Carāfī, Furūq, I, 1:45.
² Shāṭibī, I'tisām, 11:141.
"All rules in the Sharī'ah are based on changing customs, when customs change, the rules change in accordance with the requirements of the new custom."¹

Besides its prominence in judicial decisions and scholarly writing, custom has played a considerable role in expansion of the meaning of law. Custom was particularly important because it was more flexible of interpretation than other methods.² It also provided the law with various ideas and terms of usage for deciding the validity of contracts and ascertaining the legality of every-day individual acts. Many words used in every-day speech had a different meaning in law, for which custom was the only guide. For example the word, "al-batta" or "anti 'alayya ḥarām" indicated a definite meaning of irrevocable divorce in Malikite law.³ The Malikite jurists tended to base themselves on the derivation of these words to determine their legal sense, but they found that custom played an important rôle in their meaning. Customary meanings could change depending on the social context; the words batta or ḥarām did not have the same meaning in Ifriqiyya as they did in Egypt. As legal terms in Egypt, they had only the connotation of 'sanctuary'.⁴

¹. Qarāfi, Ihkām, p.232.
². The well known maxim in Malikite law "custom has the force of proviso" might indicate that custom and usage are a valid source of law. See Ma'dānī, Ḥashiya, i:191f; Mawwāq, Tāj, iv:340.
⁴. Muḥammad 'Alī, Tahdhib, I, 1:41; Qarāfi, Ihkām, 237f.
The scope of custom was quite varied. The distinctive feature of the custom was its limitation either to a particular geographical region or to a definite group doing certain jobs, or carrying on certain particular trades or occupations. The variety of customs necessitated flexibility of legal interpretation, particularly with regard to the status of a custom within a specific location. So it became necessary for the judge to consider the time and place, in which the law was to be executed. For example, the sense of certain legal terms could vary from district to district; if a man were to hire a person to build a wall and the worker demanded his wage payable in advance, but the man refused to pay him until the work was finished, then the relevant custom regarding such an instance would be of importance in deciding the case, and the custom would have varied with the place. The Malikite answer would be that if there was no contract, written or verbal between them, the dispute must be viewed in the light of the current custom of the city.

It was important to observe context as a force determining the law of custom. For example, in a contract, the two parties had ascertained the value due to one of them, stating that one should pay the other a measure of wheat. The term "measure of wheat" denoted different quantities in different provinces, and

1. Ḥattāb, Maw, i11:323f; Carāfī, Furūq, II, i11,237f; Ḥikūm, pp. 231-35; Shāṭibi, Ḥiw, ii:284f.
2. Ḥattāb, Maw, v:395; Carāfī, Ḥikūm, pp.234-37.
it was obligatory that the meaning of the term be construed according to custom in the locality where the contract was made.¹

As the application of a given custom was restricted to its locality, it had only a limited effect. It is a part of the same rule that where, by known and established usage, the technical senses of certain words and practices have been accepted relative to particular acts by respected specialists and craftsmen, these senses ought to be used in settling disputes, explaining contracts and defining aspects of law.² Usage and custom between husband and wife frequently determined the proper meaning of a certain word or the exact import of a particular act. For example, if the husband denied the allegation of his wife that he did not provide her maintenance for some years, the court could refuse her claim, depending on the application of a custom that such short or long length of time together in a house invalidated her claim.

The custom, as a rule of law, must, however, be understood within the limitation of its specific meaning. Thus, the word ٌ٠٠٠٠ (monetary unit), in order to have acquired an unequivocal monetary value, must have been defined by the practice of trade and recognized accordingly by the courts. Al-Māzirī (d.535/1141) claimed the unanimity of the jurists on the question regarding the sale of goods depending on fluctuating monetary value. If

¹. Ibn Farḥūn, Tabgīra, 11:57ff.
². Shāṭibī, Maw, 11:284.
the goods had been sold for the price of 100 dīnār, and the value of the dīnār in the province was not the same as it had been at the time of the sale, then the jurists agreed that the contract was invalid.¹

This left open to possibility that customary laws could be overridden if they were inconsistent with the requirements of local circumstances or directly contradicted the text or were likely, by their application, to bring grievous harm. From this discussion of custom it is clear that as a rule of law, it was not a classical source, as is the case with revealed text, analogy, and consensus. It was merely a method of interpretation with these special functions: 1) To clarify the text, or to clarify the terms involved in contracts; 2) To decide a case in which there was no evidence; 3) or to refuse to hear a case in the instance that there was no basis for the litigation. Carāfī said, "If a man comes to you [supposing that you are a jurist] from another province you must decide his case according to the custom of his province, not according to the custom of your province or your legal text."²

However, it seems that Malikite jurists, in employing this methodological analysis denied to custom any universal legal validity unless it was implicitly sanctioned by the text; that is, that it was in harmony with the positive law. But in judicial

1. Ibn Farḥūn, Tafsīr, 11:57; Carāfī, Ikāk, p.232.
2. Furūq, I, 1:176f.
practice, they gave the principle of custom the self-sufficiency of legislative authority. For example, the jurists of Cordova carried this principle so far as to set it on an equal footing with the injunction of obligation (wājib). It was a prevailing custom in Cordoba that the bridegroom give a present in addition to the legally required dowry.\(^1\) This custom was a social one that might appear to have no legal status, yet it had been made equal with the legal decisions of the text.

Jurists of Qayrawān allowed less importance to the rôle of custom. The status assigned to custom as an operative source of law was unimportant when the principle assumed extra-judicial authority. Malik insisted that if some of the dowry payable to the son-in-law was given as a credit note, the date on which the remainder was to be paid must be mentioned in the contract. Moreover, the date assigned for the credited dowry was not allowed to exceed six months. Custom in Ifriqiyya ruled against the six month limitation, the possibility of postponement of payment of the remainder being up to three years. In this case, the customs overruled Malik's opinion.\(^2\)

**Genesis and the Method of Malikite Law**

Pride in the purity of the Traditions of Medina and in the richness of the legal ideas of Medinan Tradition, the decisions

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1. Ibn Rashīq, Mafasāt, recto, 93.
of the Companions (especially the four righteous Caliphs), and prophetic Traditions, all inspired Mālik's thought.\(^1\) It must be remembered that the pervasiveness of such cultural materials based on acceptance of authority would have discouraged the development of an absolutely rationalistic attitude.\(^2\) Of course, it is always possible to find some points of agreement between Mālik and the Ḥaqīj jurists, no matter how different their approaches. Mālik and Abū Ḥanīfa, both believed the Qur'ān and the Sunna were the main sources of law; both of them appealed to the principle of istiḥsān (equity). There was the positive demand by both schools: that the revealed text should be the first source the jurists had recourse to, although both the schools, Medinan and Ḥaqīj, used independent speculation to answer the needs of matters connected with religious interpretation ('ibādāt). In that sense they were all agreed on this in principle, whether they were called Traditionists (aṣḥāb al-ḥadīth) or Opinionists (aṣḥāb ar-ra'īy).\(^3\) But one of the keystones that identified each one by the above-mentioned name was that of the use of human reasoning, relatively prominent in Ḥaqīj law, whereas the Malikite laid great emphasis on the authority of prophetic Tradition.

At the start it is well to know what the word ra'īy means. The distinction made by later generations between aṣḥāb ar-ra'īy and

1. 'Iyād, Madārik, I, i, pp.60-67.
2. Ibid., p.94f.
ahl al-ḥadīth is inapplicable to the time of the Companions. There was no legal thought that was not based on or mixed with ra'ya. Any independent legal idea pronounced by the Companions, even their first followers, must be determined by analysis based on rationalism.¹

In the late decade of the second century the word ra'ya developed a different shade of meaning. It became uniquely attributed to the Irāqī jurists, whose legal theories considered that the solitary Tradition, ḥadīth āhād, and interrupted Tradition, ḥadīth mursal, could both be curtailed and regulated by judicial reasoning.²

The Malikite asserted that the prophetic Tradition, especially if it was confirmed by the practice of the people of Medina, possessed an authority (ṣuṣja) superior to that law which was obtained by means of reasoning.³ They accepted mursal and āhād Traditions, even though they might contradict certain legal rules, provided those Traditions were corroborated by other rules of Medinan practice. The Malikite argument was that one must accept what the Prophet said, if one was unable to understand the ratio legis; one should not attempt to rely on any rational inquiry which would suggest an answer contradictory to the content of such Tradition.⁴

3. ‘Iyāq, Madārik, I, i:94; Ibn al-Cayyim, Ṭiḥām, I, i:33.
4. ʿIyāq's method of interpretation having been discussed, ‘Iyāq stresses, in his momentous introduction to Madārik, pp.89-90, the custom and method of the Companions and the early Predecessors (as-Salaf al-Awwal) among the formulae which made up the bulk of ʿIyāq's principle of jurisprudence.
The theoretical consequence of the emphasis on Tradition was that it made Malikite legal thought dependent on a conservative approach to jurisprudence, that is, it was based on adherence to legal text rather than on human reason for interpretation. Moreover, Malik had various motives for Prophetic Traditions. He might have, for example, wanted to preserve for posterity the actual character of the Medinan doctrine. This assumption is supported by Malik’s famous work al-Muwatta’ which reflects Malik’s experience with and his conviction about the importance of hadîth.

Two intellectual trends could have stimulated Malik’s preference for Tradition. The first was the reputation of the Traditionist. A muhaddith’s personal integrity and religious devotion, centred on the Prophet’s way of life and his hadîth, inspired Malik’s admiration; such ideals influenced him to undertake any activity or follow a line of thought which would have led him to these ideal attainments.

The prevalence of another intellectual trend encouraged Malik to study Tradition: this was “the doctrine of the predecessors” madhhab as-Salaf, the absolutist attitude of the Traditionists, which precluded all sectarian views. As it ruled out the possibility of accepting other views, this doctrine necessitated Malik’s total commitment to Traditional studies if he was to study them seriously.¹

Malik’s activities were mainly associated with the efforts

¹. Abdul Gadir, The Traditional View, p.37.
of individual Traditionists who aimed to revive the Sunna of the Prophet along the lines of Ibn 'Umar, the son of the righteous Caliph 'Umar I, and his disciples, among whom were the seven jurists of Medina. The most illustrious of these jurists was Sa'id b. al-Musayyab.

Yet Malik's interest was not exclusively Tradition bound for he showed some inclination to rationalism. This was due to the attitude of ra'y, favoured in some intellectual circles of Medina. The influence of judicial reasoning took various forms. Admiration for his teacher's (Rabi'a) rational skill gave rise to his interest in "judicial reasoning", ra'y. Probably more important for Malik was the rational cast of mind of Rabi'a that gave his opinions so individual a character. The most important result of Malik's study of ra'y with Rabi'a was the use of rationalistic analysis of the kind used by Rabi'a, who argued against the head of jurisconsults of Medina, ra'Ta' al-futya bi-Madīna from a point of view attained through logical process.

The rational idea underlying the general practice of Medina and the doctrine of the city was the principle that distinguished

1. Ibid., p.32.
4. For his life and works, see Khatīb, Tārikh, viii, pp.420-426.
Mālik's "personal opinion" from the opinions of Iraq.  

Interest in the Traditional literature and concern with judicial reasoning were thus inter-related, at least in the development of Mālik's ideas. Of course the Traditional elements overrode speculation on the process of the law. But an analysis of the Malikite legal theories shows that rational and social elements played an important role in their formation. Their doctrine of equity, (istihsān) and utility, (nāglaḥa), their special interpretation of the 'illah (ratio legis) and the theory of "Medinan practice" have given their legal system many peculiarities.

Analogy

After these preliminary observations, we move now to the study of some of the methods of interpretation which have had great influence upon the development of Malikite law. Mālik himself did not prescribe his own rules of law; they were developed by contemporary and succeeding disciples who gathered the rules by induction from Mālik's reported decisions, responsa and his legal opinions pronounced in various circumstances.

1. One of the four unprecedented judgements pronounced by Mālik was his allowing the application, in cases of deliberate wounding, of the lex talionis against the accused on the testimony of one witness and the oath of the plaintiff. See Hawwāq, Tāj, vi:182.

2. Mālik was not in favour of writing down his rational judgement on certain legal problems. See Shāṭibi, Niy, iv:290. Those who expounded these collections of Mālik's law were divided into two categories by the methods of interpretation and demonstration by which they proceeded.
The methods were divided into two different categories, to elaborate their Master's own conception of the principles of jurisprudence.

The famous jurists within the school were increasingly expected to provide solutions for contemporary problems. In their attempts to answer particular questions, the jurists took even greater liberties in using the principle of expedience. This pressure molded the Malikite jurists into a dynamic organization, which solved some new problems and decided matters of law left undecided by their predecessors. However, these formal responses of Medinan law were insufficient to meet the needs of the changes in the Maghrib's economic and social position occurring through many events and forces present in the surrounding society. Nevertheless, the desire to judge in accordance with the Imam's main principle forced the jurists to establish a basis for judging new cases as they arose in a changing society, judgements which would be consonant with the basic rules that made up the Malikī law. Most of these unprecedented cases were resolved by a process of comparison through analogy with the decisions already pronounced by the Imam. Thus the new decisions became part of that made-up law of Malik. By this method, the jurists assisted in the formation of a new law.

1. For more details concerning the factors which forced the jurists to invent additional rules, cf. Shāfiʿī, Ḥuw, iv, pp. 234–238.
Thus the Malikite jurists established their Master's principles of law. The advantageous result of the application of these principles was an increase in the number of possible sources for interpretation of the law. The primary concern in this discussion is not those orthodox principles which were applied by Malik's succeeding followers to prevent decisions being a misrepresentation of Malik's views, although orthodoxy played an important rôle in the process of legal growth. This development was the result of the use of several principles by two methods: first, by the extension and development of the general rules of the law by analogy; and secondly, by the application of the rules of public interest (maqlaha) and usage and custom (al-'urf wa-l-'adā). 1

There was no dispute between Malikism and the other schools of law respecting the right to employ reason; the issue arose rather over the exact rôle of reason in legal affairs. To Malik, its legitimate employment, therefore, was not to establish new precedents, but to point out the legal implications of the text, the primary sources of the Sharī'a. Like most of his contemporaries among the Medinan jurists, Malik was sceptical of the claim that use of reason was the most successful method for recognising the demands of the circumstances of a case. 2

1. Šātibī, Jami', iv:104f.
2. Ibn 'Abd al-Barr, Jami', Part ii, p.144f; Šātibī said that Malik criticised the Irāqīs for neglecting hadīth which would give them indispensable knowledge of the Sharī'a. See, I'tigām, 1:105.
There is no doubt that Mālik considered himself primarily a Traditionist (muḥaddith). Traditionally, rational judgement was opposed to the prevailing tendency among the first generation of the Muslim Community. To understand Mālik’s objection to dependence on reason is to conceive that his objection was not to reason in general, but to the use of reason as conceived by rationalists. Mālik rejected the claim that rationalist decision was inspired wholly by reason without a mixture of the passions; and passions, so often containing perverse desires, were not apt to regard the truth. Yet at the same time Mālik stressed the value of speculative deduction (gīrās), giving it a place among the four principles of law. The expansion of the meaning of law served to make Muslim jurists in general, and Mālik in particular, aware of the importance of analogical reasoning in legal and judicial thought.

The classical theory of the function of law, the basis of jurisprudence was that the law had been revealed to man as a criterion of good and evil. All judgement of what was lawful could therefore be derived by logical reasoning from the revealed document, the assumption being that the character of good and evil was unchanging. For practical reasons jurists added two methods of adjudication: consensus and analogy. The scope of consensus

is a matter of conjecture. While consensus had the force of positive law, it was not regarded as necessarily a fixed or permanent form of the law, and was therefore usually valid only in its own time and place. The rule of analogy was more a method of interpretation than a source of law. It was not a criterion on which the decision was based, but was merely a procedure by which a decision could be reached. Its use was justified by the fact that the revealed texts did not provide answers for every detail of life's problems. This dilemma is well delineated by Ibn Rushd's statement, "...because occurrences between people are infinite, whereas texts, acts and decisions are finite, and it is possible for something finite to correspond to something infinite."²

From the very first, the primary function and effect of analogy (qiyās) lay not in establishing new rules but in extending the meaning of known ones. Mālik never doubted that by employing deductive reasoning, he was maintaining principles unanimously accepted by his predecessors.

What the Malikites meant by analogy was the accord of a known rule with a set of circumstances, which in some way were similar to or typical of, the instances to which the known rule applied. Analogy is an extension of a rule of law to a new case

2. Ibn Rushd, Bidāya, p.2f; Mūhammad, Tahdhib, I, 1:8.
on the assumption that the original contention on which the two cases are based is similar.\textsuperscript{1} Al-Carāfī defined qiyās as "establishing the applicability of a ruling in one case to another case on grounds of their similarity with respect to the attribute upon which the ruling is based."\textsuperscript{2} Analogy, therefore, would not be decisive in an already formed law. It afforded a rigorous demonstration only in the absence of clear-cut law derived from the three main textual sources. The value of analogy in the Malikite point of view\textsuperscript{3} was thus not its usefulness when the text was ambiguous or inconsistent with respect to the case on hand, but its usefulness in deriving some sort of judgement in a case for which the text did not directly provide a judgement.

An example of the use of analogy is the question, whether the situation of the guardian is analogous to that of a bailiff or other judiciary whose personal pecuniary interest might be advanced as a result of the exercise of his duties. The Kedinan law gave the guardian of a minor absolute authority, as his position was regarded as similar to that of a bailiff; he was held responsible for the property of the minor. For example, if there were two guardians for a minor's property, and they separated the property into two parts, each of the two guardians was held responsible for that part. In the case of loss or

\begin{itemize}
\item \textsuperscript{1} Bāji, Risāla in RIEEI, ii (1954) 29f.
\item \textsuperscript{2} Carāfī, Tanqīth, quoted by Kerr, Islamic Reform, p.66.
\item \textsuperscript{3} Ibn Rushd, Mug, p.22.
\end{itemize}
damage they would have been held liable.

According to the Maghribī law (Saḥnūn's opinion), the function of the guardians in this case were analogous to the Trustee. Their position was like to that of the trustee who could be exempted from liability for loss or damage, unless he was proven negligent or in some way responsible for loss or damage.\(^1\) This givān is one of the methods of interpretation adopted by the Malikite jurists which enlarged the horizon of the province of the law, and paved the way for important developments in several fields of law.

Analogously, there is a comparable process apparent in the following two cases. The principle that correlates one case to the other was that of attribute ('illa), in which common characteristics of the cases being compared determined the basis of judgement.\(^2\) For example, the absence of "legal capacity" is a particular characteristic defined by rule of law, such as a guardian should be given charge of the possessions of a minor. The guardian of the minor, who would be given the legal privileges and responsibilities of a father, would then have absolute control over the supervision of the property belonging to the minor. The incapacity of the minor was itself part of the incapacity which was defined as a lack of will in a person, resulting from sequestration. Similarly, incapacity of which "minority" was one type, necessitating the naming of a guardian for protecting the

\(^1\) Ḥaṭṭāb, Naw, vi: 398.

\(^2\) Rāzī, Risālā, in RIEEI, 11 (1954), 30f.
interests of the minor, was a case similar in kind to that which entitled a father to maintain absolute rights over the protection of his daughter's welfare until she married. ¹

As a result of this correspondent attribute, the Malikite jurists noted that the guardian of a minor had a right to prevent his charge from making any contracts that might be unprofitable or unbenevolent to the minor's welfare. So the Malikite law, by correspondence to a similar case, applied the same rights of guardianship to the father-daughter relationship. He could refuse, or accept, any person who asked the daughter's hand in marriage; the court was not entitled to question the reason for his refusal to consent to the marriage, for it was assumed that the father's interest in his daughter's happiness was reason enough for the refusal. ²

Preference

The second method of interpretation was the rule of preference (istihsân). Although analogy was very important as a legal method in supplementing textual sources, there was still a sizeable proportion of law which could not be covered by analogy. Moreover, the scope of analogy was questioned by jurists who denied that analogy could establish a new rule of law. Their theory was that analogy merely helped them to discover and extend

the meaning of the law already given.

The Malikites presumed that the rule of analogy was clear, but that the consequences which derived from the analogical deduction in certain cases might be either too excessive or such as might lead to serious injury. In this conflict between the logic of the law and the solution appropriate to the special circumstances of the case, the Malikites had had to resort to the rule of preference (istihsan). The Malikites had had to resort to the rule of preference (istihsan). Ibn Farqun, in his definition of istihsan, said that when a case wavered between two precepts of law, one of which appeared more closely analogous to the case in question, and when the jurist followed the more remote principle, it would be because of custom, for reasons of pragmatism, in order to avoid inconvenience, or for fear of injury. The decision to use a particular rule in preference to another rule indicates that considerations of utility or equity were allowed to prevail over the dictates of logical reasoning.

Jurists in fact could not always avoid using the principle of 'extra convenience'. But 'extra convenience' could not be used until it had been proved impossible to find any solutions in the Qur'an, tradition, or through analogy with similar cases. These rules governed cases which necessitated using the principles of utility (maslaha) and equity or preference (istihsan). These two terms are the alternative names for ra'y, i.e. a conclusion adopted

according to a systematic process of reasoning.¹ Malik applied these two methods largely for practical reasons - sometimes to fill the gaps that were left disfunctionalised in ra'y - especially when not even ra'y, but the use of legal analogy damaged the validity and undermined the meaning of the principle of utility.²

The exercise of independent personal judgement in cases where the revealed sources did not contain explicit guidance required that the jurist base his ruling on the dictates of his intelligence and reason. By exercising his discretion, the jurist could direct his opinion so that it reflected his personal choice, guided by his idea of appropriateness. This personal choice was called "Istiḥsān", preference.³

Preference, therefore, meant, approval or disapproval of certain actions not based on Shari'a, nor on any rational derivations from Shari'a's evidence, but merely the result of a jurist's disposition to approve or disapprove of those actions.⁴ In such a case, the preference did not, however, exclude the possibility that different jurists with equal qualifications might come to different decisions on the same point.

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¹ For example, practicality and scope of this principle, (istihsān) had been given by al-Bājī. Risālā, in RIEEI, ii (1954), 27f.
³ Shātibī, Iʿtīṣām, ii:138. The Ḥanafite regarded Istiḥsān as a subdivision of analogy; they called it qiyās khafi, a hidden analogy, that is, giving preference to one qiyās over an alternative one for reasons that were not clearly defined, but amounted to consideration of maṣlaḥa. See Shātibī, Iʿtīṣām, ii:138; Kerr, Islamic Reform, p.89,
On this account Shāfi‘ī contended that he did not have to permit the preference to over-reach the Sharī‘a on the basis of a jurist's whim; in such a case in which use of preference was demonstrably irresponsible, Shāfi‘ī refused outright the use of istiḥsān, saying that "He who uses istiḥsān claims to be a law-maker" (man istaḥṣana faqad Sharra‘a).  

Istiḥsān, Shāfi‘ī said, would not be valid without being established as rooted in acknowledged sources. Without taking these sources into consideration, the interpretation would have employed only the principle of convenience. Any istiḥsān that did not have its authority based upon one of the revealed texts was not valid.  

Shāṭibī, in order to rescue istiḥsān from its critics, said that it was an axiomatic rule derived from the revealed texts, and therefore a binding rule with self-sufficient value; there was no use in calling such a rule istiḥsān. Providing it was rooted in revelation, there could be no charge of presumptuousness levelled against the use of human preference; there was no need to call it istiḥsān because it had already acquired a name of one of the four principles of law. If preference depended on the errors of the classical sources, then it could be called human preference.  

In admitting claim of istihsan, Malikites made an effort to show that the method of "preference" did not really depart from the accepted principles and methods of interpretation; to some extent, the method of preference was a matter of legitimate choice, as long as it was remembered that the choice could not be entirely arbitrary, but had to be guided by the rules of Qur'an and Sunna. The jurist's choice was not to be simply arbitrary, but had to be based on that which he considered just and good (haran).  

The description of istihsan according to Ibn Rushd was that the jurists, instead of adhering to analogy which dealt with the nearest example ('illa), followed an analogy founded on the more remote example ('illa).  

In this sense, the importance of the derivation of the idea of preference stemmed primarily from the fact that the apparent rigours of using analogy inspired jurists to try to reshape the law, so that use of the law might be more flexible and less difficult than it was within the strict methods which governed the use of analogy.  

In the 'utbiyya, a slave girl became pregnant by one of a partnership who owned her. When the baby was born, one of the partners denied paternity of the child. Aqbagh said "The rule which deals with analogy requires that both of the partners had the paternal character and effect, but it

1. Ibn Farhun, Tabgira, p.49f.
   cf. Ibn Farhun, Tabgira, ii:49.
seems to me preferable to decide that the boy would belong to one partner." The consequence which derived from the circumstance of the boy having no legal father constituted injury to the child.  

Aqbagh, in order to avoid such an absurdity, resorted to the principle of istihsan and awarded the boy to the partner who affirmed his fatherhood.  

Thus it happened that the principle of istihsan had as great an influence upon the Malikite law as that of analogy. It is not surprising, therefore, to find, especially in Spanish Malikite law, that there were very frequent references to this rule.

Public Interest

... third method of judicial interpretation was the rule of utility (maṣlaḥa mursala) or public interest, which consisted of reasoning based on the criterion of the public interest and on the intentions of the legislator (God).

When there was no reference in the revealed law, Qur'an and Sunna, nor a basis for decision in the subsidiary principles, the jurist had to utilize all his intellectual abilities to understand the spirit and intimate sense of the law well enough to make a legally convincing judgement.

The concept of utility (maṣlaḥa) clearly occupied an important place among the methods of interpretation which the Malikites found themselves obliged to depend on. The rule of maṣlaḥa emerged from the idea that God had instituted the law primarily for the good of

1. Ibid., p.142f. cf. the same author, Muw, iv:209f.
society, therefore the overall welfare of the community came before that of any individual's legal claims. Hence the task of the judge, and the jurists, was to find out the "intent" in a particular case and to judge accordingly. This rule, therefore, represents an extension of the method of analogy, progressing as Kerr said, beyond the limits of *qiyās* to implications that varied considerably with the individual jurists resorting to it; the most extreme usage was such that any resemblance to *qiyās* virtually disappeared. The definition of this rule according to jurists, was "legislation of certain action on the account of the legislator tending to augment the public interest." Out of this definition it seems that in the rule of public interest there was no comparative process. It was a rule by which the jurist and judge could find out the intention of God, e.g. the concern for human welfare that governed all parts of Islamic law which had not been indicated by the texts (Corān and Ḥadīth). By public interest was meant the promotion of the welfare of men by securing for them positive advantages or protecting them from injury. The "maslaha" interest was a more specific term for *hikma*, a moral evaluation on the part of the law giver, and since this "interest" had not been explicitly covered by any of the revealed texts but was dependent on the jurist's own judgement, it was called *maslaha*

mursala,¹ that is not bound by the text.

Since the meaning of maṣlaḥa could be clarified only by the jurist's own judgement, it was not surprising that the scope of this utilitarian methodology was restricted to this non-ritual aspect of law.² It is in this way that the concept of utility could originate through reason, so long as the utility was consistent with the will of God. The principle of public interest, and particularly the notion that the maṣlaḥa was a matter of clear-cut certainty in most of the rules of law, and was a dynamic process in the expansion of the field of legislation. It provided a free rein to the legislators.

The method of utility was admirably fitted to the purpose of Màlikism, which asserted that the benefit of law was not always static, and the law that was based on the public interest could be changed when the concept of public interest changed. Public interest, then, became a basic source of legal interpretation in its own right. "The maṣlaḥa mursala," said Ibn Farṣūn, which was accepted by Màlik (may Allāh be pleased with him) and a group of religious scholars is the utility which the Shari'ā neither "considered nor rejected."³

However, this attitude towards public interest met some resistance from other groups of jurists who were fearful that permitting such latitude in legal interpretation would lead to abuse. What the opponents of this principle assumed was that

1. Kerr, Islamic Reform, p. 81.
3. Ibn Farṣūn, Tabgira, i:150f.
the maṣlaḥa was so loose a term that any jurist would take it as an excuse for following his own desires. The existence of maṣlaḥa could not always be ascertained; and any case interpreted by maṣlaḥa carried an element of probability. Consequently there was no avoiding a partial intrusion of human guesswork and error, which was likely in any judgement and interpretation in which probability was important.¹ In fact, the principle of utility was not very peculiar to Màlikism; what made it attributable to Malikism was the use of it on a large scale. Whenever they saw the necessity of a rule for a new problem, the Malikites judged it in terms of utility such that there was general agreement among jurists that the Malikites alone overused the principle of maṣlaḥa.

Qarāfī, in refuting this claim assumed that all the imāmā had some experience with the principle of public interest. He said that the maṣlaḥa mursala was found in all the school's responsa, inasmuch as each drew analogies and distinctions between related situations without openly calling attention to what they were doing; and this was what was meant by maṣlaḥa.²

Shāṭibī, having had long experience of the use of maṣlaḥa, came to the conclusion that, in order to consider the question of human welfare, one must take into consideration certain rules. He described the attributes of maṣlaḥa by rules whose purpose was to prevent the intrusion of the jurist's personal preference.

These rules or conditions were:

1) Public interest should not deal with matters of ritual and worship because these were not within the realm of human comprehension;

2) Public interest must be consistent with the revealed texts;

3) Public interest must perform a concrete and positive function with respect to promotion of social welfare and deterrence of harmful actions;¹

Shāṭībī, in order to bring moral authority to this principle, traced its origin back to the time of the Companions, who decided, Shāṭībī claimed, to put the Qur'ān in a written form, which nothing in the law expressly authorized them to do.²

An example of the application of this principle in Maliki law was the acceptance of presumptive evidence in certain criminal cases. The Malikites admitted a presumption that he who was found with goods recently stolen would be accused of having stolen them, and if he could not prove he was in legal possession of those goods, could be held guilty of theft unless he could give reasonable explanations as to how they came into his possession. But before the law judged him guilty, the Court had to take into account the circumstances in which the goods were found and their quality and appearance, in considering the

possibility that the man was guilty of theft. The charge itself might be probable or improbable, possible or impossible; in all these cases the principle of utility regarded the possibility of guilt as relative to the presumptive evidence to be considered.¹ The rule of utility had a much wider application than the principle of analogy and was consulted wherever there was thought to be an interest. The most extreme idea, with regard to the principle of utility, was that of the Manbalite jurist, Najm ad-Dīn at-Ṭūfī (d.716/1316) the most radical of all the champions of "maṣālaḥa".²

However, the Malikites were far from this radical view, which granted a legal latitude to initiate new laws for novel circumstances. Faced by protests against the ruler's tendency towards absolutism in political and legal judgements, the Malikites claimed that the "extra-judicial" authority exercised by the ruler was a matter of utility and policy (siyāsah) necessitated by the enormous corruption, fasād which had not characterised the first generation of Muslims. This fasād led to the adoption of siyāsah and changes of judicial adaptations which ensured that the new views would not completely be counter to the spirit of law. This tendency is expressed in the ḥadīth (la ḍarara walā dirār), - "Do not commit injury or reciprocate injury".³ The first part of this Tradition (la ḍarara) meant

². At-Ṭūfī claimed that the principle of maṣālaḥa might occasionally overrule the revealed texts. See Zayd, Risāla, Appendix, pp.42-48.
that no one could use his own rights and power for the purpose of abusing others. The second part (walaā dirār) meant that no one could make disproportionate use of his own rights under the pretext of having been hurt by others.

It was natural, then, that the Malikite interpretation of law should be greatly affected by considerations of utility. They found in this rule an instrument which helped them to meet the demands of changing society.
CHAPTER III
THE JUDICIARY

The Grand Cadi

The Aghlabid's courtiers and the state army were predominantly mu'tazilite. Their presence and potential power made them a political force which the rulers acknowledged by choosing a cadi, for the supreme court of Qayrawān, whose view was compatible with theirs. In these circumstances it was inexpedient to nominate any jurists with views which threatened or offended the privilege and status of the army and the courtiers. Presumably it was for this reason that 'Iyād al-Allāh had nominated Ibn Abī al-Jawād, a mu'tazilite jurist and the son-in-law of Asad b. al-Furat, the grand cadi of Qayrawān.

With the appointment of Ibn Abī al-Jawād in 221/835 it became obvious among the Malikite circle that the nominee for the post of judgeship of Qayrawān was not chosen exclusively for his knowledge of law and court procedure; it was more important that he be favourably disposed to the Irāqīs doctrine. However, doctrine as a determining factor in the selection of the judge did not preclude legal and political considerations.

In the year 231/846, Abū Ja'far Ahmad b. al-Aghlab carried out a successful coup against his brother Muhammad. The alarm was

1. 'Iyād, Madārik, I, 11:624.
raised and a battle broke out between the Emir's men and those of his brother. The struggle went on for some time. Then, faced by such resistance, the attacker appealed to his adversaries by saying "Why are you fighting us? We recognize the authority of Muḥammad. We are only rising against the son of 'Alī b. Ḫumayd who has ruined you and has grabbed the goods of your master at your expense."¹

From the time of the assassination of the house of 'Alī b. Ḫumayd, which was the protector of Malikite, Saḥmūn's life was in jeopardy. He refused to perform his prayers behind the amir and his cadi. He declared he was following the example of his master, al-Bahlūl b. Rāshid when he did not recognize the heretics and refused to pray under their leadership.²

Muḥammad b. al-Aghlab, when he foiled his brother's coup in 231/845, was confronted by a number of formidable problems, including a shortage of loyalists. At this time the Malikite intellectual circle was a force in Ifriqiyya of sufficient importance to concern the ruler. Ibn al-Aghlab saw in the appointment of Malikite jurists a possibility of changing the political climate in favour of his side.³ This was because throughout the struggle with his brother Aḥmad, the Iraqīs maintained a policy of neutrality and did not commit themselves to

¹. Ibn 'Idhārī, Bayān, 1:108.
his cause. The Malikites, on the contrary, guided by their
dogmas were strongly opposed to Āhmād's power.

