# A Theory of Early Classical Ḥanafism: Authority, Rationality and Tradition in the *Hidāyah* of Burhān al-Dīn ʻAlī ibn Abī Bakr al-Marghīnānī (d. 593/1197)

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بسم الله الرحمن الرحيم

To my parents, Muhammad and Nasim Hanif.

Without you both, none of this would have been possible.

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# Abstract

*Fiqh*, literally ‘deep understanding’, is the science of religious law in Islam. What does it mean for an Islamic jurist to ‘do *fiqh*’? And how does an engagement with *fiqh* guide a jurist to produce statements of law for particular social contexts? These are perennial questions in the field of Islamic legal studies. The current thesis offers an answer to these questions from the viewpoint of jurists from the early classical Ḥanafī tradition of Central Asia. The thesis starts with an examination of Central-Asian Ḥanafī works of legal theory to extract the underlying epistemological foundations of this legal tradition. The remainder of the thesis presents a series of investigations into a leading work of legal commentary – the *Hidāyah* of Burhān al-Dīn ‘Alī ibn Abī Bakr al-Marghīnānī (d. 593/1197) – to assess how these epistemological foundations inform the work. These investigations range from a study of the processes by which the legal cases commented on in the work were seen to be authoritative, to a study of the use of rational arguments, dialectical sequences and juristic disagreement in exploring and expositing cases of the law. The thesis also studies points of theory employed in the commentary that reveal how social context was seen to impact on the production of law. The study concludes by suggesting a general theory of Ḥanafī jurisprudence, explaining what it means to ‘do *fiqh*’ – presented as a particular form of engagement with the legal cases transmitted from the teaching circle of Abū Ḥanīfah (d. 150/767), the school’s eponym – and how this *fiqh* engagement with Ḥanafī precedent informed the production of legal statements tailored to specific contexts – by the application of a particular filter of legal mechanisms, each of which reflects an understanding of the overarching principle of ‘necessity’ (*ḍarūrah*). The study presents a uniquely Ḥanafī legal epistemology which is underpinned by particular notions of authority, rationality and tradition.

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# A Note on Dates and Transliteration

The transliteration system I have followed is the system of the Library of Congress, except I do not distinguish between *alif* and *alif maqṣūrah* (e.g. *lā* vs *ilā*). When a century is mentioned, what is meant is the century according to the Islamic calendar. Where I present years on both Common Era and Islamic calendars, I separate the two with a forward slash, presenting the Islamic year first. Where I do not know the exact month in the Islamic year for the event I am referring to (usually the date of someone's death), I present a split date in the Common Era equivalent, showing the two Common Era years in which the intended Islamic date might have occurred.

# Introduction

This is a study of legal epistemology in the early-classical Ḥanafī tradition. 'Early-classical' depicts, primarily, the fifth and sixth Islamic centuries, two centuries of scholarly activity that occurred after the full maturation – both doctrinally and socially – of the Islamic schools of law, the *madhhab*s. Doctrinally, these schools developed a sophisticated legal theory through which they defended the legal cases upheld by each school as authoritative doctrine.[1] Socially, these schools functioned as guilds of law, where master-student relations were documented, legal output was regulated by the guild, and guild-members displayed their legal prowess through commentary works on key school texts.[2] With respect to the Ḥanafī school of law, the leading written works of these two centuries remained among the most referenced works in the later history of the school[3] and can thus be termed the 'classics' of the Ḥanafī legal tradition.

The current thesis is a study of what is arguably the greatest of these classics, a work of legal commentary written towards the end of this period, upheld as the best summary of the early classical tradition: the *Hidāyah* of the Central Asian Ḥanafī jurist, Burhān al-Dīn 'Alī ibn Abī Bakr al-Marghīnānī (d. 593/1197), one of the most

[1] The doctrinal school is Wael Hallaq's term for the fully mature *madhhab*, explained in brief in Wael Hallaq, "From Regional to Personal Schools of Law? A Reevaluation", 19-25, and expanded in Wael Hallaq, *Authority, Continuity and Change in Islamic Law*.

[2] That the fully mature *madhhab* functioned effectively as a self-regulating guild of jurists was a thesis advanced by George Makdisi over several publications: George Makdisi, "The Guilds of Law in Medieval European History: An Inquiry into the Origins of the Inns of Court", 4-7; idem, *The Rise of Humanism in Classical Islam and the Christian West*, 18-22; idem, "Baghdad, Bologna and Scholasticism"; idem, "'*Ṭabaqāt*'-Biography: Law and Orthodoxy in Classical Islam". On the formation of the guild-schools, see Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.*

[3] Talal al-Azem shows that more jurists who died between 400 and 650 were cited as authority figures in a ninth-century Ḥanafī legal commentary than jurists from any other period: Talal al-Azem, *Rule Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlūbughā's Commentary on* The Compendium *of Qudūrī*, 50-84.

exposited legal works in Islamic history.[4] Its authoritative representation of the early classical school tradition is succinctly summarised by the oft-quoted couplet,

> Verily, the *Hidāyah*, like the Qur'an, has abrogated the books of sacred law they authored from afore,
> So guard its principles and tread its pathways, your words will be saved from deviation and falsities.[5]

Its stature in the memory of the school is reflected by Qāsim ibn Quṭlūbughah's (d. 879/1474), *al-Taṣḥīḥ wa-al-tarjīḥ*, a ninth-century work that summarised authoritative school doctrine down to Ibn Quṭlūbughā's time, where the *Hidāyah* was by far the most quoted work, and its author the most quoted authority.[6] The lasting interest in this classic continued through to the modern era, where it served as a central text informing Anglo-Muhammaden Law, a merging of British and Islamic law applied by the British colonial authority in India.[7] Given the lasting interest in this text, a historical study of the various engagements with it across space and time is needed. The current work, however, is not a historical study; it is a study of legal epistemology.

A legal epistemology studies how we come to know the law. Now, 'law', when used in the current study, does not refer to a code that is necessarily enforced by a state entity, as we intend by 'law' in our modern context. Rather, as Islamic law is an example of a divine law, 'law', in our discussions, is a reference to what God expects a person to do or not to do.[8] The question that naturally arises concerning a divine law is "How do you *know* what God expects you to do?" This is a question concerning the epistemology of law. The Islamic discipline that attempts to reveal

[4] I present a list of Ḥanafī legal commentaries on pages 140-2, below, relying on two classical bibliographic sources. These sources record almost one-hundred commentaries on the *Hidāyah*, more than they record on any other Ḥanafī epitome (*mukhtaṣar*) or commentary.
[5] Quoted in Kātib Çelebi, *Kashf al-ẓunūn 'an asāmī al-kutub wa-al-funūn*, 2:2022.
[6] Al-Azem, *Rule Formulation*, 71.
[7] See John Strawson, "Translating the Hedaya: Colonial Foundations of Islamic Law".
[8] The Oxford English Dictionary defines a divine law as "The body of commandments which express the will of God with regard to the conduct of His intelligent creatures": *Oxford English Dictionary*, s.v. "Law".

God's law is *fiqh*, literally meaning 'deep understanding'. The *fiqh* tradition itself tells us that God's law is rarely arrived with certitude; the most we can hope for is arriving at a strong preponderance in favour of having found the law. Epistemology is therefore a key activity of this legal tradition, whose *uṣūl al-fiqh* (lit. 'roots of deep understanding') literature provides exhaustive details of sources of knowledge pertaining to the law and how these are to be engaged to arrive at a strong preponderance of having found God's law. Though the *uṣūl al-fiqh* literature provides exhaustive epistemological discussions, a long-standing debate in contemporary scholarship challenges the role of this literature in actually determining God's law, with many suggesting that it only functioned as a tool to justify already accepted statements of law transmitted in the *fiqh* tradition.[9]

It is the *fiqh* tradition itself, meaning the literature that actually provides statements of substantive law, that must be engaged with to fully grasp the question of what it meant to an Islamic jurist to know the law. Therefore, rather than exploring the seemingly endless intricacies of *uṣūl al-fiqh*, the current study seeks a more conceptual understanding of the *fiqh* project. This conceptual understanding can be summarised in two basic questions: What is *fiqh*, and what is the law? 'What is *fiqh*' asks what it means to engage with this tradition; what are the basic methods and objectives of the engagement with *fiqh*: Simply speaking, what does it mean to

[9] Studies suggesting that the categories of *uṣūl al-fiqh* served not to produce law, but to justify already existent statements of law include Sherman Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Uṣūl al-Fiqh*"; Mohammed Fadel, "'*Istiḥsān* is Nine-Tenths of the Law': The Puzzling Relationship of *Uṣūl* to *Furū'*"; Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition*, esp. 34-39. In recent decades, one of the few outspoken proponents of *uṣūl al-fiqh*'s ability to generate law is Wael Hallaq, in several of his publications, including, "Considerations on the Function and Character of Sunnī Legal Theory", where he presents "discovering the law of God" as one of *uṣūl al-fiqh*'s primary functions. See also Robert Gleave's introduction to Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Law*, xii-xiii, for a brief survey of this debate.

actually 'do *fiqh*'?[10] "What is the law" asks how an engagement with the *fiqh* tradition enables a jurist to formulate specific laws for a particular place or time. These two questions aim to reveal an understanding of *fiqh* as a system of knowledge that a jurist is initiated into by a particular form of training to enable a particular form of legal output, and how this system provided its practitioner the knowledge that his legal output was a faithful representation of God's law.

These broad questions will be directed to a specific school of Islamic legal thought in a specific time: the Ḥanafī school in its early classical period. The premise underlying the specificity of the current study is that schools of legal thought cannot be assumed to share the same epistemology of the Islamic legal project – meaning the same exact answer to how one *knows* the law – even if externally they appear to structure arguments and texts in a similar fashion. A legal-epistemological study should reveal what each strand of argument is meant to signify within a particular legal tradition and what end it is to serve. Only by comparing a series of such studies can we discern which epistemological premises are shared across legal schools and which are unique to particular schools. Similarly, we should not assume epistemology to remain stable across time periods within a single school of law. Although participants in legal debates within a single school tradition might argue about questions of the law in a similar manner and refer to similar authorities, particular parts of these arguments can play stronger roles in particular times than they do in others, reflecting developing notions of epistemology in a single legal tradition.

[10] This question is framed from within the tradition as befits the question of epistemology. "What is *fiqh*?" can also be asked from the 'outside' to describe the kind of system represented by Islamic law in comparison with competing systems of law. For an overview of the western engagement with this question from the 'outside', see Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*, 42-72.

The Ḥanafī school stands out from other schools in a number of intriguing ways. The first is a particular rationalism associated with the school at its inception. Abū Ḥanīfah (d. 150/767), the schools eponym, and his circle of students were accused by opponents of a predilection for applying rational insights to determine the law, even at the risk of contradicting Prophetic reports.[11] A school that gave great weight to rational inference of the law at its inception can be expected to have developed a sophisticated understanding of the role of the mind in arriving at this divine law, making it a fitting candidate for such a study. The second is that it developed an *uṣūl al-fiqh* tradition that was seen as distinct from the *uṣūl al-fiqh* tradition of other schools of law.[12] This suggests a conscious differentiation of epistemology on the part of these jurists who developed legal-theoretical tools specifically catered to their own legal tradition. The third, which builds on the second, is a peculiar attachment to the legal cases transmitted from Abū Ḥanīfah's circle. This is borne out by the Ḥanafī *uṣūl al-fiqh* literature, which ties legal theory to exploring and studying legal cases, as opposed to the *uṣūl al-fiqh* texts of other schools of law, which present legal theory as a purely theoretical approach to how the law ought to be derived.[13] This peculiar attachment to substantive law on the part of Ḥanafī legal theorists shows a conscious assignment of a particular epistemic status to the legal cases of Ḥanafī precedent around which they constructed their theory of law. Each of these features makes the Ḥanafī school well-suited for such an exploration, with its

[11] El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History*, 22-34. The texts of Abū Ḥanīfah's own students show a clear interest in the production of rationally coherent and consistent statements of law on the part of Abū Ḥanīfah: See Sohail Hanif, "A Tale of Two Kufans: Abū Yūsuf's *Ikhtilāf Abī Ḥanīfah wa-Ibn Abī Laylā* and Schacht's Ancient Schools".
[12] Ibn Khaldūn presents Ḥanafī *uṣūl al-fiqh* as a 'juristic' tradition, in view of its constant analysis of actual legal cases, in contrast with the non-Ḥanafī *uṣūl al-fiqh* tradition, which he presents as 'theological', in view of the more abstract and theoretical nature of its discussions: Ibn Khaldūn, *Muqaddimat Ibn Khaldūn*, 2:199-202. More on the distinction between these two *uṣūl al-fiqh* traditions follows in Chapter One.
[13] Ibid.

theoretical literature and its legal literature better integrated than in other Islamic legal schools.

On the question of a legal epistemology, time periods can be assumed to vary in the vistas they offer researchers. No doubt, there would have been a time period that was foundational in presenting a coherent, fully formed epistemology, and subsequent time periods would have built on this epistemology and altered it in subtle ways. The most revealing time period for the proposed study would be the initial period of a school's full maturity, with its developed literature of legal theory and commentary. It is this period that we are attempting to study, as the *Hidāyah* was authored towards the end of what I have called the early classical period. My identifying this period as being foundational in the historical development of the school is based on two scholarly studies. The first is that of Ya'akov Meron, who identifies a 'classical' period of the school, starting from the Iraqi Aḥmad ibn Muḥammad al-Qudūrī (d. 428/1037), and ending with the author of our text, al-Marghīnānī, whom he mentions, at times, as the last figure of this classical period, and, at other times, as the first scholar of a subsequent post-classical period.[14] He identifies an epistemological shift that occurs between the classical and post-classical periods, with the former focusing on knowing the law through the investigation of 'legal norms' – meaning thereby general principles underpinning topics of the law – and the latter ignoring such legal norms and focusing instead on analogy to the many cases of legal *responsa*.[15] The *Hidāyah* encompasses Meron's 'classical' period, as the author of the commentary comes at the end of this period, whilst the text on which he comments incorporates the epitome (*mukhtaṣar*) of al-Qudūrī, whom Meron identifies as the inaugural figure of the classical period.

[14] Ya'akov Meron, "The Development of Legal Thought in Hanafi Texts"; idem, "Marghīnānī, His Method and His Legacy".
[15] Meron, "The Development".

The second scholarly study that identifies this period for having particular significance in the history of the school is that of Talal al-Azem, who offers the most detailed periodisation available of the Ḥanafī school, based on a study of Ḥanafī authorities quoted in the ninth-century work *al-Taṣḥīḥ wa-al-tarjīḥ* of Qāsim ibn Quṭlūbughā. Meron's 'classical' period roughly corresponds to al-Azem's period of *tarjīḥ* (rendered by al-Azem as 'rule determination'), which lasted from the years 400 to 650.[16] This period played the greatest role in determining which legal rules were held as authoritative in this school tradition, and its texts were the most quoted texts in the later memory of the school. In al-Azem's study, al-Marghīnānī was the most quoted authority of this period – indeed, of any period – and therefore, was presented as the greatest authority in determining authoritative legal rules in the Ḥanafī school. It is interesting to note that Meron's study presents a periodisation based on the method of legal reasoning, while al-Azem's presents periodisation based on the formulation of actual legal rules. That a particular method of legal reasoning corresponds to a particular activity in rule production demonstrates how particular approaches to epistemology of the law, within a single tradition, correspond to particular forms of legal output, with the period studied here as the most influential in the history of the school. I refer to this period as 'early classical', and not simply 'classical', as the latter is often employed for all post-formative and pre-modern periods.

If we speak of time, then we must also make mention of place. Al-Azem's study shows that the most influential place in this period of *tarjīḥ* was Transoxiana.[17] In this period, the early Iraqi teachings of Abū Ḥanīfah's circle were consolidated in what I am calling the fully mature school. While Ḥanafī jurists were operating in

[16] Al-Azem, *Rule-Formulation*, 52-84, esp. 61-77.
[17] Ibid., 89-90.

many parts of the world in this period, it is the Transoxianan tradition that most defined the Ḥanafī school for posterity. A text that can give an insight into the core, fully mature epistemology of the Ḥanafī school, would be a text produced in the early classical Transoxianan tradition. Therefore, with regard to place, time and school, the *Hidāyah* is an excellent text for the proposed study. It should be noted that the *Hidāyah* is only used here as an example text, representative of the concerns of a period of juristic activity. If the current study truly reveals a meaningful epistemology of the legal project from a study of this text, then it will also help explain the practices of other authors from the same milieu.

Of previous studies, three deserve particular mention for their engagement with Ḥanafī legal commentaries, each providing conclusions that have direct bearings on the current study. These are the studies of Brannon Wheeler, Norman Calder and Behnam Sadeghi. Each of these studies provides valuable insights into the world of Ḥanafī legal commentators, and each addresses the topic from a different angle: Wheeler focuses on how these texts were authored to maintain a particular form of legal reasoning; Calder focuses on particular features in these texts through which he reflects on the form of 'science' Islamic law represents; and Sadeghi focuses on how these texts accommodate and justify change in legal doctrine. We may extract from each of these studies a possible answer to the two leading questions of the current investigation: What is *fiqh*, and what is the law?

Wheeler's study argues that the set of legal rules transmitted from Abū Ḥanīfah's circle were canonised not for their own sake, but to canonise the form of reasoning through which these rules were to be understood.[18] This form of reasoning was arrived at by discovering what he calls the 'logic' underlying the legal rules of

[18] Brannon Wheeler, *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Ḥanafī Scholarship*.

Ḥanafī precedent. He notes, "[T]o be a Ḥanafī is to follow Ḥanafī precedent as a guide for the sort of reasoning required to determine the practical significance of the revelation,"[19] an observation that places the legal cases of Abū Ḥanīfah's circle on an higher epistemic level than any direct engagement with the texts of the revelation, as those texts can only be understood in the light of these cases. He emphasises that this consideration of the logic of Ḥanafī legal rulings in these commentaries informed how the law was to be applied in differing contexts:

> By stipulating a method rather than certain conclusions, Ḥanafī scholarship teaches future scholars the reasons why certain conclusions are authoritative. Precedents are not meant to be repeated but rather used as heuristic examples indicating how previous scholarship arrived at its conclusions, and what made those conclusions authoritative.[20]

Answers to our two leading questions may be extracted from Wheeler's study. What is *fiqh*: *Fiqh* is a training in a particular form of legal reasoning arrived at by a careful inspection of Ḥanafī precedent; the tools needed for one to engage in *fiqh* are the range of methods and techniques employed in this careful engagement with Ḥanafī precedent; once trained, a jurist is able to explain this precedent, understand the texts of revelation in the light of this precedent, and formulate statements of law inspired by this precedent. What is law: The law is the legal output that results from this training in *fiqh*; it is not identical to Ḥanafī precedent – which presumably was law in its time and place – but rather it is a legal output that is faithful to the underlying logic and reasoning contained in Ḥanafī precedent. Wheeler's study suggests that, to legal commentators, Ḥanafī precedent is an example of an 'ideal' law, meaning a statement of law tied to an 'ideal' time and place, not directly speaking to their own time and place. It is not law, but it guides the jurist trained in the logic of this ideal law to produce law in its mould.

[19] Ibid., 186.
[20] Ibid., 228.

Sadeghi's study, which assesses legal change through Ḥanafī commentaries, presents the role of legal reasoning in justifying such instances of legal change.[21] He argues that *madhhab* scholars sought to uphold the law of Ḥanafī precedent – i.e. as *actual* law – but if any part of this law was seen as being intolerable due to a change in social circumstance or values, it would be changed to a more tolerable statement of law. Throughout, the purpose of legal reasoning in commentaries was to justify the law, whether this law consisted of the original 'received law' of Ḥanafī precedent or the new statements of changed law where received law was no longer practicable. In the latter case, justification was deftly employed to present this new law as a valid extension of received law. We may suggest, from Sadeghi's study, two further possible answers to our two questions. What is *fiqh*: *Fiqh* is training in a particular form of reasoning whose purpose is to justify the law; *fiqh* also entails a form of practical awareness, whereby laws that are impractical will be flagged for change. What is the law: The law is that which is documented in Ḥanafī precedent; it only shifts away from this where Ḥanafī precedent is deemed intolerable.

Norman Calder, in his study, focuses on the notably stable nature of the law reflected in these commentaries. He emphasises the role of commentators in grounding the legal statements of their source texts, the *mukhtaṣar*s, in the texts of revelation and rational argument.[22] For Calder, *fiqh* satisfies the Aristotelian notion of 'science', where the legal cases are unchanging propositions that are shown to be grounded in demonstrable proof. The generally unchanging nature of the law also reflects the theological understanding that God's law is perfect and unchanging. The law studied in *fiqh* texts cannot be viewed directly as a template for practical application, being removed as it is from temporal considerations; rather, a

[21] Behnam Sadeghi, *The Logic*, esp. Chapters 1, 7, 8.
[22] Norman Calder, *Islamic Jurisprudence in the Classical Era*, 22-73; idem, "Law".

"hermeneutical bridge" is required for its investigations to speak to "real contemporary social practice".[23] He acknowledges the presence of occasional references to social practice in this literature, but presents these as rarities that do not reflect the main concern of this tradition. *Fiqh* authorship, he argues, is ultimately an intellectual art-form, where authors find pleasure in its aesthetic presentation and their displays of erudition. We may extract from his study a third possible answer to our two questions. What is *fiqh*: *Fiqh* is the 'scientific' study of the propositions transmitted as Ḥanafī precedent; this scientific study presents the legal cases of Ḥanafī precedent as ideal statements of God's law; these ideal statements are explored primarily for the purpose of grounding them in revelatory texts and rational argument, and occasionally to extract new rules from them. What is law: It is not clear what law – with the meaning of what should actually be applied in any particular time or place – actually is, as *fiqh* only addresses it occasionally, so we cannot build a theory of what law *fiqh* provides societies; the production of law is not the goal of *fiqh*, except in as much as it provides a code for the pious to aspire to emulate.

The current thesis adds to these studies of Ḥanafī commentaries by approaching these commentary works as sites for accessing the epistemology of the Ḥanafī legal project. Where each of these studies presents the authority of Ḥanafī precedent, the current study seeks to reveal the underlying epistemological understandings that led to this set of legal rulings to acquire such authority. Where each of these studies speaks of commentators grounding the law of Ḥanafī precedent in rational and scriptural arguments, the current study attempts to understand why these arguments took the forms that they did, and what possible role they played for jurists seeking to know God's law. Where each of these studies offers varying

[23] Calder, *Islamic*, 48.

analyses of the interaction of this legal tradition with social reality, the current study attempts to identify the main mechanisms in this legal tradition for accommodating legal change and suggests how a training in the discipline of *fiqh* prepares a jurist for knowing the place of these mechanisms in the larger hierarchy of the indicators of God's law.

The study starts, in Chapter One, with the provision of a legal-theoretical lens, extracted from works of legal theory that would have been widely studied in al-Marghīnānī's Central-Asian Ḥanafī context. While it might seem odd to base a study of legal commentary on discussions from legal theory (*uṣūl al-fiqh*), as these represent two distinct genres of writing, we have seen above that Ḥanafī texts of *uṣūl al-fiqh* are better integrated into the world of legal commentary than non-Ḥanafī texts, as the former give great importance to the exposition of the legal cases of Ḥanafī precedent. This legal-theoretical lens uncovers the underlying epistemological foundations of Ḥanafī *uṣūl al-fiqh*, as well as providing a very specific answer to "What is *fiqh*" from a Central-Asian Ḥanafī *uṣūl* work. Chapter One also introduces the areas of juristic dialectic (*jadal*) and disagreement (*khilāf*), both important methods employed in commentary works for exploring the law. In Chapter Two, a detailed study is undertaken of the legal cases exposited in the commentary to uncover why this particular set of cases were seen as authoritative. In Chapter Three, argumentation in the *Hidāyah* is studied through our legal-theoretical lens, revealing the purposes and methods of investigating and justifying the law. Chapter Four presents further theories and methods for engaging the law that are found in the commentary but do not directly draw on the theory of Chapter One; prominent among these points of further theory are mechanisms for applying the law to particular social contexts. Bringing together the various forms of legal theory applied in the commentary, a general theory

of Ḥanafī jurisprudence is suggested, accounting for both what it means to 'do *fiqh*' and how this *fiqh* engagement guides a jurist in producing statements of law. This is followed by a conclusion that summarises the findings of the study and draws larger observations relating to *fiqh*, law, and the *madhhab*, and offers a specifically Ḥanafī answer to the relationship between *uṣūl al-fiqh* (legal theory) and *furū' al-fiqh* (substantive law).