The Malikites became more antagonistic to Āhmād after the
assassination of the Banū, 'Alī b. Ḥumayd, who was in fact one
of the protectors of the Malikites at the Court; the protectors
were very closely linked with the Malikites. The vizir of
Ziyādat, Allāh I, 'Alī b. Ḥumayd, once saved Saḥnūn from torture
at the hands of his court enemies. Towards the middle of 231/846,
Saḥnūn was arrested and transferred to Cayrawān and charged before
the court, presided over by the mu'tazilite judge, Ibn Abī al-
Jawād. The verdict of death-suspended sentence was passed, but
Saḥnūn was saved by the intervention of a courtier, an advocate
of Malikite doctrine. Saḥnūn was, therefore, ordered to cease
all teaching activities.¹ Moreover, there were some connections
between Banū Ḥumayd and the Malikite jurists.² Therefore it is
not surprising that the assassination of a member of the
protectorate of Malikite jurists inspired further hostility
towards Āhmād.

Muḥammad's recovery of political power was marked by radical
reorganization of the administrative police, regarded as a step
towards improvement of the state's ills. The reform which had been
introduced did not, however, bring Muḥammad all the support he had

1. Malikī, Riyāḍ, 1:286.
2. The son of 'Alī b. Ḥumayd was a well known Malikite jurist, and
his sister was married to Āhmād b. al-Ḥasan al-Ḥashdī, a
disciple of Saḥnūn, see, Talbi, L'Emirate, p.227.
anticipated. The first step Ibn al-Aghlab sought to take was to remove Ibn Abī al-Jawād from the most influential post of the grand cadi, and to fill it with someone whom he could trust to maintain law and order in the state.

One might infer from this event (of the Malikite involvement in the widespread hostility to Aḥmad's regime, and their vulnerability to extensive persecution) that Muḥammad's new approach to Malikite jurists was necessitated by circumstances as a counter-balance to the unfavourable attitude of his soldiers and officials.

At the same time, the Malikite jurists changed their tactics and began to seek a better relationship with the ruler. The rapid growth of Malikite influence inevitably evoked opposition from its rivals, the Muʿtazilites and the Ḥanafites. As part of its strategy to reinforce itself for the struggle against those rival groups, the Malikite began to strengthen its ties with the ruler Muḥammad b. al-Aghlab. Saḥnūn's attitude to Ibn al-Aghlab was at the very least ambivalent. He doubtless appreciated the action of the ruler who dismissed the cadi of Qayrawān, Ibn Abī al-Jawād, in 232/846 for his Muʿtazilite tendency. He tactfully managed to win the confidence of Ibn al-Aghlab. Saḥnūn, who was nearly a victim of the militant Iʿtīzāl of the discharged cadi, addressed himself to amīr Muḥammad in these terms: "O Amīr! May God give you the best rewards! You have just relieved the people

1. Janjānī, Qayrawān, p.74.
from the Pharaon of this community, its tyrant and its most iniquitous cadi."¹ A few months later, Ibn al-Aghlab proposed to Saḥnūn the post of judgeship. Later on Saḥnūn was appointed to the vacant post of chief cadi of Qayrawān from which the former cadi had been dismissed. 'Iyāḍ described the procedure of Saḥnūn's appointment. He said that the emir assembled the jurists in Council. Saḥnūn advised him to invest Sulaymān b. 'Imrān (d.270/883), and the latter counselled him to invest Saḥnūn. All the other jurists counselled the emir to invest Sulaymān. "The reason for the jurists choosing Sulaymān," said 'Iyāḍ, "was that the majority of the jurists were then of the Ira'ī conviction, convictions which were shared by Sulaymān." But Sulaymān insisted that nobody else was fit for the judgeship post, as long as Saḥnūn was alive.²

There is no doubt that among Saḥnūn's biographies there are varying degrees of exaggeration, by which the less attractive aspects of his character and career are idealised. His biographers maintain that Saḥnūn was powerful because he became able to put the status of the law above that of the ruler.³ Nevertheless, it is perhaps a distortion of the facts to assume that Saḥnūn enjoyed

1. Ibid.
2. 'Iyāḍ, Madārik, I, ii:596.
3. The same stipulation is attributed to his predecessor, ʿAbd al-Mihriz, when he was nominated for the judgeship of Qayrawān. Dawādāri, Kanz ad-durar, vi:30. This assures us that the Malikite biographers were wont to attribute such hagiographical information to the individual they were writing about.
complete independence in his official judicial deliberations; he did enjoy independence in the sense that there could be no intervention or instruction from the governor on the decision of any particular legal case.¹ In his court, Sahnūn exercised a jurisdiction, in theory unlimited, but in practice there was no evidence of any constitutional law that Sahnūn dealt with nor did he have any jurisdiction over the type of government or make any decisions involving the rights and duties of government. The government was not bound to a strict application of law on political issues.

Sahnūn, the supreme court of Qayrawān, was granted all the jurisdiction in civil and criminal matters including exclusive jurisdiction to determine all suits and crimes committed by the jund, the army of Ibn al-Aghlab.²

At this point, one can easily get lost in the welter of his seemingly contradictory utterances. At one time Sahnūn seemed to have disdained any contact with government circles. But his later move into government office caused anxiety. Friends and students began to criticise him for accepting the post. Abū Zakariyya, a very close friend of Sahnūn, stopped frequenting his company after he became a cadi. Another friend wrote to Sahnūn in a complaining manner, "You were busy with the other world, now you are only concerned with this world." In defence of this

¹ 'Iyāq, Madārik, I, ii:596.
² Ibn Abī Dīnār, Mu'nīs, p.50f. cf. 'Iyāq, Madārik, I, ii:596.
charge, Sahnun referred to a hadith which says that every mufti (jurisconsult) is a cadi. In conformity with this hadith Sahnun was practicing the function of cadi for forty years. With this justification, followed by a supplication, Sahnun continued, "The other world depends on this one and this dunya is merely an extension to akhira. I have been put to the test, pray for me."1

He remained sensitive to the charge even some years after his nomination. "I have been a jurisconsultant of more than forty years," he told his pupils, justifying his acceptance of the post. My judgement is law; and it has been executed since then.2

"I was not aware that one can legally accept this office. Such was my opinion until I received two concessions from the Amir: on one side he accepted all my conditions; on the other he gave me all the power, I sought for, to such a point that I told him: I shall begin with the people of your house, and your servants; they have committed a lot of injustices, have disappropriated many people of their goods, and my predecessor did not dare sue them. "All right," he replied to me, "make justice follow its own course, even if my head is at stake" - 'You swear by God?' I asked. 'Yea, by God', he replied three times. Therefore I saw that his resolution was such that I could fear for my own person. At last I accepted I could not see any body worthy of this responsibility, and I could, consequently, find no excuse for escape."3

His son, Muhammad, said, "Sahnun was invested with the judgeship after having been solicited during a whole year, and after very strong pressure, and after Muhammad b. al-Aghlab had sought him with the most redoubtable oath."4

2. 'Iyaq, Madariq, I, 11:598.
3. 'Iyaq, Madariq, I, 11.596; Malik, Riyad, 1:273.
4. Ibid.
Despite this exaggeration of Saḥnūn's virtues, it is not without some truth. For example, it is true that the sources of Saḥnūn's influence and power were great although Saḥnūn refused to be paid by the state for rendering his services to the Court. One of the conditions he made in fact, despite the jurists' tolerance in this matter, was that if he accepted the post of judgeship, he would receive no pay. Saḥnūn's gesture was primarily political, permitting him to keep his liberty and making his practice consistent with his beliefs. Instead he obtained his living from an independent source. According to 'Iyāq's statement, Saḥnūn possessed in Ifriqiyya about 12,000 olive trees; he used his leisure time to cultivate his farm, which rendered him an annual income of 500 dīnār.

Saḥnūn's financial, and hence political, independence meant that his court decisions were not subject to the whims and passions of the authorities. He would rather live self-sufficiently than humble himself by yielding to the pressure of influential persons and groups. In this way the court procedure and Saḥnūn's legal opinions were exempted from any interference by the rulers. Ibn al-Qayyim was persuaded to classify him among Mālik's followers who had the capacity to deliberate on some legal questions without his master's guidance. He was described as having a

1. 'Iyāq, Kudārik, II, 1,99.
2. Ibid., I, ii:619.
retentive memory, and credited himself with the ability to recall the volume and the page where a relevant case could be found. Saḥnūn, in fact, had all the qualities which could inspire the admiration of his contemporaries. Abū al-‘Arab mentioned some of these qualities, emphasising that Saḥnūn had qualities which were not found together in any one other person: perfect knowledge of law; sincere piety; courage in judicial decisions; contempt for vanity of worldly wealth; refusal to accept what is normally princely. 

The dominance of Malikite legal and social influence accelerated the course of Qayrawān's development. Saḥnūn decided not only the application of the law of Medina in judicial administration, but also the restriction of the administrative judicial office to Malikite jurists. He sometimes chose to co-operate with jurists in Ifriqiyya's court, motivated by the need for effective administration of justice, which the Iraqīs could supply.

The Aḥlabid ruler vested Saḥnūn with the authority to control all legal administration. Saḥnūn took this opportunity to staff the whole court of Ifriqiyya with adequately trained Malikite qādis, clerks and notaries. While Saḥnūn did not absolutely exclude or disregard the Iraqīs point of view, it is

4. Ḫumayyī, Jadhwa, p.361.
not surprising that he used his position to establish his concepts of legal practice and thought. The greatest development of Malikite law in this period was achieved under Saḥnūn and, as he had both authority and prestige, he enjoyed great influence. Saḥnūn's teachings developed not only from his knowledge, but also from this experience of applying principles to practice.

Saḥnūn's legal influence was not only in Gayravān's court but also in Cordova. He was consulted by the Judge of Cordova, to whom Saḥnūn gave rigorous instructions. In replying to Muḥammad b. Ziyād (d.240/853)¹ the cadi of Cordova, Saḥnūn instructed him to be particularly rigorous in the cases of those who declared bankruptcy to escape the settlement of their debts, giving as an example his own severity towards his predecessor, Ibn Abī al-Jawād the cadi of Gayravān, who was killed during the course of his punishment.²

Saḥnūn's concept of the judicial function was blended with the rôle that the Egyptian jurists, Ibn al-Qāsim and Ashhab, ascribed to Mālik b. Anas. They applied deductive reasoning, not to create new rules, but to find out what might be just in each individual case within the framework of Mālik's law. By this time he had begun to assimilate Ibn al-Qāsim and Ashhab's interpretation and application of Mālik's law to his own decision-making processes.

He set forth principles for the cadi under his jurisdiction

1. For Ibn Ziyād's biography, cf. Khushanī, Cudūt, p.68.
to follow, as the basis for effective judgement of cases.\(^1\)

Therefore, all the cadis throughout Ifriqiyya usually used Sağnūn's edicts and opinions as models. To regularize the presentation of cases for judgement, it was necessary for Sağnūn to devise a system of court procedure; he circulated his official notices to each litigant.

By the steady application of uniform principles and his insistence on consistent judgements among the courts throughout the state of the Aghlabid,\(^2\) Sağnūn exposed the arbitrary character of the judiciary of Qayrawān, which in reality merely reflected the personal influence of his predecessor, Ibn Abī al-Jawād. There was an unfavourable record of decisions by Ibn Abī al-Jawād, whose judgements turned entirely upon the opinion of the Ḥanafī and the Muʿtazilite doctrine.\(^3\) It was very natural, therefore, that the jurisdiction of Sağnūn inspired the litigants with confidence and gave to the law a new respectability in the eyes of the Maghribīs.

The emergence of the sole Malikite court of Qayrawān in 234/848 and particularly its rapid development under the Grand Cadi Sağnūn, provided one of the most important assurances against


\(^2\) See Sağnūn commanding Ibn Imrān to base his judgeship on the Medinan principle: Madārik, I, 11:593; 'Alīsh, Fath, 1:75; Mālikī, Riyāḍ, 1:275.

any threat to the development of the law. Its growing popularity was linked to Sañün's interpretation of the law, which, among other things, limited the powers of the government.¹

Sañün was very careful about advocating the exertion of any direct² or indirect pressure on the court. Such indirect pressure or influence might be exerted by one court on another court. Sañün was of the opinion that a letter of recommendation, suggesting a particular judgement on a case which had been referred earlier to the now recommending court, should not be considered unless it was established that the letter had really been written by the court and that the said court was fully competent to make such judgements. The value of the recommendation would depend on evidence of the understanding of recommending court, the knowledge of the precedents, the knowledge of religion, and the clarity of the recommendation.³ Even having met these qualifications, Sañün insisted that the letter be referred to him as no more than a recommendation. If his opinion did not agree with the recommendation, it was Sañün opinion rather than that advocated in the recommendation, which was binding as final judgement.⁴

¹ 'Iyād, Madārik, I, ii, pp. 600-606.
² His condition of accepting the office of cadi, which was the Cadi's power to sue even the member of the Royal family, is suggestive of his emphasis on making the court independent of direct court influence. See Mālikī, Riyād, 1:273.
³ Nubāhī, Ta'rīkh, p.178.
⁴ Ibid., p.179.
But Saḥnūn did not enjoy this supremacy for long. Muḥammad was not in favour of the increasing influence of Saḥnūn. He saw in Saḥnūn's rise to fame the beginning of a possible threat to his sovereignty. As his fear grew, Ibn al-Aghlab saw that the real danger lay in Saḥnūn's status as a supreme cadi. This in turn explains why he did not hesitate to advocate measures depriving Saḥnūn of jurisdiction in some cases at court.

The emir did not dare remove Saḥnūn from the office, but he put another man, known for his animosity to Saḥnūn, to be in charge along with Saḥnūn. After the appointment of this man to judicial office, the strong personality of Saḥnūn was no longer there to ensure cohesion among his students. In fact, from then until Saḥnūn's death, the Malikites suffered a series of persecutions and torture by the Ḥanafī cadi, especially Sulaymān b. 'Imrān and Ibn 'Abdūn. Some time later, in 240/854, Saḥnūn died bitter and chagrinned.

The Function of the Cadi

The chief cadi (cadi al-Jamā‘a) in Córdoba did not have the same freedom to exercise his discretion as belonged to his counterpart (cadi Ifriqiyya) in Kairuān. The difference was

1. There was no information concerning the new cadi - only his name has been given as at-Ṭubnī who was very active in challenging Saḥnūn's authority on his judicial jurisdiction. See Madārik, I, 11:603. cf. Mālikī, Riyād, 1:284.
primarily one of historical tradition: the court of Ifriqiyya had in fact an independent identity, although it was theoretically subordinate to the Caliph in Baghdad. In addition, the ruler of Ifriqiyya had less power over the procedure of the court than the ruler of Spain. The ruler and the cadi of Ifriqiyya, until around 190/805, were both nominated by the Caliphs of Damascus and/or Baghdad and the functions of these two offices were regulated by and subordinated to the authority of the caliph, with the consequence that the court was ultimately bound by the discretion of the ruler. However, because the limiting authority was located at such a great distance from the subordinate court, the court in fact enjoyed relative independence. Thus the court enjoyed a power of its own, and sometimes had jurisdiction equal to, if not above, the government in respect to criminal and civil law.

When Ifriqiyya became semi-autonomous state under the rule of Aghlabid, the status of the court remained the same for some time (until the death of Muhammad b. al-Aghlab, 242/856), although the ruler theoretically had more administrative power to remove the cadi than when the state was under the direct rule of the Caliph of Baghdad.

2. Ibid., p.279f.
3. The dismissal of the cadi rarely occurred without a reaction, it often gave rise to a trial which afforded the opposing school a chance to assert its views and righteousness. Cf. Talbi, L'Emirat, p.696.
The subordinate status of the cadi was typical everywhere in Muslim countries. The cadi was originally a delegate of the caliph or of the provincial governor and had no independent authority. In practice this isolated the authority of the cadi, making him dependent on the instruction of the governor. Theoretically speaking, however, the cadi never shared his authority with any official governor; the caliph and his subjects owed absolute obedience to his jurisdiction. But in practical judicial affairs, the actions of the judge reflected the assumption that all judges in the Caliph's empire were merely his delegates whose legal decisions were of little account when they conflicted with those of the sovereign. Khalīl said that every cadi should have a separate jurisdiction but the sovereign could limit that jurisdiction in any way he pleased with respect to either the district over which his power extended, or his powers of carrying on any judicial proceeding.\(^1\) This statement illustrates the extent to which the cadi in the third and fourth century could have exercised his jurisdiction in the context of an autocratic government. The cadi was in no sense an independent judiciary as he was normally appointed from the centre, and his judgements were subject to review by the political superior who nominated him. Although the independence of the cadi and of the judiciary remained theoretically valid, he not only was subject to dismissal at the whim of the central government, but had to depend on the political authorities for the execution of his judgements.\(^2\)

The limitations of the court's independence in jurisdiction were not clearly defined, thus causing some confusion and misunderstanding. In terms of interior political affairs of the state, the power of the court was restricted; in terms of its jurisdiction as far as juridical affairs were concerned, it was broad. The governor, at his discretion, had recourse to the court whenever there was some juridical point to be settled or some controversial political act which had to be invested with legality by the court.\(^1\)

Although the cadi was chosen by the ruler, there is no reason to suppose that the cadi was less bound to observe the rules of judicial conduct than he was the ruler's orders. Enforcing justice was understood to be the daily practical duty of the court. The punishment of moral and criminal offences and the protection of the rights of an individual against encroachments from another was not a function belonging to the ruler; it was purely a judicial function.\(^2\)

The court usually preferred the cases of those litigants who attempted to settle their dispute outside its supervision, therefore attempted settlement outside court was usually the first step. The parties involved in the litigation chose a third person to intervene and draw up an agreement through arbitration or persuasion. Sometimes the court assigned an official commission (arbitrators) for the case, especially when the litigations were

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1. 'Iyād, Madārik, I, 11:604ff.
taking place between persons who lived at some distance from the court.¹

If the parties did not come to an agreement, or if they refused to co-operate with the arbitrators, the case would then be submitted to the court. The arbitrators were usually specialists; they were recognized experts in their field handling a great number of cases which involved questions of similar and familiar natures. Khalīl said that in matters that concern business interests, or in cases of wilful wounding, it would be necessary to have recourse to an arbitrator who would be acquainted with the law on the subject before him. Arbitration was unlawful only in cases where the law fixed definite punishments, as in the case of murder, adultery, or in cases of affiliation, repudiation or enfranchisement, for, in all these cases, the rights of third parties would have to be decided.²

However, the Ifriqiyya courts were invested with a much wider jurisdiction, both in respect to geography and the range of cases. Although the grand cadī of Ifriqiyya did not, as in the East, have the title of "Cadī al-Cuğāt," nor that of "Cadī al-Jamā'a" as used in Spain, he always enjoyed great prestige and his authority was respected by the populace. This might have been due to the social conditions which invested the cadī almost with the status of baraka. For example Sāhnūn and Ibn Ṭalib

enjoyed powers during their judgeship which were never invested in their counterparts either in the East or in Spain. The emir Ibrāhīm b. Ahmad charged Ibn Ṭālib with punishing, dismissing and nominating governors and tax-collectors.¹ And in general the cadis had more power than the emir's ministers.

The cadis, however, did not in fact perceive the delicate and precarious nature of their positions with vis-à-vis politics and law. Indeed, their recognition of the need for independent courts, which enjoyed immunity from the ruler's whims led them, however unintentionally, to turn a blind eye to political injustice. If the ruler should see fit to pass a law denying his subjects the privilege of declaring their grievances against the state, the court would not have intervened to prevent such an enactment to argue on behalf of the subjects.² The court's rôle was wholly adjudicatory: it had no authority to take decisions which would alter legislation.

When investigating cases for which there was provision in the texts, the cadi was not under the governor's supervision in the exercise of his powers, nor was his opinion checked. The cadi could try any offence for which the punishment was prescribed by the texts. The offence for which no punishments were given in the revealed texts were left for the ruler who would prescribe punishment at his discretion. In such instances, the judge first decided whether or not guilt had been proven, and then he had to

¹ 'Iyād,  Ṣadārīk, II, i:205; Talbi, L'Enrat, 296f.
² Janjānī, Cayrawān, p.145.
establish that the offence had the character of a crime legally defined in the texts. The judge had considerable jurisdiction in cases involving bankruptcy and distribution of assets.

The cadis duties and prerogatives were not only judicial, but also administrative. He took into his care the estates of orphans and minors who had no guardian; the wealth and other property of anyone who died without leaving heirs were also entrusted to him. He also presided over most of the disputes that arose out of financial and personal affairs or obligations founded on contracts such as loans, purchases, tenancies, and partnerships.

Supplementary Judicial Administration

At first sight, this would appear to be a wide and impressive field of action. But the fact is that the cadis, who presided over the supreme court, had several assistant judges working on various judicial administrations. These cadis, who presided over the lower courts, performed the supplementary function of executing various judiciary matters for the high courts.

The judicial structure in Ifriqiyya was headed by the chief justice of the state; his court was located in Câvânnîn, but subordinate courts were located in every city. The functions and

1. Ibn Sahl, Ahkâm, verse 3. This is also the procedure of the Spanish Courts. cf. Ibid.
duties of the grand cadi expanded as a result of the mounting volume of business and technicality of procedure, and added increasingly to the court's judicial responsibilities. Consequently it was inevitable that a large amount of procedure which was once handled and supervised by the cadi had to be handed over to other judicial institutions. There were various judicial branches, including the Court of Complaints (mazālin), market inspectorate (muḥtasib) and the family court. These courts could only deal with those cases over which the supreme court expressly gave them jurisdiction.

The Market Inspectorate

Cayrawān and Cordova were commercial centres. Their locations near the Mediterranean sea gave rise to an increasing amount of trade and much intercommunication between the different countries. With the development of their economy, agricultural and mercantile, Ifriqiyya and Spain felt the need for the construction of another judicial institution, in addition to the courts already existing.

As a result there emerged the court of hisba, a new judicial court whose function was a continuation and supplement of the jurisdiction of the cadi. Originally the jurisdiction over the municipal corporation and market trade was in the hands

of the emirs, and later the duty was relegated to a muhtasib who acquired the name from the post of hisba.¹

As far as the legal sources were concerned, the Spanish muhtasib was under the jurisdiction of the state and the governor could, if he chose, dismiss the muhtasib.² The same was true in Ifriqiyya until Saḥnūn became the grand cadi of Qayrawān; then the office was made part of the court, and the judge had the right to nominate the muhtasib.³

The law of hisba was an important strand in the law of the Maghrib from the rise of the Aghlabids and Umayyad emirate. Its importance was due to the fact that it dealt with the vital interests of people, such as the management of health services, supply of food and its price, and welfare. Legal literature concerning hisba bestowed upon the muhtasib the right to act on behalf of the ruler or the judge in certain important matters such as the responsibility for seeing that the officials and employees performed their judicial obligations; overseeing and preventing the bribery of officials, threats to public health and security, forgery of evidence and licence, and serious wrong.⁴ He had the

1. Jarā'if, hisba, p.119.
2. Maqqarī, Naḥḥ, 1,203f. A market inspector of Spain in the exercise of his function was assumed to be performing work incidental to the Court of Complaints, and the position seems to have developed as an offshoot of this court. See Ibn Sa‘id, Kuṣhrīb, p.45.
power to confiscate and destroy articles, or food, or animals if he considered them a hazard to the public health.\(^1\) The functions of the muhtasib have been compared to those of the agoranomos of Roman time.\(^2\) Grunbaum describes the function as follows: "He enforced the regulations under which the merchants operate; he sees to the use of correct weights and measures. His authority extends to the producers as well as to the traders. The goods are under his inspection, and he is responsible for the maintenance of quality as well as of a fair price level."\(^3\) The foundation of the muhtasib's authority was his option to order what was approved and to prohibit what was not approved; and in that sense the market inspector's authority exceeded the cadi's. He could proceed independently of any complaint, to investigate cases where he suspected legal infringement whereas the cadi could proceed only where there was an official complaint made.\(^4\) However, to allow them to act on their own initiative was necessary for the efficient performance of the market inspectors as such functions were mainly customary and regulatory in character.

In the decisions concerning legal problems, the court of hisba exercised powers similar to those exercised by judges. But in cases involving purely customary law the court of hisba usually

4. Ibn al-Ukhūwā, Ma'ūlim, p.10.
based its authority on the local custom designated "hukm 'urfi" to avoid the charge of arbitrary encroachment upon the function of the judges or of passing arbitrary decisions. Its authority to determine whether a building was not completed in the allotted time for its construction, or whether the measure of capacity of liquid such as milk, oil, were in the interest of the public had its origin in custom.¹

In his function as protector of the public and the state against harm, the muhtasib had to have the right to deal with situations without observing court rules of evidence and procedure. Similarly the muhtasib was charged with the duty of promoting the welfare of the state.

The Ḥudawwana contains some views on cases concerning hisba, but the first work dealing solely with this area was written in Maghrib in the middle of the third century by Yaḥyā b. ʿUmar al-Kinānī (d. 289/907) and was entitled Ḥkām as-sūq.²

**Court of Complaint**

As the burden of jurisdiction, as well as of watching over and inspecting the judicial administration of the other courts of Ifriqiyya began to increase, Saḥnūn established a new institution to exercise jurisdiction over offensive acts. He appointed his clerk and student, Ḥabīb b. Naqr (d. 287/900) over the maẓūlim jurisdiction, that is the court of complaint, which was to take

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¹ Saqaṭī, Ḥdāb al-ḥisba, p.11ff.
² The work had been edited by M.A. Makki, RIEEI, IV (1956), pp.59-151.
care of cases that dealt with offences which did not come under ordinary court procedure. He was empowered to mete out punishment on the spot to offenders and trespassers.

The mazālim tribunal acquired jurisdiction by virtue of the ruler's order. Growth of litigation could only be met by separate courts. The metropolitan court was too busy to keep up with the course of social and economic change. As a result of the failure or inability of the cadis to cope with the new cases, the mazālim court was instituted to deal with matters not covered by the court.¹ In this case the function of šāhib al mazālim more or less resembled that of the criminal court of a modern state, involving judgement of cases classed as misdemeanors.²

Civil Court

Among the judicial officials who helped the grand cadi to fulfil his task was a cadi of a civil court. The importance and responsibilities of the court, together with the vast amount of work involved, convinced the Malikite jurists of Ifriqiyya that they should amend procedures so that there could be two cadis in association to hear and determine the same case. The amendment was a compromise designed to relieve the courts of some of their

². For more detail about the origin, proceeding and jurisdiction of mazālim court see Tyan, Histoire, ii, pp.141-272.
The Tunisians, said Ibn 'Arafa (803/1400), recognized from the beginning that the supreme court would have to be supplemented by other courts with specialized jurisdiction. This was the first instance, as we know from the Malikite legal sources, of the separation of courts: the civil court and the criminal court within the same geographical jurisdiction. This was an almost inevitable consequence of the growing pressure of increasing amounts of litigation.

The civil jurisdiction of this court could cover the following matters: a. wills or death-bed gifts of deceased persons; b. maintenance of dependents. Sometimes the civil court dealt with law suits arising out of quarrels about heritage and executory matters. From these cases it seems that the competence of the cadi of the civil court was confined to matters of civil law, never criminal proceedings.

Other court personnel included an usher and a porter to keep order in the Court. Examination of witnesses had usually been allocated to the cadi himself, but as the case load increased, it became necessary to appoint clerks to perform this function. They examined those written testimonies bearing the signature of the witnesses.

1. For his life and work see Ibn 'Ashūr, A'lam, pp.63-64.
Scope and Qualification

The cadi always had to give a decision for any case brought before him, in conformity with the principles of his doctrine. The cadi's judgement had to be based on the jurisprudence of the school which he had adopted, as well as being in strict conformity with the revealed texts that were the very foundation of the law.¹ The cadi could follow the usual forms, in the absence of any contradictory authority (if he failed to cite any authority): the usual reasoning processes; analogical deduction; and custom or utility. He decided how particular disputes should be settled, but he could never permit himself to make hazardous or arbitrary inferences.²

As a rule, however, people within the realm of his jurisdiction were bound to accept his interpretation of the law and its application to any given case. Therefore the cadi had the right to interpret the law authoritatively, and his ruling was deemed irrevocable.³

The functions of the cadi in his application of the rule was to elaborate, restrict or distinguish the meaning of the law. In the light of his knowledge of the Imam's method of interpretation, a cadi might be able to deduce the rule in a way which would enable him to perform his duty, as a legislator, while remaining within the discipline of the Imam's rules and principles.

¹. Ḥaṭṭāb, Nāw, vi:91; Carāfī, İhkām, p.79f.
Haṭṭāb, in his chapter on the "Function of the Court", related that Ibn Rushd and the majority of the jurists of Ifriqiyya and Spain emphasised that the cadi, in exercising legal authority, was to act always in complete conformity with these rules. The cadi would not do otherwise, not because he did not possess the knowledge to do so, but rather that he was not prepared to initiate his own programme of derivation from first principles, thereby rejecting the entire methodology of his Imām and returning direct to the Qurʾān and Sunna sources.¹

The scope of the cadi's discretion varied, depending on the conditions and circumstances of the case. Firstly, in matters of interpretation, the imām's language might be ambiguous and his opinion lacking in clarity on certain points. In delivering his decision, the cadi was bound to make enquiries of his master's rules so that he could pass his judgement in accordance with these rules. Secondly, the cadi could choose, in the event of conflicting views being attributed to the Imām concerning a point of law for which there was no evidence, which legal opinion should supersede the other. In this case, the cadi had to arrive at his own decision as to which of these two variant opinions could be followed.²

As we have seen, the scope of the cadi's discretion was not based on legal rules other than those of his masters; it had to be in strict conformity and entirely in accordance with the

1. Haṭṭāb, Maw, vi:94.
2. Ibid., p.93. cf. 'Alīsh, Fath, 1:68ff.
spirit of the madhhab. The cadi, therefore, could not always apply his own individual discretion as freely as he wished, but to the best of his ability had to apply the principles that were laid out by his predecessors. His aim therefore was to identify a meaning, an idea to which the word of his master was designed to give expression. The cadi thus had to ascertain that the legal decision he gave was in fact consistent with, and conformed to, the framework of his master's methodology. This qualification called for careful attention inasmuch as it distinguished the judicial function of interpretation within the framework of the recognized law from the absolute discretion of the cadi.

It is very clear, therefore, that as far as the scope of the cadi's discretion, in the Malikite conception of it, is concerned, the process of decisions involved the interplay of many considerations. He had to take into account that the use of human reason in the elaboration of the law was confined to the subsidiary sources of law since there was no cadi or lawyer who had any legislative power to modify or abrogate the primary sources or the revealed law. In theory, the rules of the Imam's law were a complete existing body; cadis and lawyers had to decide cases not according to their own rules nor those of another Imam, but by the rules of their own Imam.

Possession of prescribed qualifications determined who was eligible to be considered as an eligible cadi. The capacity for the office of cadi, in the eyes of MalikI, was acquired by a jurist who had perfect knowledge of legal opinions of the majority of doctors of law and had achieved thorough knowledge of the Qur'ān
and Sunna, and had mastered the method of deducing legal matters therefrom. He had to be skilled in Arabic, possess a measure of speculative power, and be capable of building and elaborating valid conjecture. The mujtahid had also to adequately grasp the aim and intention of the Shari'ah.¹

The requirements of knowing the arts of ijtihād only proved the impossibility of finding such qualified men. The Malikites, therefore, saw it necessary to reduce the stringency of the requirements in order to fill judicial posts.² Therefore, the mujtahid was not necessarily required to have a comprehensive mastery of jurisprudence in all its aspects, nor to know the details of the Arabic language nor to learn by heart all the Qur'ānic verses. Nevertheless, he must have acquired a proportion of these skills that would be adequate for cases with which he had to deal.³

The Malikites seemed to suggest that in a situation where a cadi was faced by a problem not covered by any identifiable sources, the matter must be left to his personal discretion; yet this

2. Shātibī, Maw, iv: 109f. Ibn 'Arafa (d. 803/1400) in his dispute of Ibn al-Arabi's statement (d. 543/1143) concerning the requirements and qualifications said that if the law insisted that the cadi must have such qualifications, the inevitable consequence would be the closing of the court as there would rarely appear such qualified persons. See Ḥattab, Maw, v: 92.
discretion must be exercised in accordance with legal principles applied by the founder of the school (Mālik b. Anas). As a corollary to the principle, the cadi could not, in the exercise of his judicial function, depart from the already established rules and establish binding law.

Judicial Procedure

The most important force behind the growth of Ifriqiyya's court jurisdiction was the desire of the people for assurance that their persons and property would be protected from arbitrary treatment or seizure by officials of the government. The judge listened to litigants, passed judgement and saw that the penalties were enforced. His scruples often prevented the cadi from giving judgement immediately, sometimes from giving any judgement at all. Saḥnūn disapproved of those who gave their judicial advice too quickly because, a cadi should initially contemplate the case, consult the books and review the circumstances. Saḥnūn himself hesitated three days before replying to a man from Ṣafāra who had consulted him. "Those," Saḥnūn said "who are quickest to give their judicial decisions are the most ignorant. There are those who know a chapter and think that it comprises the whole of the law." Referring to himself, he said that there were questions where he was acquainted with eight answers by eight different scholars, yet he would not give the answer right away without re-evaluating their decisions.  

1. Ibn Farḥūn, Tabāsira, 1:64.
The Court was characterized by comparatively informal procedures. The name of the defendant was issued in a small note to inform him that he was being summoned to the court.\(^1\) The cadi handed the plaintiff the bill to call the defendant; if the plaintiff came with his counterpart, Saḥnūn withdrew the bill from him lest someone misuse it. During the course of the trial, the cadi of Qayrawān remained in full command, weighing the value of witnesses' testimony according to the relevant rules of evidence before reading his final decision.

The cadi usually employed clerks chosen for their integrity who would recapitulate the statements made by the parties. The statements of witnesses, too, were written with careful attention in order not to leave loopholes by which the accused could escape responsibility. These records concluded with the date of prosecution, names of litigants, signatures of witnesses and endorsement of the cadis.\(^1\)

The Court appointed a group of official investigators to attest the integrity of the witness. Very often the cadi found that the witness was overawed by the court. In such situations, he pretended not to have noticed the witness's apprehension.\(^2\) The Malikite cadi usually did not take into consideration the personal impression made upon the cadi by the witness, nor the way in which the witnesses answered questions. The remarks and

\(^1\) Ibn Ṭāhir, 'ā'lā, 1:36; Ibn Farhūn, 'Āthir, 1:32f.
\(^2\) Ibn Farhūn, Dībāj, 163.
gestures made by the witness during the trial were by no means taken as indications whether their statements were trustworthy or not.\textsuperscript{1} During court trials, the judge cleared the court of spectators, lest their presence might distract the accused from speaking the truth. In order to discourage people from attending the court, Saḫnūn decreed that he who frequented the court over three times could not offer again to testify for their witness.\textsuperscript{2} Contrary to this policy, the Spanish court was convinced that the attendance of the professional jurists in the court would be conducive to the proper administration of justice. Saḫnūn, however, insisted that the trial proceedings and production of proof should not be public, that is, that persons who were not directly interested parties should have no right to witness the proceedings.

The cadī who felt almost certain of the guilt of the accused, but could not quite prove it, was not allowed to render a judgement based on his own speculations. The rule prohibiting the cadī from convicting the accused merely on the basis of his own intuition was just, for it was based upon the principle that no judge ought to bring anyone for trial without sufficient evidence to support an accusation of guilt.\textsuperscript{3}

\textsuperscript{1} The cadī of Qayrawān, Sulaymān b. Imrān, who succeeded Saḫnūn to the office of judgeship was reported to have watched the witness, and passed his judgement in respect of the specific reaction of the witness. See Malikī, Riyāḍ, 1:492.

\textsuperscript{2} 'Iyāḍ, Maḍārik, I, 11:620. Later after two centuries al-Māzīrī (d.536/1141) proclaimed a different view from that of Saḫnūn. He insisted that the court trial proceeding must be witnessed by a group of jurists. Ibn Farḥūn, TABAIRA, 1:37.

\textsuperscript{3} Saḫnūn and 'Abd al-Malik held opposite views. They were in favour of the judge making his own hearing or seeing sufficient evidence to proceed with the trial, see Ma'dānī, Ḥashīya, 1:29.
This protection for anyone on trial was developed with the evolution of the status and function of the cadi, his authority changing from an absolute one to an authority based on other sources of evidence. In the system regulating witnesses, the Malikite law forbade the cadi to give decisions based on his own tuition or knowledge, other than that provided by witnesses or circumstantial evidence against the accused, which would condemn the accused. However, though this was the general view of the jurists we find in practice that Spanish Court procedure held the opposite doctrine following Saḥnūn who maintained that the judge may give his decision according to what he believed.

Evidence

The ethical standard that should be required of a witness was not, in some cases, the same as that required in the court procedure of Ifriqiyya. After Saḥnūn became cadi, the law was that a debtor who was able to pay his debt but chose to defy his creditor could affect his qualifications as an acceptable witness. Some jurists failed to appreciate the implications about the integrity of the witness suggested by such irresponsible procrastination. But Saḥnūn insisted that the testimony of witnesses who were well-known for defying their creditors was likely to be rejected.

The Maghribi system of evidence and theory of judicial evidence was an outcome of a number of rulings by prominent judges and jurists. The rules of evidence were formulated by judges for litigation of varying nature. Cadis needed to settle disputes by applying rules believed to be correct and appropriate to the case. But when matters of fact bearing on the issue belonged to the law of evidence, the cadis' decision could not proceed on the basis of conjecture, but had to be rooted on firmer ground.

When the nature of the issue required a decision as to the degree of importance and weight of evidence, the cadis had to know the categories which divided different kinds of evidence. The following are the general categories:

A. Hearsay evidence, that is, a witness who did not personally know the circumstances of which he was speaking, but only knew them as someone else had related them to him.

B. Written depictions of testimony.

A. Hearsay Evidence

It was often difficult to prove any decision which was established on evidence other than that of direct testimony. In such cases, however, less direct testimony would be required and greater reliance placed on circumstantial evidence. Lack of conclusive evidence was typical of many cases, and thus circumstantial evidence was often considered to be indispensable, especially in criminal cases.
Apart from corroborated or presumptive evidence there was hearsay evidence.\(^1\) When testimonies of a number of people of every age and social group were presented to a cadi to attest that an occurrence happened in public or to verify an occurrence or fact which was publicly known (and this mostly related to property possession), the testimonies of the group were held to be sufficient proof.\(^2\) In spite of the fact that most of the non-Malikite jurists rejected altogether the evidentiary value of hearsay evidence, the Malikites regarded it as valid evidence if it was in conformity with certain rules. The cadi must be satisfied that the necessary evidence was received by numerous people and others corroborated that they had heard the same thing from their predecessors. Secondly, the facts revealed through hearsay must have been established for some time. But how long a fact had to be established before it could be verified by hearsay evidence was a matter of dispute.\(^3\)

The evidence of a witness reporting his testimony from hearsay was not considered as full proof. When he testified to a tradition prevailing in the community, or to a widespread rumour among the community concerning the existence of a private right, he implied the assertions of other people in order to establish the truth of that which was asserted. Because of its lack of force, the hearsay evidence was limited to specific classes

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1. See Malik's opinion on this type of testimony in the *Mudawwana*, vipp.42-92.
of cases which usually, by the nature of the circumstances surrounding them, could not otherwise be proved. Among these cases Ibn 'Asim mentioned, a; Character and trustworthiness of the witness. b; The existence of a marital status between a couple. c; The existence of a charitable land for some years. d; Ill-treatment of a wife by her husband or vice versa.

B. Written Testimony

In Islamic law, a contract had to be in a written form, signed by the concerned parties, and endorsed by two witnesses. In all transactions, including a marriage agreement and wills, the parties concerned went to a notary's office or shop, and made a contract by which they would be bound. The notary drew up the relevant documents, signed them, and had a witness sign them also, to complete the required number of the witnesses.

The following citation will show the notarial system of writing contracts.

"In the name of God the Merciful, the Compassionate. This is the dowry fixed by Yaḥyā b. Yaḥyā al-Laythī upon his future wife 'Abdat bint Muḥammad b. Jābir al-Qurashi; one thousand dinārs. Of which five hundred [is to be paid] in cash, two hundred are remitted by her guardian during the completion of the contract; after the cash payment and the remittance there remains to her three hundred dinārs to be paid later before the end of

1. see Mudawwana, v:142f; Mawqūf, Tāj, vi:191.
2. Ibn 'Āsim, Tuhfa, i:85f; Ḥaṭṭāb, Maw, vi:192f.
216 A.H. She is given away by her father being a virgin in his
 guardianship and under his supervision, in accordance with the
 above conditions to cash, remittance and postponed payment.
 Yaḥyā b. Yaḥyā agrees to this and accepts it. Witnessed by her
 father and by Ibrāhīm b. Abbād al-ʿUšrāshī and written by his
 hand, Jumādā al-ʿĀkhira 211 and by al-Ḥajjāj b. Yarbūʿ al-ʿUšrāshī

 The notary and witness then signed the contract which made
 it valid and binding. The documentation of a contract,
particularly one that related to loans, was preferred to oral
 testimony in order to preserve it as evidence in case of any
 further dispute. Another important function of a written contract
 was to preserve an account of circumstances and evidence in the
 event of there being any future reference to the case.

 Despite the importance of the written document, the law
 seemed to rely on oral testimony rather than on written testimony.
 One of the reasons why jurists gave prominence to oral evidence was
 the question of authorship of hand-written testimony. The court
 also encountered another difficulty. If the witnesses were
 deceased, the written evidence would be of little value.

 Where the authenticity of a written contract or signatures
 of witnesses were doubtful or denied, the document could be
 examined by experts who could distinguish between hand writings. 2

 The purpose of checking the handwriting was to verify that the

1. Charnāṭī, Wathāʾiq, verso, 81.
written testimony was that of the signee of the testimonial. Verification by written document, though the most unreliable according to the Spanish law, nevertheless was the method most frequently resorted to in cases concerning grants or a religious donation (waqf).\(^1\) A party against whom a written document testified had either to admit guilt or establish false identity of the handwriting. If he denied the authenticity of the handwriting a special form of investigation ensued. The Ifriqiyyan jurist, Abū al-Ḥasan al-Lakhmī (d. 478/1085) said that the defendant could request a sample written in long hand by which he could determine the authenticity of the signature.\(^2\)

An illustrative case was that of a plaintiff who claimed that his deceased uncle left a will giving him part of his property. The defendant, the direct heir of the deceased, denied that the will was in the dead uncle's handwriting. The plaintiff brought samples of his uncle's handwriting as testimony that it was authentic. The plaintiff's claim could not be admitted to be genuine, however, unless two experts declared, after identifying the script, that they could verify the authenticity of the writing without any shadow of doubt.\(^3\)

The early law insisted that the witness could not give testimony in a written contract or document, claiming himself that the writing was his own handwriting, unless he were able to

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2. Ibn Farḥūn, Tabṣira, i: 363.
3. Mayyāra, Sharḥ, i: 65; Ma'dānī, Ḥashiya, i: 63.
recognize the content of the document. The Court of Ifriqiyya
did not hesitate to accept the testimony of the witness confirming
that the writing was his own writing, even though he might have
completely forgotten the content of the document, provided that
there was no alteration or addition that raised any doubts of the
witness as to the authenticity and correctness of the written
document in question.\(^1\)

**Presumptive Evidence**

When the witness attested the fact as proved, the evidence
was said to be positive. And when the witness failed to provide
such evidence but something from which the fact could be inferred,
the evidence was categorized as presumptive (*lawath*).\(^2\) For
example, if a witness gave report that he saw a man damage another's
property; this would be a case of direct evidence, but if the
witness saw a man carrying a knife from the house of a wounded
man this would be an example of presumptive evidence. However,
such evidence, though inconclusive, could not be ignored: the
accused would be held for further investigation of the case. For
example, take the case where an individual was killed under
circumstances which only inferentially referred to the accused.
The murdered man, found dying by a passer-by, told the passer-by
who it was that attacked him. But, there having been no witnesses
or other evidence apart from that of the passer-by, the identity

\(^1\) Mawwāq, Tāj, vi:190.

\(^2\) Mālik, in his *Muwatta*; Vol. IV, p. 211, defines the meaning of
*lawath* as "Lawath is an inconclusive evidence, al bayyina
of the murderer could not be proven without investigation. Malikite law maintains that such a case must not be ignored, but must be investigated for further evidence.¹

In other words, a form of proof or evidence which fell short of standards required to establish a fact, but qualified as grounds for further investigation, was one trustworthy witness, or several witnesses, although ineligible, corroborating one another's testimony. This sort of evidence was considered circumstantial evidence, and was never allowed to be the sole foundation of a conviction.

The [Mudawwana] stipulated that a person could not give evidence in favour of near relatives. Any evidence that could result in monetary benefit to the witness must be excluded.² The law held that there was presumption of undue influence when the weaker party in a relationship, such as debtor and creditor, solicitor and client, or promisor and promissee, benefitted the stronger party who, because of his position, was able to influence the will and the case of the other.³

Similarly, the law dismissed the evidence of a man regarding his close relative because it might be conditioned by respect, affection and family loyalty.⁴ Ties of kindness and affection

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² Mudawwana, vi:152 & 156; Ḥaṭṭāb, Maw, vi:168.
³ Mawwāq, Tāj, vi:170f; Ibn Fārūn, Tabṣira, 1:326.
⁴ Ibn 'Arafa said that among other reasons which justified rejection of evidence was suspicion of affection, either family loyalty, or loyalty of friends (min mawāní' ash-shahāda tuhmat al-ḥubb li așl aw 'āriq). Mawwāq, Tāj, vi:154. Cf. Mudawwana, vi:139.
were considered to bias the son or the father's opinions and induce him to give testimony which would be untrue.¹

For a witness's testimony to be legally acceptable, his good character must be accredited by at least two certified witnesses. But careful investigation of the qualification and background of the witness was not always possible and, in this case, rather than jeopardise the possibility of justice being done by excluding a witness by so stringent a procedure, the law allowed certain exceptional cases, where the bearer of the testimony did not have the standard qualifications required by the law.² The testimony of children in favour or against the witnesses could be accepted, though they fell outside the categories of eligibility.³ In the case of fighting amongst children, Saḥnūn said that children's testimony against or in favour of each other would be valid if it met five conditions: 1. The children must have reached the age of discretion. The testimony of those among them who did not possess this qualification would be rejected. 2. They must be males. 3. There must be no discrepancy in their testimony. 4. They should not yet have dispersed from where the event took place. 5. No adult was found among them even before they dispersed.⁴ For the first provision, Muḥammad argued with his father, Saḥnūn for his differentiation between personal and

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¹. Ibn Ḵaṭib, Tuhfa, 1:57; Maʿdānī, Yāshiya, 1:57.
². Mudawwana, v:154f & 163f.
³. For the dispute over the validity of children's testimony, see Mudawwana, v:163f.
⁴. Mayyāra, Sharḥ, 1:73.
property offences. His father's answer was that the law accepted the child as a witness to physical crime only as a necessity, in order that the public interest would not be harmed. Most property crime was witnessed by adults. But the answer did not satisfy his son who queried further saying:

"You have to accept their testimony in cases related to taking of each other's property wrongfully and by force."

As the father could not refute the major premiss of his son's argument, he took refuge in following the steps of his predecessors, and citing precedent.

The testimonies of a group (a Caravan, for example) in cases of homicide were held to be sufficient proof. However, if in that number there were persons who were known to be generally immoral or anti-social, they had to be excluded as witnesses. The same applied when a contract was made amongst the travellers or questions of theft arose during a journey. The cudi could admit their favourable view of each other (tazkiya) that is to say, the extent to which the travellers would vouch for one another; a decision was then based on the impression of honorability based only on superficial criteria, such as those qualities which could be known from their experience of one another in the temporary, shared life or community of the travelling convoy.

Judicial Decision: originality and deviation from Medinan law

The litigants could be disciplined by flogging or a blow

on their shoulder if they employed pejorative terms against each other, or if they attacked the character of the witnesses. Although every defendant was entitled to show that the witnesses against him might be untrustworthy, he could say nothing against the witness until the court sought his opinion.¹

In practice, where a claim for right or damages was brought before the court in proceedings against the accused, the judge of Cayrawān was able to issue 'stop orders' (injunction) which effectually prevented the accused from dealing with his property. During the process of litigation on cases dealing with conflict of rights, the plaintiff required the court to enjoin a defendant from continuing private action until the dispute in question was settled. Mālik maintained that the defendant had a right to continue exercising his contract. Sağnūn did not object to Mālik's attitude, but he elaborated it by saying that the defendant should not be stopped from doing his work unless the plaintiff's claim had substantial grounds.²

However, Sağnūn's emphasis on judicial rather than the political aspects of the life of Ifriqiyya gave him an important rôle in shaping the law of the country. His legislation concerning court procedure was authoritative in prescribing a consistency of doctrine that would insure the supremacy of his beliefs. Moreover, the fact that Sağnūn provided practical application of his theory of law, that is Medina Law, by court

². Mudawwana, v:143.
jurisdiction, is convincing evidence that he was the maker of Ifriqiyyan law.

It is characteristic of the rationalist bent of Saḥnūn's mind that he made Mālik's legal theory a strong influence upon the application of law. In his duties as, first, a jurisconsult and later as a judge, Saḥnūn displayed dexterous legal and judicial abilities. Saḥnūn saw no harm in placing his legal knowledge at the service of any legal inquirer, so long as the person was not a prospective litigant.¹ Perhaps the occasional departure of Saḥnūn in his judgements and legal advice from the strict rules which had been laid down by Mālik b. Anas and Ibn al-Cāsim was a consequence of his detailed knowledge of individual cases and of his attention to their unique solution.

It cannot be denied that he decided almost every case on its merits rather than on mere matter of form. When his legal decisions overruled judgements passed by his master, Mālik and Ibn al-Cāsim, Saḥnūn justified this by saying that as times changed, new customs and manners arose in consideration of which disagreement must occur.

The judicial decision of Saḥnūn sometimes deviated from the judicial principles pronounced by Mālik, as will be seen by the following cases:

In the procedure of the court, the court might ask the litigant who seems unable to present or defend adequately his case to employ a proxy or advocate (wakīl). This advocate presents

¹ Ḥattāb, Maw, vi:118f; Mawwāq, Tāj, vi:118.
the facts so as to appear as favourable as possible to his client. The other party has no right to refuse or disqualify his opponent's advocate unless he can prove or produce legal evidence for his demand. In his proceedings, Sahnūn refused to accept a proxy on behalf of the defendant unless the defendant was a woman or a sick person. When he was told that Mālik used to accept proxy from both litigants, Sahnūn replied that the position of the accused in previous times tended to be controlled by his conscience and the community. Now, however, it was not unreasonable for the judge to reject a proxy for the defendant. Nowadays, Sahnūn argued, when the situation had changed, it was reasonable for the court not to accept proxy; the defendant himself, if he proved able, must attend the court.¹

The development of the law by the jurists of Ifriqiyya is evident from their relatively independent judicial decisions. At the first half of the second century, the Ifriqiyyan jurists and cadis showed growing confidence in their own judicial discretion and understanding of the rule of the law. This is evident from their less frequent reference to Mālik's decision on certain points.

Mālik made a ruling that whoever found a runaway slave must keep him for one year. If, during this time, his master did not appear to claim him he could sell him, or give him to the

Sahnūn departed from this prescribed period on the ground of the costly maintenance of the slave. Sahnūn, therefore, said that he would not agree that the slave should be kept for one year; any period which allowed the finder to identify the slave and recognize his character and appearance would be sufficient for his release.¹

Matters of pre-emption (shuf'a) were developed in a different way. Mālik's opinion and the expression of the Mudawwana did not recognize the right of the co-hirer to rent his partner's part of the land as a consequence of the rule of pre-emption.² But Sahnūn gave a co-partner in a hired house or land the right of pre-emption if his joint partner wanted to rent his part.

The right of the co-hirer in pre-emption which the Ifriqiyyan courts conceded was accepted as a principle alien to Mālikī law based on the custom of the province. While this judicial latitude in expanding the scope of pre-emption is widely accepted in Ifriqiyyan courts, the jurists noticed the danger of conceding to such a co-hirer the right of hire before an opportunity is offered to the other. In order to exclude any exploitation of this rule by a co-hirer, the Ifriqiyyan court set forth two stipulations: 1. The house or the land to be disposed of should be habitually divided. 2. The reason for

¹. Mudawwana, vi:176f.
². Ḥaṭṭāb, Maw, vi:83; Mawwāq, Taj, vi:83.
pre-emption is solely for purposes of residence.¹

In a contract in which the performance depends on the continued existence of a given person, a proviso is implied that the impossibility of a completion arising from the event impeding the person from his work would not change a promise. If A was hired by B to build a wall, and A was to receive his daily wage half an hour before sunset, then if A was impeded by a heavy rain from completing his daily job, the contract of that day was held to be discharged and A was able to recover payment only for the work actually completed.² This rule was based on the view that the payment of the wage was, by the term of the contract, conditional on the accomplishment of the timed contract.

Saḥnūn maintained that the hired man must receive his full payment because he was unable to perform the contract owing to circumstances over which he had no control.

In his judicial procedure Saḥnūn sometimes declared that the procedure of trial was his own device. This was contrary to Mālik's principle, and was disputed by several of his contemporary jurists. When the claimant discovered his lost property in the defendant's possession, the claimant was required to prove his title, and corroborate the evidence with his oath. Saḥnūn maintained that the oath required by the claimant was not of Mālik's rule.³ The other judges recognized the evidence produced by the

1. Ḥāṭṭāb, Maw, v:313.
2. Ḥāṭṭāb, Maw, v:432.
3. Ibn Sahl, Āḥkām, verso, 57.
Another example of Ifriqiyyan jurists disagreement with the Malikite is the case of the contract of joint partnership. When a man paid another two capitals for trade business the owner stipulated that the benefit from one of the capitals be equally shared while the other capital was to be divided in the proportions of two thirds for the owner and one third for the joint partner. Malik was reported to have legalized such contract insofar as the two capitals were not mixed.\(^1\) Saḥnūn, however, departed from Malik's view and recognized the contract as valid even where the two capitals were mixed as the benefit would amount to one specific proportion.\(^2\)

Another example of development in judicial process is the question of torture to obtain confession from an accused. Most tort cases were decided largely upon circumstantial evidence. Some of this evidence was not legally valid until it had been corroborated with negative character evidence.

Sometimes the conclusion did not rest on very strong evidence but had to be deduced from a great quantity of circumstantial evidence. The distinction between direct and circumstantial evidence is by no means a clear one. A combination of several inferred facts might serve as data from which a further inference of criminality could be made.

There were cases in which the defendant's conduct aroused some suspicions. A judicial official would ask for his arrest in

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respect of his conduct. But the accusation would have been of such a nature that evidence would in reality not be a conclusive character. Nevertheless, there were certain considerations which always carried great weight against a suspect: unusual activities of the defendant; the apparent circumstantial evidence against him; and his conduct towards certain persons. This measure against the accused played an important role. Malikites believed in disclosing the guilt that had previously been put in question by some strong presumptive evidence, and in some cases it was the only means of bringing a criminal to justice.¹

Confession obtained through torture or threat was not condoned. Torture and threat were approved by Saḥnūn only in two kinds of criminal offences; firstly, in the case of homicide lacking a full proof against the killer,² and secondly, pecuniary offences involving theft, plunder, or fraudulent exactions of wealth. The first example refers to a situation in which the assaulted person immediately before his death named the offender and his accusation was witnessed by only one person. The court in such a situation was empowered to examine circumstantial evidence against the accused and if it was established that there could have been a possibility of the alleged person's commission of the offence, the court could threaten him; or order him to be tortured to obtain his confession. Saḥnūn's opinion was accepted by Malikite jurists in al-Maghrib and was supported by precedent

¹ cf. Ibn Sahl, Ṭabārī, recto, 71 and verso, 72.
² Ṣaḥṣūb, Maw, vi:296ff.
in Sunna. In practice, the admissibility of confession so obtained was considered very helpful in finding out the criminal.\footnote{1}

Another point of discussion among jurists was the case of a known debtor. This case, in Sahnūn's view, could be settled by means of punishment for the purpose of obtaining information. He assumed that the punishment provided an efficient means for the discovery of concealed property and the detection of fraud.\footnote{2}

The statute of a "test" by imprisonment or punishment clearly did not apply indiscriminately to each and every debtor. It was in fact only observed with respect to two cases:

\begin{itemize}
  \item[a)] Where a prosperous debtor was procrastinating his payment without any reasonable cause.
  \item[b)] Where a debtor's insolvency was based on an assumption of bankruptcy which had not been proved.
\end{itemize}

Laws relating to debtors who could not satisfy the demands of their creditors fall into five categories.

1. The first category was of prosperous debtors. According to Mālik this debtor must serve a prison term until he had paid his debts.\footnote{3} But Sahnūn held the opinion that this punishment would not recover the loss of time which the accused spent in prison. Such a debtor should be dealt with in a different manner from those of a second type who could not pay their debt

\begin{itemize}
  \item[1.] For justification for such procedure in criminal cases, see Ibn Farḥūn, Tabṣira, 1:266f; Ibn al-Qayyim, ʿIḍā, I, 1:94f.
  \item[2.] The introduction of the statute of "Insolvency punishment" as a part of Malikite law was first suggested by Sahnūn. See Nayyāra, Sharḥ, ii:233.
  \item[3.] Kudawwana, vi:442ff; Ibn Farḥūn, Tabṣira, 11:322.
\end{itemize}
for justifiable reasons. Therefore Sāhmūn, in addition to imprisonment, maintained that the accused must from time to time be brought out of prison and punished physically. This punishment should be repeated until he had repaid the creditors.¹

2. The second category was the debtor who was neither rich nor destitute. His debt was due and yet had remained unpaid. This debtor perhaps possessed merchandise or real-estate or capital goods as the source of his livelihood. If the attestation proved that the debtor did not possess any ready cash, the judgement would postpone his payment to a suitable date.² Forcing him to pay his debt in due time or compelling him to sell his merchandise or his machinery might cause the debtor some harm through taking away his means of livelihood.

This proceeding was only applicable when the debtor seemed to have future prospects and was not yet bankrupt. But if the debtor was bankrupt, the court then had to impose an interdiction on all assets and property belonging to him. The court procedure was to order a trustee to distribute all the existing property of the debtor. The distribution of the property was perforce to be a rateable one. This distribution, of course, did not affect all the assets of debtors, since various exemptions were allowed.

¹. Mayyāra, Sharḥ, ii:233. This type of punishment is only applicable when the debtor clearly has the means to pay. Cf. Khushānī, Cudāt, p.88; Mudawwana, v:204f.

². The Spanish jurist's view on the term of postponement of a due debt is determined by the degree of the debtor's wealth. see Mayyāra, Sharḥ, ii:235f.
Also ḫāṭīḥa, for example, prescribed certain allowances to be made to the debtor and his family.\(^1\) Certain commodities were not to come under the control of the trustee, either because of their importance for the debtor's sustenance such as house and clothing, or because they were indispensable for his support, such as his shop, machine and tools for working.

3. The third type was of one who claimed bankruptcy, his claim being clear and indisputable. The court must postpone the due date, the debt to be paid only when the debtor managed to reconstruct his wealth.\(^2\)

4. The fourth was a debtor who showed no willingness to compensate his creditors by feigning bankruptcy. But circumstantial evidence showed that he had defrauded creditors by disposing of his property before the hostile creditors were able to seize it. The effective principle was that fraudulent conduct on the part of a pretending insolvent debtor should be severely punished. That was thought to offer the greatest inducement to a dishonest debtor to make early and final arrangements with his creditor.

In this case when the creditor's debt was liable to be lost by such a dishonest practice, the Maliki law tended,

\(^1\) Ibn Ḥabīb in his above-mentioned work released one month's allowance for the debtor. See Ibn Juzayy, Qawānīn, p.347.
\(^2\) Mudawwana, v:233. This judgement was based on a Qur'ānic verse: "If there be any debtor under a difficulty of paying his debt, let his creditor wait till it be easy for him to do it; but if you remit as alms, it will be better for you, if you knew it." Qur'ān, 11:280.
through the compulsion of the legal process, to impose a long period of imprisonment. This punishment tended to ensure the real security of the creditor. But Sahnün found imprisonment an insufficient compulsion on the debtor to compensate for his fraudulence. The fraudulent debtor, said Sahnün, who avoided making the declaration of his property required by a court, should be deemed guilty of a misdemeanor. His judgement was based on the hadith "maṭla al-ghaniyya ḥulm." This interpretation of the hadith empowered Sahnün to compel the debtor to confess and disclose his property.\(^1\) In fact, the method of compelling an accused burglar who concealed the stolen property, or a debtor who defrauded his creditor by assuming his bankruptcy, to confess was restricted only to cases dealing with hidden property which needed to be disclosed. The extraction of confession by torture could not be applied to force the accused to admit his crime. It was a principle acknowledged in Malikite law that a confession extorted by force was invalid.

The only thing that would have prevented the debtor from receiving punishment was one of these three alternatives.\(^2\) The debtor was obliged to give security to the creditor's satisfaction, that is 1) to provide the creditor a guarantor who would guarantee to repay the money in case of failure, 2) to prove his inability

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1. Ibn Farḥūn, Tabṣira, 11:321f.
2. For the law regarding the guarantor's liability of a failure by the guarantee to pay his debt in due time see Ibn 'Āṣim, Tuhfa, 1:124ff.
to pay, 3) to refund the creditor by assigning sufficient funds to satisfy the debt and give an appearance bond to pay the debt. By one of these procedures a debtor could avoid imprisonment on account of his debts.¹

The creditor was most secure when a full assurance was promised by a guarantor to pay his claim. Obviously the creditor could not refuse to honour a guarantor's promise if the guarantee was based on valid consideration. Creditors had, in some cases, been allowed not only to take advantage of the assurance, but to ask for a warrant to search the house of his creditor.²

The debtor whose financial condition was unknown might pass through the ordeal of an examination in custody. Custody was not, as in this case, held as punishment; it was taken as interdiction until such time as the defendant was proved innocent of any misconduct.³ The debtor in this case, where there was not strong presumption of fraud, would not be held in prison for a long time. His release depended on confirmation of his financial position, but Ibn al-Cāsim maintained that he might be released, if he was able to bring someone to stand as a guarantor for him, much as a bail-bondsman. Saḥmūn refused to allow the debtor to be released on provision of a guarantor on the ground that if the debtor's financial situation proved insolvent then he was required to give

1. Ibn Sahl, Ḥikāya, fols, 51f; Mudawwana, v:204.
2. This enactment "investigation of the debtor's house" was applied by the Court of Toledo. See Ibn Sahl, Ḥikāya, fol. 53.
an oath that he was not defrauding his property, for which truth
the guarantor could not legally vouch.¹

There was another provision in Malikite law covering the
case of bankruptcy which must be regarded as a distinct step
in advance of the Maghribīs law. If a debtor had not been able
to pay his debt in due time but wanted to retain the property
which was owing to creditors, he asked his creditors to postpone
the day of payment until he could pay them. The cadi of Toledo
accepted the postponement, if the debtor had a guarantor. Ibn
‘Āṭtāb (d. 462/1069),² a famous notary and the chief counsellor of
his time said that the acceptance of a guarantor was not the
practice of the Spanish courts and not the usage of the country
unless it was assumed that the debtor intended to escape or to
leave the country.³ His assumption was based on the principle
that if the creditor insisted on demanding surety, they (the
debtors) were intending to contravene the prevalent statute of
the country with regard to payment of debts.

² For more detail concerning his biographical information, see
   Ibn Bashkuwāl, Sīla, 11:515ff.
³ Ibn Sahl, ʿAbkām, recto, 53.
PART II

SPANISH MALIKISM: ITS RECEPTION AND DEVELOPMENT
CHAPTER IV

JUDICIARY AND LEGAL ACTIVITIES

The Legitimacy of the Emirate Authority

The period of Umayyad rule in Spain is marked by a two-fold cultural development: first by the formation of the Malikite legal literature, and second by the flowering of Arts and Science. Indeed, the comparatively short life of the Umayyad Emirate in Spain from 138/756 until the end of al-Ḥakam II's reign in 366/976 seems to have been the age of the progressive evolution of Malikite law. For the better part of about two centuries al-Andalus enjoyed more undisputed authority in the field of law, especially of the Malikite legal doctrine, than in any other branch of science.

The decisive facts that helped the jurists to shape the law and increased their influence was the lack of a tradition of legitimacy in the structure of government. The success of 'Abd ar-Raḥmān ad-Dākhil in detaching the Spanish domains from the 'Abbāsid empire drastically altered the relationship between 'Abd ar-Raḥmān I and sections of the citizenry, making it necessary for the ruler to seek a policy by which his relationship with the subject would be enforced.

'Abd ar-Raḥmān I was conscious of the need of legal recognition and loyalty to substantiate his claim to be ruler of an independent state. To consolidate his power, he sought the support of jurists and scholars as the 'Abbāsids had done. In the first years of his reign 'Abd ar-Raḥmān was quick to
realise that if he attacked the caliphate in Baghdad, the inevitable consequence would be opposition detrimental to his power. Instead, he made minimal concessions and retained the use of the caliph's name in Friday sermons. He sought to impress the Andalusians that he too respected the Caliphate.1 Mentioning the name of the 'Abbasid Caliph during the beginning of his rule was the step which allowed 'Abd ar-Raḥmān to retract and change his policy towards the Caliphate of Baghdad without openly attacking the traditional structure of the Khilāfa.

His absolute sovereignty in Spain necessitated dropping the name of the 'Abbasid Caliph from the sermon. Despite this bold move 'Abd ar-Raḥmān never claimed the Caliphate for himself; to have done so would have been a contradiction in principle of the concept and meaning of Caliphate, or would have implied a complete rejection of the ideology of the Islamic state.2

A new ruler of limited powers, moving in fear of insurrection or attack and jealous of restoring his ancestors' sovereignty naturally would not be preoccupied with recasting the state's judicial system. Continuous opposition left time for 'Abd ar-Raḥmān I to concentrate only on building the morale and power of his army. The cadi had no stable place; his Court moved where the army moved. The title of the cadi was "the cadi of the army" (Cādī al-Jund). Only when 'Abd ar-Raḥmān

gained confidence, and the government became sure of the viability of the state, did the title of cadi change to "the cadi of the people" (Cādī al-jamāʾī). ¹

Despite the change effected by 'Abd ar-Raḥmān's conquest, the legal administration of Cordova remained remarkably intact. The court continued to function with the same jurisdiction as before. Yahyā b. Yazīd at-Tūjībī, qādī al-Jund, continued to hold his Judgeship.² But with the impact of legal reforms began the process of resorting to the appointment of more cadis and new courts.