After having summarised the scope of this work, I would like to reflect briefly on my use of the term 'legal epistemology' in this study. Legal epistemology is a fairly recent branch of modern legal studies, [24] with some legal theorists still questioning how it stands apart from the established fields of legal philosophy, legal theory and jurisprudence. Geoffrey Samuel offers helpful reflections on the distinction between legal epistemology, on the one hand, and legal theory and philosophy, on the other, by suggesting four key differences. First, legal theory and philosophy are universal in their goals, aiming to provide general encompassing theories of law, whereas epistemology operates on the premise that there exist different "knowledges of the law rather than a single idea of legal knowledge". Second, epistemology has a practical focus, and occupies a middle ground between theory and practice. A legal epistemologist will give as much interest to the concepts, textbooks and categories of substantive law as to the work of legal theorists, and aims to bring both poles of legal activity together to answer the larger question of what it is to know the law. Third, an epistemologist takes interest in the historical development of legal concepts and terms to better understand what they mean in the period under study. Fourth, in understanding the interface between law and social reality, the

[24] Officially forming a part of modern jurisprudence after the 1985 work of Christian Atias, *Épistémologie juridique*.

epistemologist asks whether legal knowledge draws from other forms of knowledge in its interaction with the wider human context.[25]

These four points correspond well to the premises, scope and methods of the present study, from its attempt to offer a focused study on a sub-tradition of Islamic law and its combining a study of legal theory and substantive law, to its focus on the historical passage of legal doctrine and its interest in how the interaction between law and social reality impacts on the question of knowing the law. It is with this understanding that I have termed this specifically a study of legal epistemology and not simply of legal theory, and I employ the term 'epistemology' throughout this study when describing the underlying premises on which this system of legal thought is based.

Throughout this study we will see that texts, such as the one under study, are windows onto living teaching traditions that both inform the production of these texts and provide the assumptions held by the intended audience of these texts. The epistemology presented here is the epistemology of this living teaching tradition. In other words, it is an attempt to describe a hierarchy of knowledge pertaining to the law in the minds of jurists from this tradition. We will ultimately see that the epistemology of the legal tradition is grounded in particular notions of authority, rationality and tradition. But before we embark on this journey, we will acquaint ourselves with the author of the commentary.

### *Al-Marghīnānī, Author of the* Hidāyah

'Alī ibn Abī Bakr ibn 'Abd al-Jalīl al-Marghīnānī hailed from Marghīnān, in the Farghānah province of Transoxiana. As is the case with many Central-Asian Ḥanafī scholars, biographical entries on al-Marghīnānī are brief, giving us little information

[25] Geoffrey Samuel, "What is Legal Epistemology".

about his life. Al-Dhahabī (d. 748/1348), for example, after noting that al-Marghīnānī was the scholar of Transoxiana (*'ālim mā warā' al-nahr*) and the author of the *Hidāyah* and the *Bidāyah*, simply states, "Details from his life have not reached us" (*lam tablughnā akhbāruh*).[26] However, unlike many Central-Asian scholars, al-Marghīnānī authored a work in which he described his teachers and his studies with them, known as his *mashyakhah*.[27] Although the work is no longer extant, Ibn Abī al-Wafā' (d. 775/1373) in *al-Jawāhir al-muḍīyah*, the leading Ḥanafī biographical dictionary, quotes from it in various places to point out the relationship between particular jurists and al-Marghīnānī. By bringing together these quotations, we are able to piece together a picture of his travels, studies and interests. The following is a summary from this picture, with a focus on details that will help contextualise the discussions of the current study.

He was reportedly born in 511/1117.[28] His initial studies were with his maternal grandfather, 'Umar ibn Ḥabīb ibn 'Alī al-Zandrāmisī (d. ?),[29] who had been a leading student of the *qāḍī* Aḥmad ibn 'Abd al-'Azīz al-Zawzanī (d. ?), after whose death he studied with the renowned Shams al-A'immah Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī (d. *c.* 483/1090). This grandfather, with whom al-Marghīnānī studied some cases of legal disagreement (*khilāf*), is his first of several links to the influential Bukharan school of al-Sarakhsī.[30] After his grandfather's death, he studied with Ẓahīr al-Dīn Ziyād ibn Ilyās (d. ?) (a student of the renowned *uṣūl al-fiqh* author Fakhr al-Islām al-Bazdawī (d. 482/1089)) with whom al-Marghīnānī studied some

[26] Al-Dhahabī, *Siyar a'lām al-nubalā'*, 21:232.
[27] This is the usual name given to it by Ibn Abī al-Wafā'. He also refers to it as *mu'jam al-shuyūkh*.
[28] I have only found this date in al-Laknawī's introduction to his commentary on the *Hidāyah*: al-Laknawī, *al-Hidāyah sharḥ Bidāyat al-mubtadī ma'a sharḥ al-'allāmah 'Abd al-Ḥayy al-Laknawī*, 1:12. It is a reasonable date and accords with the death dates of his early teachers mentioned below.
[29] Ibn Abī al-Wafā' refers to him as al-Zandrāmisī in one place and al-Zandrāmishī in another: Ibn Abī al-Wafā', *al-Jawāhir al-muḍīyah*, 1:389, 2:313.
[30] Al-Azem asserts that it was through the person of al-Sarakhsī and his teacher al-Ḥalwānī (d. 448/1056-7) that the Ḥanafī school, as a social guild, was established in Transoxiana: al-Azem, *Rule-Formulation*, 67-77.

matters from *fiqh* and juristic disagreement.[31] After this period of initial studies, he travelled widely and studied with a great many teachers. In total, the entries from his *mashyakhah* reveal twenty-eight teachers, ranging from those he presented as mentors in *fiqh*, to teachers in *ḥadīth*, scholars who gave general authorisations (*ijāzah*) to narrate books, and ascetic figures. His travels took him to Bukhara, Samarqand, Marv, Nishapur, Hamadan, Mecca and Medina.

One of his primary *fiqh* mentors was Minhāj al-Sharī'ah Muḥammad ibn Muḥammad ibn al-Ḥasan (d. ?), concerning whom little is known. Al-Marghīnānī held him in high regard: "My eye never saw anyone more unique in virtue, nor greater in knowledge. … I studied with him in my youth at the beginning of my studies, and I kept drawing from his oceans and benefitting from his lights until the year 535/1141-2."[32] He recorded notes from this teacher (*'allaqtu 'anhu*) on the main written works attributed to Abū Ḥanīfah's student Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189/805): *al-Jāmi' al-ṣaghīr*, *al-Jāmi' al-kabīr*, *al-Ziyādāt*, and most of the books from the *Mabsūṭ* (*mu'ẓam al-kutub al-mabsūṭah*),[33] along with the *Adab al-qāḍī* of al-Khaṣṣāf (d. 261/874-5). Another *fiqh* mentor of his was Ḍiyā' al-Dīn Muḥammad ibn al-Ḥusayn ibn Nāṣir al-Yarsūkhī (d. ?), through whom he was connected to a prominent chain of Samarqandī teachers.[34] Another Samarqandī master with whom he studied was the renowned Najm al-Dīn 'Umar ibn Muḥammad ibn Aḥmad al-Nasafī (d. 537/1142), with whom he studied some of the *shaykh*'s own written works and the *Kitāb al-Musnadāt* of al-Khaṣṣāf.[35] A final Samarqandī *shaykh* whom he presents as a

[31] Ibn Abī al-Wafā', *al-Jawāhir*, 1:245-6.
[32] Ibid., 2:115.
[33] The largest work attributed to Muḥammad al-Shaybānī is *al-Aṣl*, also known as *al-Mabsūṭ*. Each of its sections is termed a book; thus the whole collection is sometimes referred to as *al-Kutub al-mabsūṭah* ('the drawn-out books'). This is also the name used by Abū al-Layth al-Samarqandī (d. 373/983) in the beginning of his *al-Nawāzil*: Mangera, "A Critical Edition of Abū Al-Layth Al-Samarqandī's Nawāzil," 111-112.
[34] Ibn Abī al-Wafā', *al-Jawāhir*, 2:51-2.
[35] Ibid., 1:394-5. I am not aware which of al-Khaṣṣāf's works this is a reference to.

*fiqh* mentor was the leading *muftī* and teacher Shaykh al-Islām ʻAlī ibn Muḥammad ibn Ismāʻīl al-Isbījābī (d. 535/1141). Al-Marghīnānī speaks of studying with him over a long period (*muddah madīdah*); considering that al-Marghīnānī was twenty-four when he died, al-Isbījābī must have been another of his teachers from his early youth. He studied with him the books of al-Shaybānī: *al-Ziyādāt* and parts from the *Mabsūṭ* and the *Jāmiʻ*,[36] and received from him a written authorisation to issue *fatwā*s.[37]

Al-Marghīnānī was connected to the Bukharan school of al-Sarakhsī by two other *fiqh* mentors. The first is al-Ṣadr al-Shahīd ʻUmar ibn ʻAbd al-ʻAzīz ibn ʻUmar ibn Māzah (d. 536/1141), whose father, known as Burhān al-A'immah, was a leading student of al-Sarakhsī and served as a civic leader of Bukhara.[38] Al-Marghīnānī speaks of learning *fiqh* and *naẓar* from al-Ṣadr al-Shahīd, the latter presumably being a reference to juristic dialectic or *jadal*.[39] Al-Ṣadr al-Shahīd died one year after the aforementioned al-Isbījābī, when al-Marghīnānī was twenty-five years of age. The second mentor connecting him to al-Sarakhsī is ʻUthmān ibn Ibrāhīm ibn ʻAlī al-Khuwāqandī (d. ?), a teacher in Farghānah who was a student of al-Sadr al-Shahīd's father, Burhān al-A'immah.[40]

We can take from the descriptions of his studies and the death dates of his mentors, that his main *fiqh* mentors were three: Minhāj al-Sharīʻah Muḥammad ibn Muḥammad, Shaykh al-Islām ʻAlī al-Isbījābī and al-Ṣadr al-Shahīd ʻUmar ibn Māzah.[41] By the time he was twenty-five, he had completed his studies with them. Of the first mentor we know little, although the fact that al-Marghīnānī describes him as

[36] He does not specify which of the two *Jāmiʻ*s, the *ṣaghīr* or the *kabīr*, this is a reference to.
[37] Ibid., 1:370-1.
[38] *Encyclopaedia Iranica*, s.v. "Āl-e Burhān", by C.E. Bosworth.
[39] Ibn Abī al-Wafā', *al-*Jawāhir, 1:391-2.
[40] Ibid., 1:343.
[41] We can consider the aforementioned Ḍiyā' al-Dīn Muḥammad ibn al-Ḥusayn ibn Nāṣir al-Yarsūkhī as a fourth main *fiqh* mentor: Ibn Abī al-Wafā' provides the emphatic, "And from him was the author of the *Hidāyah* trained in *fiqh*" (*wa-ʻalayhi tafaqqaha Ṣāḥib al-Hidāyah*). However, as we know no details of his studies with him, when this *shaykh* died or what al-Marghīnānī said of him, we are unable to comment on the role played by this teacher.

his teacher from a young age would suggest that he was a teacher in his native Farghānah, while al-Isbījābī was Samarqandī and al-Ṣadr al-Shahīd was Bukharan. This shows his travelling between these Transoxianan centres during his early training. To summarise his relation between prominent Transoxianan masters, Figures 1 and 2, respectively, show al-Marghīnānī's links to the main masters of Bukhara and Samarqand. Names in bold feature prominently in the legal-theoretical discussions of Chapter One. Black arrows represent *fiqh* mentorship, while dashed arrows show authorisation through *ijāzah* (meaning the authorisation to transmit texts through the teacher's chain of transmission without necessarily having studied these texts with the teacher).