In a state facing vast problems, Jurists in the public service can contribute much towards a harmonious solution of the confusion involved. The work of such jurists (in their various professions as advocates, notaries, counsellors or cadis), on the one hand, involves a necessary relationship of trust with the individual and, on the other hand, implies equal influence on the machinery of the state, the court and on the general public subject to the decisions of the state. In an effort to fill the gap between the demise of the old structure and the ascendancy of the new, 'Abd ar-Raḥmān I cultivated the intellectual class of society, which comprised the cadis and jurisconsults. He gave them prominent positions. He enquired about jurists who were known for their influence and integrity and put them in charge of judicial offices.³

¹ Khushanī, Qudāt, p. 28.
² Ibid.
³ Ibid., p. 39.
The consequence of this policy was that an increasing number of jurists busied themselves with law and literature. Another result, however, was the proliferation of specialized agencies to which legislative or judicial powers, or both, might be assigned.\(^1\) The confluence of student interests, whatever their motivations were in this developing situation, provided the opportunity for their legal views and doctrines to shape, in substantial measure, the structure of the legal profession in successive years. Moreover the jurists acquired a status which was not enjoyed by other professions. Levi Provençal illustrates this point by remarking how often the religious dignitaries, theologians and jurists, who played a major rôle in Muslim Society in the West up to the end of the middle ages, took second place under a ruler like 'Abd ar-Rahmān I. Impeccably orthodox in his thinking, 'Abd ar-Rahmān was so jealous of his authority that he consistently rejected the influence and advice of the clerics.\(^2\)

'Abd ar-Rahmān's policy of using the prestige of scholars to win and hold mass support determined the introduction process of Malikite legal thought into Spain, it also, by encouraging scholarly enquiry, created circumstances much more congenial for certain legal doctrines. The intellectual atmosphere in Spain was unlike that of Ifriqiyya. In Cayrawān the Aghlabids, by virtue of their army background, were unsympathetic, if not hostile, towards the Malikites, whereas the Umayyads in Spain

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2. Histoire, 1:146f.
played an important part in establishing the Malikite legal school. Besides, there was no strong rival to slow its progress in Spain, whereas there was such a rival in Qayrawān.¹ Later, around the beginning of the third century, Malikism became the doctrine of the state. To oppose it was to oppose the true faith, and this was heresy, which was punishable by death. The majority of the açahā became watchful guardians of this doctrinal monopoly which, as Provencal indicated, did not take long in becoming speculative inertia contrasting particularly with other activities of the same period in theological and legal spheres by the oriental schools.² The political implication of such an attitude is clear. A multi-sectarian view would inevitably have threatened the unity of the young country's society. This might be behind the motive of the authorities who located all their rights within the orthodox jurists, and therefore identified the jurists law as a whole with the law of the state. Because of this recognition, the jurists were able to eliminate any alternative to their doctrine.

This fact, and the total absence of the Kharijite sect in the peninsula, indicates that heresy was not as common in Spain as it was in Ifriqiyya. The Arab pride and exclusiveness that attracted the Ifriqiyyan Berbers to the Kharijites were less influential in Spain. The threat posed by the outside enemy

¹. This rival was the Ḫanafite School, which actively resisted the Malikī doctrine. See Khushanī, 'Ulamā', pp.180-190.
². Lévi Provencal, "Le Malikisme Andalou et les apports doctrinaux de L'orient", RIEEI, I (1953), 156.
necessitated a measure of tolerance between Arabs and Berbers. In the name of defence, unity was of the first importance, and consequently nationalism along racial lines scarcely appealed to either group.

According to Watt, once they had settled in al-Andalus the Berbers found it necessary to join in solidarity with the other Muslims, especially the Arabs, in the face of a certain amount of hostility from the non-Muslim population. Watt goes on to suggest that it may be largely for this reason that the heretical forms of Islam, prominent in North Africa, did not take root in Spain.¹

The Malikite jurists felt a pressing need to banish sects from their group and to advocate harsh policies against heresy and sectarian views. As Levi Provençal put it, it was not only in al-Andalus that heterodoxical movement and apostasy were punished with the utmost severity; but in the Iberian Peninsula repression was always swift and aroused no discussion.²

This might explain the fact that the Maliki Spaniards were not so broad-minded as Qayrawanīs were in allowing the free meeting of minds in debate and argument attended by other sects and schools such as the Ḥanafite and the Muʿtazilite.³

But this unified effort against heretical views had little effect on the destructive element of national self-pride among

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¹ Watt, Islamic Spain, p. 52.
² Levi Provençal, Histoire, 1:149f.
the Spanish Arab tribes.\textsuperscript{1} Political events also directed the Spaniards' attention towards the Medinan Law, which they came to regard as an effective method of enforcing discipline and regulation.

The Decline of the Awza'ite Influence

Settlers from the time of the conquest brought their own way of life, their tribal differences and their concepts of religion. Each of the tribes insisted on its own tribal distinctions;\textsuperscript{2} however the differences between the two main tribal groups were not so emphatic as to disturb unified efforts by intellectuals and scholars.\textsuperscript{3} Nevertheless, it made them conscious of the need for some stronger, more specialised legal regulations. Yet this popular feeling led not only Arabs but also Berbers to concern themselves with legal and religious movements. This was one among a number of factors that contributed to promoting and maintaining a unified doctrine. The popular Awza'ite law that scholars patronised by the Umayyads of Damascus established in Spain did not seem to bring any change in the nation's self-esteem, although it was imposed from outside. But there was some hostility towards it among the people which may have affected the Spanish attitude towards the jurists. The discontent resulted in increased interest in the study of Malik's doctrine in an attempt

\textsuperscript{1} The notion of Arabism in Spain rooted itself long before the Umayyad emirate, and perhaps around 124/741. See PabbI, \textit{Suzhva}, p.233f, 272; Ibn al-Khatib, \textit{Idara}, p.108.
\textsuperscript{2} Maqari, \textit{Nafh}, i:271-79; Watt, \textit{Islamic Spain}, p.31f.
\textsuperscript{3} Ibn al-Khatib, \textit{Idara}, p.103.
to overcome the initial hostility. The jurists seem to have felt that a more widespread knowledge of the Medinan law would reduce hostility. When in the course of the first years of Hishām, jurists trained in Medinan law became more numerous, and the science of jurisprudence became a normal part of government, the court began to display a greater inclination to turn to Malikite law.

The Awzā'I school gradually spread in Spain up to some time before 756. Damascus, which had been abandoned by the Abbasid Caliphs, was still one of the most important centres of Islam. The new Umayyad dynasty of Spain had more friendly relations with the subject Syrians than with the Iraqis, where the hateful Abbasid dynasty had asserted itself. Spanish Muslims must often have passed through Syria when they undertook the Pilgrimage to Mecca. This was another reason why it was necessary for the new Umayyad emirate in Spain to have more friendly relations with the subjects of Syria than with those of Iraq. The Arab population of al-Andalus was mostly of Syrian origin. The idea of Awzā'I was destined, through the migrant Syrians, to become part of Spanish doctrine. Although

1. It has been said that the Muslim Spanish residents sent a delegation to Malik b. Anas to pronounce his legal opinion on the Spanish nation hostility. See Mawāq, Ta'j, vi:277.
2. Ibn al-Faraj, Ta'rīkh, 1:181.
it had been assumed that the introduction of the Awzā'I element into Spain was made by Syrians, particularly Sa' ša' a b. Sallām (d.192/868),¹ this is a somewhat uncertain hypothesis, since there is no reliable survey with which to correlate information about the introduction of this doctrine. As early as 'Abd ar-Raḥmān's rule, Mu'awiya b. Ṣāliḥ (d.158/774), a man of Syrian origin who studied with Awzā'I's teacher, became a supreme cadi of Cordova,² and he certainly would have encouraged legal administrators to follow his Master al-Awzā'I.

Leopóz has argued that Sa' ša' a could hardly have been the first person to introduce the Awzā'I's school into Spain, as ad-Dabbī claimed. He points out that Ibn Ḥabīb, the first Spanish chronicler, and the immediate disciple of Sa' ša' a, would have mentioned this, and ascribed the accomplishment as a credit to his teacher.³

Administration of justice was entrusted to the hands of the Syrian jurists, whose standpoint almost always typically Awzā'I, was influential to the end of Hishām's era. But the influence of the Awza'Ite doctrine in Spain was confined to the Syrians and some of the Spanish intellectuals. The other classes

¹. Ibn al-Farādī, Ta'rikh, 11:138. Ibn Sa'id reported the year of Sa' ša' a's death as 202/817. Mughrib, p.44; Dabbī, Bughya, p.311.
². Knushani, Cugāt, p.30f; Balbās, "Los edificios hispano-musulmanes," RIEEI, I (1953), 95f.
were indifferent to the school, as was apparent from the fact that there was no reciprocal influence between them and the Awzā'ītes.

The new Malikite movement had a more popular appeal than the old Awzā'īs who had preceded it. And that, in brief, is the substance of the history of the emergence of Malikite doctrine and its adherents' rôle in the social life of Spain.

New Juristic Rôle

Many of those who received their education in the Orient were men of higher legal status, and were better educated than most of the former Awzā'ī jurists. The pressure of possible social and political fragmentation spurred them in their quest for a more broadly based legal theory which might bring unity to Spanish society. This was the reason for Hishām's appeal for unification of the system of law in accordance with Malikite law, on the assumption that the unity of his state law would end the political and social divisions within the state. Hishām's insistence that the state be free from any links with outside political influences resulted in an enactment that the Malikite law be the only official law of al-Andalus; this was not only an expression of the unity of his state, but also an assertion of his power against the orthodoxy of his rival, the Abbasids.

1. See Ḍabbi, Ḍughya, pp. 304-356.
2. It has been reported that Muḥammad b. Ibrāhīm b. Muzayn (d. 183/799) resigned from high judiciary status in 170/786 and left for Hijāz where he became acquainted with Mālik. See Ibn al-Abbār, Takmila, 1:90.
This readiness of Andalusians to seek a legal form that was more adaptable to their own purposes and society, made them receptive to a shift to Medinan culture and Mālik’s ideology. The rapid advancement of Malikite law in Spain was further aided by the fact that authoritative legal sources of the Awzā‘Ī law were, in some instances, not written, or were extremely scarce and in fragmented statements scattered through various works.

With the appearance of the recension of the Muwatta’, the first authoritative written law, Medinan law, became important, often the only source of legal knowledge. Though the data are merely conjectural, one can understand how the desire for stability aided the spread of Mālikism, and why the people welcomed the new doctrine. What is certain is that, without proving their readiness to accept Mālik’s doctrine as binding law, their knowledge and use of Muwatta’ prepared the way for the reception of more far-reaching Medinan law. This attitude was accompanied by a hostile reaction to the formal doctrine of their state. In this period the seeds of Mālik’s ideas were disseminated. The biographers take pleasure in making known the care that the Spanish jurists took in impressing their authority on the people.

Jurists, especially those who studied with Mālik, in propagating his doctrines, emphasized the master’s glory and honour through anecdotes and personal observations. Such a technique, of making Mālik human and approachable, probably had a favourable effect on the promotion of his doctrine.  ʻa‘īd b.
Abī Hind (d. 200/815), Mālik's disciple, told the Spanish people:

"I was never awed by anybody as much as I was by 'Abd ar-Raḥmān b. Muḥāwiya up to the day when I made the pilgrimage, and visited Mālik. I was very impressed by him, to the extent that the awe that I felt toward the emir was mitigated."¹

The role of individual jurists in expanding this ideology deserves attention. Most of these jurists were among the pioneering scholars who were associated in one way or another with Medinan jurists, particularly since the city was on the route of the pilgrimage. Obviously it would be wise not to underestimate their achievement.²

The first intimations of this doctrine were carried by several Andalusians who studied with Mālik at Medina and followed his doctrine. The reason why Spanish jurists travelled exclusively to the East, apart from the search for knowledge, was to make the pilgrimage. The Muslims living in al-Andalus, both the conquerors and the new converts, had to perform the Pilgrimage to Mecca, at least once in a lifetime. The nature and importance of the role of the pilgrimage in the spread of Medinan culture is too obvious to need emphasis. There is also the geographical factor that made al-Andalus more receptive to the introduction of Mālikism than to any other doctrine. It was connected with its neighbours to the east, Qayrawān and Egypt, by a common language and similar culture and religion. This was very important for the introduction of legal principles from those countries.

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However, this was the beginning of a long process of assimilation of Malik's doctrine by Spain. Students from different parts of al-`andalus went to Medina and returned to their homes having imbibed the knowledge and the spirit of Medinan legal thought. Some of these students entered the service of the court as clerks, and applied their knowledge to the drafting of legal cases and other documents. Others, such as Sa'id b. `Abd `ind (d. 909/315) assumed offices in Government administration, where their knowledge of Medinan Law qualified them to hold the position of vizier. The rise of popular Medinan-trained jurists and cadis, therefore, brought with it the ascendancy of Medinan Law.

Among the jurists who brought Malik's ideas to Spain were Ziyād b. `Abd ar-Rahmān, known as Shabtūn (d. 204/819), and al-Ghāzi b. Cays (d. 199/815). Both of these jurists were credited with introducing a version of Muwatta', Malik's legal work, into Cordova. They began to form a school around themselves. By their efforts, Ziyād and his colleagues continued to make the influence of Medinan culture felt at all levels of Andalusian society. It is clear that the legal influence which these Medinan-educated jurists had on the judicial life was extensive.

3. Al-Ghāzi was reported to have been a tutor for the Spanish emir. See Ibn Kashkuwāl, Sīla, 1:103.
They established a tradition of professional excellence and legal experience by inspiring jurists to serve as scribes, copyists, advocates and notaries.¹ These jurists wrote for the benefit of their profession, with the intention of collecting and diffusing the known laws and usage of Medina, as it existed at Malik's time. But although the Malikite jurists showed reluctance to accept Awza'I views through the period of the first three successive emirs ('Abd ar-Rahmān, ʿĪsāhām and al-Ḥakam), there was never a distinction with regard to the division of judicial administration between Awza'I and Malikite jurists.

With the death of 'Abd ar-Rahmān I in 172/788, his son, Hishām came to power to find that the Malikite jurists held specialized and respectable positions in the social and judicial life of the state, as teachers, jurisconsults, leaders of prayer and cadis.² As Hishām grew up and absorbed the social and religious traditions of his society, indulging a widespread interest in legal studies, he was in a better position than his father had been to gain the respect of the state intellectuals. His rule was indeed known as the age of justice and beneficence.³ Besides his reputation for justice and piety, he was described as

1. The famous jurists of the time, most of whom had recently arrived from Medina, were not admirers of the Awza'I law. See 'Iyāḍ, Madārik, II, 1:20; Naṣirī, Istiqāʿ, I, 1:138.
2. Among these leading figures were Saʿīd b. Abī Hind, Saʿīd b. ʿAbdūs (d.180/796), Saʿīd b. ʿAbdūs and Qarʿūs b. Abbās (d.220/815). See Ibn al-Faraqī, Tāʾrīkh, 1:190f and 413.
the first one to give stimulus to the further development of Malikite legal influence. Dunlop said:

"Hishām I, whose public and private conduct was guided by religion, has been compared to his relative 'Umar b. 'Abd al-'Aziz [q.v.]. With his encouragement, the new Malik school began to make headway in al-Andalus."

Despite Hishām's veneration for the Malikite jurists, he was not willing to give them a completely free hand in the judicial administration of the state. Most of his advisors were Malikite but, for political reasons, Hishām nominated Cādī al-Jamā'a, the highest judicial office in Spain, Ḥusayn b. 'Imrām, who was said to be an independent cadi; his legal counsellor was Ṣa'ṭa b. Sallām and after his death the cadi, Ibn 'Imrān, chose to replace him by the famous jurist Ziyād b. 'Abd ar-Raḥmān. By this time the Muwatta', the earliest code of law in Spain, was extant in several copies, and had been circulated throughout the country since the death of Ṣa'ṭa. The Awzā`I legal influence was declining, and with the coming of Hishām's rule, only a few more Awzā`I jurists appeared on the scene. At the same time there was a marked decline in the prestige of the Awzā`I law. This process coincides with the Malikisation of the Spanish law by way of judicial practice and activities of individual jurists. 3

1. D.H. Dunlop, EI 2, iii:495 (s.v. Hishām I); Haqqarī, Naṣīr, 1:316.
3. Ibn al-Faraqī reported that Ibn Ḥabīb exerted a stern pressure over Zuhaīr b. Ḥālīkl al-Balawyy (d. in the beginning of 'Abd ar-Raḥmān's II reign) an Awzā`I leader of his time, in order to change his doctrine to Medinan law, Ta'fīkh, 1:181.
As has been noted, Malikism began to penetrate the Iberian peninsula as early as 'Abd ar-Rahmān I's reign. While the slow process of transmission of Malikism by pilgrims, merchants and Spaniards who had lived for a time in Medina, Egypt and Rayy continued, Hishām realised he could no longer overlook the fact that Malikism was developing as an important idea among his people. At this time the growing influence of the Malikite jurists impressed the Spanish enir, Hishām and his successors, with its potential and the political importance of Malikism was acknowledged by the rulers.

Hishām's partiality to Malikism meant that apart from the political security which Malikite doctrine now enjoyed, the Malikite followers and views gained far greater prestige in the judicial sphere. By this attitude, Hishām discouraged all legal opinions except those of Malik. He passed a decree that the Malikite law alone would be maintained as the form for state institutional systems.¹ Hishām's sympathy with the views of Medinan jurists partially accounts for the issuance of the decree, but it was also in part due to Hishām's antagonistic attitude to Baghdad where the official doctrine was Ḥanafī; this perhaps motivated him to close the gate against any incursions of Iraqi ideas.² Whether imbued with faith that a common doctrine could save him and his state from outside challenges, or motivated by

¹ 'Iyāḍ, Intro. to Madārīk, p. 55.
² Tanbukṭī, Nayl, p. 191.
hope that Malikite Consensus might enable him to control the country, Hishām invested a great deal of energy to support and encourage the growth of Malikism. Perhaps Hishām sensed that the only way to achieve his aim was to give plenty of opportunities for acceptance of the Malikite law by the state judiciary. To enact the law in accordance with Malikism, Hishām had no recourse but to ask the jurists, such as Ziyād b. ʿAbd ar-Rahmān, for practical guidance in legal cases that lent themselves to Malikite interpretation.¹

When Hishām pronounced his wish for unification, the legal climate in Spain was such that the articulation of Medinan doctrine was brought about by royal support. Without such official support, Malikism would have been in a less favourable position to compete with Awzāʿism. The trend towards the unification of the state and its influence on legal development is illustrated by Rabīʿ’s statement.

"Historical experience shows that the development of the legal phenomenon is presided upon by a trend towards unification. Any progressive society feels at a certain moment of its history the necessity of realizing an internal unification."²

Now the Malikite jurists were in a much stronger position to press their claim than they had been in the period of ʿAbd ar-Rahmān. Another measure was recommended to control the legal appointments

1. Hishām's son, al-Ẓakam, held the same view towards Ziyād, see Ibn Saʿīd, Mushriḥ, p. 39.
in favour of Malikism. Only persons who had Malikite legal education and had learned the whole of the Mudawwana and Muwatta', could be named as jurists.¹ Rules were made for practising legal responsa, which provided for regulation of legal practice. No one could assume the status of fuqaha, or office of judgeship, unless he had sat examinations set by many law-experts. The candidate was assumed to have some independent income which was regarded as an assurance that he would not exploit his position for his own personal gain.²

Presumably this would have had a desirable result for Malikism, though these rules were probably an attempt to limit the power of unqualified jurists rather than an effort to promulgate the doctrine of Malikism, or of making sure that these posts were accessible only to Malikites. The rules also resulted in a gradual weeding out of the Awza'Is. These measures were passed, with the result that knowledge of Medinan law became an essential prerequisite for preferment in the judicial services in particular, and in government administration in general. The result was a neglect of the Awza'I school.

The Malikites too had become more powerful agents of Hisham's rule and retained a large degree of independence, initiative and responsibility. Al-Qar'Us b. 'Abbās (d.220/835) told Malik b. Anas of his father's strict adherence to the letter

². Murîr, Abîbath, 1:180f.
of the law while he was holding the office of market inspector "muhâtasib". Ibn al-Faraðî relates this incident to show how far al-`Abbâs' influence had been exerted. "He was very strict in his task as well as very severe with offenders and wrong-doers." In that connection he related how once al-`Yakan I, during the reign of Mûshân, was spending a moment of relaxation with his relative Sa'Id al-Khayr. In the evening Sa'Id recalled that he had at his home a splendid wine. Al-`Yakan asked him to send a servant to bring some of it in a goat-skin. On his return with the goat-skin in his hand, the servant had the bad luck to meet Car'ús's father who was leaving the mosque. As soon as he saw the servant carrying the wine, he ordered his arrest. The servant cried out, "My master is with the emîr and it was he who asked me to go and get his wine." `Abbâs paid no attention to what he said and dealt him several lashes of the whip after he had ripped the goat-skin to pieces. In the meantime, Sa'Id was getting anxious at his servant's late return. It was not long before he was informed of what had happened. He returned to the emîr shouting "Our day is gone, we have been reduced to nothing." al-`Yakan asked him what had happened and Sa'Id told him. al-`Yakan replied wisely "Not at all, this will increase our reign's prestige" and a few moments later he added, "...and that idiot of a servant had better hide himself."¹

The jurists contributed significantly to the orderly

¹. Ibn al-Faraðî, Ta'rîkh, 1:413f.
evolution of their organisation. They adopted and developed the attitudes and characteristic spirit which made up, more or less, the complete ideology of Mālik b. Anas. The establishment of Mālikism was reinforced by conversions to Mālikism of men from other schools. The advantage of their association with Hishām was that the Mālikī doctrine began to enjoy considerable status in Spain. From this time on, one can see the beginning of a sort of aristocracy in the capital of the Hispano Umayyad emirate, both religious and political, which was made up of faqīhs or Mālikī jurists. As far as one can see, this privileged class soon started on the one hand to gain the intimacy of the ruler in order to exert influence on his decision and to embroil themselves in the affairs of the state, and on the other hand to oppose those rulers who ignored them and who carried out policies hostile to them.

One can observe in retrospect how the official and the jurist class acquired honour and prestige in Muslim Spain. Since the jurists occupied such a prominent position in Spanish socio-religious life, it is natural that they should have played an important political and cultural rôle. Unfortunately, we cannot accurately weigh the influence of the Malikite jurists in shaping al-Andalus political life during this period. They acted as Hishām's liaison with the populace. They served as propagandists,

1. Ibid., p.312; 'Iyāḍ, Madārik, I, 11:20.
2. Levi Provençal, Histoire, 1:149.
and linked themselves with those intellectual circles not directly concerned with legal reform. In Medina, Ziyād described Hishām’s piety to Malik b. Anas, whose reaction was to express the wish that Medina might boast more like him.¹

The Growth of the Movement

Perhaps the most important period in Malikite legal history was the quarter century which immediately followed the death of Malik b. Anas (179/795). With Malik’s death Medina was no longer the sole destination of Ifriqiyyan and Spanish students. Yet his legacy and thought still enjoyed prestige, not only in Hijāz, but also in Egypt where followers of Malik were among the leading scholars.

So when al-Ḥakām came to power in 180/796, the Malikite jurists began to learn from predominantly Egyptian sources. They continued to hold a monopoly in the administration of the state. They had become so influential that they could indeed claim to represent the cultural, political and religious life of the latter part of al-Ḥakām’s reign. But al-Ḥakām’s perception of the potential power of the jurists as a new menace to his authority made him intolerant of them even in their official roles in the state.

Al-Ḥakām, according to some of his biographers,² unlike his father, was accused of putting his private interest before

¹. Maqqari, Naḥ, i:316.
that of the public. Such conduct incurred the censure of the jurists. This, however, was not the major complaint in their protest against al-Ḥakām's rule, but rather his policy of excluding prominent jurists from participation in the affairs of the state. The jurists, on the other hand, considered their state had achieved the ideal, as a result of their own religious and legal achievements. Neither side expressed much confidence in the other. For the jurists it was the moment at which men—sharing little else in common, began to unite because of their common grievances.

Al-Ḥakām's denial of the jurist's right to the supervision of affairs of state undoubtedly worsened his standing with the community. His precautionary measure simply increased the dissatisfaction. The jurists went as far as to conspire to depose al-Ḥakām, giving their allegiance to one of his cousins.\(^1\)

Brockelmann described this unsuccessful attempt:

"Its representatives, the fuqaha had been distinguished from the first by a particular fidelity to the law and a fanatical ambition. Consequently they took serious offense at Hakam's manner of life—devoid, in the style of his Syrian forebears, of any legal scruples—and together with the discontented nobility they carried on an incitement against him among the new converts. Twice in 805 and 806, he had to suppress insurrections in his capital, Cordova.\(^2\)

Al-Ḥakam discovered their plot before they could do anything. He punished and imprisoned some of them and executed seventy-two

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of them. Using the discovery of the conspiracy as a weapon, he attempted to press further charges against the jurists.

However, this shattering blow did not put an end to the hopes of the intellectual class that al-Ḫakam would fall from power. It may be noted that no new serious threat came from their side; nevertheless, their resentment was too powerful for the ruler to ignore. They did not make a direct ideological attack on the authorities, but mobilized and mounted it through the common people. However, the jurists were not the only force behind the trouble. The residents of Toledo were also in a perpetual state of ferment.

But al-Ḫakam realized that the growing moral indignation of his subjects would force him to submit to their influence. Therefore he had to provide protection for the Malikites, not because he wanted to, but to appease the people. He changed his attitude; and whether from choice or necessity, he listened to their advice, respected their views, and gave his cadi a wide jurisdiction. If he had taken any further drastic measures against them, he would inevitably have alienated the state from the jurists on whom the affairs of state depended.

1. Ibn al-ʿAbbār, Takmiṣa, 1:389. Cf. Ibn al-Faraḍī who related that there were 140 bodies crucified, and that the wooden crosses stretched from raʿs al-Cantara along to the end of raṣif. Taʾrīkh, 11:174.
Of course, the expansion of the tasks of state created greater demands for intellectuals and jurists capable of issuing rules and making decisions. This fact has been stated by Edward Shils:

"The larger the society and the more complex the tasks its rulers undertake, the greater the need therefore for a body of religious and secular intellectuals."¹

They could, through their class status, be a useful instrument if al-Ḥakam came under pressure from the community, for he could not dispense with the support of the people, and these people would not accept a ruler whose authority the jurists did not recognize.² Thus al-Ḥakam showed his willingness to release the Malikite prisoners. He even made it his business to demonstrate his favourable attitude by announcing amnesty for the rebel jurists and restored them to their former status. A sort of treaty was concluded between him and the jurists. The former had to recognize the jurists' right to participate in the affairs of state and the latter promised to support the throne and to vouch to the people the legitimacy of the rulers.³

The Spanish state was as completely Malikite as it had been Awzā'I in the first few years of Hishām's reign. Consequently the jurists renewed their activities. Politically they derived every advantage from this rôle, as they were able to reinforce the influence of their doctrine and legal thought. Thus, during

3. Ibid.
the last years of al-Ḥakam's rule, the conduct of state affairs
was influenced by the presence of men such as Ibn Bashīr the
cadi of Cordova in al-Ḥakam's time, Yaḥyā b. Yaḥyā al-Laythī and
ʿIsā b. Dīnār (d.212/827). The latter was a devout Malikite
and studied under Ibn al-Ḡasim. ʿIsā b. Dīnār is said to have
brought back from Ibn al-Ḡasim the copy of al-ʿAsadiyya. He is
also supposed to have compiled al-Ḥidāya, favoured by Spanish
jurists as the best and most comprehensive work of Malikite
jurisprudence.

The influence of the jurists which had supported the
ruler's position and his ideology prevailed also over the social
and political life of Spain. It is thus that the ṣuqāʿ, whose
popularity was their strongest claim to political authority,
elevated Malikite ideas to the most important position in their
judicial services. Legitimizing the existing structure of
authority won them participation in the popular responsibility
for administration. This close identification of the authorities
and jurists led quite naturally to the embodiment of the latter's
ideas in the judicial and administrative functions of the state.

It is significant that as a result of this political
liberalism, the jurists attained a high level of scholarship
and produced important and respected legal works. During al-
Ḥakam's reign there appeared: Yaḥyā b. Yaḥyā's recension of the

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1. The latter two of these jurists are known to have been
influenced by the Egyptian jurists, and to have plotted to
overthrow al-Ḥakam. see 'Iyāḍ, Hadāʾik, I, II, 545, and
Vol, II, i:17.
Kuwat‘a'; the ten treatises known as 'Asharat Yahyā (judicial decisions delivered by Ibn al-Gāsim and compiled by Yahyā); al-Madaniyya, works collected by 'Abd ar-Raḥmān b. Dīnār while he was staying in Medina; al-Asadiyya, the origin of Mudawwana, brought by Ḥāfaṣ b. Dīnār from Egypt.¹

Just as Yahyā had taken the text of Kuwat‘a’ to Spain, other Spaniards followed his example and introduced new legal works into their country. Qāsim b. Hilāl (d. 231/846) was the companion of Saḥnūn at Ibn al-Gāsim's house. He made the Mudawwana a recognised work in Spain.²

The development of legal writing, a response to the pressure on influential jurists to write legal works as a qualification for admission in judicial posts, led to a flourishing stage of Malikism.³ Malikite scholarship influenced the growth of legal thought and literature. The Kuwat‘a’ was used more as a model for legal treaties than for its contents. The existence of such important works reflected the desire of the promoters of Malikism to define the wider implications of their doctrine. The exclusive concentration on Malikism seemed to preclude any tendency to refer to other legal doctrines.

The Influence of Foreign Exponents

The Spanish jurists who travelled to learn more of Islamic

1. Ibn Farḥūn, Dībā‘, pp. 149, 78, 79, 350f.
culture could not fail to be immensely impressed with the
flourishing of the science of jurisprudence and refinement of
scholarship in Egypt. En route to the Eastern Islamic countries
they passed through Egypt, the great cultural centre of learning,
whose law had assimilated the ideas of Medinan legal literatures.
Long before Mālik's lifetime, Egypt received the ideas of the
various Medinan jurists who carried to her the legacy of Medina.¹
This is clear from the fact that there were many scholars whose
thoughts were typically Medinan. The first who were said to
have brought Mālik's legal view into Egypt were 'Uthmān b. al-
Ḥakam (d.163/762) and 'Abd ar-Rahmān b. Khālid (d. 153/753).²

Malikite studies in Egypt continued to grow and to attract
to their educated jurists a number of students, mainly from Africa
and Spain. Due to this fact, Malikism in Qayrawān and Cordova
acquired features which distinguished it from Malikism in the
rest of the Muslim world, and made it into one of the Egyptian
Mālikī-philosophy systems. In absorbing so much of the Egyptian
judicial culture, Qayrawān and Cordova adopted a system of law
and legal thought which were significantly different from some
of the judicial views of Mālik. Not only did the role played
by the Egyptian jurists give rise to a unique doctrine of power,
but it contributed significantly to the adaptability of Spanish
Malikite law to novel concepts. The motive for seeking Malikite

². Maqrīzī, Khīṭāb, 11:334; Ibn Farṣūn, Dībāi; cf. Suyūṭī,
   Ḫusn, Part 1, p.163f.
ideas was thus to assist them in promoting Malikism at home. In addition the jurists sought to obtain a fresh Malikite interpretation of judicial thought from the jurists most famed for their scholarship. Among the Egyptian jurists and their successors of the third Islamic century, the Spanish jurists encountered a detailed exposition of Malikite law, adapted to the requirements and needs of their time.1

Ibn al-Cāsim (d. 191/806) and his colleagues are generally recognized as being the exponents of Malik thought in Egypt.2 Their ideas served as a guide and a stimulus to the Spanish jurists. There was a steady infiltration of Egyptian influence which profoundly affected both the theory and the practice of Spanish Law. Where the Medinan law failed to provide for any particular case, the opinion of the Egyptian jurists was invoked and cited as authority. Several Andalusian jurists, some of whom held high positions in the government, had come into contact with the most prominent Egyptian jurists, not only the Malikites like 'Abd al-Raḥmān b. al-Cāsim, 'Abd-Allāh b. Wahb, Ashhab b. 'Abd al-'Azīz (d. 204/819), Aḥbāgh b. al-Faraj (d. 225/839) and al-Ḥārith b. al-Muṣkin (d. 250/864), but also with the famous

1. See Madārik, II, 1:69.
2. The Egyptian jurists, in fact, were aware of their intellectual impact on the whole of the Ifriqiyyan and Spanish jurists. They arrogantly refused to countenance any legal ideas put forward by Spanish or Ifriqiyyan jurists which might compete with their own views on the grounds that they were the givers of the law. cf. 'Iyād, Madārik, II, 1:72f.
independent jurist, al-Layth b. Sa'd (d.175/792).\(^1\) Throughout the formative period of Spanish Law, Egyptian and Ifriqiyyan legal ideas, rather than specific rules, exercised a considerable influence in the development of Malikite law in Spain.

The Spanish jurists who received their education in Egypt were efficient agents in the promotion of Malikite law and also played a key rôle in infusing the non-Malikite judicial opinion with the doctrine of Malik b. Anas. Before deciding what was the exact nature and function of foreign elements in the development of Spanish Malikite law, a summary of biographical accounts of the jurists who brought Malikism into Spain and brief surveys of their influence would be helpful, and would put this chapter in total perspective.

The Egyptian jurists' interpretation of Malik's legal views influenced Spanish jurists' concepts of the doctrine of power. It contributed significantly and in the time of 'Abd ar-Rahman II, blossomed into the judicial perceptions of the three jurists, 'Isa b. Dinâr, Yahyâ b. Yahyâ and 'Abd al-Malik b. Ḥabîb. These jurists, on their return from Egypt, were responsible for increased interest in Egyptian legal literature. Several Spanish intellectuals followed suit and most of them returned to their native land, having been influenced by Egyptian Malikite ideas.

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\(^1\) For al-Layth's biography see Suyûtî, Ḥusn, Part 1, p.164f.
Yaḥyā b. Yaḥyā

Among the rebellious jurists who were granted amnesty
was a middle-aged man of thirty-eight who had just returned from
Egypt after studying with Ibn al-Ḡāsim. His name was Yaḥyā b.
Yaḥyā al-Laythī. He was born in Cordova, where his grandfather,
and afterwards his father, settled before 152/234. He had
studied in Spain with the prominent Malikite jurists of the time,
Ziyād b. 'Abd ar-Rahmān and Yaḥyā b. Maṣār.1 Ziyād instructed
him in the Muwatṭāʾ which he had received directly from Mālik.
Because of Yaḥyā's desire for concise information, Ziyād
recommended that he travel to Medīna where he could satisfy his
quest by studying with Mālik b. Anas.2 Yaḥyā's first recension
of Muwatṭāʾ in Spain, had its origin in his intensive study of
this work in Medīna. His version of al-Muwaṭṭāʾ earned him the
esteem of his contemporary jurists.

As has been pointed out, Yaḥyā was not the first man to
introduce into Spain either the doctrine of Mālik or a version
of al-Muwaṭṭāʾ. Nevertheless, he was regarded as one of the
earliest exponents of Mālikism, who performed a remarkable
service in transforming these incipient tendencies into a formal
Malikite legal school. And, presumably, his version of Muwatṭaʾ

2. Ibid., p.252.
was more systematic and comprehensive than that of his predecessors: Ziyūd and Qarʿūs.¹

After studying in Medina, Yahyā was made to stop in Egypt before going back to his home, and there he acquainted himself with another jurist, al-Layth b. Saʿd (d. 175/791), whose judicial decisions were considered better than Mālik's.²

The brief periods of studying with al-Layth made an impression which influenced his future legal decision and judgement. Al-Layth's aim was to make Yahyā's thought conform to his own.

Because of his authority Yahyā was able to play an immensely important role in imposing al-Layth's legal views on court decisions. The Spanish courts differed from Malikite law in not accepting evidence which was the testimony of only one witness, verified by oath. The value of the evidence of one witness corroborated by oath was generally acceptable to the Malikites. Yahyā adopted al-Layth's opinion, in which at least two witnesses were required in order to establish the validity of the proof. Since then, under Spanish law, guilt and innocence have been determined by the testimonies of a minimum of two witnesses.

Despite the striking impression that the teaching of al-Layth had made upon him, Yahyā had doubts about the way and cases

¹. This might be supported by the fact that Yahyā, besides his own version of Ḥumayd, received the recension of 'Abd Allāh b. Yahb in Egypt. See, 'Iyāq, Hadārik, I, ii, 536.
in which Layth presented his doctrine. Yaḥyā prepared for another journey to Mālik to confirm his understanding of some of the legal thought he acquired in Egypt. But Mālik had recently died, so Yaḥyā went back to Spain just before the death of Hishām.

In his second journey to Egypt, Yaḥyā recognized the necessity of learning more about law from Ibn al-Ǧāsim. In the passage of time, Yaḥyā became increasingly obsessed by the desire to perfect his knowledge of jurisprudence.¹

His purpose, to renovate the Malikite literature which he received from his Spanish teachers, combined with his unshakeable confidence in the competence of Egyptian jurists, necessitated his return to Egypt. His celebrated recension of Muwatta' became the best-known legal document of Spain. But Yaḥyā, the self-proclaimed egotist, did not settle until he had produced a version of 'Abd-Allāh b. Wahb.² His edition of this wide-ranging work and his recognised brilliance won him sufficient reputation to ensure that his Muwatta' would be the exclusive authority. He did the same with Ibn al-Ǧāsim's ten essays. This collection of legal cases made by Yaḥyā during his study with 'Abd ar-Raḥmān b. al-Ǧāsim and known as 'Asharat Yaḥyā, has long remained the standard interpretation of Mālik's law.

². Madārik, i, ii:536.
According to the sources,1 Muḥammad b. Bashīr was a Malikite jurist nominated by al-Ḥakam as chief cadi of Cordova. Ibn Bashīr studied under both Malik and Ibn al-Qāsim. Because of his influential position he was able to disseminate Ibn al-Qāsim's ideas and to impose them on his court procedure. At any rate, Yaḥyā's intimate association with Ibn al-Qāsim reinforced Ibn Bashīr's favourable disposition towards Ibn al-Qāsim's opinion and made it the final criterion of his own judgement. Ibn Bashīr's respect, however, for Ibn al-Qāsim's ideal moved him to welcome Yaḥyā as an adviser.

After his return to Spain, Yaḥyā enjoyed considerable fame and influence, both in academic life and in official circles. He could advise the supreme cadi of al-Andalus, usually named Qādī al-Jamā‘a, on subtle matters.2 During the dispute between the jurists and al-Ḥakam, al-Ḥakam believed that Yaḥyā's influential personality could play an important rôle in reaching a settlement. He commissioned him to act as mediator between the two parties.3

The event of rabaq in 189/805 marked the end of cordiality in the relationship between Yaḥyā and al-Ḥakam. Yaḥyā was accused of inciting people against al-Ḥakam. Consequently he had to face the same fate as his fellow jurists. But he succeeded in escaping

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2. Khushānī, Qudāt, p.56.
from the execution that al-ʿjakam inflicted upon those who fell into his hands, fleeing to Toledo from where he soon returned to Cordova under al-ʿjakam’s amnesty.

Yaḥyā enjoyed his highest reputation as a scholar when ʿAbd ar-ʿRahmān II succeeded his father on the throne in 206/821. In this period Yaḥyā’s influence in social and official life was considerable. His personality was a dominant element at court and in government circles. In this eminent position, Yaḥyā showed an uncompromising attitude in his exposition of the law. A case is cited by Ibn Bashkuwāl and quoted by ʿAsh-Shāṭībī where the emir ʿAbd ar-ʿRahmān II (ruled from 207/822 to 238/850) had sexual relations with one of his slaves during the daytime in the month of Ṣaḥbān. The penance, according to the codified teaching of Mālik was to leave to the offender the choice between setting a slave free, giving charity to sixty poor persons, or fasting two lunar months. Yaḥyā did not allow the emir a choice, but imposed upon him a fast of sixty days. Asked by his colleague for the reason of his departure from Ṣaḥbānite view in this case, Yaḥyā replied that the alternative solution would have encouraged a recurrence, nothing being simpler for a prince than to set free a slave.¹ He succeeded in gaining the favour of ʿAbd ar-ʿRahmān and exercised considerable influence over him. One of the ruler’s first steps on coming to power was to offer Yaḥyā the

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¹ ʿAsh-Shāṭībī, ʿIʿtīṣām, 11,114; Maqṣarī, ʿNaḥf, 11:218f.
post of Chief Cadi in Cordova.¹ To keep up his influence and to preserve his prestige, Yaḥyā saw fit to refrain from accepting this post. He knew that the post of counselship possessed appellate jurisdiction over the decision of the court. Yaḥyā therefore answered the request of ‘Abd ar- Раḥmān by saying:

"The high prestige I enjoy could have a better use for you. If the people complain about a judge, you can always ask me to interrogate him and examine his conduct, but if I have the post of judgeship and people complain about me, whom would you think qualified to indict me?"²

‘Abd ar- Раḥmān appreciated his argument, but he asked him to recommend a jurist to fill the post. By his refusing the judgeship, Yaḥyā in fact allowed himself a chance to give instruction to the cadi or to set limits upon him, for a cadi would not be permitted to pass a sentence on a complicated case without consulting the mushāwar.³ The role of the mushāwar, of which Yaḥyā became head, was seen as the carrying out of the functions of legal executive, rather than the supervision of court procedure and legislative functions. This new and influential job gave him a good opportunity to ensure the accession of his followers to the post of judgeship. From that time Yaḥyā, potentially at least, by virtue of his intimate

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¹ The judgeship in Cordova carried with it the highest authority and responsibility of the realm, second only to those of emir. The court of Cordova had exclusive jurisdiction over more serious crimes. Maqqarī, Nafāh, i:203.
² Khushanī, Qudūd, p.15. cf. Ibn Sa‘īd, Mughrib, p.148.
³ Khushanī, Qudūd, p.77. This does not mean that the cadi had to consult the counsellor about every judicial decision which he proposed to take, for that would have made the cadi’s jurisdiction meaningless.
relationship with 'Abd ar-Raḥmān, and effectively, by virtue of his consultant prestige, possessed jurisdiction over the conduct of cadis. The most likely to win Yaḥyā's approval was the one who was to adopt his legal views. The jurist was bound to lose his rightful chance for ṣuṭ Yan if he did not study the text of Yaḥyā's recension of Muwatṭa'. The cadi, too, had to acquaint himself with Yaḥyā's opinion in such cases, and to familiarize himself with Yaḥyā's ideas. The jurist, therefore, was required to serve a period of judicial apprenticeship before he could attain any religious office. He would not be admitted to serve in iftā' or as a prayer leader unless his opinion was in harmony with Yaḥyā's.

Yaḥyā was aware of the limits of the cadi's jurisdiction. He knew very well that the counsellor had far more effect than the cadi on the court's adjudicative power. However, this new and influential job gave him a good opportunity to ensure accession of his followers to the post of judgeship.

'Isā b. Dīnār

The most prominent of those jurists who played a major rôle in establishing Malikite law in Spain was 'Isā b. Dīnār (d. 212/827). Around 180/97 'Isā made a trip to the Orient where he

1. Ibn Saʿīd, Muḏrib, p. 46; Ǧabbāl, Busīya, p. 497; Maqqarī, Naẓīf, 11:218f.
2. Ibn Saʿīd, Muḏrib, p. 149f.
3. Ashagh b. Khalīl, a legal advisor in Cordova at the time of emir Muḥammad said that the initiative and impetus for widespread reception of law was due to 'Isā's personal effort. 'Iyūḍ, Ḍadārīk, II, 1:17.
conducted the famous jurists of the time including Ibn al-Qāsim whose brilliance greatly influenced the Spanish courts.¹

The famous collection of legal cases called the Asadiyyah, to which reference has already been made, was brought to Spain by 'Isā. During Ibn al-Qāsim's revision of the Asadiyyah, 'Isā ibn Dīnār was known to have attended the lectures. He copied the Asadiyyah from Ibn al-Qāsim's dictation, and carried it home, together with another ten manuals of Ibn al-Qāsim's legal opinions. When Ibn al-Qāsim made substantial alterations to the Asadiyyah text, 'Isā contacted his master asking him either for the revised editions or for advice as to where changes had been made. Since there were no copies left, and it had proved difficult for 'Isā to travel to Egypt, Ibn al-Qāsim showed his confidence in 'Isā's analytical abilities by asking him to sift the contents of the Asadiyyah text, "make a survey and leave what seems to be consistent with your opinion and cross off what you disapprove of."²

'Isā's purpose in writing these works, however, was partly to imitate Asad's practice of codification, and partly to answer the need, in time of increasing population, for more legal codification. Besides it was a response to the social changes, an attempt to simplify the life of cadis, jurists, lawyers and counsellors, who needed written sources.

Later on, 'Isā, prompted by the necessity for social change and the request of an emir, felt compelled to write a complete

¹. Ibn al-Faraqī, Ta'rīkh, 1:374.
². 'Iyāq, Madārik, II, 1:19.
code of law. But the date of its composition and the identity of the emir for whom it was compiled are still unknown. 1 'Isa achieved his object in the Hidayā, at one time a very important work of Malikite law. Unfortunately the work seems to have been lost, and we are unable to describe it. Nonetheless, the Asadiyya may well have been frequently consulted as a model in the process of compiling the Hidayā. Although largely based on these earlier works, the Hidayā was characterised by its excellent content which was respected by Ibn Ḥazan, despite his irreconcilable hostility to the Malikites. 2 This work consists largely of a collection of decisions of Mālik and Ibn al-Ḡāsim on specific cases.

Undoubtedly the Hidayā stood at the head of Malikite literature and set the standards for succeeding jurists. The Hidayā exerted a certain influence on the composition of later works. However, his version of Asadiyya followed the Malikite law which the jurists expounded. It consisted of Ḥāṣi legal cases related in accordance with the Malikite requirements by Ibn al-Ḡāsim who was a convenient and prestigious spokesman. Attempts were made to promulgate the Medinan law by literary means, following the earlier oral transmission of Mālik's words and introduction of Muwatta' by Ziyād and others. But Mālik's doctrine assumed its real importance and significance when 'Isa became the first exponent, not only of Mālik's legal thought, but

1. Ibid.
of Ibn al-Casim too.¹

In a broader sense, the Hidāyah came to comprise the works and ideas of Egyptian jurists who had been designated as Malikite in their careers. This work in many ways resembled and contained Ibn al-Casim's ideas, and was Egyptian in style. It imposed the Egyptian jurist's interpretation of Malikite law without recourse to Malik himself. Contemporary jurists reacted by attempting to reduce Egyptian influence and to restore the law to its Madinan form. 'Abd al-Malik b. Ḥabīb (d.238/852), who assumed intellectual leadership after the death of 'Isa b. Dinār, compiled his Hādīth in order to make the Madinan, rather than the Egyptian, interpretation the authoritative voice of Malikism.²

Returning to Toledo, 'Isa assumed the title of fasīḥ al-Andalus. So great was his popularity that al-Ŷakam became alarmed and ordered his men to move 'Isa from his home town of Toledo to Cordova. 'Iyāḍ had suggested that his departure from Toledo was due to the cadi's and the governor's displeasure and jealousy at his fame.³ 'Isa's conspiracy was probably not in fact the chief reason that al-Ŷakam disgraced him; it is more likely that it served as a convenient pretext to disguise the ruler's real reason, 'Isa's dangerous popularity with the people.

Later on, however, extremely impressed by 'Isa's skill

¹ Ibn Farhūn, Dībāj, p.179.
² cf. 'Iyāḍ, Madārik, II, 1:34.
³ 'Iyāḍ, Madārik, II, 1:16.
in interpreting Malik's and Ibn al-Qāsim's ideas, al-Ḥakam changed his attitude toward 'Isā. Under his patronage, 'Isā became the cadi of Toledo and also held the position of legal advisor to al-Ḥakam in Cordova.¹ After his appointment to the Toledo court and later his promotion as legal advisor to the court of Cordova, 'Isā began a new academic career.²

'Isā's achievement as a student of Ibn al-Qāsim was recognized by his students. Aḥbagh b. al-Faraj described him as "The first jurist to introduce Ibn al-Qāsim's opinion to al-Andalus."³ 'Isā therefore made an important contribution to the development of Malikite legal literature. He laid particular emphasis on Ibn al-Qāsim's opinion. Besides this, the ideas of Ibn al-Qāsim made a great impact on the mind of the cadis of Cordova so that they followed with enthusiasm Ibn al-Qāsim's fatwā. However, through this Spanish jurist, Ibn al-Qāsim's judicial ideas spread far and wide. The judgements of Ibn al-Qāsim became the foundation of the Cordova's court system. This was because the Cordova court's decision to maintain the Malikite law was accepted, so that the system would not be liable to alteration with every new cadi's opinion.

In the beginning of al-Ḥakam's period, a tradition became established of relying on Egyptian jurists. This began when Ibn Bashīr commissioned Yaḥyā to enquire from Ibn al-Qāsim for

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1. Ibid.
2. Ibid.
3. Ibid., p.17.
explanation or illumination of certain legal problems and was the starting point of a long process of infiltration of Malikite Egyptian opinion into legal documents and court decisions.

This influence increased after numerous collections of decisions came from Egypt and elsewhere. These collections seemed to be not merely prepared for propagation and educational purposes, but also for guidance of legal practice and citation in court. Andalusian jurists seem to have considered that, in weighty matters involving doubtful questions of law, the cadi and jurist consultants should give due weight to the arguments put forward by Egyptian jurists.

Therefore the practical influence of the Egyptian jurists on the legal affairs of al-Andalus was seen in the accomplishment of jurists who studied with Ibn al-Qāsim and his colleagues, who by that time held the most significant administrative posts in the state. Probably Cordova had never had a more influential body of followers of the Egyptian Scholars than this particular group of jurists, which dominated the judicial life of Spain around the beginning of the third century.
CHAPTER V

THE MOVEMENT FOR LEGAL REFORM

Conflict in Law

The rationality and flexibility of the Spanish Malikite law is impressive, especially when it is viewed in comparison with its counterpart in Egypt and Medina. Medinan law and Egyptian Malikite law were most clearly to be seen in Andalusian legal practice, but the jurists who are credited with introducing these practices did not entirely follow the examples of their predecessors, but went their own way, adopting what they considered most equitable to the demands of their state. From the doctrinal point of view, the Court's enactments and jurist's legal opinions were tending towards an extension of pure Malikite law, and a correspondingly strict adherence to it.

With the rivalry among jurists which was the prime stimulus for legal development, the Spanish law underwent various important changes, many temporary and a few permanent. The legal documents of notaries and cadis contained some of these alterations. Although we suppose that adoption of these innovations would have required some justification, it is very seldom, if at all, that there is any explanation.¹

¹ See, for example, the following Mss. Charnāṭī, Wathā’īq, fols. 79-96 and Ibn Rashīq, Ḥafṣūt, fol. 97 and Ibn Sahl, Aḥkām, fol. llff.
In legal records of the Court of Cordova, the jurists state unequivocally that Ibn al-İması's opinion was regarded as authoritative law, and the judgement of the court had to be confined to and based on it; but nonetheless the Spanish law disagreed with his authoritative opinion in eighteen legal judgements.¹

Again the Spanish jurists found the response of their predecessors authoritative only in so far as these were given in accordance with the explicit and/or implicit principal theories of Malik. Yet they were unable to resist or change foreign laws which were totally opposed to the doctrine of Malik. There were four categories of law which were clearly not of Malikite origin and eighteen others that were clearly contradicted by Ibn al-İması's legal opinion. Because each of these laws was concerned with different aspects of law it cannot be merely by coincidence that cases illustrative of those laws have been assimilated with little controversy into Spanish law.

The earliest influential Spanish jurists Ibn Bashîr² (the Cadi of Cordova) and Yağıb b. Yağıb, enjoyed an authority so undisputed that they were able to introduce non-Malikite laws into permanent usage.³ They succeeded in convincing the masses that these alien laws were closer to the law of the Qur'ân than

¹. Gharnâṭî, ʾinthāʾîn, fol. 96.
². For his life and legal career, cf. Ibn al-Abbâr, Takmîla, 1:90f.
³. Ağ-Dabbû mentioned some of these non-Malikite laws in his Dughya, p.497ff.
the doctrine of their masters. Whatever the process by which the foreign elements were promulgated, whether by certain jurists who pursued their academic career in Egypt and subsequently influenced their colleagues and pupils or whether the court had a role in this, reflected the adaptability and readiness of the court to accept the laws best fitted to the needs of the country. However, the adoption of new foreign law did not mean a departure from the traditional view of Malikite jurists. Although these foreign laws did not really mark a significant break with Malikite law, they represented a new phenomenon of development in the realm of law.

Yaḥyā publicly cultivated the attitude of the self-styled Egyptian jurist al-Layth b. Saʿd and encouraged the widest possible discussion of al-Layth's opinion. The Spanish jurists gradually tempered their feelings and disagreements about these foreign elements, but this can in no sense be interpreted as hostility towards Malik's opinion in general. Some of these judicial views, such as "the necessity of two witnesses to establish a fact" had much merit. Yaḥyā became their chief advocate.

Elements of these ideologies made a deep impact on the thinking of Spanish intellectuals. Although the presence of some non-Malikite elements did not alter the basic judicial ideas or

1. Ibid.
2. 'Iyāḍ, Madārik, I, ii:536ff.
forms of procedure in al-Andalus, they nevertheless brought about important modifications. It is remarkable that al-Layth b. Sa'd's law displayed a number of affinities with Malikite Spanish law. It is this blending that perhaps convinces one of the presence and impresses one with the effective usage of so many disparate influences in the development of Malikite law.

Other causes, it is true, contributed to the assimilation of new foreign elements of law and enforcement of Medinan legal doctrine. Among these factors was the art of interpreting beyond the limits of the particular case in order to clarify any obscurity or ambiguity. Once a legal point had been decided in a case by Malik or Ibn al-Casim, that decision became a precedent for the Courts of Cordova. As Malikite law became the official state doctrine, there was a growing need for law to be more uniformly administered in accordance with the recognized principles and precedents of Malik. The first step towards realisation of this was obviously the assignment of the most important judicial administration to these jurists who had spent some of their academic career under the tuition of Malik.\(^1\) Ibn Bashir, the chief justice, and Ibn Ziyad, the state legal advisor, did much toward establishing the practice and procedure of the court, and most of all, they successfully established the supremacy of their jurisdiction over the members of the emirate.\(^2\)

Put the active influence of this law in Spanish courts became

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1. see al-Dabī, al-Mughna, pp.304 & 57.
2. Khushānī, Cuṭṭat, p.49f; Ḫūmaydī, Jadhwa, pp.359-61; 'Iyāḍ, al-Insāriq, I, i.535ff; Ibn Sa'īd, Mughrib, i.145, & 150.
apparent when Yaḥyā was appointed grand legal advisor for the courts, about the beginning of the third Islamic century. Judges were required to justify their decisions to Yaḥyā, and to refer to the statements of Ibn al-Cāsim in order to avoid being accused of departure from the prevailing practices. ¹

Yaḥyā was deeply impressed by al-Layth's ideas, and as a result he was less concerned with many aspects of Mālik's rationalism than with formal Egyptian Mālikism. He was sympathetic to al-Layth's teaching and interested in his argument, but he remained at heart a very devoted Malikite. His main prerogative as chief of counsellors was the right to interpret the law authoritatively. Nevertheless his judgement was not always uncontested by other jurists. As a raʾīs al-fuyūḥ, however, the court over which Yaḥyā had jurisdiction was bound to accept his interpretation of the law and its application to any given case. ²

In connection with the system received through al-Layth, the law of al-Layth had some influence on Spanish Malikite law in its formative era. The liberal attitude of Yaḥyā encouraged him to question the authority of law received from various teachers. Such an attitude left its mark on the reception of a few rules from al-Layth and Ibn al-Cāsim. In order to illustrate such influence on the Spanish judicial procedure we may cite the

¹. Ibn Saʿīd, Mughrib, 1:164f.
². 'Iyāq, Madārik, I, 11:538f.
following cases. The first of these cases, in which the Spanish Malikites did not follow the İmām was over the plantation of trees inside the mosque. Malik did not allow trees to be planted inside the mosque on the ground that it might distract the people from paying the due attention to their prayer.

Another reason led Malik to forbid the cultivation of the courtyard of the mosque was that it was an innovation, which Malik consistently opposed.

The date at which Spanish courts allowed planting of the patio of the mosque has been traced back to the time of the emir Hishām I. During this period Şa‘ṣa‘a b. Sallām was the leader of prayer in Cordova, and because he was an Awza‘ite advocate he allowed the patio of Cordova's mosque to be cultivated.¹

Arbitration in Marital disputes

One of the most striking aspects of Yaḥyā's non-Malikite judicial thought was the law of "sending arbitrators to disputing spouses."

The contention was that a dispute between the married couple ought to be solved, for marital interests, without involving Court action. A settlement would be achieved according to the Qur‘ān by arbitration.² This principle was adopted so as to protect the welfare of a spouse whose well-being would be in danger as a consequence of the tension of a court litigation.

1. Ibn Sahl, ʿApkām, verso, 64.
2. Qur‘ān, iv:35.
Reconciliation could be effected by either judicial administra tors or by close relatives who usually would send two arbitrators to represent each side.

The principle of arbitration (taḥkīm) was clearly recognized by Mālik, although his disciples were divided in opinion as to the exact jurisdiction of the arbitrators. Some were of the opinion that the jurisdiction of the arbitrators should be restricted to recommendation, so that when there was no hope of reconciliation they could recommend a grant of divorce to the couple. Others maintained that the arbitrators who were chosen by the court as discreet and impartial persons should be deputed to give judgement in favour or against either of the spouses.

Yahyū rejected Mālik's concept of arbitration, in favour of al-Layth's principle, which interpreted the ḥakam (arbitor) as merely an minist (trustee) or a wakīl (agent). The function of this minist was that of a mediator whose business was to discuss the matter in dispute with the couple, and try to bring them to some agreement; he was not bound to form any opinion of his own on the merits of the case, and if he gave an opinion, neither one of the parties were bound to accept it. The minist had no power other than offer solutions for the dispute. He could not dissolve the marriage nor could he act beyond the consent of the

1. Qurṭabī, Ḥikām, iii,v,175f.
parties. The arbitrator, on the contrary, was appointed not only to advise but also to decide, although he had the option in the course of the proceedings to suggest a compromise.

The rejection of tabkīn, in Yahyā's view, was on the ground that it would lead to arbitrary decision. Instead, he suggested reducing differences between hostile spouses by choosing men (preferably versed in law, and if possible, relatives of the concerned parties) to act not as arbitrators but as peacemakers.¹

In consequence, Yahyā's decision was assimilated into Spanish law until the middle of the fifth century, when Ibn al-'Arabī, the Chief Justice of Cordova, rejected the anti-Malikite view and restored the Maliki practice of using arbitrators who had a wider scope of power.³

The Defendant's Oath as Prescribed by Social or Commercial Relationship with the Plaintiff.

The Spanish law regarding the defendant's oath (to corroborate his innocence in the absence of evidence against him). so far as it may be known from documents, appears to have been

2. His full name was Abū Bakr Muḥammad b. 'Abd Allāh (d. 544/1149). Ibn Bashkuwāl described him as the last of the independent jurists (mujtahids) in Spain whose career marked the end of its tradition of famous scholars. Sīlah, 11:558f; Maqqari, Azhār, 111:62ff. For more detail of his works see Ibn Fārūn, Dībāj, pp. 281-284.
surrounded with uncertainty. A plaintiff could sue someone in which the actual claim was an extremely doubtful one. The decisive element between two litigants was an established relationship between them; which, however, must have been such as to have the effect of establishing circumstantial evidence in favour of one or other of the litigants. ¹

The principle of "established relationship" thus afforded a turning-point in cases of doubt. It was, perhaps, the safest deterrent preventing criminals from accusing innocent persons. This rule is utilised when the judge cannot hope to draw the correct inference from the circumstances laid before him. ² For example, a man sued another man on the ground that the accused defrauded him of some money. The cadi found that the charge alone, unsupported by proof, might tend to injure innocent people. A known relationship (khulfa) between the litigants was taken by Malikite law as a measure against any false allegation, in addition to the defendant's sworn oath that he was not guilty. ³

The Malikites alone attached legal importance, varying in degree, to a connection between the litigants that might provide any proof that the claim was based on fact. If there were no links between the plaintiff, who claimed that a sum of money was borrowed by the defendant, and the defendant, who denied

2. Ibn Sahl, Ahkam, verso, 11.
categorically such a claim, then since there was no apparent
evidence in support of the plaintiff's claim the charge would be
dismissed. If there had been any sort of connection between
them, the case would have been viewed in a different manner. If,
for example, a plaintiff sued his partner for denying him money
he borrowed, though there might have been no evidence to support
the plaintiff's claim, the partnership would have been presumed
evidence that would give grounds for consideration of the
allegation. In order for the accused to clear himself from the
charge, he had to give an oath to support his innocence.¹

Just as certain claims led by rule of *khulṭa* to particular
presumptions which resulted in imposing oaths on the accused,
so there were other claims from which the law would allow no
presumption to be drawn from *khulṭa*; so that if a rich man
claimed that he lent a poor man a million dinār, despite the
fact that there was a sort of *khulṭa* between them, the claim would
not be admitted on the ground of its extraordinary nature; it
would be held to contradict the natural presumption that a poor
man would not borrow this huge sum of money. Establishment of
this relationship was more or less necessary to force the accused
to give an oath. The plaintiff's litigation depended on the
merit of his claim.²

The Spanish jurists specified as exceptions to the general

rule five categories of people who had to give an oath without any known khulṭa. Among the people to whom the Jurists considered the khulṭa irrelevant and inapplicable, the Spanish manuscript mentioned the following: i) the artisan (ṣ-gāni'); ii) one who was accused of theft (al-muttaham bis-sarīqa); iii) a person at the point of death who claimed that someone else owed him a sum of money; iv) and an alien who claimed that he had entrusted his money to a native.¹

**Crop-sharing (muzāra‘a)**

Islamic law stipulated that every contract must be clearly written so as to exclude any doubt about its terms or possible ambiguities, either as to the nature or to the value of the subject of the contract. Any contract failing to observe these conditions could be adjudged null and void.² However, there was a very remarkable divergence of opinion among the jurists as to the drawing up of a valid contract of muzāra‘a (crop sharing), that is definition of the boundaries of land by description of the extent of its crops. This type of contract, which was a lease of land, the rent usually paid from the crops, was categorically opposed by the Malikite legalists.

As far as the contract was concerned the Spanish courts legalized the contract, even though the rent payable to the owner of land was from the produce of the cultivation. Whether the

¹. Ibn Sahl, Ахкāм, verso, 11.
². Ibn Rushd, Муг, p.626.
Spanish courts forsook the Malikite law in this instance because it was the custom in Spain, or they judged that Malikite law in this particular case would not be appropriate in their state, they undoubtedly opted for non-Malikite law for expedient and economic reasons.¹

The contract of lease was accepted by Malikite law only when the rent was not paid from either known or unknown portions of the harvest. It was a hazardous contract, the Malikites argued, since it might happen that the land produced poor crops, or that the value of the harvest could vary from year to year.

In defending their departure from the Malikites, the Spanish jurists followed the idea of al-Layth b. Sa'd. They argued that the muzāra'ā which was prohibited in Islamic law, was that which was in practice in Khaybar. The contractor claimed as a rent all the harvest that grew around the streams or irrigation canals, while the rest of the produce belonged to the tenant, or vice versa. This, the Spanish court said, constituted an unfair contract, and in any case the precise quantity of the produce which had to be given to the other party to the contract remained uncertain. But, they argued, since each party knew the proportion he was to receive there was no reason for any authority to be cited to invalidate such contract.

Such uncertainty on the part of the rentor of the true rent he was to be paid, constituted the decisive factor in

¹ Mayyāra, Sharḥ, 11:86; Ma’dānī, Ḥāshiya, 11:118.
determining the validity or invalidity of a muzārnī'a. But the Spanish jurists, under the pressure of commercial need, turned down Mālik's principle and opted for that of al-Layth b. Sa'd, whose opinion on this form of contract seemed to be more practical for Spanish society than Mālik's. Under such circumstances, the Spanish court allowed the land owner and the cultivator to enter into a contract with full knowledge on both sides, that the rent of the cultivator was to be a certain portion of the land's yield, e.g., two thirds, or half, or a third, or a quarter of the crop.

In the reign of historical jurisprudence in the first decade of the third century, this doctrine was vigorously attacked by Ḥusayn b. Dinār on the ground of its repugnance to Medinan law. However, the Spanish law retained and developed it.¹

Resistance

The best known of the group of Spanish judicial thinkers was ʿAbd al-Malik b. Ḥabīb as-Suʿāmī (d. 238/852).² He possessed qualities which the other jurists lacked: wide learning in various branches of legal theory and practice, and powerful command of logical argument. He was born in Toledo in 182/798 and later moved with his father to Ivrīra.³ In 208/823 Ibn Ḥabīb

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¹. Gharnāṭī, Mathā'īn, verso, 89.
². For Ibn Ḥabīb's academic achievement see Ibn ʿIdhārī, Bayān, ii:110.
³. Ḥabīb, the father of ʿAbd al-Malik, who died in 221/835 was counted among the nobility of Cordova (wa kān fī ḍidād an-nubahā bi Qurtuba) Ibn al-Abbār, Takmīla, 1:32.
travelled to the Orient where he studied with Muṭṭarrīf and Ibn al-Ḥājishūn, the celebrated disciples of Mālik. In 210/825 he returned to his native land. On his return to Alvira he soon rose to great eminence as a Medinan jurist. ‘Abd ar-Rahmān II admired his versatility and wide knowledge of religion, and transferred him to Cordova where he became a member of the Council to the Court. He was at once proclaimed a hero, the champion of Spanish sages and the defender of Mālikism.

The post which Ibn Ḥabīb held in the Judicial service indicates that he had ample opportunity to become familiar with current legal thought of the courts. As cadi, and eventually consultant of the court, Ibn Ḥabīb was not satisfied with the dominance of Egyptian Mālikism in the courts. In reaction to these prevailing views, he prepared himself to challenge all legal practice and to consider legal questions beyond the sphere of the traditional law of the city of Medina. In one of his confrontations with his colleagues, mentioned by ‘Iyād, the cadi of Cordova, Ibn Ma‘mār passed judgement which was based on a precise reading of the doctrine of Ibn al-Ḡāsim. Ibn Ḥabīb was not satisfied with Ibn al-Qādi’s doctrine, so he asked the cadi to rescind the decision, and suggested a judgement in accordance

2. For more details see Ibn Sa‘īd, Mughrib, i:147; Ḥabbū, Bughya, 492.
with Ash-hab's view. The cadi rejected his recommendation, saying that he would not contravene the practice of the court which was based on Ibn al-Cāsim's legal doctrine.¹

Because of the predominance of his ideas in their (Muṭarrif and Ibn al-Majishūn) thought, Ibn Ḥabīb regarded his work as definitive of true Malikite law.

The underlying theme which distinguished his work as a legal code was criticism of the Egyptian jurist; he stressed the Medinan viewpoint, and demanded the replacement of the Egyptian jurist's legal view with that of the Medinan one. His persistent rejection of the Egyptian interpretation of Malikite law made itself felt among the widespread circle of jurists. It is not surprising, therefore, that during this period a number of laws based on Egyptian precedent were abolished. This tendency to stress the value of direct and fresh Medinan legal thought was not confined to his intellectual argument and responsa. His excellent work, al-Qādiha, revealed his growing appreciation of Medinan tradition, of what was specifically, genuinely Medinan and untouched by Egyptian influence.²

It is conceded that the Andalusian courts enforced Ibn al-Cāsim's law as a result of his influence on Spanish jurists who executed his decisions, prompted by the knowledge that there was no other interpretation of Malik appropriate to al-Andalus at that time. However, notwithstanding the long chain of authorities

¹. Khushanî, Cuḍat, p. 77; 'Iyāq, Madārik, II, 1:54; Ḥumaydī, Jadhwā, p. 263ff.
². Ibn Farḥūn, Dibāj, 154f; Ibn al-Faraqī, Ta'rīkh, 1:313f.
(including cadis and counsellors), who supported Ibn al-Ćāsim's legal interpretation as the main source of Spanish law, this does not provide a substantial argument for accepting the theory that the Umayyad government was officially supporting it. Even with the most enthusiastic support for Ibn al-Ćāsim's judicial theory, the Spanish cadi would not, however, enforce a rule of Ibn-Ćāsim which is inconsistent with a rule voiced by Mālik.¹

In support of the theory that any doctrine in disagreement with Ibn al-Ćāsim was in violation of the custom prevailing in Spain, we may point to the instance of the Court's refusal to recognize the Medinan law concerning the doubtful nature of an oath pronounced by an individual who lacked legal capacity (saffīh). The situation was that when such a person had made a claim against another, this saffīh could obtain his claim by swearing the oath, corroborated by a witness. But the Spanish Courts drew no distinction between a man of legal capacity and one who lacked it. The qualifying adjective "rashi'd" did not originally signify an exceptional action, but was used to distinguish a person who could obtain his claim without a witness from one who could only obtain his claim with evidence. The Medinan jurists said that a saffīh can pronounce the oath only to reserve the right of reclaiming upon attaining a state of legal responsibility.²

In contrast with this tendency, Ibn Ḥabīb considered the interpretation of the Medinan jurists who succeeded Mālik, in

1. Ḣadārīk, II, 1:54.
every way self-sufficient. He often cited the legal opinions of Muťarrif and Ibn al-Mājishūn, justifying such citation by saying that the Medinan interpretation of Mālik's law was closer and more faithful to the principle of Mālik in many ways.¹

These various legal trends, including that of Ibn al-Qāsim, were open to challenge. If the judgement was an opinion pronounced by some jurists, it could have been held invalid if it challenged that of Mālik. If the judgement was from Ibn al-Qāsim, it could still be challenged as directly contravening the custom of the country.