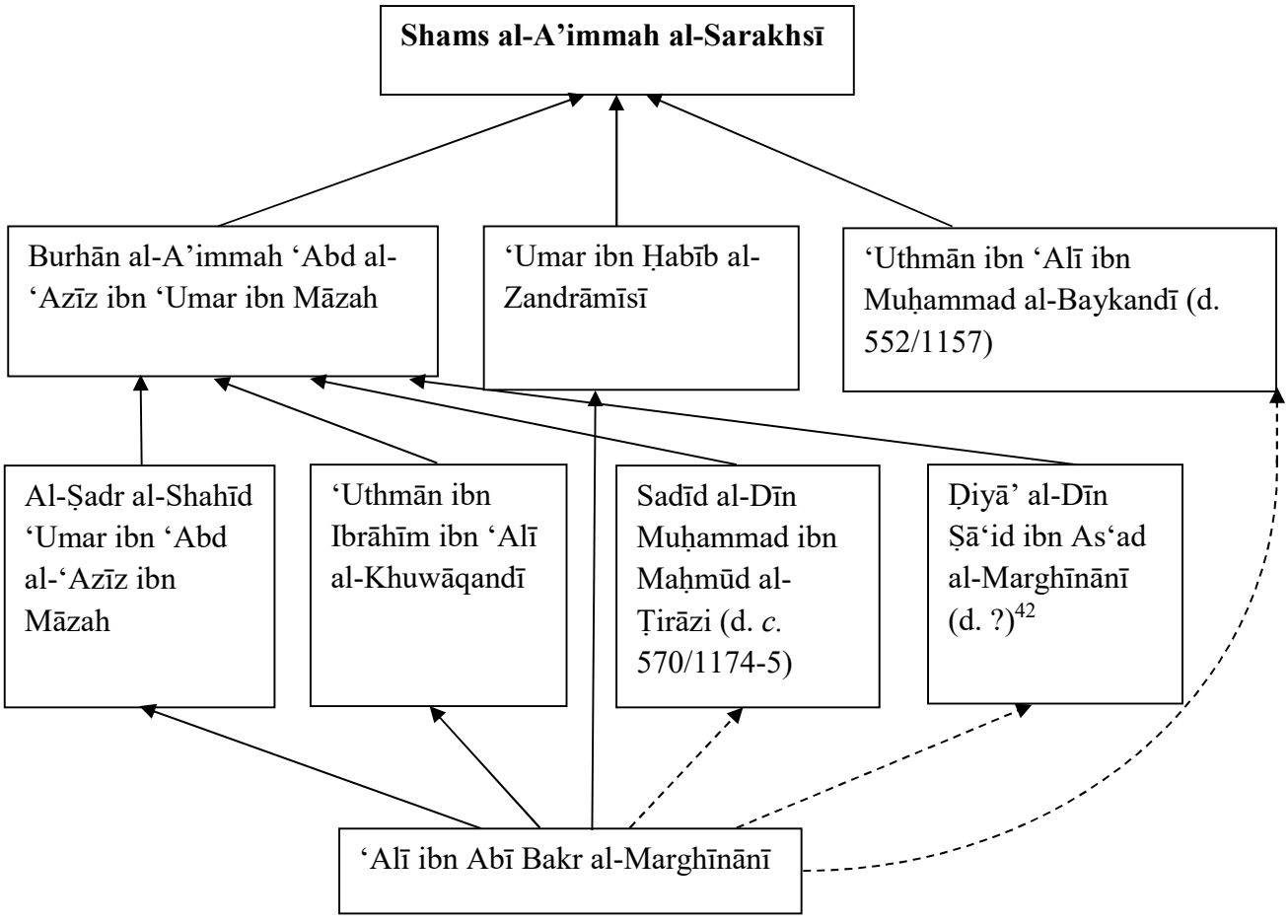


*Figure 1: al-Marghīnānī's links to Bukharan jurists*

[42] This *ijāzah* was in the *Jāmi'* of al-Tirmidhī (d. 279/892), which Ṣā'id ibn As'ad heard read from Burhān al-A'immah: Ibn Abī al-Wafā', *al-Jawāhir*, 1:259.

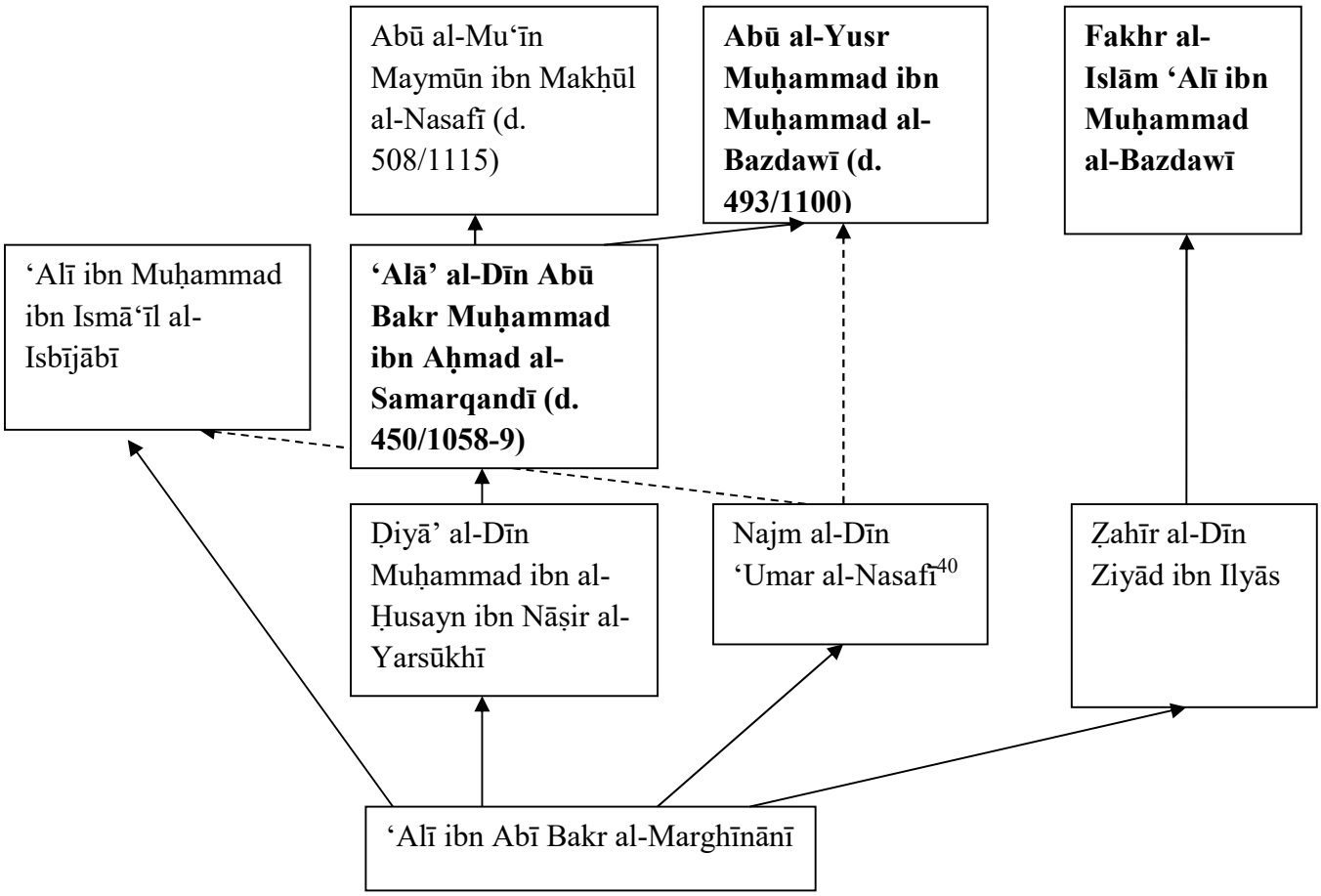


*Figure 2: al-Marghīnānī's links to Samarqandī jurists*

A distinction between these Samarqandi and Bukharan traditions is not always identifiable, as masters, such as al-Marghīnānī himself, regularly travelled between these centres, both as students and as teachers. For example Abū al-Yusr al-Bazdawī, presented here as a Samarqandī master due to the prominence of his Samarqandi links, is hailed both as the head judge (*qāḍī al-quḍāh*) of Samarqand and as a teacher in Bukhara, where he died,[44] and the Bukharan Shams al-A'immah al-Ḥalwānī (d. 456/1064)[45] was a teacher for each of al-Sarakhsī, Abū al-Yusr al-Bazdawī and Fakhr

[43] Both arrows from 'Umar al-Nasafī are dashed, as references to both teachers in Ibn Abī al-Wafā''s work only indicate his narrating (books or *ḥadīth*s) from these two scholars. Otherwise, he had many teachers and wrote of them in *Ti'dād al-shuyūkh li-'Umar mustaṭraf 'alā al-ḥurūf mustaṭar*, containing 550 *shaykh*s: ibid., 1:394-5; Kātib Çelebī, *Kashf*, 1:418.
[44] Ibn Abī al-Wafā', *al-Jawāhir*, 2:270-1.
[45] Some later scholars (*muta'akhkhirūn*) called him al-Ḥalwā'ī: see Ibn al-Ḥinnā'ī, *Ṭabaqāt al-ḥanafīyah*, 2:61.

al-Islām al-Bazdawī, making him one of the grand-*shaykh*s of all Transoxiana.[46] One distinguishing feature that can be identified, however, is a marked Samarqandi interest in the theological school of Abū Manṣūr al-Māturīdi (d. 333/944-5), a Samarqandi *shaykh*: Abū al-Mu'īn al-Nasafī was the leading propagator of the Māturīdī school;[47] each of Abū al-Yusr al-Bazdawī and 'Umar al-Nasafī authored Māturīdi theological works;[48] and 'Alā' al-Dīn Abū Bakr al-Samarqandī attempted a theologically inspired Ḥanafī *uṣūl al-fiqh* work.[49] While Figure 2 shows al-Marghīnānī's connections with these leading Māturīdī scholars, mention of *kalām* is conspicuously absent from his *mashyakhah*, suggesting he had little interest in the discipline.[50] This would appear an influence from the Bukharan tradition, whose main *shaykh*, al-Sarakhsī, had no apparent interest in speculative theology (*kalām*).[51] More work is needed on the relationship between these two main Transoxianan traditions, on which more will be mentioned later in the current study.[52]

A recurring feature in al-Marghīnānī's *mashyakhah* is his interest in the transmission of books and *ḥadīth*s. There are fifteen *shaykh*s from whom he records an authorisation (*ijāzah*) to transmit knowledge from them; some of these are general authorisations to transmit everything the *shaykh* had heard – with phrases such as

[46] Al-Dhahabī, *Siyar*, 18:177.
[47] Ulrich Rudolph, "Ḥanafī Theological Tradition and Māturīdism", 291-3.
[48] Abū al-Yusr authored *Uṣūl al-dīn*, edited by Hanz Peterlins; and 'Umar al-Nasafī authored a famous creed known as *al-'Aqā'id* or *al-'Aqā'id al-nasafīyah*: Kātib Celebī, *Kashf*, 2:1145.
[49] 'Alā' al-Dīn al-Samarqandī, *Mīzān al-uṣūl fī nata'ij al-'uqūl*, 1-5.
[50] Although Ibn Abī al-Wafā' does not quote from the entire *mashyakhah*, his mentioning several figures of no juristic pedigree only for their mention in the *mashyakhah* (such as ascetics, see below) gives a degree of confidence that he mentions all teachers listed by al-Marghīnānī. Furthermore, Ibn Abī al-Wafā' mentions names of texts studied; had a *kalām* book been named in the *mashyakhah*, he would likely have mentioned it.
[51] Aron Zysow, "Mu'tazilism and Māturīdism in Ḥanafī Legal Theory", 239.
[52] I advise caution against identifying scholars as being either Bukharan or Samarqandi if they are known to have had links to both centres. Talal al-Azem, on the other hand, categorically identifies al-Marghīnānī as Bukharan: al-Azem, *Rule-Formulation*, 71, 228. However, in addition to al-Marghīnānī's prominent links to both towns, he appears to have authored the *Hidāyah* in Samarqand, as the first to study it from him studied it in Samarqand (see below), and he died in Samarqand (as clearly inferred from Ibn Abī al-Wafā', *al-Jawāhir*, 1:4). Bukhara does not, therefore, dominate Samarqand in his biography, neither in residence, nor in intellectual heritage, nor in his final resting place.