His ideas about the preservation of Medinan law and custom can clearly be seen in two aspects of his work, in his Kitāb and in his academic career: (1) The citation of the opinion of ʿAbd al-Malik b. al-Mājishūn (d.213/823) and Muťarrif b. ʿAbd Allah (d.220/835). (2) His persistent efforts to free the legal works of the time, such as al-Hidāya of ʿIsā b. Dīnār, of all the ingredients inconsistent with Medinan thought and to mould the law anew with the aid of Muwatṭa' and some legal treaties from Medina. Some of his dreams were realised in his work al-Kitāb.² Ibn Ḥabīb was moved by the spirit of scholarliness that inspired the advocates of the Egyptian views to resolve differences within the existing Medinan law, provided in the Hidāya. Being one of the

¹. Ibn Farūq, Tabsira, 11:344f.
². For brief analysis and review of this work see Schacht, "Sur quelques manuscrits de la bibliothèque de la mosquée d'al-Carawiyîn a Fès" in Levi Provençal, Études d'Orientalisme, 1:273.
counsellors, Ibn Ḥabīb demonstrated how his legal activity broke
down the rigid monopoly of doctrinaire legal interpretation of
Ibn al-Ḡāsim, as exercised in the courts.

With the appearance of the opposition group, however, the
search for the Medinan view in law was revived. And their
campaign to revive the Medinan law bore little relation to the
practices of the Egyptian educated jurists. Ibn Ḥabīb argued
violently with some of his contemporaries because they dared to
oppose the authority of Medinan jurists who were, in Ibn Ḥabīb's
view, the origin and springboard of Malik's ideas.

Two examples will show how strongly Ibn Ḥabīb reacted
against the Egyptian interpretation, and opted for the Medinan.

In his strategy to build up the law of Medinan jurists,
Ibn Ḥabīb did not hesitate to substantiate certain views by
saying "Someone told me that Ibn al-Ḡāsim, too, holds the same
opinion." In the contract of purchase and sale there arose
some difference between the vendor and the vendee as to whether
the trees would follow the land, because there was no statement
in the contract. In his Mādiha Ibn Ḥabīb cited the Medinan
judgement that if the price was decided the matter would depend
on the buyer's words, corroborated with his oath. If he refused,
the seller could take the oath and win the case. Ibn Ḥabīb went
on to say that Aṣbagh was told Ibn al-Ḡāsim also held the same
opinion.¹

¹. Ibn Sahl, Ahkām, recto, 35 and verso, 35.
In the law of irrigation Ibn Ḥabīb held the view opposite to Ibn al-Cāsim. The controversy arose over a question involving a dispute between two farmers irrigating their farms from one canal. The canal poured its water first into one of the farmer’s lands. The other farmer complained that his neighbour exhausted the water supply, so that there remained very little current to water his land.

Ibn al-Cāsim’s judgement on this question was that the first farmer had a right to draw water from the canal until it reached "the ankle," and then he must let the water (including what remained on the first farmer’s land) pass to the other farmer. The result of Ibn al-Cāsim’s judgement was that the usufructuary right acquired by the land first located in the stream of the water must in its nature be unexploitive. And the right to the enjoyment of the stream was governed by the rule of "public property."

Ibn Ḥabīb followed his Medinan teachers, Ibn al-Kājishūn and Muṭarrīf, who maintained that the entrance of the canal should be closed after the water reached "the ankle." The position contended for by Ibn Ḥabīb, as it appears from the judgement, was that the farmer whose land first enjoyed a natural stream of water, had a right to the advantage of the stream, to the extent that this farmer could reserve the water that remained after the land took what it needed from the stream.

Ibn Ḥabīb said, "Muṭarrīf and Ibn al-Kājishūn’s decision is more favourable than that of Ibn al-Cāsim, and they are better
informed because Medina is their home, and there the issue took place.\(^1\)

What Ibn Ḥabīb was trying to do was to curb Ibn al-Qāsim's influence, and to turn the attention of his contemporaries (whose preoccupations were the same as his) to the fact that what the Egyptian jurists said did not reflect the ideas of their master, Mālik b. Anas. To prove this, Ibn Ḥabīb always referred to the fact that the Medinan jurists, not the Egyptians, possessed an exhaustive knowledge of such legal matters, and their practice was a valid criterion by which to verify legal information given by those other than Medinan scholars.

Whatever the effects of these efforts to blockade the invasion of foreign legal attitudes, the purpose was to turn the direction of scholarship towards the study of Medinan law.

In short, Ibn Ḥabīb, together with those who supported his ideas, had an important part in leading court opinion, in certain legal cases (which numbered about eighteen), away from Ibn al-Qāsim's interpretation. Among these cases was the standard of personal status.

The principle upon which the Malikite law showed uniformity was in cases affecting the interests of an incompetent individual (ṣafīh). The principle adopted was that of protecting him against the consequence of any irresponsible acts, namely contracts, resulting from his insufficient capacity to deal with his own

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affairs. The principle of the "protection of an incompetent's interest" was dependent, according to law, on the category of incompetent. "Incompetent" was a term which contained a wide variety of meanings: 1. orphans (before reaching puberty), 2. insane people and 3. Sufahā', singular safīh (one who is deficient in judgement, whether prodigal or an easy prey to deception).¹ In the present case the concept "incompetent" is confined to the third category (safīh).²

In Malikite law there were different views as to the circumstances in which an incompetent was normally entitled to take over control of his property from the jurisdiction of his guardian, and as to the validity of a safīh's acts in connection with contracts.

As to a safīh's capacity to make contracts and to carry through other transactions, his legal deficiency subjected him to a number of disadvantages. He was generally regarded as incapable of making contracts without the supervision of his guardian, or of doing any other act which would be legally binding. A contract by a minor was unlawful and void because the minor, by his lack of judgement, was incapable of making it.

Malik's opinion on the validity of the incompetent's act after he was released from his guardian's supervision, depended on his reaching adulthood. Any contracts performed by an adult

². For the definition of the term safīh and the scope of his legal capacity see Ibn 'Āṣim, Tuhfa, 11:203.
who was known as being an incompetent nonetheless were binding upon him, whether he was under guardianship or not or had been declared safīn or not. The safīn, however, might in all cases act independently of his guardian.

Ibn al-Majishūn’s view was that if the contract was confirmed by a competent adult who was later adjudged incompetent, he could not be relieved of the responsibilities incurred by the contract, but was bound by them.¹

Ibn al-Qāsim held that if a safīn made a contract with full legal capacity then he was bound by such a contract whether or not he was under the protection of a guardian or had reached adulthood. The legal scholars of Fez followed the same step. They abandoned Mālik’s idea in favour of that of his disciple Ibn al-Qāsim. Coulson explained this transfer in legal attitude and said, "...on a matter of personal status, the Moroccan courts had consistently applied the view of Mālik that the validity or otherwise of the transactions undertaken by a mentally defective person depended solely upon whether he had, or had not, been formally placed under interdiction, however much to his personal advantage or disadvantage the transaction might be. But during the nineteenth century the practice changed and became settled in favour of the precisely contrary opinion of Mālik’s pupil, Ibn-al-Qāsim."²

¹ Ibn Sahl, Abkār, verso, 14.
² Coulson, Islamic Law, p.145f.
As to his contract and other transactions, his deficiency subjected the safīh to a number of disadvantages. He was generally incapable of making contracts without interference from his guardian, or of acting in any way which would be legally binding. In consideration of this incapacity, Malikite law claimed illegality of any contract of a safīh unless it was performed with his guardian's authority.

Clearly the Spanish court rejected the underlying assumption of Ibn al-rāsim's rule that, because an incompetent safīh cannot wisely manage his own affairs, all his acts would be invalid without a guardian (wasi') who would act in a manner most advantageous to the incompetent's own interest.¹ Mudawwana's statement was cited as an authority for this proposition.

According to Spanish legal documents² it would appear, therefore, that the prevailing view was favourable to the doctrine that the validity of a safīh's contract depended entirely on his adulthood irrespective of whether he remained under a guardian or not. But a few years later Ibn Salama, the jurist of Toledo, was not willing to go upon the authority of Malik's decision, and rejected the doctrine as running counter to a principle that interdiction must be based upon incapacity.³

As it was the duty of a guardian to protect the interest of an incompetent, he was also responsible for the protection of

anyone else's properties from being involved in an unlawful contract with the incompetent. The only thing that could relieve the guardian from liability was to announce publicly that his charge was of tender age, imperfect intelligence, or lack of experience. The guardian was bound to point out the risk which was known or should be known to him to be incident to any dealings.\(^1\)

**Challenge to Malikite Law**

Previous to 'Abd ar-Rahmān II, jurisprudence in al-Andalus had been confined to the study of Malikite legal codes under the traditional Malikite jurists, and there is no record of studies of other legal systems open to the student. When al-Andalus began to communicate with the Islamic countries of the East, new thought and ideology was introduced into Cordova. Iraqi and Shafī'ite law found their way into Spain through books imported from Cayrawān, Egypt and Iraq, by means of a group of jurists who studied for some time in these countries.

It might be regarded impracticable to search for the non-Malikite influence on Muslim jurists of Spain before the reign of 'Abd ar-Rahmān b. al-Ḥakam, who succeeded his father in 206/822. This ruler is notable above all for his erudition and his devotion to knowledge.\(^2\) He was widely credited with being the first Umayyad emir to lead al-Andalus in the adoption of Baghdad models

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in science and the arts. 'Abd ar-Rahmān was in an excellent position to possess considerable knowledge of Baghdad culture by virtue of his relationship with some of the ʻIrāqī intellectuals, to whom the emir gave patronage, and with Spanish jurists who passed back and forth between Baghdad and Cordova. His sympathetic attitude towards Baghdad culture could be attributed to 'Abd ar-Rahmān's ʻIrāqī teacher Jūdī b. ʻUthmān al-Nahwī (d.198/813) who had impressed the ruler. This emir made an attempt to transmit some of the legacy of Baghdad to Cordova. 1 In 201/817, before he came to power, 'Abd ar-Rahmān was reported to have commissioned the poet 'Abbās b. Nāṣih ath-Thaqafī to travel to Baghdad in search of ancient works concerning various sciences. 2

Cordova, like any other Muslim city, looked to Baghdad as the chief source of literary culture. 3 'Abd ar-Rahmān II, with his interest in culture, encouraged intercourse with Baghdad. This cultural communication has been described as follows:

"Despite the intense rivalries between the 'Abbāsids of Baghdad and the Umayyads of Cordova, however, the cultural relations of the eastern and western wings of the Muslim empire were not always war-like. From the ninth century on, scholars travelled from one end of

1. Ibn al-Abbār, Takmilah, 1:8.
3. Watt, Islamic Spain, p.60.
the empire to the other, carrying books and ideas and thereby insuring what one might call the cultural unity of the Islamic world."

The introduction of books is always an important phase in the migration of ideas, and this was particularly true in the history of Islamic Spain. This might be seen from the rapidity of movement of Malikite culture when scholarship depended in so large a degree upon Muwattil and Mudawwana.) However, this cultural communication revitalised the imagination of Spanish jurists and writers, and provided Spanish legal studies with an important source of inspiration. These Spanish jurists met many of the leading Iraqis, traditionalists and jurists. Zayd Ibn al-Hubbâb (d.203/818) the Kufan traditionist travelled west to Spain in order to seek knowledge from Spanish scholars. Influence from such intercourse was inevitable. The influence, in fact, was not always direct; Qayrawân acted as a bridge between the two countries.


2. Ibn Sa‘īd, Mughrib, 1:45f. Aslam b. ‘Abd al-‘Azīz, the cadí of Cordova, was reported to have studied with the famous Iraqis in Qayrawân. See Khushanî, Qudat, p.155.

These various influences on Spanish culture laid the groundwork for the acceptance of new cultural ideas. The contact of the oriental civilization, so fruitful in intellectual and other spheres, also produced results in matters of judiciary which had more to do with relations among individuals of different ways of thinking. In this period, cedis had, in Court procedure, to repeat the law which Yahyā formulated. At that time it was the practice of the cadi to submit important cases involving criminal punishment to the assembly of counsellors to propose legislative measures. The power of the assembly to give its legal verdict was almost always in the hands of Yahyā.¹

Under the detailed scrutiny of Yahyā, legislative practice became more stringent than ever, and did not have the flexibility necessary to absorb legal reform. The cadi's opinion was no longer deemed as the most important source of legal code. The new jurists perceived and revolted against stagnating effects of so narrow an approach to judicial practice. Some jurists were not content with the dominant legal system, contending that little more could be accomplished by this method. The system adopted from Ḥudafah and Mudawwana, was used to discover solutions to the legal problems of their own time,² so stifling the possibility of any originality. The consequence was that the jurists never displayed any interest in moving away from the

¹. Ḥumaydī, Jadīla, p.360f.
². Aḥmad, Fath, 1:90f.
conventional rules. The jurisdiction of the judges and the legal verdicts of jurisconsults, finally lost their significance as legal precedents.

The Malikism of al-Andalus, however, in its singularity of purpose, was developing in the tradition of the systems of Egypt and Cyrawān. The manner and technique of the law which court and legal administration had applied, did not encourage the flexibility of legal judgement. Jurists, cadis and counsellors had adopted the same patterns of thinking, and used the same methods with the consequence that the Spanish jurists became increasingly aware of the judicial stagnation in legal practice. They realised that the development had come to a standstill.

Ibn al-`Arabi’s criticism of a somewhat narrow Spanish Malikite view revealed the reasons behind it. The rule of law was kept by jurists; and the Spanish School of thought had renounced the study of ḥadīth and replaced it with the study of detailed manuals of jurisprudence which virtually limited the judicial function to mere clarification of accepted rules and lines of authority. He saw in this stagnation and monopoly an unacceptable social evil that led necessarily to taqlīd, immobilization of speculation. ¹

The exclusive study of frūʿ had resulted in neglect of the study of the Qurʾān and ḥadīth and had little of value to contribute, but much that was destructive to the study of usūl. The more these studies of frūʿ grew, the more they were open to

¹. Ibn Farḥūn, Mībāj, p.121.
attack, and thus they were jealously defended. Such was the background to the non-Malikite jurists' attack upon the professional jurist and judicial system of Spain.¹

The first sign of change appeared in the dissatisfaction with the prevailing legal system. The ensuing cultural and legal upheaval was in reaction to the prevailing judiciary system, and was encouraged by the attempt to enforce acceptance of cultural ideas on the thinking of large numbers, which led them to challenge, though not always explicitly, the common practice of Malikite doctrine. These unfavourable circumstances demanded legal solutions, and thus study turned from classical literature to the Shafi‘ite and Iraqīs legal literature. In their first flush of contact with the outside Muslim world, Baghdad and Egypt, the Spanish jurists became aware of legal and judicial stagnation of their country. They came to realize the origin and cause of this standstill was the dogmatism of Malikite jurists. Malikite domination of religious and legislative life was in fact a major factor in stimulating the intellectuals and jurists who grow up in this era and who absorbed some of the non-Malikite legal ideas, to further their doctrine by using their prestige as intellectual authorities to stimulate judicial innovation.²

1. This was the first reason for the antagonism of Malikite Spain to the followers of Tradition. See Shāṭibī, I‘tīṣām, 11:348.
The new jurists who separated themselves from the Malikite circle, were on the one hand expressing the rising revolt against
the cultural monopoly of their predecessors, and on the other
hand regarding it as an effort towards checking the increasing
pressure of the dominant jurists. They represented above all
else, several groups holding different legal views who demanded
a place for their doctrines in the legal life of the state.¹

The Emergence of Shafi‘ite

One of the most impressive consequences of this period of
taqlīd was the emergence of ahl ar-rā‘îy, an idea which originated
in Shafi‘ite doctrine adopted by students studying with the
Iraqis of Ifriqiyya and the Shafi‘ite of Egypt. Prior to this
change, the right of “Iftā‘”, passing legal verdict, was the
exclusive preserve of the Malikite ḥuquqā. The most notable
result of the introduction of this idea was that the judiciary
ceased to be the exclusive monopoly of the Malikites. A number
of jurists began by presuming to liberate "thinking" from the
authority of Malikism, thereby giving encouragement to all
legalists to think more freely. At that time, during ʿAbd ar-
Raḥmān’s reign, the Malikī jurists witnessed the diminution of
their judicial prerogative and the emergence of rival forms and
procedures unlike Malikism. The cultural infusion of non-Malikite
systems and ideas changed the outlook of jurists and initiated
a trend away from some Malikite legal views.²

¹ See Maqrīzī, Nafr, 11:256f.
² See Ibn Farḥūn, Dībāj, p.84, and his biographical statement
about ʿIbrāhīm b. Ḥusayn, and his legal dispute with Yaḥyā
b. Yaḥyā.
At that time, Shafi'ite law in Egypt was a rival of Malikite law for the attention of scholars interested in jurisprudence. It is certain, however, that most of the Spanish intellectuals who spent some time in Egypt had some elementary knowledge of the Shafi'ite doctrine; this affirmed itself more and more in Cordova where the influence of this doctrine manifested itself. The School of Shafi'ite found a strong representative in Qasim b. Muhammad b. Sayyid (d. 277/890) who was among the Spanish jurists affected by his Egyptian Shafi'ite teachers, Muhammad b. 'Abd al-'Yakan (d. 268/881) and al-Muzani (d. 264/877).

His teachers succeeded in influencing his attitudes and influenced him to be sympathetic towards their doctrine. Although Qasim in his quest for knowledge spent twelve years with the most prominent Malikite jurists of the time, he by no means adopted Malikism as his doctrine. Through his influence, the Shafi'ite school came to formulate its own principles of law and its doctrine had become known to a group of influential Spaniards. At the time of emir Muhammad, Qasim made clear his dissatisfaction with the Malikite line and wrote a work criticising the adherents of the doctrine. The Shafi'ite works later on were openly promulgated amongst the masses.

1. For biographical information of these jurists see, Subki, Tabaqat, 11:67-71, 93ff.
3. Maqqari, Nafah, 11:256f. Al-'Umaydi provided us with the title of this work as Ar-Rad'ala al-mugalladIn li Malik, see Jadhwa, p.203.
well known mushāwar Ibn al-Kharrāz (d. 295/907) used to give
lectures on the abridgement of al-Muzanī, al-Mukhtasar, and
the Risālah of ash-Shāfi‘ī.¹

The Irāqī and Rational Jurists

The Irāqīs constituted a very small proportion of the
Islamic population of Spain. The Arab conquerors of Spain were
mostly of Syrian, Egyptian or Medinan origin. Thus Spaniards
visiting the Orient had patrimonial links that united them to
these nations; they therefore had personal reasons to journey
to Medina and Syria, the country of their ancestors. The lack
of ties with Iraq, however, did not exclude Irāqī influence. By
the end of al-Ḥakam's reign, with the Malikization of a great
part of the population, the rigidity of the jurists manifested
itself time after time. However, when the cultural link was
established between Cordova and Baghdad, it brought a new phase
of literary culture to Cordova.²

The combination of widespread criticism of Malikism and
the impact of the new ideology gave some of the intellectuals,
who as a group were numerically small but had a great deal of
prestige, the possibility of promulgating their views. It was
in this atmosphere of innovation that there arose a new legal
state unlike that of the status-oriented one of Cordova.

1. Ibn al-Faraḍī, Ta’rīkh, 11:182f.
2. The Cayrawānis also played a role in disseminating the Irāqī
legal doctrine. See Ibn al-Faraḍī, Ta’rīkh, 1:74f.
Several factors contributed to the development of independent speculation: the influence of new cultural movements, the wish of many intellectuals to move away from the cultural monopoly of the jurists, and the fact that most jurists of the time were Malikite (Malikite in theory, that is their thinking was restricted by the school rules of law, but in practice they paid little attention to the prime source of the doctrine, that is the prophet's tradition).

These speculations found individual admirers among the jurists. The Malikite position was very strong, to such an extent that any attempt to employ Iraqī legal thought was doomed to failure. Perhaps the first open challenge to Malikite authority came in the first decade of the second century when Muhammad b. 'Isā - known by al-A‘shā (d. 221/835) - declared his opinion in favour of the Iraqī legal doctrine as to the legality of drinking certain amounts of wine. He might himself not consume wine, but he publicly upheld the principle of the Iraqīs against that of the Medinan doctrine.¹

An anecdote which was recorded by his biographer shows that his declaration was intended as deliberate defiance of Malikite authority. Al-Khushanī reported that while al-A‘shā was accompanied by the cadi of Cordova, Muhammad b. Ziyād, they met a drunken man. The cadi ordered him to be detained. Al-A‘shā, a little while later, ordered the guard to set him free. When

¹  ‘Iyād, Madārik, II, 1,23f.
the cadi heard of the offender's release, he was careful not to provoke his friend; he simply ratified al-A'ashā's order.  

Ibn-Farādī informs us that al-Lakhrīṣ Ahmad b. Ibrāhīm (d.290/999) advocated the same judgement in matters concerning wine-drinking. Though they involved deviations from the traditional principle of Malikism, the majority of the jurists did not regard them as dangerous to the state doctrine, so long as the speculations and new ideas were not taken seriously by the general population. Such legal speculation developed silently under the pretext of merely reforming and revitalising the prevailing legal system.

Thus the existence of new ideas of non-Malikite origins was a challenge to the official doctrine of the state and resulted in a confrontation between jurists. The following is an example of the sharp contrast between Malikite and non-Malikite.

On the question of slaughtering animals without assurance of conformity to the stipulation of Malikite law concerning the method of slaughtering, Ibrāhīm, the prominent figure in the rationalist group, challenged the leader of the Malikites, Yaḥyā b. Yaḥyā, to prove any prerequisite for slaughtering animals.

When killing permissible animals (legally allowed to be eaten) the Malikite insisted that the requirements of tadhkīya

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1. Khushanī, Qudat, p.89.
2. Ibn al-Faraḍī, Taḥrikh, 1:33. Cf. Ibn al-Faraḍī's and Ibn Farḥun's recurrent statements "wa kāna Yadhhab fi'il ashrība madhhab ahl al-'Irāq," when they were giving biographical information on Spanish jurists.
should be observed,¹ that is: a) to sever the windpipe of the animal, b) to cut its gullet and c) to cut its jugular veins. If these regulations were not kept, the animal could not be legally eaten.

Ibrähîm was in opposition to this Malikite view, maintaining that God did not in fact stipulate these requirements, and that it was therefore not necessary to observe them.² In the determination of what is permitted and what is prohibited, says Ibrähîm, one follows God's words.

In Islamic law marriage is a sort of contract arranged between a man and a woman. To solemnize this contract a bridegroom must give his bride a dowry, mahr, which is the obligatory marriage payment due to the wife at the time of marriage.

In Malikite law there is a fixed legal minimum value for the mahr. It is not necessary that the dowry be paid in money; it could be anything which possesses money value.³

Some independent Malikite jurists extended the definition of dowry to cover any means (commodity and otherwise) which could bring the wife some benefit. According to this concept of dowry, the personal services of the husband would be included. The bride may require of the bridegroom that he perform some specific service.⁴

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1. Ibn Rushd, Fug, p.325.
2. 'Tyâq, Mâdarîk, II, 1:136.
4. Ibid., p.225.
The decisive authority in disputes over legal questions is either the Qurʾān or Sunna. Malikites claimed that no services in lieu of mahr, such as the above, is mentioned in the text, and therefore ijāra could substitute the dowry value.\(^1\) Ibrāhīm b. Ḥusayn (d. 249/863) affirmed that the Qurʾān legalized ijāra as a mahr. He cited verses from the Qurʾān that Shuʿayb said to Moses, "Verily I will give you one of my two daughters in marriage, on condition that you serve me for hire eight years; and if you fulfil ten years, it is in your own breast; for I seek not to impose a hardship on you..."\(^2\) But the Malikites did not accept the implication of this verse on the grounds that it was simply the relation of an historical episode in the lives of the People of the Book; it had no statute value, and therefore was not to be followed. In order to refute the argument of his opponent, Ibrāhīm cited other Verses which order the believers to follow the post-Prophet practice. ("Those are they whom Allāh guides, so follow their guidance."\(^3\)) This argument could not be refuted by the Malikites.

However, the rationalist jurists began to command some influence in Spain during the middle of the third Islamic century; and, in fact, most of them were sympathetic to Malik's legal doctrine. But it was their contempt for the arbitrary views of

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1. Mayyāra, Sharḥ, 1:158.
2. 'Īṣāq, Madārik, II, 11:135; Qurʾān, XXVIII, 27.
3. Qurʾān, vi:90.
their predecessors and colleagues that first led certain individuals to challenge the supremacy of Malikism. Among them al-Faraqī counted: Ahmad b. Khālid (d. 322/933),1 Aslam b. Abī al-‘Azīz (d. 319/931),2 Muḥammad b. ‘Umar b. Lubāba (d. 314/926).3 They were a group of jurists who, in respect of attitude as well as academic training, were different from their predecessors. Partly owing to this difference of background, and partly owing to the liberal attitude of the time, they were able not only to examine the soundness of their predecessor’s authorities, but also to produce a new authority.

The rationalization of legal thought and the influx ofIraqī ideas prepared some of the Malikite jurists to plunge into extremes. Many of the most admired figures of Spanish jurists subscribed to rational thinking. Some, like ‘Abd al-‘Alā b. Wahb4 (d. 261/874), Ibrāhīm b. Ḫusayn (d. 249/863) and Ġāsim b. Muḥammad — openly opposed their leader on certain legal cases. Others, such as al-‘Ānā'ī,5 d. 262/875 and Muḥammad b. ‘Isā al-Mu‘āfīrī6 d. 220/835, indulged non-Malikite views, though remaining nominally within the Medinan school.

Although there was a tendency in jurists towards

1. Ibn al-Faraqī, Ta‘rīkh, 1:42.
2. Ibid., p. 105; Ibn Ḫayyān, Muqtabis, Part iii, p. 7f.
4. He was thought to be influenced by the Mu‘tazilīte. See Madārik, II, 1:133ff.
5. Ibid., p. 129.
6. Ibid., p. 23.
originality in their judicial practice and independence in their legal decisions, it must be noted that the Malikite jurists who displayed this tendency were not absolutely detached themselves from the school and formed their own variety of Malikism, as is the case in other schools.¹

At this stage, some independent Malikites were nominated judges. They are al-Ǧāqī Abū Bakr b. al-ʿArabī (d. 544/1149), Abū 'l-Ḥalīd al-Bāji (d. 474/1081) and Ibn Rushd (d. 520/1126). These jurists, along with others, brought their various skills and experiences to the Spanish courts. Ibn Rushd and al-Bāji had themselves in their local courts built up a body of legal principles which were important for the expansion of the legal theory and practice of the official lawyers. Particularly significant was the active agitation by Ibn Rushd against materialist philosophy and of al-Bāji against the Ẓahirīs. Their practices were an important influence in broadening the Malikite doctrine. Their responses and judgements did not follow their Imām, but reflected their own views. They maintained that a qādi should not be allowed to use the views of other qādis in pronouncing legal decisions. The qādi should be an independent jurist, obliged to derive his views directly from the sources.

¹ For example, Ibn Jarīr at-Ṭabarī (d. 316/928), Abū Thawr (d. 240/854), Dāʾūd b. ʿAlī were all belonging to the Shafiʿite, but later on they formed their own school. See Subkī, Ṭabāqāt, 1:227ff and Vol, 11:135ff.
This liberal attitude not only protected Malikism from stagnation, but also created a system of jurisprudence well adapted for the needs of each individual case.

The Appearance of Traditional School

Some time before the reception of the Malikite doctrine, Traditionist ideas were in circulation among students. Yaḥyā b. Yaḥyā declared that Muʿāwiya b. Ṣāliḥ (d.157/773) was the first to introduce the Tradition of the Prophet into Spain. Ibn al-Abbār (d.658/1239) described Ḥabīb b. al-Kalīd (died after 200/815) as a Traditionist who taught Tradition inside the mosque of Cordova, and enjoyed a high reputation in his Traditional classes. Without doubt the flourishing study of

1. Some of the Traditions were known only through Muʿāwiya. Al-Iṣḥāṣī cited the following episode recounting the meeting of Muʿāwiya with the most reputable of oriental traditionists. On one occasion, in his presence in Mecca, when Muʿāwiya reported a ḥadīth, a man with a rare knowledge of traditional criticism, told him that such ḥadīth with such isnād (name of the transmitter, through which the ḥadīth goes back to the Prophet) was known to him only through one man, who must be in al-Andalus, and who was called Muʿāwiya b. Ṣāliḥ. See Cudat, pp.30-37.

2. For Ibn al-Abbār biographical information see Maqqari, ḏadh, iii:346ff.

Tradition was due to these scholars. But the Traditionists as a class, identifying itself as *ahl al-hadīth*, was not known until around the middle of the third Islamic century.

Besides providing the philosophy for their doctrine, the Traditionists were a well educated and influential cultural force. In addition to these rationalist-class counterforces to Malikite, a third class should be distinguished, those followers of the Prophet's Tradition which accepted *hadīth* as an obligatory source of law even though the majority disputed this argument.

The Traditionists themselves, however, like any other relatively new legal school, desired to have their own legal literature founded on the basis of *hadīth*. The Traditionists dealt extensively and freely with the customs and obligations of *hadīth*, refusing to be confined to the circle of Malikite law. There appeared the *Munṣad* of Ibn Abī Shayba whose proponent, Baqīyy b. Makhlad, (d. 276/885)¹ professed a special respect for this *Munṣad*. This work stimulated enthusiasm for legal reinterpretation and gave new vitality and prestige to the legal Tradition. Baqīyy's *Munṣad*, along with his *Tafsīr*, were placed by Ibn Ḥazm on the same level as the *Ṣaḥīḥ al-Bukhārī* and *Tafsīr* at-Ṭabarī, reflecting the optimistic Traditionist spirit of the age.² Unfortunately none of his writings are extant, and therefore we are not able to present any of his legal views as

¹. For Baqīyy's life and rôle, see Ibn al-Ḥarīm, *Taʾrīkh*, 1:209ff.
examples of his thought.

The growth of the school of ḥadīth is difficult to trace because the jurists knew that prevailing dogmatism meant that mention of anything having to do with non-Malikite doctrine was likely to be met with suspicion or anger. Some of the jurists attributed apocryphal traditions to the prophet, in defence of certain personal opinions. Aṣbāgh b. Khalīl, in spite of the prestige he enjoyed as a Malikite jurist, falsified the tradition to strengthen the authority of his opinion on juridical details. The opposing trend of the mugallida, as Shāfībī said, or of any kind of independent investigation was clearly dangerous, as was exemplified by the uncompromising act of the Spanish Malikites against Baqiyyy. Those jurists hesitated to accept any ideas other than those of their imām. Aṣbāgh b. Khalīl (d. 273/886) a pupil of Saḥmūn who followed with fanatical respect the ideas of Mālik, rejected explicitly the ḥadīth and openly displayed his scorn for Traditions. "I would prefer" he said "to have a pig's head in my safe rather than the Musnad of Ibn Abī Shayba." The Spanish jurists, however,

3. 'Īyāḍ, Madārik, II, 1:143. Aṣbāgh was accused of relating Tradition of his own making and ascribing it to the Prophet in order to support his pre-conceived doctrine. Ibid., cf. Goldziher, Intro. to Le Livre d' Ibn Toumert, pp. 22-25.
4. 'Īyāḍ, Madārik, II, 1:143.
saw in the emergence of the ideology of hadīth a challenge to the
dominant thought they represented.

This was an era that regarded Malikism as the sine qua non
for the practicing legalist. It is difficult to find explicit
denunciation of any jurist though implicitly taqlīd does so, but
without being overt enough to provoke hostility. In spite of
the Caliph's protection, this movement was pursued by the
hatred of the majority of the Malikite jurists. They continued
to be a source of trouble for him. The fame and success of
Baqiyy elicited the envy and hostility of the dominant jurists.
‘Ubayd Allāh, the eldest son of Yaḥyā, was really only the trustee
and transmitter of his father’s recension of the Muwatta’; the
ideas must be traced back to his father. With this concept,
‘Ubayd Allāh and his brother Isḥāq came to Baqiyy when he
compiled his famous work al-Musnad, asking him the reason for
the promotion of the name of Abū al-Muṣ’āb az-Zuhrī and Bukayr
over their father's name. Baqiyy said that he did so because
Abū al-Muṣ’āb was of Quraysh origin, and was the elder in age,
therefore his name must be foremost, preceding Bukayr's name.
(Baqiyy cited his authority from Tradition for both reasons.)
In addition, Baqiyy continued, Bukayr had received the Muwatta'
from Malik over seventeen times, whereas 'your father had heard
it only once.'¹ Their growing mistrust took the form of an

¹. Ibn Bashkuwāl, Sīla, 1:82.
attack on the ideas set forth by this school when Muhammad b. ‘Abd ar-Raḥmān gave positive support to Baqiyy. The jurists claimed that the innovations of Baqiyy were not only endangering the good faith of the population, but also encouraging the heresy which it had been the object of the establishment doctrine to avoid.  

A few years after the failure of Malikite jurists to destroy the growth of the School of Ḥadīth in Spain, and chiefly because of the governor's patronage, a new attempt was made by emir Muhammad to protect Baqiyy from his rivals and to remove all the restrictions that had previously crippled his cultural activities. From that time, Baqiyy and his followers were allowed to continue reading and teaching their doctrine without fear of violent retributions or suppression. Their ideas continued to display vitality and attraction, in contrast to the declining Malikite supremacy and power. 