*ijāzah ʻāmmah* (general authorisation), *ijāzah bi-jamīʻ masmūʻātihi* (authorisation to transmit everything he had heard [from his teachers]), or "*ajāza lī riwāyat jamīʻ mā ṣaḥḥa min masmūʻātihi wa-min mustajāzātihi wa-muṣannafātihi*" ("He authorised me to transmit everything established to be from what he heard, what he sought an *ijāzah* in and what he authored) – whilst with others he names particular texts he transmitted through these *ijāzah*s. For example he tells us that in Marv, in 545/1151-2, he received a general authorisation from Muḥammad ibn ʻAbd al-Raḥmān al-Kushmīhanī (d. 548/1153). Included in this authorisation was the permission to transmit *Ṣaḥīḥ al-Bukhārī*, most of which he read to the *shaykh*, and the rest he conveyed by *ijāzah*; he mentions the full chain connecting him through this *shaykh* to al-Bukhārī with the year in which each person in the chain was authorised.[53] He read all of the renowned *ḥadīth* collection *Jāmiʻ al-Tirmidhī* with Ḍiyāʾ al-Dīn Ṣāʻid ibn Asʻad in Marghīnān, and narrated it by *ijāzah* from Ẓahīr al-Dīn al-Ḥasan ibn ʻAlī al-Marghīnānī (d. ?), both of whom heard the book from Burhān al-Aʾimmah, al-Sarakhsī's student.[54] Non-*ḥadīth* books he narrates by *ijāzah* include a chain in al-Shaybānī's *al-Siyar al-kabīr* passing through al-Sarakhsī from al-Marghīnānī's teacher Aḥmad ibn ʻAbd al-ʻAzīz ibn Māzah (d. ?),[55] the *Tafsīr al-wasīṭ* of al-Wāḥidī (d. 468/1076) from Muḥammad ibn Abī Bakr al-Būsanjī (d. ?),[56] and the *Sharḥ* [*maʻānī*] *al-āthār* of al-Ṭaḥāwī (d. 321/933) from Muḥammad ibn al-Ḥasan ibn Masʻūd (d. ?)[57] – providing his full chain of transmission connecting him to the authors of each of these works. The attainment of the *ijāzah* seemed a formal process; he would often note whether it was given verbally, or in writing, or both, and which city it was given in. Interestingly, with al-Ṣadr al-Shahīd and al-Isbījābī, identified

[53] Ibn Abī al-Wafāʾ, *al-Jawāhir*, 2:76-7.
[54] Ibid., 1:198-9, 259.
[55] Ibid., 1:74-5.
[56] Ibid., 2:35.
[57] Ibid., 2:46-7.

above as two of his three main early *fiqh* mentors, he mentions that he did not receive an *ijāzah* from either of them and provides indirect chains through which he narrates through these teachers, despite the fact that he was given a written authorisation to issue *fatwā*s by al-Isbījābī.[58] Also interesting is that he is said to have studied *fiqh* with the Samarqandī Ḍiyā' al-Dīn al-Yarsūkhī, but that he only received the *ijāzah* from him in Marv in 545/1151-2, through which he narrates *Ṣaḥīḥ Muslim*.[59] These last two observations suggest perhaps that the seeking of *ijāzah*s was an interest that developed after his initial studies, denying him the ability to seek them from his teachers who had already died.

In addition to the specific *ḥadīth* works mentioned above, his general interest in transmitting *ḥadīth*s appears to have been a ongoing pursuit. Throughout his *mashyakhah* he mentions Prophetic reports that he transmitted from particular teachers. The sharing of Prophetic reports was clearly an important part of knowledge transmission. We are told, for example, that he travelled to perform the Hajj pilgrimage in the year 544/1150-1 in the company of the Balkhi *shaykh* 'Umar ibn 'Abd al-Mu'min al-Kajwādirī (d. ?), whom he accompanied on the journey to Mecca, Medina and then to Hamadān; along the way, we are told he studied *ḥādīth*s with him.

His interest in *ḥadīth*s, *ḥadīth* transmission and book transmission is highlighted here for a reason, namely, that it stands in stark contrast to his approach to *ḥadīth*s and received tradition in the *Hidāyah*. We will see that although *ḥadīth*s are plentiful in the work, they are never referenced, neither to a known book, nor to a chain of transmission. Likewise, we will see him take pains *not* to mention the names of teachers or renowned Ḥanafī jurists after the generation of Abū Ḥanīfa's circle, except with rare exception. We learn from his *mashyakhah* that this omission of both

[58] Ibid., 1:370-1, 391-2.
[59] Ibid., 2:51-2.

*ḥadīth* and juristic sources in the *Hidāyah* does not stem from his belonging to a learning culture where such matters were unimportant. On the contrary, they were extremely important to him. However, we see that the *fiqh* genre was one from which he felt this aspect of Islamic learning culture should be removed. Why he might have felt this will be explored in our study.

A final observation that can be made from the *mashyakhah*, though not one of direct relevance to the current study, is his interest in the ascetic tradition. There are several figures mentioned in the *mashyakhah* who are described only as 'ascetic' (*zāhid*) and 'sermon-giver' (*khaṭīb*). Some of these are mentioned in the context of *ijāzah*s that al-Marghīnānī received from them, while three are mentioned only for encounters he had with them: He describes each for being dedicated to worship and relates lines of poetry he heard from them.[60] It also appears that he studied something of the works of Abū 'Abd al-Raḥmān al-Sulamī (d. 412/1021), renowned Sufi author of Nishapur, when in Nishapur, with 'Abd Allāh ibn Muḥammad al-Ṣā'idī (d. 549/1155), as he narrates a line of ascetic poetry with a chain from al-Sulamī as part of the texts he studied with this Nishapuri teacher.[61] The interest of this generation of Ḥanafī jurists in the ascetic tradition and their treating these, often casual, links to such local preachers as part of their formal studies is an interesting feature and one to which further attention can be directed.

The main authored works attributed to him, in addition to his *mashyakhah*, are a commentary on Muḥammad al-Shaybānī's *al-Jāmi' al-ṣaghīr*, three works identified as *fatāwā* works: *Mukhtārāt al-nawāzil*, *Mukhtār al-fatāwā* and *al-Tajnīs wa-al-*

[60] Ibid., 2:272, 273, 280-1.
[61] Ibid., 1:288.

*mazīd*,[62] an epitome of authoritative Ḥanafī rules (*mukhtaṣar*), the *Bidāyat al-mubtadī*, a long commentary on this *mukhtaṣar* called *Kifāyat al-muntahī*,[63] and a shorter commentary on it, namely, the *Hidāyah*.[64] Of all of these works, it is the *Hidāyah* that sealed his status in the memory of the later school as the leading scholar of his generation.

It must be noted, however, that more work is needed to understand his status during his own life. He did not occupy any formal positions, such as *qāḍī*. We are not told that he was the leading Ḥanafī master of his age, a phrase used in Ḥanafī biographical works for several key figures. What we are told by Ibn Abī al-Wafā' is that he taught *fiqh* to a great many students (*tafaqqaha 'alayhi al-jam' al-ghafīr*) and that "the people of his age such as Qāḍīkhān (d. 592/1196) and Zayn al-Dīn al-'Attābī (d. 586/1190-1) [two leading Ḥanafī authors] acknowledged his rank and superiority."[65] This would certainly suggest widespread fame during his life. However, few recognised jurists are mentioned as students of his in Ibn Abī al-Wafā''s work. A total of seven students are identified, including a son, Muḥammad, concerning whom little else is known;[66] Burhān al-Dīn al-Zarnūjī (d. *c*. 610/1213-14), known only for a treatise he authored on how to study;[67] and a student mentioned in

[62] On the meaning of *fatāwā* in this early classical Ḥanafī context with a comparative study between *Mukhtārāt al-nawāzil* and related *fatāwā* works, see Sohail Hanif, "Sixth-Century Ḥanafī *Fatāwā* Literature and the Consolidation of School Identity".
[63] Several writers, including Norman Calder and Christopher Melchert, have transliterated the title as *Kifāyat al-muntahā*, 'The sufficiency for the furthest limit'. However, it seems more suitable to transliterate it *Kifāyat al-muntahī,* 'The sufficiency for the expert', firstly because the book is meant to be a sufficiency for a person not a place or time, and secondly because of its clear parallelism to the *mukhtaṣar* entitled 'The beginning of the beginner'. Accordingly, I prefer to transliterate the *mukhtaṣar* as *Bidāyat al-mubtadī*, ending with the letter *yā'*, over *Bidāyat al-mubtadi'*, ending in a *hamzah*. Changing the *hamzah* for a *yā'* in such a context is acceptable Arabic usage and facilitates a rhyming title with *Kifāyat al-muntahī*, which is often desired by medieval Islamic authors. Arabic texts frequently vowel *muntahī* and *mubtadī* in such a manner.
[64] 'Umar Kaḥḥālah, *Mu'jam al-mu'allifīn*, 7:45.
[65] Ibn Abī al-Wafā', *al-Jawāhir*, 1:383.
[66] Ibid., 2:99.
[67] Ibid., 2:364.

the *mashyakhah* for a poem he wrote for al-Marghīnānī.[68] Only three of the students named by Ibn Abī al-Wafā' seemed to have had a recognised juristic career. The first is his son 'Umar, who "excelled in *fiqh*", issued *fatwā*s, and to whom a *fiqh* work is ascribed.[69] The second is Muḥammad ibn 'Alī ibn 'Uthmān (d. ?), whom we are told was the chief judge (*qāḍī al-quḍāh*) in Samarqand. The third is the most outstanding student ascribed to al-Marghīnānī: Shams al-A'immah 'Abd al-Sattār al-Kardarī (d. 642/1244). We are told that al-Kardarī was the first to study the *Hidāyah* with him,[70] and, indeed, al-Kardarī is the only figure mentioned as a transmitter of the *Hidāyah*: All details of the *Hidāyah*'s transmission in Ibn Abī al-Wafā''s work pass through the intermediary of al-Kardarī.[71] Ibn Abī al-Wafā' mentions twelve students of al-Kardarī, more than al-Marghīnānī, six of whom are clearly identified as recognised teachers.[72] Interestingly, al-Kardarī was also a student of the two jurists named by Ibn Abī al-Wafā' as acknowledging al-Marghīnānī's superiority, Qāḍīkhān and al-'Attābī. Now was this acknowledgement from them a publicly known matter, or something al-Kardarī himself narrated or deduced from them during his classes with them? We can only speculate. It appears entirely possible that al-Marghīnānī was only seen as one among many recognised *fiqh* teachers in his age, but that al-Kardarī, his widely travelled and highly accomplished student, felt the superiority of this particular teacher and his particular work, and as one of the leading teachers of his own generation of jurists, al-Kardarī cemented al-Marghīnānī's status as the leading scholar of the previous generation, a status entirely supported by the book he produced.

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[68] Ibid., 1:399.
[69] Ibid., 1:394; Kaḥḥālah, *Mu'jam*, 7:298-9.
[70] Al-Laknawī, *al-Hidāyah*, 1:12-13.
[71] Ibn Abī al-Wafā', *al-Jawāhir*, 1:213, 383 ("[Al-Kardarī] narrated the *Hidāyah* from [al-Marghīnānī] to people"), 2:115.
[72] Ibid., 1:270-1, 2:22, 104, 115, 121, 131.

Now, to the *Hidāyah*. As mentioned, it is a commentary on a concise collection of legal rules, a *mukhtaṣar*, that he himself compiled. Studying the cases in the *mukhtaṣar* to account for the authority awarded to them is essential for an epistemological study of the text, and accordingly Chapter Two is dedicated to this. As for the commentary, we have seen that it is a more concise version of his initial commentary on the *Bidāyat al-mubtadī*, entitled *Kifāyat al-muntahī*, which he feared had grown too long and would therefore be ignored.[73] He appears to have authored the work in Samarqand, as it is there that al-Kardarī, the first to study the text, studied with al-Marghīnānī.[74] And it appears to have been towards the later stages of his life, as it is also in Samarqand that al-Marghīnānī died.[75]

The success enjoyed by the *Hidāyah* is remarkable. It can certainly compete for being one of the most successful works of law in Islamic history, and, by extension, in human history. A fascinating feature of Ibn Abī al-Wafā''s engagement with the text is that the first detail given of any jurist in his biographical dictionary is affirming if his name is mentioned in the *Hidāyah*. As mentioned above, al-Marghīnānī avoids name references to Ḥanafī jurists outside of Abū Ḥanīfah's direct circle. The few mentions he makes are to leading scholars in the school. The fact that Ibn Abī al-Wafā' sees it appropriate to record such mentions as the very first detail he gives of these significant scholars in the history of the school is testament to the status of the text as the great classic, by reference to which the school defines itself.