By this time, the new trend was strengthened by the ideas of another outstanding scholar, Muhammad b. Wāḍīsh, who was born in 199/814 (d.287/900). He studied law under the direction of  

1. Ibn 'Idhārī, Bayān, 11:109f.  
2. Those who suffered from heresy and innovation because they had lost Malikite favour and were regarded as a potential menace to the jurists' status did not belong to any one particular ideology. They were merely ascribing their rivals with bid'a for the sake of finding better justification for their hatred. see Shāṭibi, I'tisām, 11:346.  
3. For his biography, see Ibn al-Faragī, Taʾrīkh, 11:17f.  
Yahyä and Ibn Ḥabīb. In the year 218/833 he undertook his first journey, but the main objective of the trip was to gain knowledge of systems and ideas other than Tradition. On his second trip, which has not been dated, he dedicated himself exclusively to the Tradition. In Iraq he studied with the prominent figures of the day: Sa'id b. Manṣūr, Ḥamd b. Ḥanbal, Abū Bakr b. Abī Shāybā and Yaḥyā b. Ma'in.¹

In spite of the fact that he spent some time with Aḥbāgh b. al-Faraj studying law, and attended jurisprudence classes in Cāyrawān with Saḥmūn, from whom he received the Mudawwana, al-Faradī claimed that Ibn Waṣūṣ had no knowledge of the science of law, nor of the rules of Arabic language.² He firmly opposed any legal system which put limits on man's intellectual activities. There soon gathered around Bāqiyy and Ibn Waṣūṣ a group of students who hailed them as their intellectual leaders. The Ḥadīth school had spread to all parts of al-Andalus; recruitment had been made from all classes of society. Those who were dissatisfied for one reason or another with the social and cultural conditions of Spain felt immediately at home in this group of Traditionists. Another factor that helped anti-Malikite ideas win credibility, though very limited, among intellectuals, was the notorious rumour ascribing immoral conduct to jurists and cadirs.³ The cadirs were confronted with endless accusations,

1. Ibn al-Farajī, Ta'riḵh, 11:17f.
2. Ibid., p.19.
3. For sarcastic and hostile attitude against the Malikite see Ḥimyarī, Rawd al-miftār, p.14a.
(though we might not take these charges too seriously), of
everity, embezzlement and recklessness.¹

Although we know little of the individual roles of those
two Traditionists in Spanish legal life, there is no concrete
evidence that all were real Traditionists any more than the
Medinan Malikism was more than merely Traditionism.

These Traditionists, in their struggle to revive the
effectiveness of the Sunna, were indirectly developing the old
image of the Medinan (Malikism) but with the Sunna as a prime
source of law.²

The other schools, such as the rationalists, began to
fear that Baqiyyy and Ibn Wadānah's Traditionism was to be
entrenched more and more firmly on al-Andalus. So, the Malikites,
along with the other schools, were not happy during the last
years of Amir Muḥammad's rule.

It was the appearance of Shafīʿite doctrine and the
influence of the Ḥadīth's followers that provided the starting
point for the Zahirite³ thinking in Spain. Several years after
its appearance, jurists began to hear and to read that the

2. For more detail concerning the development and influence of
the school of Ḥadīth in Spain, and its succeeding generation
which carried the same attitude, see Monès,
"Hommes de religion", ST, XX (1964), pp.64–72.
3. This school had been founded in Iraq in the 3rd/9th century
by Dāwūd Ibn ʿAlī (d.270/883). His doctrine distinguished it-
self by its excessive respect for Ḥadīth over any other sources
of the law.
Traditionists' conception was a development of the Ẓahirīs'. For it was the interest in disseminating and reinforcing the ḥadīth in Spain which lent impetus to the revival of Zahirite ideas that were to flourish a decade later.\(^1\)

In all these cases, the convergence of those new legal attitudes was the result of the Malikite jurists' inability to maintain their intellectual vitality. Their increasing insistence on the exclusive use of Malikite doctrine encouraged already alienated elements to look beyond the Malikite circle for legal forms and precedents.

These ideas were never able to establish themselves effectively. This was partly due to political and partly to other reasons. The social structure of the Spanish Muslim community was not conducive to the assimilation of non-Malikite legal thought; but even among the people, ordinary men showed stubborn powers of resistance to the infiltration of an alien spirit of conceptual legal thinking. These social groups, sharing similar taste and usage, were comfortable only with the concepts of doctrines consistent with custom.

To sum up, the introduction of non-Malikite elements thus brought into Spain critics of the existing legal thought, and at the same time bred among jurists a sense of inadequacy and an anticipation that the structure of law would change.

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CHAPTER VI
JUDICIAL REVIEW

A. Law in Perspective

Little information about jurisprudence and legal procedure during the period of Islamic rule in Spain which preceded the establishment of the independent Umayyad emirate has been preserved. Fragments of this period and of the first ten years of the Umayyad showed that law and court procedure in fact deviated in no respect from the Awza'I law.¹

The Umayyads, on establishing themselves in al-Andalus, retained the law and institutions previously used by the Syrian Umayyad governors. The court procedure and the science of jurisprudence was still in the early stages and the cadis did not hold enough power to contribute to legal development. The Syrian cadis of Cordova, Mu‘awiya b. Šalih (d.157/773) made use of analogy in court procedure to solve new legal problems. The following is one case which presented a solution that contradicted the explicit opinion of Malik. Mu‘awiya, who was in temporary possession of a female slave by whom he had a son, was asked by the real owner to hand her back. Since there was no precise solution, Mu‘awiya, who was a jurist, was asked to give his opinion. Mu‘awiya used the analogy of a case where one person

was recognised as the owner of a pillar which another person had used to support his wall. If that pillar had been taken away the wall would, of necessity, have been harmed. Mu'āwiya said that if the child were taken from his mother she would suffer more than that wall would have done if the pillar had been removed.¹

But since the period when Hishām I, the son of the founder of the Umayyad emirate, had first promulgated the decree banning any legal discussion except Malikite, the Malikite law had evolved considerably for it had become, in large measure, the official doctrine of the state. The Malikite jurists worked to eradicate laws or institutions which had been transplanted from the ancient laws of Awzā‘I and which therefore contradicted Malik's ideas. However, these attempts were by no means wholly effective in preventing the incursion of non-Malikite elements. The Awzā‘I law retained some of its influence, while other new laws were introduced by the Malikites themselves.²

There is not as much dispute concerning the accomplishments of the period, as about the manner in which Malik's doctrine became dominant. We understand from previous studies that several Medinan legal works were brought to Spain; among them was the Kuwattā, the classic of Malikite jurisprudence.³

1. Khushanî, Cudat, p.34f.
2. Ḫumaydî in his Jadhwâ, p.205, has recorded that Abū Kināna, Zuhayr b. Malik, died before 250/863 used to issue his legal opinion in accordance with the Awzā‘I doctrine.
Soon after study of this work had become widespread, several other works containing Medinan ideas came into usage.

The impetus for the disruption of Medinan law was correctly attributed to the importation of more than one recension of al-Muwatta', yet there can also be little doubt that other works (such as al-Madaniyya of 'Abd ar-Rahman b. Dinär, and a copy of the Asadiyya of Asad b. al-Furāt by 'Isā b. Dinār) played an important rôle, greater than that which has been previously assumed. It is true that these works lent a powerful stimulus to the enthusiasm already current.¹ But while these works received the devout homage of the jurists of the Spanish legal renaissance, it would in no sense be true to say that Spanish law originally was a mere reflection of the law of Medina and Egypt.

This stimulus inspired many students to embark on the pursuit of Medinan ideas; these students went to the three famous centres of culture, Medina, Egypt and Ifriqiyya. Under the tuition of their teachers, the students acquired knowledge of ideas not always identical with Malik's, such as those of al-Layth b. Sa'd. The most prominent student of Malikite law who was influenced by al-Layth was Yaḥyā b. Yaḥyā al-Laythī² (d.233/847) who formulated a unique method of expounding Malikite jurisprudence, guided by independent reasoning rather than by strict adherence to Malik's original teachings.³

¹ Madārik, II, i, pp.15-19.
² See above, pp.162-70.
³ Ḥumaydī, Jadhwa, pp.359-61; 'Iyāq, Madārik, I, ii, 538.
The great social and economic changes which accompanied stabilization of the state and economic prosperity, and the changes in jurists' ideas as to the expediency of changes in the law (especially after the introduction of various legal works), all contributed to revive inquiry into many legal problems. When the Malikite jurists offered new explanations for some legal cases, or rather when they encountered elements of law different from what they knew, they had to make a choice between points of Medina doctrine and those of a foreign body of law. This would explain the adoption of some legislative regulations framed by teachers other than Malik. These new elements made an impression and consequently excited further interest in adopted principles which seemed to be in opposition, in spirit, to Malikite law. However, these laws were not pervasive enough to change the predominant trends that prevailed in Spain.

Only after the conversion of the Spanish to Malikism, did the influence of Malikite jurists begin to make itself felt in the judicial institutions of the country. Juridical representatives not in government employment, certain jurists and jurisconsults, and government representatives, such as cadis, counsellors, notaries, and market-inspectors, never admitted that they were practising law and issuing responsa based on Malikite principles. They were merely introducing the views of lawyers whom they had met outside the country.

The number of prominent jurists who had direct contact with Malik is impressive, among them were Yahyā b. Muğar, who
died crucified in 189/804, Qar'ūs b. al-'Abbās (d.220/835), Ibn Abī Hind, who is qualified as ḥakīm, al-Ghażi b. Cays (d.199/814) and Ziyād b. 'Abd ar-Raḥmān known as Shabūn (d.193/808). Although those jurists and others were given credit and were venerated for introducing Malikite doctrines, their younger colleagues in fact had a greater influence on Spanish law. Among these jurists were Yaḥyā b. Yaḥyā al-Laythī, Ḥāṣā and 'Abd ar-Raḥmān, sons of Dīnār, 'Abd al-Mālik b. Ḥabīb and Aḥbāgh b. Khalīl (d.293/905).

To a large extent, however, the younger jurists, due to their different academic backgrounds, seem to have adopted different legal attitudes and to have exercised more influence. Evidence of this assimilation of attitudes is to be found in the works of al-Wāḍiḥa of Ibn Ḥabīb, al-Muṣṭakhraja of al-ʿUtbī (d.255/868) and in a collection of Ibn al-Ǧāsim's legal cases by Ḥāṣā b. Dīnār. The same disagreements are to be found in the decisions of Yaḥyā b. Yaḥyā and the Court of Cordova which in turn led to the rise of rivalry among those jurists; this rivalry, instead of destroying efforts to make Malikite law nationally recognized, was a useful stimulus which eventually created a real unity of doctrine and left Malikite law as the absolute

1. see Madārik, I, ii, 540-643; Ibid., II, i, 15-51.
2. For biographical information concerning Aḥbāgh, see Madārik, II, i, 30-40 & 142f. Cf. Ibn Farṭūn, Mīnād, 97.
3. For a short review of this work see Ḥattāb, Naw, i:411; Naqqarī, Naw, ii:214, 217.
authority in Spain. Thus, while Medinan law was left in possession of the field in al-Andalus, as the only system of law applicable in the Courts, historians said that it had been arbitrarily enacted by the ruler.\(^1\) However, they have not allowed for the natural development not by his authority, but by the nation's free acceptance, of Malikite code as the law of the Prophet's city.

Not until after the death of Malik did Andalusian jurists and cads energetically strive to force the Egyptian theory of Malik's law into their court. To some extent, this was no more than part of a general tendency to rely upon the interpretation and argument of Ibn al-Cāsim, Ashhab and, later, Aṣbagh b. al-Faraj and Ibn al-Mawwāẓ.\(^2\)

With the passage of time, many of the attitudes that had originated with the above mentioned Egyptian jurists became generally associated with the Malikites of Spain. It is significant, as an indication of the progress of the law, to find that a wide diversity of opinion existed among the Malikite jurists in Spain. Equally important for the development of the law was the new respect given to individual choice of the jurists in making decisions. Most of the later jurists maintained highly individual legal interpretations: Sa‘īd b. Ḥassān (d.135/753) a legal counsellor supported Ash‘hab,\(^3\) Ibn Ḥabīb supported

\(^1\) Tanbukti's view is that the Andalusians accepted the doctrine of Malik because they were threatened with violence. See Nayf, p.191.

\(^2\) Madārik, II, 1, 16-35; cf. Īumaydī, Jadhwa, pp.213,263,279.

\(^3\) Ibn al-Farajī, Ta‘rīkh, 1:190f.
Mutarrif and Ibn al-Majishun; 'Isa b. Dinar supported Ibn al-
Casim.¹

Any particular judgement in court, which was regarded as a particular inference from an established work such as Muwatta', Mudawwana and Asadiyya, was to the Malikites in no way distinguishable from their own opinions. The result of such independent judgement was a development of a legal literature of responses. This literature was primarily intended to achieve what the Mudawwana² and Muwatta' had failed to do. The responses were recorded by Ibn Habib in his great Wadiha and al-Utbī (255/868) in a well known work al-Utbiyya or al-Mustakhraja.³

These two manuals, which soon dominated legal thought and practice of the whole of Muslim Spain, gave rise to elaborate commentaries. And, in the interpretation of their provisions, they generated the really remarkable development of a literature of codified legal procedure in the professions of notary⁴ (Muwathiq or Sa'ih al-Wathā'iq), solicitor (Khāṣīm, Wākīl or in the modern legal term Muḥāmī), and cadi.

1. see Mada'rik, II, 1:16ff.
2. The Mudawwana was reported to have been in wide circulation in Spain before 220/835. see Ibn al-Abbār, Takmila, 1:92ff.
3. We possess more records of the thoughts of those late classical jurists than of their predecessors. Thus it is that attention has often turned to them.
4. The notary played an extremely important rôle. He did all conveyances, drafted wills and marriage contracts, drafted partnership deeds. See for example, the Wathā'iq of Gharnāṭī, fols. 80-96.
All (Mudawwana, Kuwatṭa', Hidāya, Wadiba and `Uthbiyya) are fully comparable as attempts to control the direction of Medinan law, but they differed in the way in which the law was to be developed. The decisions based on Malik's response were those most consistently applied. Some of these treatises such as al-'Uthbiyya and al-Mustaqṣiya, were greatly influenced by the rational tendency, adapted to a Tradition that had rid itself of Malikī judicial methodology, that is, decisions based on the Qur'ān and Sunna. They were theoretical and more abstract than was appropriate or necessary to the concept of Medinan law.

These works resulted in considerable changes in Gærawān and Cordova. Jurists of these places, since the introduction of Kuwatṭa', tended to adopt the law embodied in this work. As a result a great mass of totally new laws were introduced. It was in the classical period of Spanish law (Malikite law) that the further development of law was influenced by local practice. The famous Spanish jurists were practitioners (notaries, counsellors and jurisconsults) who knew how to handle the legal technique as a creative art. These legal professionals were familiar not only with Malikite, including the Medinan, practice, but also with the customary laws of their localities.

With the availability of a vast number of responses and exhaustive collections of legal works, the Cadi of Cordova had a wide range of choice and decided the question according to one of these responses. Sometimes unavoidably he had to decide

1. 'Iyāq, Madārīk, II, 1, 135–145.
a case according to other sources when the given matter did not fall within the compass of judicial views expressed by the masters. These variations were a means of enlarging the frame of reference, offering a choice where formerly there was only one set legal standard. The law of liability is perhaps the best example of what this variety contributed to Ifriqiyya and Spanish law.

**The Nature and Kind of Liability**

The precise definition of the term "liability" remained a question of degree, relative to the case in question. The following will serve as an example. The defendant was leading his horse in the main street, when another man made a loud sound frightening the horse, which then damaged goods in a shop. The cadi and jurist first asked whether the owner had been negligent, and what the degree of avoidable risk to others was which was necessary to constitute liability in law, and whether the damage involved was obviously to be regarded as a case of tort.¹

There was room, indeed necessity, for difference of opinion in order to draw a useful inference from such an elastic concept. Whatever evidence was available confirmed the continuance of several characteristic features of the Ifriqiyyan and Andalusian attitudes to legal matters; and their judgements and viewpoints were circumscribed by the main principles of the *Muwaṭṭa* and the *Mudawwana*.

The law of liability in general, and the provisions relating to negligence and to torts in particular, are supposed to give sufficient proof of the development and expansion of the Maghribi law. Regarding these laws, it would serve no useful purpose to point out differences of detail which have developed, sometimes through judicial decision and sometimes through the influence of other famous jurists, between Malikite law in Spain and Malikite law in Medina. The creative aspects of the judicial process which contributed to the expansion of Medinan law were not, however, peculiar to the law of liability, but they were much more evident in this branch of law than in others. These laws are concerned with a situation where the conduct of an individual causes harm to the interests of others. As far as the Malikite law was concerned the general ground for liability in tort was damage caused to a person or property by blameworthy conduct on the part of another as regards that person or his property. In all the following cases under discussion the plaintiff's person or property, or the person or property of another, must be threatened with injury as the result of some wrongful misconduct by the defendant.\(^1\) The main function of this aspect of the law was to clarify the right and liability of the parties so that each would know the extent of liability which he must bear if he was at fault. It is difficult, however, to differentiate between an act unlawfully performed, and the

act which is merely in the nature of tort. During the formative period of Spanish law, the law of liability had developed little further than defining a number of named categories of intentional aggression upon person or property.

The decisions of Spanish courts in relation to accidental damage or consequential loss and normal loss were different in consequence according to the type and manner of the loss. Owing to this varied aspect of tort, a jurist could not escape from passing judgement upon this matter of law, unless he could refer to some matter of fact which would serve as a standard of loss or damage. The jurist certainly would find his criteria of tort were shaped from his experience and upon what he supposed to have been the experience of other jurists. As he interpreted the scope of the damage according to his opinion as to what constituted damage, it was likely that other jurists would differ regarding the exact standard of tort which held the defendant liable. These varying opinions resulted from the differing experiences and personal attitudes of the jurists.¹

Therefore, under the influence of these various concepts of damage, the law was careful to remember that the defendant who created a dangerous situation resulting in injury was not necessarily guilty. Only malice aforethought constituted liability.

Much of the fundamental thinking about intention and wrongdoing stemmed originally from Mālik's legal philosophy, yet it

was the Maghribi jurists who elaborated it. It was fairly usual for the courts of Cordova and Qayrawān to find a provision for liability implied in Mālik's judgement in cases requiring or prohibiting conduct for the protection of individuals. The decision and judgement of Mālik, of course, did not cover the total range of conduct. As a consequence of this lack of comprehensivity, the Malikite jurists held that every case of an injurious nature must be determined by its own circumstances.¹

Misconduct and wrongful intent were the two alternative forms of transgression and violation (ta'addii); one or the other was required before liability could be imputed. When an injury was unintended, as in the case of negligence, the offender was not necessarily found liable, even though the consequences were likely to be very serious for the other person.² Whenever negligence was charged the court had to discover what duty existed on the part of the charged person towards the complainant. Negligence (tafrīt) and carelessness (ihmāl) in many cases were virtually indistinguishable and their consequences too were seldom different. As a result of the absence of a sharp distinction in consequence of carelessness or negligence, the Malikite law regarded them as complementary rather than as separate cases.

In the law of tort the most disputed cases were in fact

¹. Ma'dānī, Ḥashiya, 11:257f.
². See Mawwāq, Ta'ā, v:290f.
the consequences of negligence. The most obvious way to settle disputes involving such negligence was to set an absolute minimum standard of care which cannot be evaded in any circumstances. It is true, nevertheless, that in a majority of cases the minimum standard of care was difficult to ascertain. The absence of absolute standards necessitated occasional departure from the precedents cited in *Muwaṭṭa* or *Mudawwana*. The following example will illustrate the attitude of the Maghribi jurists towards the use of precedents.

The statement of the *Mudawwana* does not seem to exempt the borrower (*mustaʿfir*) and the mortgagee (*murtahin*, one who received the mortgage), if they claimed they were not responsible for the loss or damage of mortgaged property, or the thing borrowed, except if the loss or damage happened through an act of God.1 But the Maghribi jurists judged that whoever held the property was liable for damage, whether such damage or loss was his own fault or not. The case in point is that of a man 'A', who borrowed clothes from B. B sued A for damaging the clothes. A defended himself, saying that the accident occurred when he left the clothes in a mouse-infested cupboard, the damage being caused by the mice. Although A asserted that he, himself, had been sufficiently careful, the Maghribi jurists would not exempt him from responsibility, for it was by his negligence in leaving the clothes where they were not safe that

they were damaged.1

Different from the above case was that of the custodian who would not be held liable if he could prove that damage was caused by insects and not himself. The reason for exempting him from liability was that the defendant must not be held responsible, in such cases, for foreseeing the probable consequence of the insects' act. Steps must be taken to guard things against a reasonable probability of damage. And that decision corresponded to the case of damage caused by mice. But for accidents of a rare or unpredictable kind, occurring under conditions in which normally there would be no danger or likelihood of accident, defendants could not be held responsible.2

The same might be said about the difference between the terms 'accident', 'negligence', and 'mistake'. The accident and negligent conduct is regarded as an act of tort because the defendant actually foresaw or should have foreseen that such an effect was probable enough to guard against its consequences. Whereas, a mistake where the wrongdoer has perceived an effect, was not a case of tort.

However, in all classes of cases in which the defendant mistakenly damages other property or diminishes its usefulness, the defendant was held liable and had to give compensation.3 Therefore, one who maintained or acted negligently was liable

1. Ma'dānī, Yāshiya, 11:185; Mudawwana, vi:163.
if the act caused damage. This added to the Madinan category of liability for injury due to fault. An example was given by Ibn Salmūn in his wathāʾiq and cited by ‘Alīsh: A man walking near the sea saw a wandering camel. In order to prevent the camel going further away from his owner, the man tethered the camel, ‘aqal al-baʿīr. (i.e. He bound the camel’s foreshank to its upper leg by a rope). Because of this restriction the camel could not escape from the incoming tide and was drowned. The man was held liable even though the death of the camel was not intended. The ‘aqal was intended under a mistaken idea. He believed he was justified in behaving as he did in order to protect property. ¹

Again, there may be mistakes which show that there was neither intention nor negligence, and the defendant was not the prime cause of the accident. An illustration is the case of the man who set fire to his land, knowing his neighbour’s threshing flour was but several yards away. The fire was so small that under all probable conditions it could not stretch to the threshing flour. But an unexpected wind blew up and drove the fire to the threshing flour causing damage to the farmer’s crops. ² The fire spreading to the threshing flour had an injurious effect which was neither intended, nor reasonably foreseeable, and the man, therefore, was held not liable. ³

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1. ‘Alīsh, Fath, ii:168f.
On commenting on the status of the Mudawwana, the cadis of Tunis, Ibn 'Abd as-Salām (d. 749/1348) said that in the aforementioned case the man would be liable if he set a fire when there was a wind blowing up. In such circumstances the plaintiff was negligent in so doing, as he had not taken a reasonable standard of care to avoid the risk, although he may not have had the intention of setting fire to his neighbour's flour. The Malikite law took into account the fact that perceptions of liability were the basis which dictated any decision of guilt.

In a situation where a herdsman tried to protect his herd from a wild wolf by erecting a trap near a paddock, and a thief coming to steal a sheep, fell into the trap and was killed immediately, then the herdsman was cleared from wrongdoing because he did not intend or anticipate any danger resulting from his act. Though he would be responsible for aggravated misconduct, before being convicted, the court had to decide if the herdsman intended to kill a human being, and whether his trap was erected in a common place or road where there was possibility that the danger would arise.

He would be held liable for homicide if he set a trap to kill a thief and the trap instead killed another man. It is a reasonable principle that this man should have been criminally

1. Ḥawwāq, Ta'āj, vi:321.
liable as he ought to have foreseen this consequence. The act itself was not sufficient to counterbalance actual intention, though his actions afforded the safest exposition of the agent's intention. Thus due care, intention and negligence were most important factors in the law of liability.¹

The rule of liability applies to the following case. A man who dug a well in order to cause damage to his neighbour's cattle was not safeguarded if another man pushed the cattle inside the well. In Spanish law, following Ibn al-Casim's decision, it was generally acknowledged that the man who pushed the cattle was the real offender and he alone would be held responsible, except where positive proof showed the criminal intention of the digger. Any act, although indirect, could not be allowed to neutralize the effect of such an intention.² This distinction was recognized as a rule in all similar cases and it was considered that malicious intention which could be inferred from the act, or even word, as injurious to the other was sufficient to support an action of liability.

Such were the Malikite views on cases involving only the liability of the directly guilty party. The following case illustrates the Malikite attitude to cases involving liability of indirectly guilty party, and cases involving more than one party. The principle at issue is whether or not an employer is liable in cases where an independent contractor had been

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¹ Mudawwana, vi:445.
² Kawwâq, Tâj, v:276.
used. The Spanish jurist, al-Bā Büyük (d. 474/1081) distinguished three types of contract. First, there was the contract involving no wage and almost always to be fulfilled without payment, e.g. a person asking someone to hand him an article (stick or shoes); if, for instance, he asked a boy to pass him a stone, which was not too heavy for him, and the stone fell on his toe, causing him injury, the person in this case was not liable for the injury.

Secondly, there was a contract where an independent contractor had to be paid and the nature of the contract was free from any risk. This case would be viewed differently in different situations. a) The employer was liable for any injury that happened to the employee if he employed a person who had no right to work (for health or other reasons, such as being a slave or a young boy). b) The employer was liable if he employed a servant of another master without payment even though the employee himself was originally guilty of violating his duty.

Thirdly, an employer was held unconditionally liable, if he entrusted an independent contractor with a dangerous enterprise. But if such contract was generally known always to involve risk of injury, then the employer was not liable. For example, if an employee was asked to work inside a well and a stone from the well collapsed on top of him, or to climb up a

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3. Ibid., p. 351.
palm tree to bring some dates, and fell down from the tree, the employer was not liable.\(^1\)

It was thought that the man who was directly responsible for the injury was the only cause of it.\(^2\) But the doctrine of the *Mudawwana* was that a man who was indirectly responsible as an accomplice to the injury was also liable.\(^3\)

To illustrate this principle there is the case of a defendant whose money was stolen in this manner: Two persons held him while the third took his money away. All three, the thief and his accomplices, were liable for theft and for subsequent payment of compensation though the two accomplices played only subordinate parts. Even if the third person had played only a slight rôle in the wrongdoing, he would not be exempt from liability. Another example of the liability of accomplices is the case of the man who kept guard while his partner stole some property. The liability of the accomplices in these two cases was established because they acted with the intent to bring about the successful execution of a crime which could not have been possible without the action of all the accomplices.\(^4\)

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2. This is Ashhab's view which differs from Ibn al-Ǧāsim, see Māṭṭāb, *Ma wa*, vi:242.
But the case is different when the act of the third person occurs after the deed of the injury. This example was given by Spanish jurists in the case of a criminal act: if the accused stabbed a man so severely that the assaulted man would die of the wounds, and another man then beat the victim, both of them were considered killers.¹

In addition, liability could be charged in fraudulent representations involving negligence. The following is an example of this: The law of torts prohibited fraud between those dealing with one another. The law demanded, on the part of the owner, that he be bound to provide for the safety of the dealer in the course of their contract to the best of his judgement. The owner's duty was to his dealer, in that a fair description of the goods to be sold or hired had to be given. In a case when the owner rented a barrel, or it was borrowed from him, and the borrower or the hirer did not notice the hole in the barrel while pouring his oil into it, the owner was liable for the loss of the oil; the only adequate protection of the owner from liability would have been the disclosure of the defect to the other party. If the defect had been disclosed there would be no liability to the borrower who knew of the defect through which he was injured.²

A man could be liable for making a statement, though it—

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1. Nawwāq, Thālī, vi:244.
A man could be liable for making a statement, though it was not malicious, which was carelessly made in the sense that the speaker had no reasonable ground for believing it. The opinions of all the Maghribi jurists including Ibn Abī-Zayd, Ibn Yunus, al-Māzirī suggested that anyone who professed to be an expert on the matter upon which he gave advice, was liable for his negligent statements. The money changer who told a man that the metal was gold, while knowing that it was copper or silver gilt, was liable if the reliance on his statement caused damage.\(^1\) Damage by a hired animal is another example of this category: if a man hired a horse to transport his luggage and the animal damaged the luggage because it was unsuited to the work, the owner would only be exempt from liability if he had warned the hirer of the horse's defect.\(^2\)

This illustrates the law of liability for negligence in the Malike law. In the aforementioned case the owner knew that the animal he was about to deliver to the hirer was of a defective character. Although the owner could have warned the hirer of the dangerous character of the animal in time to prevent any damage, he carelessly neglected to do so.\(^3\)

As liability could be the result of negligent or deliberate acts, it was also either remedial or penal. The principle of remedial liability was based on a direct link between damage and

recovery (or fault and compensation). This categorization was of real importance in deciding whether an act was of a harmful nature or not.

In cases of tort there were certain circumstances in which the plaintiff's compensation depended on the defendant's liability, that is whether the defendant was negligent or whether he should have foreseen that his conduct might injure others, or whether such injury was within the scope of the protection of the particular tort or contract. These circumstances were all given extended consideration.

In the following statement there are cases which can be regarded as examples of remedial liability. If a man rents a shop and an accident prevented him from using it, should he have to pay the full rent?

The accident might either be a natural catastrophe or the consequence of human actions or negligence. When the accident was something beyond man's control (jāḥīṣa), e.g. natural calamity, the loss was held to be the liability of the owner or the landlord. In the case of human action or negligence, there were three legal possibilities:

a. If the accident was very negligible in its effects and did not change the value of the house nor bring any harm to the tenant, there could be no dispute that the rent should continue to be paid.

b. If the house was partly destroyed, but the tenant was not harmed, the damage would lower the rent value. The contract
was still valid and the owner was obliged to honour it. If he did not repair the damage, the rent had to be reduced from the time the damage occurred.\(^1\)

c. If the destruction did not absolutely prevent the use of the house, but made it difficult to inhabit, then, in this case, the law provided for two possibilities. According to Ibn al-Chāsim, the owner was not obliged to repair the damage on behalf of the tenant. However, the tenant could terminate the contract. The tenant had the choice either of staying, paying a full rent, or of vacating the house.\(^2\)

Saḥnūn maintained that the owner had to repair the damage if an express stipulation to that effect had been introduced into the contract.\(^3\) However, Saḥnūn was almost always on the side of the tenant's claim that he was not responsible for the damage incurred while he was occupying the premises. It was the responsibility of the owner to repair the damage. Except when the contract provided, for example, that the tenant should not or use fire on the premises, Saḥnūn refused to absolve the tenant from liability or to extend any equitable relief to him.\(^4\)

A wide diversity of opinion existed among the Maghribis Malikite jurists as to the effect of the damage caused to an

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1. Ibn Ruahd, Ḥujj, p.664.
2. The attitude of Mūdawwana held that the tenant in any case was not liable for general repairs to the house. See Ḥattāb, Maw, v:444.
4. Ibid., p.522.
owner's property.

Suppose that a stone fell from a decayed wall on the head of a passer-by; should the owner be held liable for such a mishap? The Malikite jurists considered many cases drawn from their personal experience, in the light of several principles of law. The question of the owner's foreknowledge of the dangerous state of his wall might determine whether or not he was liable for the accident. But if the owner was not informed of the condition of his wall, would he be absolved from liability? These were the considerations which would have commended themselves in different degrees to different jurists.

In a case recorded by al-‘Utbī, Yaḥyā asked Ibn al-Ḡūsim about a man who reported his neighbour to the Court because of the danger of the wall close to the defendant's house. If the court considered it likely that the existence of such a wall could cause an accident, should the owner be ordered to destroy the wall or to remove the danger? Ibn al-Ḡūsim declared that the owner was liable for any future danger, and that the wall should be either repaired or removed. This warning from the Court would have been certain to play an important rôle in determining whether or not the owner was liable for his negligence and would have been a decisive factor in assessing the owner's responsibility for any subsequent damage or injury. The warning was the only means by which the court could hold the owner liable for an accident resulting from his wall.²

1. Ḥaṭṭāb, Maw, vi:321.
Because of the emphasis on the requirement of an advance warning by a juridical authority, Ibn Ḥabīb came to the conclusion that any accident resulting after this warning spoke for itself and constituted a straightforward proof of negligence. 'Improper care' constituted liability. In fact, the damage that was caused by further deterioration of the wall could not in itself lead to the charge. It was rather negligence and carelessness which were the most important factors in proving guilt.¹

Saḥmūn, in considering the above-mentioned case, decided that the owner could be compelled to remove from his wall anything which might be a physical hazard to the neighbour or passer-by. Saḥmūn also maintained that the forewarning by the court was not a necessary pre-requisite for liability. It was primarily the awareness of the owner which made him responsible, but an official forewarning would make him inescapably responsible in the eyes of the court. Saḥmūn thus contributed to the theory of liability in this case by defining an official forewarning as not necessary in determining guilt.²

Just as the landowner was under an obligation to avoid harming neighbours and passers-by through repairing his properties, he was also under an obligation to remove any object which might cause some nuisance or danger to them. But the

¹. Ḥāfiz, Mail, vi:321.
². For more legal discussion on this case see Ibn Farṣūn, Tabṣira, 11:347.
theory of the landowner's duty to remove all possible hazards from his land occasioned a wide divergence of opinion. These varied opinions concerned the landowner's right to possess his land and to do his lawful business in a lawful way and disputed whether he was under any legal obligation to consider the protection and passage of his neighbour or a passer-by.

A case which brought out these opposed views was that of the plaintiff who complained that his neighbour's pigeons had caused damage to his farm and demanded the removal of their dove-cot. Malik's decision in this case was not to compel the owner to remove his birds. Ibn al-Gāsim agreed with this view; but Ibn Ḥabīb seems not to be satisfied with Ibn al-Gāsim's judgement. His view was that the owner ought to take special precautions to safeguard his neighbour's property, either by keeping the birds on his own land, or removing them altogether; and, if he did not take such special precautions, then the owner should be liable for the damage.¹

Liability of fiduciary

The trustee as the legal owner was authorized and responsible for the property as a consequence of his legal obligation. The authorization of a trustee was not for the trustee's benefit, but for the benefit of the other party.