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[73] Al-Marghīnānī, *al-Hidāyah sharḥ Bidāyat al-mubtadī*, 1:13; idem, *Al-Hidāyah: The Guidance: A Translation of* al-Hidāyah fī sharḥ Bidāyat al-mubtadi' *a Classical Manual of Islamic Law: Volume One*, 3-4. I am not aware of a standard critical edition of the *Hidāyah*. Therefore for ease of reference, I will follow all references to the Arabic text with a reference to the English translation of Imran Ahsan Khan Nyazee. Henceforth, references to the Arabic text will simply be '*Hidāyah*' and to the two volumes of the English translation as '*Guidance I*' and '*Guidance II*'. The translations provided in this study are my own, as I only consulted the translation for reference purposes.

[74] On al-Kardarī's studying with al-Marghīnānī in Samarqand, see Ibn Abī al-Wafā', *al-Jawāhir*, 2:82. On him being the first to study the *Hidāyah*, see al-Laknawī, *al-Hidāyah*, 1:12-13.

[75] He was buried in Samarqand: Ibn Abī al-Wafā', *al-Jawahir*, 1:4. Al-Laknawī states that he commenced the work in 573/1178 and spent thirteen years writing it, which would place the completion of the work in 586, nine years before al-Marghīnānī died: al-Laknawī, *al-Hidāyah*, 1:12.

The role played by classics in a civilisation is the narrative of continuity they provide, as each generation sees itself as building on the same classics referred to by preceding generations.[76] Down to the current moment, in lands such as Great Britain, far removed in time and space from the Transoxianan Islamic heartlands of the author, the *Hidāyah* is still taught in religious seminaries as the crowning achievement of Ḥanafī juristic training, a final text after which the student may claim his right to belong to and participate in this juristic tradition. The story of the *Hidāyah* is the story of a shared *madhhab* enterprise defining its core conception of law and authority around this classic and is thus a story worth telling. The current work is not that story, but it sets the grounds for that story by attempting to identify the conception of the legal project that informed this text and is thus being preserved by this text. It is to this study that we now turn.

[76] For reflections on what makes a work a classic and the role of referencing past classics in current education, see Michael Levin, "What Makes a Classic in Political Theory".

# Chapter One

## Legal Theory in al-Marghīnānī's Milieu: The Construction of a Theory Lens

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In this chapter, we undertake to identify key epistemological foundations of *uṣūl al-fiqh* in the Ḥanafī tradition. As an introduction to Islamic legal theory, it is helpful to review the summary offered by the social historian Ibn Khaldūn (d. 808/1406) in his renowned *prolegomenon* to his work on history:

> Know that *uṣūl al-fiqh* is among the most tremendous of sacred sciences. ... It consists in reflection upon sacred indicators so that sacred rulings and injunctions may be extracted therefrom. ... The first to author in this [science] was al-Shāfi'ī (d. 204/820).[77] ... Then the Ḥanafī *fuqahā'* (jurists) authored works in it ... as did the *mutakallimūn* (theologians). The works of the *fuqahā'* dealt more with *fiqh* and were more suited to legal cases due to the plenitude of examples and citations [of legal cases] in them and the development of discussions around subtle legal insights. The *mutakallimūn* divested the forms of these discussions from *fiqh* and inclined towards rational inference as much as possible. ... The Ḥanafī *fuqahā'* had the most extensive reach in uncovering legal subtleties and, to the extent possible, in discovering these principles from the cases of *fiqh* [themselves]. Abū Zayd al-Dabūsī (d. 430/1038-9), one of their imams, authored their most expansive treatment of legal analogy (*qiyās*), completing the investigations and conditions required for its performance. ... And the best work authored by [their] later scholars is the comprehensive work of Sayf al-Islām al-Bazdawī,[78] one of their imams.[79]

In this passage, Ibn Khaldūn apprises us of a distinctly Ḥanafī approach to *uṣūl al-fiqh* which is grounded in legal cases, contrasted with a more theoretical approach ascribed

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[77] Al-Shāfi'ī's being the first author is a topic of debate. For a rejection of this notion, see Wael Hallaq, "Was al-Shāfi'ī the Master Architect of Islamic Jurisprudence".

[78] The reference should be understood to be to Fakhr al-Islām 'Alī ibn Muḥammad al-Bazdawī, as his book became the main focus for Ḥanafī commentaries, as will be mentioned below. However, I have not found any source awarding him the honorific 'Sayf al-Islām'. His brother Abū al-Yusr Muḥammad ibn Muḥammad al-Bazdawī also wrote on *uṣūl al-fiqh*. I have found one reference awarding him the honorific 'Sayf al-Sunnah wa-al-Dīn', written by the copyist of a manuscript of Abū al-Yusr's *uṣūl* work, edited by Eric Chaumont and Marie Bernand: *Al-Bazdawī: Livre où repose la connaissance des preuves légales*, 6. While it is possible that Abū al-Yusr is the Bazdawī to whom Ibn Khaldūn refers, his works do not appear to fit Ibn Khaldūn's description.

[79] Ibn Khaldūn, *Muqaddimat Ibn Khaldūn*, 2:199-202.

to non-Ḥanafī theorists,[80] whom he terms the *mutakallimūn* or theologians. Other than a concern for actual legal cases and an expansive theory of *qiyās*, he gives no other analysis of the differences between these two approaches. Section 1.1 below presents an overview of this Ḥanafī theory, with a focus on pinpointing key aspects of its nomenclature and epistemological foundation.

In his summary of legal theory, Ibn Khaldūn presents the related genre of juristic disputation or *jadal*:

> As for *jadal*, it is knowledge of the proper methods (*ādāb*) for debates which occur between followers of legal schools and others. There are many possibilities for accepting and rejecting a position ... some of these [arguments] are correct, and some are incorrect. Scholars thus needed to document correct methods and rules by whose limits debators could be constrained in their mutual rebuttals, such as how someone proving a case or responding to an objection should conduct himself, where it is possible for him to present evidence for his case, how he becomes defeated, [pinpointing] the exact point of objection or opposition, and where he must be silent for his opponent to speak and present evidence.[81]

Although the term *jadal* can apply to all forms of disputation, in the formal classification of Islamic disciplines the term came to be applied particularly to disputation regarding legal theory.[82] Section 1.2, below, presents a brief overview of this genre, with a focus on disputation in legal analogy, highlighting insights in Ḥanafī texts that set them apart from standard *jadal* texts. The importance of this for the current investigation is the centrality of dialectical sequences in the *Hidāyah*.

Ibn Khaldūn presents a further genre in his presentation of legal theory: the study of juristic disagreement or *khilāfīyāt*. He tells us that the nature of the legal project naturally led to disagreements amongst jurists. With the rise of the *madhhab*s, texts were dedicated to debates amongst these four groups of jurists,

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[80] The current study employs the term 'non-Ḥanafī' in discussions of legal theory to refer to the non-Ḥanafī Sunnī tradition of *uṣūl al-fiqh*. This label will not be used for Shī'ī's, Mu'tazilīs or other groups.
[81] Ibn Khaldūn, *Muqaddimah*, 2:203.
[82] See, for example, the editor's introduction to Abū al-Walīd al-Bājī, *al-Minhāj fī tartīb al-ḥijāj*, 6.

> each seeking to show the correctness of his imam's position. [These debates] were conducted according to correct principles and valid methods which each used to argue for the school he followed and held on to. [They] were conducted for all cases of the sacred law and each chapter of *fiqh*. At times the *khilāf* is between al-Shāfi'ī and Mālik (d. 179/795) with Abū Ḥanīfah agreeing with one of them, and at times between Mālik and Abū Ḥanīfah with al-Shāfi'ī agreeing with one of them. ... This branch of knowledge was called *khilāfīyāt*. ... It is – By my life! – a science of tremendous benefit for understanding from whence the imams derived [their positions] ... and for training readers to prove what they seek to prove. The works of the Ḥanafīs and Shāfi'īs in this are more than the works of Mālikīs.[83]

Section 1.3, below, provides a brief overview of this genre, as legal disagreement is a recurring device for exploring the law in the *Hidāyah*. With these three genres ends Ibn Khaldūn's presentation of legal theory on which the division of the current chapter is based. Section 1.4 concludes the chapter, summarising the legal-theoretical insights gained from its discussions. These insights will be taken as a lens through which to study legal epistemology in the *Hidāyah*, hence the term 'theory lens' for the conclusions of this chapter.

## 1.1 Ḥanafī *Uṣūl al-fiqh*

The most authoritative study of the epistemology of Ḥanafī legal theory is still Aron Zysow's (recently published) 1984 PhD thesis.[84] In his study, Zysow presents debates on the sources of Islamic law to tease out the underlying epistemological insights of legal theorists. He bases the study on the *Mīzān al-uṣūl* of the Ḥanafī Central-Asian scholar 'Alā' al-Dīn Muḥammad ibn Aḥmad al-Samarqandī, and with each topic presents an impressive survey of opinions that crosses legal schools and time periods.

Zysow, in his introduction, suggests that Ḥanafī legal theory was moved by the same theological concerns that moved leading Shāfi'ī theorists, and is not, "as is sometimes suggested, particularly legal in any but a superficial sense,"[85] intending

[83] Ibn Khaldūn, *Muqaddimah*, 2:202-3.
[84] Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory*.
[85] Ibid., 2. He repeats the observation on p. 73.

thereby to respond to Ibn Khaldūn's description of the predominantly legal concern of the Ḥanafī *uṣūl* tradition. What Zysow means is not that Ḥanafīs did not develop unique solutions to questions of legal theory, as his book is devoted precisely to showing Ḥanafī epistemological insights. Rather, he means only that this theory developed in conversation with the larger field of legal theory, and as such it was part of the larger engagement with theology that marked the development of this field.

However, the claim that these texts are only superficially legal is hard to sustain. Ḥanafī legal theory has a peculiar relationship with the legal cases transmitted from Abū Ḥanīfah's circle and the questions of the current thesis are directly aimed at understanding this relationship between theory and law. Murteza Bedir, in his study of Ḥanafī legal theory, has suggested that Zysow's observation is influenced by his reliance on al-Samarqandī's work.[86] Al-Samarqandī commences his *uṣūl* work with a complaint that Ḥanafīs have given too much attention to *uṣūl* works that deal only with legal cases and have abandoned the more theologically based *uṣūl* works of their predecessors, of whom he names the Samarqandi Abū Manṣūr al-Māturīdī. Al-Samarqandī's work is thus an attempt to present a theologically based work of Ḥanafī *uṣūl* in contradistinction to the majority of Ḥanafī *uṣūl* works which were not thus conceived.[87]

We can note from this that there appear to have been two distinct *uṣūlī* trends in Ḥanafī Transoxiana. One of these was a Samarqandi tradition, based on the writings of al-Māturīdī, a leading spokesperson of which was the aforementioned 'Alā' al-Dīn al-Samarqandī. This tradition gave great importance to theological

[86] Murteza Bedir, "The Early Development of Ḥanafī *Uṣūl al-Fiqh*", 14. See ibid., 12-15, for the reception of Ibn Khaldūn's division of the two forms of *uṣūl* writings – the juristic and the theological – in western secondary literature. I add to Bedir's sources Bernard Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī*, 18-20, where Weiss notes that terminological differences between these two *uṣūl* traditions must reflect substantive differences between the two.

[87] 'Alā' al-Dīn al-Samarqandī, *Mīzān al-uṣūl fī natā'ij al-'uqūl*, 1-5.

orthodoxy and strove to ensure that all statements of legal theory were grounded in the orthodox theological tradition that hailed back to al-Māturīdī. In the process, this tradition drew close, on several epistemological questions, to the positions of the non-Ḥanafī *uṣūl* tradition.[88] While Zysow speaks often of a group of Samarqandis when mentioning these opinions, his main engagement is only with 'Alā' al-Dīn al-Samarqandī's work. The only other study of a Samarqandi *uṣūl* work from this period is Dale Correa's work on the *Uṣūl* of 'Alā' al-Dīn's contemporary Najm al-Dīn 'Umar al-Nasafī, although she focuses solely on questions relating to testimony and does not reveal al-Nasafī's relation to the epistemological reordering of *uṣūl* concepts attempted by 'Alā' al-Dīn.[89] This Samarqandi movement appears to have had only a marginal effect on the history of Ḥanafī legal theory, as it was eclipsed by the more legal Ḥanafī *uṣūl* tradition to which it was responding.[90]

The most important works of Ḥanafī legal theory that were regarded throughout later history as the defining representatives of Ḥanafī thought were also produced in fifth-century Transoxiana. These works drew on the fourth-century Iraqi Ḥanafī *uṣūl* tradition, particularly the writings of Abū Bakr al-Rāzī al-Jaṣṣāṣ (d. 370/981), whose *al-Fuṣūl fī al-uṣūl* remains the earliest extant work of *uṣūl al-fiqh*

[88] Among the topics in which they stood out from competing Ḥanafī theorists are what is understood by an imperative (Zysow, *The Economy*, 66-72), whether an imperative must be obeyed immediately (ibid., 74-6), the specialisation of a general term (*takhṣīṣ al-'āmm*) (ibid., 76-93) and the ontology of the *'illah* (ibid., 222-40).

[89] Dale Correa, "Testifying Beyond Experience: Theories of *Akhbār* and the Boundaries of Community in Transoxianan Islamic Thought, 10th-12th Centuries CE". It is strange that she equates 'Transoxianan' to 'Samarqandi' (ibid., 19-20), even though the latter appears to have functioned more as a sub-school in the development of the Transoxianan *uṣūl* tradition as shown by Zysow's and Bedir's studies. For al-Marghīnānī's connection to these two Samarqandi authors, see Figure 2, above.

[90] "Despite the efforts of Samarqandi theologians of the sixth century onwards the Ḥanafī *uṣūl al-fiqh* seemed to have followed the road set forth by Jaṣṣāṣ and the followers of Dabūsī, giving only lip service to the emerging ideology of Māturīdism": Bedir, "The Early", 16. Part of the reason for this lack of success is that al-Samarqandī's drive was to remove doctrine associated with Mu'tazilism, but as Ḥanafī orthodoxy gradually accepted the Ash'arīs, who on some key questions agreed with Mu'tazilīs, there was no longer a need to 'correct' these points of doctrine: See Aron Zysow, "Mu'tazilism and Māturīdism in Ḥanafī Legal Theory", 265.

from any school.[91] The father of this Iraqi-influenced Transoxianan tradition is the Bukharan scholar Abū Zayd al-Dabūsī.[92] As described by Ibn Khaldūn, al-Dabūsī expanded on the topics of this *uṣūl* system, particularly the topic of *qiyās*.[93] Two authors built on al-Dabūsī's work, their books having the greatest impact on the classical period of the school: Shams al-A'immah Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī[94] and Fakhr al-Islām 'Alī ibn Muḥammad ibn al-Ḥusayn al-Bazdawī,[95] both one teacher removed from al-Marghīnānī. Al-Bazdawī's work in particular, the *Kanz al-wuṣūl ilā 'ilm al-uṣūl*, known simply as *Uṣūl al-Bazdawī*, became a favourite for commentators throughout the classical period and is seen as the greatest representative text of this *uṣūl* tradition, which can perhaps be called Iraqi-Bukharan to contrast with the aforementioned Samarqandi tradition.[96] Murteza Bedir has studied the development of *uṣūlī* thought between al-Jaṣṣāṣ, al-Dabūsī, al-Sarakhsī and al-Bazdawī.[97] He describes these works as having an "excessive obsession with the substantive law (*furū' al-fiqh*), in that virtually every principle of *uṣūl* has been put to the test of Ḥanafī *corpus juris* with a view to reaching a legal system comprised of consistent and coherent *uṣūl* (legal theory) and *furū'* (practical

[91] Bedir, "The Early", 10.
[92] For a short biography and a list of his works, see Bedir, "The Early", 26-30, and Correa, "Testifying", 22-3.
[93] Nabil Shehaby considers Ibn Khaldūn mistaken in attributing a development in *qiyās*-theory to al-Dabūsī: Nabil Shehaby, "*'Illah* and *Qiyās* in Early Islamic Legal Theory", 28. However, Zysow attributes the development of the theory of 'effectiveness' to al-Dabūsī (Zysow, *The Economy*, 205-8), which, as we will see, is the cornerstone of Ḥanafī *qiyās*-theory.
[94] For a short biography and written works, see Bedir, "The Early", 30-5.
[95] I shall stick to the Arabised version of the name; otherwise, it is properly Pazdawī, in ascription to the village of Pazdah. See Correa, "Testifying", 23. For a short biography and written works of al-Bazdawī, see Bedir, "The Early", 35-8.
[96] I have noted above the difficulty of distinguishing between Bukharan and Samarqandi traditions, due to the free travelling of scholars between both centres. I use 'Bukharan' here to contrast with 'Samarqandi' as used by Zysow. This tradition can be considered Bukharan when its origin is traced back to al-Dabūsī; otherwise, al-Bazdawī is generally counted amongst the Samarqandis.
[97] He also studies a fifth text, the *Uṣūl al-Shāshī*, commonly believed to be a fourth-century *uṣūl* work. Bedir's study argues that the work belongs to a later period, on which he has also published an article: Murteza Bedir, "The Problem of *Uṣūl al-Shāshī*".

jurisprudence)."[98] This Transoxianan tradition may be considered Iraqi-Bukharan in view of its origin and the shared perception of the relationship between *uṣūl* and *furū'*, otherwise, theologically, there were significant differences: The Iraqi al-Jaṣṣāṣ was either a Mu'tazilī or very close to the Mu'tazilīs, while the Bukharans were anti-rationalist.[99] Al-Dabūsī had no issue with legal positions that supported Mu'tazilī doctrine, whilst al-Sarakhsī and al-Bazdawī were clearly anti-Mu'tazilī.

Secondary literature presents al-Bazdawī's work as the most important text of this tradition in its dominating subsequent Ḥanafī scholarship; however, it should be noted that his text did not eclipse the influence of al-Sarakhsī's work, despite there being no known commentaries on the latter. Al-Sarakhsī's lasting influence is inferrable from the words of Abū al-Barakāt 'Abd Allāh ibn Aḥmad al-Nasafī (d. 710/1310), who more than a century after al-Marghīnānī noted that both the *uṣūl* works of al-Sarakhsī and al-Bazdawī were subject to intense study by students in Bukhara. He explains this as the reason for his producing an epitome (*mukhtaṣar*) in *uṣūl al-fiqh* based on both works.[100] His epitome, the *Manār al-anwār*, is arguably the second most commented-upon *uṣūl al-fiqh* work in history.[101] The *Manār* cemented the lasting influence of both of these Central-Asian works of *uṣūl*. Furthermore, 'Abd al-'Azīz al-Bukhārī (d. 730/1329-30), in his renowned commentary on al-Bazdawī's *uṣūl*, frequently refers to the 'two shaykhs' (*shaykhayn*) when quoting *uṣūlī* debates, referring thereby both to al-Bazdawī and al-Sarakhsī.[102] This shows the two works were held as authoritative, independent contributions, and not simply that one – al-Bazdawī – merely reorganised the other – al-Sarakhsī – as Bedir's case studies

[98] Bedir, "The Early", 14.
[99] Bedir, "The Early", 24-6, 28. See also, Wilferd Madelung, "The Spread of Māturīdism and the Turks", 118. Zysow holds that al-Sarakhsī was anti-Mu'tazilī but otherwise disinclined to a deeper engagement with theology unlike the Bazdawī brothers: Zysow, "Mu'tazilism", 239.
[100] Al-Nasafī, *Kashf al-asrār sharḥ al-muṣannif 'alā al-Manār*, 1: 4.
[101] Second to the *Mukhtaṣar* of Ibn al-Ḥājib (d. 646/1249): See Zysow, "Mu'tazilism", 238.
[102] See for example al-Bukhārī, *Kashf al-asrār sharḥ Uṣūl al-Bazdawī*, 1:273; 2:368; 3:106, 217, 303.

suggest.[103] Accordingly, these two works provide the basis for the summary provided here.

I add to these a third work, the *Ma'rifat al-ḥujaj al-shar'īyah* ascribed[104] to al-Bazdawī's brother, Abū al-Yusr Muḥammad ibn Muḥammad al-Bazdawī. Muḥammad al-Bazdawī was nicknamed Abū al-Yusr ('father of ease') due to the ease of his books, in contrast with the Abū al-'Usr ('father of difficulty') nickname that was awarded his brother, 'Alī, due to the complexity of the latter's works. While the *kunyah* Abū al-Yusr is the primary identifier for Muḥammad al-Bazdawī in Ḥanafī texts, 'Alī al-Bazdawī is primarily referred to with his *laqab*, Fakhr al-Islām, and thus will the two brothers be distinguished here.[105] Abū al-Yusr's work is a brief work on *uṣūl al-fiqh*, not intended to be a thorough coverage like the works of his two peers; but it is an insightful work where the 'ease' of his *kunyah* proves most helpful in piecing together key concepts of the Ḥanafī *uṣūl* tradition. All three authors belonged to the same milieu and shared the same mentor in the person of Shams al-A'immah al-Ḥalwānī,[106] through whom they were connected to both Iraqi and Bukharan masters.[107] Abū al-Yusr had a greater interest in theology[108] and was the direct teacher of the aforementioned 'Alā' al-Dīn al-Samarqandī, so he may be considered a bridge between the two aforementioned Central-Asian *uṣūl* traditions.[109] For the sake of

[103] I do not mean that Bedir is wrong, but that the tradition had a more nuanced relationship with both texts than his study reveals.
[104] Eric Chaumont refers to him as the 'presumed' author, pointing out the difficulty of separating the books of the two brothers in the introduction to his edition of Abū al-Yusr's work: *Al-Bazdawī: Livre où repose*, 5-8. Zysow's references from Abū al-Yusr's book and the distinct positions it takes from Fakhr al-Islām's work suggest clearly that it is Abū al-Yusr's work.
[105] Zysow and several other writers refer to the latter in their studies with the *kunyah* Abū al-'Usr, but *fiqh* and *uṣūl* literature does not refer to him with this title outside of the biographical entries that provide us this *kunyah*.
[106] Al-Dhahabī, *Siyar a'lām al-nubalā'*, 18:177.
[107] Bedir, "The Early", 32.
[108] Bedir mentions that Brockelmann does not differentiate between the two brothers, so the works on theology ascribed to Bazdawī should be assumed to be Abū al-Yusr's in light of his greater interest in the discipline: ibid., 51-2.
[109] He was also the mentor of the Samarqandi *uṣūl* author Najm al-Dīn 'Umar al-Nasafī: Correa, "Testifying", 26. 'Alā' al-Dīn al-Samarqandī also studied with Fakhr al-Islam (Correa, "Testifying",

clarity, I take al-Sarakhsī as the basis for the following study, and add from the Bazdawī brothers where useful.[110]

The summary below is ambitious in scope. Its aim is to provide an understanding of the epistemological underpinnings of Ḥanafī *uṣūl al-fiqh*. Now, all of *uṣūl al-fiqh* addresses the epistemology of the law, as each chapter functions as a meta-topic addressing how the law is to be known. We must, therefore, be more specific about the purpose of this summary, which is to help us better understand the layers of argument in Ḥanafī legal commentaries. When observing these commentaries, we see the prominence of rational arguments. Our goal in this summary can thus be seen as an attempt to identify the underlying epistemological foundations of Ḥanafī *uṣūl al-fiqh* that serve to anchor the activity of the intellect. Of course, to do this topic justice, it would need to be the subject of a much larger treatment. My hope is that the merit of this summary will be borne out by its usefulness in facilitating a deeper understanding of legal argument in al-Marghīnānī's commentary.