The term trustee (ṣālaṭ) was used in Malikite jurisprudence

in the widest sense and included any person to whom another person had entrusted his property. But the term generally denoted more specifically, the person whose legal authority was restricted to preserving property. The present discussion will deal only with the enlarged meaning of 'trustee'.

In Malikite law, there was a maxim that he who possessed property had rights and liabilities in respect of the property in his care, which were very similar to those of trustees. In the case of loss or damage to a thing in his care, his testimony was accepted without any other qualifications other than oath. The affirmation of those trustees regarding damage or loss was allowed as long as they accepted trusteeships not detrimental to the public interest. Their privilege was that they were exempt from the rule which imposed the obligation of giving proof to any person who affirmed anything against them.

This rule of liability was applicable to all trespassers causing damage to property or persons. However, for the purpose of preserving public interest, the Malikite law made exception to that rule by creating a certain class of judiciary liable for certain accidents. The exception of the rule, predicated on presumption of fault against a trustee was provided by the law when it was not possible to prove any fault on the owner's part.

1. ḥattīb, Maw, v:250; Mawwāq, Tāj, v:250.
2. ḥattīb, Maw, v:428.
The public benefit (the rule of maglaha) was the judicial justification for the inconsistent exercise of the general rule; (al-amīn lā yaqūman) one who was authorized would not necessarily be responsible, but the law made the skilled persons and the carriers responsible for property loss or damage. The purpose of the law was to protect owners against possible claims by artisans or food carriers who might allege that the goods were stolen or damaged when they received them.1

There were different views regarding robbery. An enemy's losses were excluded from judicial jurisdiction. The example mentioned was a case against an innkeeper. The plaintiff alleged that his belongings were stolen while he was lodging at an inn. By undertaking the special duty, that is the promise to secure the guest's property during his stay, the innkeeper would be liable if the property came to harm. Other jurists maintained the opposite, though they cited no authority, on the ground that there was no tort on the innkeeper's side.

Ibn al-Qasim's attitude to robbery was more exact. He said that if an official had undertaken to perform a certain act, he should be answerable for accidents due to negligence or theft if he could recognise the thief; but he could not be liable for such accidents as happened by an act of God, or for robbery without knowing the thief.

The concept of a trustee's duties and obligations were held to apply in matters relating to the carriage of goods for hire. Cases dealing with the responsibility of carrier or vessel in the Maghribī law grew out of the development of trade and commerce. The peculiarity of the relationship existing in Medinan law (before it became part of North African law) between the owner of the carrier and all other parties is very obvious when we call to mind that the other party had no legal claims against the carrier in the case of damage or loss, except in rare instances.

The law, with regard to damage by the carriage of goods for hire (animal, man and vessel), goes back to the earliest period of Islam. Whatever its historical origin, it certainly antedates the Maghribī view on this point. As late as the beginning of the second century, it was the unquestioned doctrine of the Medinan jurists that the carrier was answerable in all cases for things he was authorized to transport and that he was liable for loss. Upon carriers, mills, goods keepers and those engaged in the many trades which Medinan Society regarded as services essential to public sustenance, was laid the responsibility of attentive performance of the service.¹ Towards the middle of the second century, the carrier's responsibility began to be insisted on more than had previously been the case.²

¹ Mayyāra, Sharḥ, 11:193.
² Ma’dānī, Ḥashiya, 11:193.
The responsibility of the carrier started with the delivery to and acceptance by him of the goods. Malik made distinction between losses resulting from negligence and those which were the consequence of supernatural disaster (act of God) which the driver was unable to prevent. But he precluded him from claiming the benefit of this exemption if the loss was a result of defect in the animal, vessel, or part of their carriage equipment.¹

The undertaking of a carrier to transport the goods to a particular destination necessarily included the duty of delivering them safely; this responsibility could be extended depending on the contract between carrier and owner. The carrier was supposed to have a trustee's privilege. Malikite law recognised the trustee function of the carrier, but, as a matter of utility, it made the carrier of food an exception.² The reason for the extraordinary law of liability for the food carrier was to ensure safe delivery of goods.³

One exception to the principles of the liability of the fiduciary was the liability of artisans and skilled workers, which was governed in Malikite law by the principle of utility. In their case, the trustee (ṣāfīn) was not considered liable unless he was proved to have been negligent or by his actions to have

¹. Ibid., p.192.
caused damage.¹

That the skilled worker was put in the position of a trustee is clear from the rule: "He who guards property for the owner's benefit will not be held liable for tort (loss)."² But his position was not identical with that of an ordinary trustee.

The one exception to this principle was that a skilled worker be held responsible for any damage to goods he received. The justification for the rule lay in the inequitable nature of the loss that would fall upon the owner, if the worker were exempted from liability. Despite the latitude given to him by Malikite law,³ the worker was held liable for any damage or loss of property in his hands.⁴ The rationale behind this is the

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3. For example, in any claim concerning the type of job, description of job, and wages, the statement of the worker outweighs that of the employer. Ibn al-Qāsim justified this point legally, arguing that to uphold the owner's claim against the worker meant that the worker could suffer a great loss by false claims. See Mayyār, Ijār, ii:103. The Malikite jurists went too far in support of the worker's claim, so that even in respect of return of goods to the owner, the worker's word was entirely accepted. Ḥajjāb, Kaw, v:447. Cf. Mudawwana, iv:392f.; Ibn 'Āsim, Tuhfa, ii:103f.
4. The valuation of the loss or damage of the property depended on its value at the time and place of contract. see Mudawwana, iv:387f.
fact that the person who undertook to do something for another should be the one held responsible. This rule was obviously founded on the principle of utility (maslaha). 1

The general principle of maslaha by which Malikites held some tradesmen and skilled workers liable for damage to goods or articles they handled in their work, exempted certain tradesmen and artisans. They were treated as exceptions, on the ground that they were engaged in a public occupation; and holding them liable would not be in the public interest. The exempt group included doctors, teachers, dentists and judges or jurisconsults, who were all treated on the same basis. They could not be held liable for the lives and limbs of their patients or pupils, unless it was proved that they had made a mistake or wrong judgement. 2

As they were bound to carry on their employment, it was to their advantage that they would avoid losses through negligence or improper preparation for their respective businesses. If a doctor amputated the diseased arm of a patient, and the patient was deformed as a consequence of the operation, the doctor would not be liable for physical damage providing there had been no fault in his diagnosis. 3

Before the law could exempt them from liability, however, the professionals had to possess proper qualifications: they

2. Ibid., 431.
had to bring to the exercise of their respective professions a reasonable amount of knowledge; they had to have been provided with a licence from the appropriate authority.

Here the law made a distinction between officials whose occupations involved the safety of lives, and those whose business was not directly related to public health and lives, though both of them might be working in the public interest.¹

Such a modification in regard to the exempted professionals did not, however, encourage negligence. The Malikite law stipulated that doctors could not practice their profession without obtaining permission from the government, which normally did not licence a doctor unless his qualification was adequate. However, these professionals knew that while they were not answerable for damages that occurred from negligence or fault, they were open to charges for exceeding the task they were asked to do.²

To absolve the artisan from liability by contract, Ibn Rushd ascribed to Malik the law that a skilled worker could not be exempted from liability due to his negligence for loss or damage to things which had been entrusted to him, by agreement or contract.³ Al-Lakham declared such a stipulation was invalid, because of the unfavourable consequences for the owners; such

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1. The Spanish jurist did not exempt the veterinarian for the loss of animals under his treatment. Mawdānī, Ḥašiya, 11:192.
conditions protecting workers from liability would encourage them not to work unless they had been insured against liability by such a contract.\(^1\)

B. Judicial Administration

The power of settling disputes was granted to various branches of administration. Besides the jurisdiction of the court there was the jurisdiction of the police (ṣāhib ash-shuʿrā) which was divided into two categories: minor (police court) and major (the criminal court) (ṣāhib al-maqālim), whose jurisdiction was more or less the same as that of the police court, and the inspector of the market (ṣāhib al-hisba) and ṣāhib ar-radd, which is described in the manuscript as a function of the court of appeal.\(^2\)

Because of these various judicial tribunals, each court gradually developed a sort of legal procedure, and sometimes a law of its own, which often differed from the others. Each cadi was free to make his own judgement guided by his understanding and conception of the law. Lower courts contradicted the higher courts; for example a decision of the court of Toledo made an

\(^1\) Ḥāṭṭāb, "Ṭahārī", in 'Alīsh's Fath, 1:369.

\(^2\) Ibn Sahl, Abkām, recto, 2. It was not until the middle of the reign of 'Abd ar-Rahmān II, that the two courts were separated: the court of the police and the court of the inspector of the market; previously they had been one court. see Ibn Saʿīd, Mughrib, 46; Imamuddin, Some Aspects, p.51.
apparent departure, contravening the controlling authority of
the supreme court of Cordova.¹

The excessive number of institutions in which judicial
power was vested, whether originating with cadı, jurist, or
police, resulted not only in conflicting decisions, but also in
restriction of the jurisdiction of the supreme court in Cordova.
In fact it narrowly confined and strictly controlled the supreme
court, thus enabling the jurisdiction of other courts, such as
of Toledo and Alvira, to keep abreast of their docket, and
giving adequate chances for other jurists and cadıs to produce
flexible judgements and response.

Thus, the diversification of the courts, and the leeway
given to cadıs with different approaches resulted in a vast
amount of recorded response and case-laws, which subsequently
deluged the courts with a wide range of legal opinions and
precedents, often of opposing characters. The positive contri-
bution of the variety of opinions, however, was the selection
of judgements available as precedents for cases involving the
same problem.

Under such conditions, it is not surprising that each
court of Spanish metropolitan bred a different variety of law.²
But the supreme court of Cayrawän did not allow such encroachments
on its jurisdiction. Spanish cadıs, in their provision of

². Malikı, Riyād, 1:275.
appointment demanded that all judicial power should be reserved to their own courts; they believed such absolute centralization was expedient.¹

Closely connected with the diversification of opinion was the growth and development of legal procedure and litigation. The constant recurrence of cases of a similar nature led consequently to the expansion of this aspect of law. According to the Medinan system of law, the cadi could have nothing to do with making inquiries to find out things for himself, except in certain special instances. His primary function was not that of inquiry, but of hearing and determining between parties according to the proof which the parties brought forward.

There were rules affecting the Malikites as to what could be considered a valid law suit, laid down by the Maghribī courts. The validity of a law suit depended on its being certain and unambiguous. In the legal proceedings the plaintiff had to affirm his case by mentioning a specific claim. It was regarded an invalid litigation if the plaintiff claimed, for example, that he had lent a large sum of money to the defendant, or that the defendant sold the plaintiff some articles.² The terms of the

¹. Ibn Sahl, Ḳaṣṣāb, verso. ². The same provision was reported to have been set forth by the court of Qayrawān, Ibid., recto, 53.

². Mawwaq, Ṭaj, vi:124. But the Ifriqiyyan jurist al-Māzīrī said that he would not refuse to hear the claimant's statement on this incident if he said that the defendant owed him some money, and he wanted the court to force the defendant to specify the amount of money. Ibid., cf. The doctrine of the Mudawwana is different from that. See Ḥaṭṭāb, Ḥaw, vi:125.
case had to be consistent with custom. When the plaintiff reclaimed land that had been a long time in the possession of the defendant, and throughout that time the plaintiff raised no objection, his claim would not be heard because hearing it would have contradicted custom.¹ This is an example of the process of litigation in the Spanish courts: the plaintiff claimed the defendant's land to be in fact his own property, bequeathed through his ancestors. The cadi, in this case, could not decide this question until the plaintiff had given evidence as to the death of the person from whom the land was inherited, and the defendant's claim was proven by evidence in the bequest of the deceased.

The plaintiff claimed that he had valid legal title to the land by virtue of inheritance. If he could produce no evidence in his favour, the defendant's right was recognized. But if the plaintiff were able to prove his claim of possession, the defendant would either have to deny or accept the plaintiff's proof. The defendant would not be asked to bring overwhelming evidence against the plaintiff's case, but neither would he be allowed to retain his ownership without some form of proof, because of the acknowledged legal presumption against him.

If the defendant rejected the plaintiff's evidence the court would let his claim be heard only if he could produce stronger evidence that he had access to the title through the

1. Ibn Juzayy, Cawānīn, p. 327f.
same person from whom the plaintiff alleged the claim to ownership originated. In other words, if the plaintiff proved it was so in accordance with the full legality of the procedure, the defendant had then to explain how he obtained the ownership of the property. If he said that he obtained it from a source other than that of the plaintiff, the court could not grant his claim to possession, even though he could prove it. His claim of ownership would be accepted only if he proved the accession to the house from the same source as the plaintiff's. However, in the aforementioned law suits the litigants had to act forth in detail the right of deceased, their own grounds for claiming repossession, and by what right they were making these claims, since it was not sufficient for the plaintiff or the defendant simply to declare he had a right to the property; rather he should specify by what right the property belonged to him, and by what title, whether because it descended to him through hereditary succession, by dowry, or by some other lawful means of acquisition.

In an instance where the defendant lived far from the locality where the plaintiff proceeded with the litigation, the costs of a court messenger sent to summon the defendant were at the charge of the plaintiff, but if the defendant resisted the order, the cost fell upon him.  

2. Ibn ‘Aṣim, Tuhfa, 1:25. For more details concerning the Spanish court procedure see Ibn Sahl, Ḥikām, fols. 4-14.
The caliph of Cordova made judgements independently of the other courts, but in view of regional peculiarities of the cases; the methods of judgement were contrary to those applied to the decision of cases of the same nature in the court of Cayrawān. A solicitor (in his capacity as a representative of a principle in litigation) might be set aside, or his contract be cancelled. Again there were different opinions as to the effective duration of the contract, but the solicitor could not be retained unless at the request of the principle.1

The court of Cayrawān recognised a different period for the validity of the contract.2 Saḥnūn maintained a view different from that of the Spanish courts. He seems to have believed that the solicitor who promised to represent and defend his client against prosecution had an obligation which could not be revoked after a certain period of time. The contract could be reviewed or even annulled only within the first two years. Except in cases in which there was a subsequent agreement, or prolonged prosecution of the client, the contract was obligatory despite the lengthy period of time of the representation.3

In the law of agency, the jurists of Cordova defined the jurisdiction of a solicitor, distinguishing between his representation of his client for the client's protection and his

acting on his own behalf in such a way as would harm his client. They refused to acknowledge that the work of the solicitor was to argue the rights of his client as well as to incur his liability.

Ibn Sahl (d. 486/1094) reported in his Ahkām that he had seen the jurists of Toledo accept a solicitor's defence of his client although he admitted evidence against him. Mayyāra allowed that a solicitor could only deny claims and defend his clients; the admission of any adverse charge had to be absolutely dependent on authorization from his client. At the same time, the litigant had a right to refuse the agency of his solicitor, provided the agent would defend, as well as make potentially damaging admissions on behalf of his client.

In general, it was open to anyone to plead his own case in court. But the cadī usually recommended that a defendant acquire a solicitor, as most defendants lacked the knowledge necessary to represent themselves in a legal proceeding.

The Spanish court followed the procedure that required the presence of the defendant in court. The court allowed the substitution of a proxy owing to certain specific situations: to an ill person, or to a woman unable to show herself in public or a person on the point of leaving the district.

1. Quoted by Ibn Farḥūn, Ṭabāṣira, 1:154.
In the law of *istiḥānaq* (reclaiming the title) the procedure of Spanish courts was different from that of Cayrawān. If, for example, the plaintiff claimed that specific articles or land was located under someone else's name or claimed some property to be his own, then he had to file an action with the court in order to transfer the title to himself. The validity of the plaintiff's claim, and conditions under which his plea could be heard, were circumscribed by three stipulations: 1) The evidence must refer to the exact matter under litigation; for example, the witnesses would be accompanied by some of the court officials who would inform them of the implications of their testimonies. 2) The court could not wait to give the defendant a chance to defend himself. 3) The plaintiff must corroborate his evidence (if he succeeded in his case), and had to swear an oath to verify its truth.

The Spanish court differed from the court of Cayrawān in that a third stipulation (the oath of the plaintiff) must be given only in cases involving moveable property; whereas Saḥnūn maintained that the oath of the new owner must be applied to all kinds of property: real estate or otherwise.

When there was sufficient evidence or sometimes none at all, the court had to resort to the rule of presumption. When the plaintiff could not provide sufficient evidence, or when the

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evidence of both parties was equally convincing, the one found in possession of a disputed thing would be granted his claim. Having possession was an added advantage because his possession was as important and as valid as the testimony of a witness who could verify his claim; it was sufficient that he took an oath, and then he obtained legal title to the possession in dispute.¹

Prevailing Practice as the Source of Law

Spanish courts generally sought for precedents and responses of the Imam, or of his disciple, Ibn al-Qasim. But when they found no responses and no precedents, the court of Cordova decided the case according to the prevailing practice of the people of Cordova (‘amal ahl Curtuba). It seems certain that this judicial rule of "custom and practice" was assimilated into Spanish law as a result of the influence of the principle of "Medinan Practice".

The cult of norms also became more influential in the judicial decisions; the more influential the jurists, the more sacrosanct was their view of practice. Most jurists in this cherished "Cordova tradition" identified themselves with the prevailing customs of the city.

The preference of the cadí depended, for the most part, on how conversant he was with the daily practice and customs of the people. This standard of familiarity was, in general,

applicable to judicial matters and court systems of the Malikite school.\(^1\) As a doctrine, it had been practised in Cordova where the jurists persistently attributed legal standards to the 'awā'id of the people of Cordova.

In order to understand this recognition of custom and practice, it is necessary to recall the part played by circumstances in the concept of 'amal ahl Curruba as coercive orders. The Malikite jurists considered Cordova as an ideal Andalusian town in respect of the traditions, norms, and moral values of its people. This reverence was necessarily bound up with the assimilation of Medinan rules and traditions. The Medinan way of life is best understood by its adherence to Malikism. Was it reasonable, in such matters, to regard the ethical character of Cordova as criterion for giving its custom a binding force? If so, it was likely that, in the long run, this ideal standard would be claimed by other towns of the Muslim world.

The tendency toward custom and regional practice, in preference to other legal patterns, such as solitary Tradition (Khabar ṣabād), may be called Malikite only in so far as the history of Malikism and the ideal town coincided; this coincidence cannot be proved since the preference for practice in Cordova was not moulded in the time before the Umayyad emirate as was the case in Medina. However, the rigidity of this theoretical position proved so successful, that for centuries

\(^1\) Ḥattāb, Maw, vi:101.
Malikism remained the absolute force in settling legal points, particularly in disputes between Malikite and their rivals. In fact, throughout the Umayyad period it was the jurists who formed the most influential class of the society, and controlled the life of Cordova.

Cordova was unique among Andalusian towns, and this uniqueness was reflected in its customs and the preoccupations of its intellectuals.¹ This veneration for Cordova's custom can be traced to the period of Hishām 170-180/786-796, which was traditionally regarded as a period of ideal rule and extraordinary achievement in Malikite law. The political authorities' association with the judicial class no doubt contributed to the respect for the custom and law. The traditional morals and manners of Cordova society, however, continued to live and grow under Malikite law, and came to be recognized as law in the procedure of the court. The habit of looking up the regional custom had a parallel with the original concept of the practice of the people of Medina. This social tradition of Cordova reflected the social veneration for custom as an instrument of justice and social order.

This circumstance, indeed, seems to explain why the customs of the people of Cordova were accepted as law in al-Andalus² but not elsewhere. The reason was sociological rather

¹. Maqqarî, Nafah, 11:93.
². The Cayrawânîs held the same view towards the custom of their city. See Taftûshî, Hawâdith, pp.65-7.
than legal. It was prompted by Malik's disciples, whose doctrines were applied to the country's judicial structures, and in order to enforce the native customs. It also derived its inspiration from the intellectual and influential class whose sympathies were predominantly Malikite, whereas the QayrawanIs' Malikism had been less prominent while the important class in Ifriqiyyan society was IraqIs or Mu'tazilites.

The custom of Cordova served to build up resistance to any foreign judicial views. However, it was the assent of the court that gave prevailing practice of Cordova its legal validity. At first sight even a theory of the authority for the "custom" might have been expected to lead to extreme rigidity and a refusal to adapt to changing social conditions.

**Council to the Court**

One of the peculiarities of the court of Cordova was the existence of a body of jurists whose function was to advise the court of new legislation and to suggest appropriate action. The members of the body were called mushāwara and the council was called ashāb ash-Shūrā. Therefore, the council was closely linked to the judicial structure; this association was peculiar to the Spanish Umayyad judicial institution.

The superficial purpose of establishing this institution was to correct and supplement the jurisdiction of the court. The appointment of the councillors was interpreted as a political
device; it was not established to watch the working of the judicial system, except by acting as a counterbalance to the divergence of legal views. The cadi's decision took the form of an official decree and was binding on the litigants. To avoid an error in judgement, the cadi had to consult the jurists or might seek advice on any problem involved in litigation, but the decision rested with him alone. Consultation was considered as adequate safeguard against any possible miscarriage of justice. Such were the characteristics of the council as it developed in Umayyad Spain. The increasing use of the council as a basic legal instrument contributed towards the development of the legal literature peculiar to Spain.

The council occupied a special place in the Andalusian judicial system. This judicial organization was considered the highest office that a jurist could attain. The ruler personally chose each mushāwar from among the famous jurists. The council was a very well-balanced representative body consisting of jurists of different attitudes, though the majority were devoted to Ḥālikism, with a few rationalists and semi-independent jurists. They were endowed with singular authority. In matters of jurisdiction, they arrived at resolutions through their own methods, and were answerable only to the ruler. These members won their posts by gaining the favour of the ruler: the

1. Ibn 'Abd ar-Ra'ūf (Risāla, p.9) said: "At least two jurists should be daily convened as the cadi's consultants, in order to avoid errors and miscarriage of justice". Ibid.
ruler, in turn, usually wanted to exploit their influence. It is, therefore, not surprising that the members of the council did not wish to give legal judgements that might alienate the ruler.¹

During al-Ḥakam's period, the councillor had only advisory power, but under ʿAbd ar-?):mān II, this institution grew in power so that it could exert considerable pressure on the cadi who presented a legal case to the member of the council for consultation. In practice as well as in theory, the institution existed as a check on the court's functions. The mushāwarūn at this period were completely accepted and began to play an important rôle in administering the state. Quite naturally, ʿAbd ar-?):mān became deeply alarmed as more and more members, particularly Yaḥyā the chief councillor, began making their judicial influence felt.

ʿAbd ar-?):mān was undoubtedly trying to curtail their activities, and it seems clear that from the late period of ʿAbd ar-?):mān the council was in decline as an influential force. On certain questions there was outright hostility to the councillors. His own act to counterbalance the juridical power of the councillors from one side and the judges from another, revealed an apprehension that the two sides might collaborate to gain power through cultivating popularity among the citizens.²

¹ cf. Murîr, Abhâth, i:179ff; ʿIyāq, Madârik, II, i:139.
² Khushanî, Cuqât, pp.78-81.
Since 'Abd ar-Rahmân II felt the danger of Yaḥyâ's increasing activity and ambition, he tried to curtail Yaḥyâ's power, but without using any overt or provocative means. He consolidated the power of influential jurists, giving them posts in which they had to function as a unit. Their jurisdiction was based on a form totally distinct from that of the court; its independence from the court resulted in disagreements amongst the councillors. The evident advantage of this policy was that of division and thus weakening of the councillors' power; the hostile attitude of each councillor towards the other manifested itself in attempts of each to nullify the legal verdicts of the other. The hostility of the councillors to some extent crippled their efficiency, yet despite the frequent and intense conflicts, they were able to exert a continuing influence on the internal affairs of the state.¹

The fear of the growing influence of Yaḥyâ and his colleagues is well documented by Spanish chroniclers. In order to diminish the power of Yaḥyâ and his coterie, 'Abd ar-Rahmân brought to the senate council in Cordova Ibn Ḥābîb, who, from the beginning, adopted an attitude of violent opposition to Yaḥyâ and his friends.² 'Abd ar-Rahmân's policy may be assumed to have represented not only a decisive minimizing of the potential danger of both cadis and councillors to the ruler's power, but also an important improvement in the administration of justice.

¹ 'Iyāq, Madārik, II, 1:38f.
² Ibid., p.31.
Although they were subordinate to government, the councillors possessed a range of discretionary powers. They could determine matters of a judicial nature; these included decisions made on their own initiative, or at the request of the governor; as well as alteration, ratification or modification of judicial decisions.

This institution served several useful purposes: (1) it relieved the cadi of some of his responsibility and his sole liability for any miscarriages of justice. (2) it maintained judicial equilibrium so that the careful and mutual surveillance of each councillor by his fellows inhibited unfair or dishonest decisions or recommendations. (3) it guarded against interference with the proper functioning of court. During 'Abd ar-Rahman's period, the council power and procedure were defined, thus helping it consolidate its position in the state.¹ No doubt the council because of its very nature, took to exercising legislative functions, while at the same time it possessed some of the characteristics of a court.

The influence of the councillors, in fact, went beyond simply prescribing procedure and finding legal solutions. Having recognized the influence exerted by councillors in the interpretation of the law, there remains the question of his influence vis-à-vis that of the jurisconsult in individual judgments. The councillors' legislative rôle should not be

¹. Ibid., pp.138ff.
neglected. They not only felt free to express their views in the supreme cadi's presence, but also had their views supported by the ruler.

According to Malikite law, the cadi had to consult legal experts. Their presence at hearings was imperative, at least when important matters were involved. The most important contribution of those experts, the councillors, was the aid they gave to the courts. Their chief contributions, therefore, lay not only in providing judicial views and procedures needed to justify legislation in process, but also in furnishing a procedural basis for extending the jurisdiction of the courts.

**Testimony of the Expert**

According to the rule of 'default' in Spanish Malikite law, the common standard applied for decision of cases of tort was to administer what is suitable under the circumstances. This suitability was not always decided by the court; it sometimes fell beyond the scope and discretion of the cadi. It was natural, therefore, that the court should in some way have to rely on experts to analyse the facts involved and to give the court aid in settling the dispute. The cadi found that the testimony which deserved most credit with the court was that of the skilled witness. Legal scholars such as Ibn Farhun, were convinced that it was of the greatest importance that cadis or

legal administrators charged with the duty of ascertaining the truth should be assisted by the knowledge and opinions of the specialists. ¹

Although the experts were usually chosen to judge the relevant facts upon which the particular issue at court turned, their judgements were not always of the nature of the evidence. ² In cases, for example, involving fraudulent trading, the court usually summoned skilled persons to find out the nature of the fraud, its history and its cause and effect, and upon their verdict the court gave its decision. As to the evidential value of the expert's information, there was perhaps no disagreement among jurists on the importance of the expert's testimony, but some disagreement over the general principles and natural laws derived from their specialized experience, which perhaps coloured their advice. ³

The expert's testimony was not always decisive, especially when there was disagreement among the experts as to the analysis of the case. For example, in a dispute between a vendor and a vendee concerning a defect in the house purchased in legal transaction between them, the Spanish jurists would have settled the dispute by the experts' testimony. In a case where the


². This is the opinion of Ibn Rushd. See Mayyāra, Sharh, 1:72.

³. Mayyāra, Sharh, 11:249.
experts were equally divided by opinions directly opposed to each other, Ibn 'Attāb said that the case should be settled according to the more just testimony.¹ When alleged defects in a property resulted in dispute between the seller and the buyer, Ibn al-Gaṭān said that if there were two opposing testimonies, one of which certified the claim's authenticity while the other denied it, a decision must be taken in the light of the affirmative one.²

Furthermore, since there were different views as to the value of the testimony of the experts, there was growing demand from North African jurists for a set requirement of the number of the expert witnesses necessary to give validity to their evidence. For example, on the procedure of partition of estates among co-heirs or co-partners, Mālik contended that the partition of the estate could be performed by one expert appraiser.³ But the Ifriqiyyan jurist Abū Is'ḥāq at-Tūnīṣī insisted that there must be two valuers in order to protect the partner's right against liability. Since value is a matter of opinion, then one person presumably could not give a fair estimate. Hence the partition was likely to be unsatisfactory to either party.

The rationale behind this view was that Mālik regarded the person who made the evaluation as merely a representative

¹. Ibn Farḥūn, TabṣIRA, ii:77.
². Ibid.
of the court, and since he was not acting as a witness only one person was needed to do the job. The Tunisian jurists maintained that the person who made the valuation was a witness to the value, and consequently the procedure of evidence required two persons.¹

The rule of evidence adopted by the Spanish courts was, in many respects, totally at variance with those known to the Ifriqiyyan courts. The retention of some of the Awzā‘I laws and the adoption of others from al-Layth’s opinions countered invasions of Malikite elements. In Awzā‘I law the testimony of two witnesses was generally required in disputes involving criminal and civil law, contrary to the rule of the Ifriqiyyan court which held that a dispute could be settled by the evidence of only one witness under oath.²

Yaḥyā reinforced the practice of using two witnesses by imposing al-Layth’s doctrine which was identical, in this respect, to the Awzā‘I. Under the influence of al-Layth, Yaḥyā made it obligatory for the courts to have no less than two male witnesses, or one male and two female witnesses.³

¹. Ḥaṭṭāb, Maw, vi:337.
². In the court of Qayrawān, Saḥnūn said that all the cases which might be settled by one witness plus the oath of the plaintiff could be judged by the testimony of one male witness and two female witnesses. See Ḥaṭṭāb, Maw, vi:161.
³. The Spanish court continued applying this particular law until the middle of the sixth century (540/1145). Ibn al-‘Arabī (al-Ḍā‘ī Abū Bakr, cadi of Cordova, d.544/1149, is assumed to have been the first cadi who was able to abolish this law; he restored it to Malik’s doctrine. See Ibn al-‘Arabī, Abkām, i:421.
The law of judiciary oath was admissible if it affected pecuniary or proprietary interest, but not if it would involve the declarant in criminal liability.

The well known hadīth, "Evidence should be offered by the plaintiff, and the oath should be taken by the defendant," made it clear that the oath should be applied whenever a plaintiff could not produce any evidence; the oath was generally administered to the defendant who was ordered to verify the truth of his statement by oath.¹

According to that hadīth, the oath (al-yāmīn) had the character of legal evidence. A party who produced testimony insufficient to make his case stand up in court, for example, a plaintiff who had only one witness, could strengthen his case by taking an oath in support of the credibility of his case. But the Spanish courts did not recognise any such procedure. Their rationale, in such instances, was that, "since the Arabs conquered Spain the court never applied the oath plus the one evidence rule." In support of their position, they said that al-Layth b. Sa'd was against such a procedure.²

A defendant could take the oath not only when the plaintiff had insufficient evidence, but he could also take it when the other party refused to swear (nakal 'an al-yāmīn); the refusal being considered a tacit confession. This "nukūl", refusal to

take the oath, however, was, in Malikite law, made equivalent to differing degrees of guilt.\(^1\) The plaintiff's lack of adequate evidence could lose him his claim unless he gave an oath to add credibility to the evidence of his litigation. But in regard to such defensible oaths, Malik maintained that a defendant would be required to swear, to show his innocence of a charge, only when the case concerned involved property.\(^2\)

Despite Malik's latitude in this particular law of evidence, he was far from arbitrary in limiting the scope of the testimony of one witness plus the oath of the plaintiff to only those cases involving pecuniary disputes. The oath could not be given to the plaintiff in criminal cases (homicide or personal assault), because an accusation of assault could not be made unless supported by indisputable proof, which would leave no shadow of doubt.\(^3\)

There was contempt among Spanish jurists for the Ifriqiyyan court because of its preference for one trustworthy witness, and the oath of the plaintiff against two trustworthy witnesses on the ground that it was far from solicitous of the rights of the accused.\(^4\) As far as the Spanish Malikite law was concerned, Spanish jurists took into account the number of the

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1. Ḥattaḥ, Maw, vi:219.
testimonies which corroborated each other. But Saḥnūn, as his son reported, maintained that the accused ought to be declared innocent, if the witnesses for the defence were of greater authority than those for the prosecution. On the other side, Spanish courts were very favourable towards Ifriqiyya's method of deciding between conflicting testimonies. A case is cited by Ibn ʿArafā (d.803/1400) when he was dealing with navāzīl of Saḥnūn (Saḥnūn's legal action) and quoted by Ḫattāb. Some witnesses declared that a certain person killed another person on a particular day whilst other witnesses testified that on that day the accused was to be found in another place, far enough away from the scene of the crime not to be implicated.

**Witnesses' qualification**

The use of certain men who had general knowledge as to the reliability of witnesses seems to have been a new device used by the Maghribī court, to speed court procedure in circumstances where trial of cases depended on the quality of witnesses testimony. Before hearing the evidence, the 'board of attestation evaluated the witness's integrity' and tried to verify the credibility of the witness. The member of this board usually dealt with the accredited witnesses whose character was not known to the cadi. The cadi himself employed a sort of

1. Ḫattāb, Maw, vi:209.
2. Ibid., vi:208.
private spy, who had to accredit witnesses before evidence could be accepted.¹

The task of the members of the board was to make inquiries into the personal history of the witness; to discover any previous legal convictions and investigate his habits, disposition and the esteem in which he was held by his friends and neighbours.²

The general view of the law as to the capacity to give evidence, conferred by the process of accrediting, held good for some months, at most for a year. But Saḥnūn assumed that the witness's credit was prone to change according to the pressure of social and economic conditions. Therefore, he insisted that the witness's character had to be certified every time he gave his testimony.³

As regards the competency of the witnesses, there were certain qualifications without which the witness would be excluded from giving evidence as a witness in any proceeding. Among those qualifications were: 1) integrity, that is the witness must not have been himself convicted of any crime; 2) He must not have any sectarian views that would prejudice his testimony; 3) He must, at the time of witnessing evidence and of giving testimony, have had the mental capacity to have understood all the provisions of the testimony lest he might be deceived by falsified evidence.⁴

2. Ḥaṭṭāb, Ṣaw, vi:116f.
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