Before commencing this study, we can note a general approach to epistemology in Ḥanafī *uṣūl al-fiqh*. A continual theme in Zysow's study is how the Ḥanafīs stood out from other jurists in their approaching the question of epistemology with great caution: They consistently sought to construct the law on the strongest

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27), but Fakhr al-Islām did not author works on theology and stayed firmly in the space of juristic thought; thus Abū al-Yusr is the more likely bridge for the bringing together of juristic and theological thought in al-Samarqandī's project. See also Zysow, *The Economy*, 43, 57, 206, 214, where Abū al-Yusr is presented as al-Samarqandī's precursor on several questions of *uṣūl al-fiqh*.

[110] A problem I encountered using al-Sarakhsī's *Uṣūl* is that the Dār al-Kutub al-'Ilmīyah reprint of Abū al-Wafā' al-Afghānī's edition misorders a large number of pages. In the middle of explaining the *ḥurūf al-ma'ānī*, for example, there are sections from various topics of *qiyās*, mentioned at random. This happens also in the topics of *jadal* at the end of the section on *qiyās*. Thus my summary of *jadal* below draws from Fakhr al-Islām's book. The substantial differences between the two books of al-Sarakhsī and Fakhr al-Islām do not appear to be large. Bedir shows that Fakhr al-Islām generally agrees with al-Sarakhsī's presentation with only the further aim to systemetise and organise. On this assumption, I will only cross reference Fakhr al-Islām's work where relevant. It is not the purpose of this summary to examine subtle differences between these authors.

epistemological foundation, negating considerations from evidence at a lower epistemological level. There is a discussion pertaining to conflicting indicators of the law, stated clearly in later *uṣūl* works, that provides a helpful overview of this approach. These texts tell us that in the case of conflict (*ta'āruḍ*) between contradictory indicators of the law (*adillah*), Ḥanafīs seek first to establish the possibility of abrogation (*naskh*), rendering one indicator null by virtue of being cancelled by the Lawgiver.[111] If this cannot be established, they seek the possibility of giving preponderance (*tarjīḥ*) to one of these indicators, rendering the weaker null in the face of the stronger. If this is not possible, they seek to explain each in the light of the other (*jam'*). And if this cannot be done, then both are ignored and we are to consider evidence at a lower epistemological level.[112] The ongoing assumption in this schema is that an epistemologically higher indicator is understood to its fullest extent; its implication is not altered by an epistemologically lower level of indication.[113] This contrasts with the non-Ḥanafī *uṣūl* tradition where in the case of conflicting indicators, the first step is to interpret sources in the light of each other (*jam'*) if possible, and only then to seek preponderance or abrogation.[114] This latter approach seeks to use all available evidence, and only if there is no avenue to that will it then prefer some indicators and negate others. This summarises the key epistemological difference between both approaches that is explored in depth in Zysow's study.

It is with the backdrop of this cautious approach to questions of epistemology in the Ḥanafī legal tradition that I seek to propose three uniquely Ḥanafī determiners of the epistemological weighting awarded to indicators of the divine law. The first of

[111] I use the word Lawgiver to mean either God or His Messenger, as is the use of the Arabic *al-shāri'* in Islamic legal literature.
[112] See, for example, Ibn Amīr Bādshāh, *Taysīr al-Taḥrīr*, 3:137.
[113] David Vishanoff traces the first complete expression of this approach to Ḥanafī epistemology to the Iraqi 'Īsā ibn Abān (d. 221/835-6): David Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law*, 212.
[114] See for example al-Ghazālī, *al-Mustaṣfā*, 253.

these is a particular language theory that is literal and confident. The second is a particular view of the early Muslim community that awards ultimate authority to the pronouncements of early jurists. The third is the 'habit of the law' that guides the jurist in matters not stated in epistemologically secure sources. I will present each of these in turn, presenting details and examples where these areas of theory are shown to be informing and anchoring human rational inference. After the detailed exploration of these three 'pillars' of Ḥanafī legal epistemology, we will be able to step back and consider the explanation of '*fiqh*' offered by our *uṣūl al-fiqh* texts, particularly that of Abū al-Yusr, in which we will see *fiqh* as a rational activity that occurs within the protective sphere of these three 'pillars' of Ḥanafī thought, which function as three anchors of rational inference. Throughout, I will draw on Zysow's study, adding needed details and examples from the primary literature.

### 1.1.1 Language

Language, I argue, is the first of the three anchors of rational inference in Ḥanafī thought. Language is a meta-topic in Ḥanafī *uṣūl* works, addressing both the sacred and the profane, each important to the jurist. Al-Sarakhsī presents this fact most clearly in his *Uṣūl* by not subsuming the discussions of language under a wider category. Only after completing the linguistic investigations, almost a third of the way into the book, does he then acquaint the reader with the main sources of the law – the Qur'an, *sunnah*, consensus and analogy – and commence their study. Fakhr al-Islām's presentation of the role of language in *uṣūl al-fiqh* is misleading.[115] He brings all linguistic investigations under the investigations of Qur'anic composition and meaning (*naẓm* and *ma'nā*), but the details of the sub-topics of these linguistic

[115] 'Abd al-'Azīz al-Bukhārī considers Fakhr al-Islām's attempt to fit scattered linguistic investigations into neat categories futile, as he was forced to make exceptions or fit categories where they didn't perfectly belong. See Bedir, "The Early", 45, and Zysow, *The Economy*, 53.

investigations are very often far removed from sacred texts and some have relevance only to legal cases pertaining to human speech.[116]

The theory of language presented in Ḥanafī legal theory gives the human mind clear constraints when dealing with sacred texts. Although all theories of Islamic law present a sophisticated hermeneutic for engaging Islam's sacred texts, Ḥanafīs stand out by the degree of confidence they award to meanings conveyed by language. In their observance of linguistic devices, they present a highly literal approach, in a manner that causes Zysow to class them closer to extreme literalist groups such as the Ẓāhirīs and Ḥanbalīs of Ibn Taymīyah's persuasion.[117]

What Zysow has pointed out as a confident approach to language is reflected by several discussions in these *uṣūl* works. Among these is their insistence that the general term (*'āmm*) – such as 'horses', 'men', 'the students' – must be understood to categorically and definitively (*qaṭ'an*) refer to *all* members of these classes, unlike non-Ḥanafī theorists, who give the general term only a presumptive (*ẓannī*) encompassment of all members of the group.[118] This has many consequences for the topic of conflicting indicators (*ta'āruḍ al-adillah*).[119] Another example is the insistence in Ḥanafī *uṣūl* texts that special (*khāṣṣ*) terms – those that refer to a specific individual or class – are clearly understood and therefore may not be further clarified. For instance, the Qur'an declares that limbs are 'washed' in ritual ablutions.

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[116] Zysow, *The Economy*, 53-4. For a brief explanation of Fakhr al-Islām's four-part schema for linguistic investigations, see ibid., 54-8.
[117] Ibid., 58. Marie Bernand has made a similar observation. She describes al-Jaṣṣāṣ's linguistic investigations as representing a "*muṭlaq* conception of language". She defines this as "a basic linguistic structure whose expressions are absolutely related to clearly defined meanings": Marie Bernand, "Ḥanafī *Uṣūl al-Fiqh* Through a Manuscript of al-Ǧaṣṣāṣ", 629. On the nature of Ẓāhirī literalism, to which Zysow compares Ḥanafī language theory, see Robert Gleave, *Islam and Literalism: Literal Meaning and Interpretation in Islamic Legal Theory*, 146-74. Vishanoff presents an insightful overview of the development of hermeneutics in Ḥanafī thought: Vishanoff, *The Formation*, 210-25. On a number of key questions of linguistic interpretation, Ḥanafī positions overlap with those of Basran Mu'tazilīs, whose views on hermeneutics are summarised in ibid., 109-51.
[118] Al-Sarakhsī, *Uṣūl*, 1:132-44.
[119] Ibid., 1:144-51.

Washing is a specific term referring to a known act. As this is clearly known, there is no scope for further clarification. Therefore, Prophetic reports that suggest washing does not purify without a person's *intending* to purify himself are rejected for their attempting to clarify – and therefore restrict – a clear Qur'anic statement.[120] Such a clarification alters the text and is considered abrogation (*naskh*) of the text, and Prophetic reports with limited chains of transmission (*āḥād*) are not able to abrogate the Qur'anic text. Another example of this approach to language is the insistence that unrestricted (*muṭlaq*) terms in sacred texts must be understood in their unrestricted sense, and may not be restricted (*muqayyad*) by other texts, even if of a similar epistemological weighting.[121] Thus, a person may free a believing or unbelieving slave in expiation for returning to his wife after *ẓihār*[122] – as the Qur'an states only "freeing a neck" (Qur'an, 58:3) – while he must free only a believing slave in expiation for accidental murder – as the Qur'an states "freeing a believing neck" (Qur'an, 4:92). The former verse must be understood unrestricted and may not be restricted by the stipulation of "believing" in the latter, as is the position of al-Shāfi'ī. Each of the above examples can be seen as a form of literalism, a confidence that the divine speaker intended His words to be understood at face value. Zysow presents a detailed analysis of this theory and various debates between the Samarqandi and the Iraqi-Bukharan traditions.[123]

Among the many linguistic investigations in Ḥanafī *uṣūl* works, there is one topic that explicitly gives scope to the rational mind for inferring legal injunctions as

[120] Zysow, *The Economy*, 77.
[121] Al-Sarakhsī, *Uṣūl*, 1:196-200.
[122] *Ẓihār* is a pre-Islamic practice whereby a man declares his wife unlawful to him like his mother. This was considered a form of divorce before Islam. In Islam, this was not considered divorce, but the man was forbidden to sexually approach his wife before performing a form of expiation. This is discussed in Chapter 58 of the Qur'an. See Ibn Kathīr, *Tafsīr al-Qur'ān al-'aẓīm*, Chapter 58, verses 1-4.
[123] For Zysow's own attempt to present linguistic postulates that describe the Ḥanafī approach to language, see Zysow, *The Economy*, 58-60.

an extension of linguistic analysis. It is the topic of understanding the intentions of a speaker or *wujūh al-wuqūf ʻalā al-murād* as Fakhr al-Islām categorises it.[124] This topic provides four forms of inferring meaning from a text: drawing inference (*istidlāl*) from the text's expression (*ʻibārah*), allusion (*ishārah*), indication (*dalālah*) or requirement (*iqtiḍā'*). For our purposes, I will explain the first three, the most important being the third.[125]

The first is drawing inference from the expression of a text (*al-istidlāl bi-ʻibārat al-naṣṣ*). This is understanding the obvious purport of a passage. It is the meaning for which the text was conveyed and is arrived at without any need for reflection (*ta'ammul*). This is contrasted with the second, namely, drawing inference from the allusion of a text (*al-istidlāl bi-ishārat al-naṣṣ*). This latter form of inference does not pertain to the meaning for which the passage was conveyed. Instead, it is an understanding acquired by reflection (*ta'ammul*) on the meanings of the words, without adding or removing any words. To explain the two, al-Sarakhsī gives the Qur'anic passage detailing the recipients of war spoils (*fay'*) that states, "for the impoverished emigrants (*lil-fuqarā' al-muhājirīn*)" (Qur'an, 59:8), in reference to the Companions of the Prophet who emigrated from Mecca to Medina. The expression of the text (*ʻibārat al-naṣṣ*) is that these emigrants have a share of the spoils, as this is what the passage is referring to, and it is to convey this that the phrase was mentioned. The allusion of the text (*ishārat al-naṣṣ*) is that the emigrants are not legally considered owners of the properties seized from them by the unbelievers in Mecca. This is inferred by the fact that they are considered impoverished (*fuqarā'*). This legal ruling is inferred from the text without adding or subtracting words from it, but it is

[124] Fakhr al-Islām, "Uṣūl", 2:210. Sarakhsī places these four forms of inference together under the title, "*Bāb bayān al-aḥkām al-thābitah bi-ẓāhir al-naṣṣ dūna al-qiyās wa-al-ra'y*": al-Sarakhsī, *Uṣūl*, 1:236.
[125] See ibid., 1:236-7, 240-54.

only arrived at after reflection, and it is not the understanding for which the text was conveyed.

The third is the most important of these linguistic investigations for the purpose of showing the relation between Ḥanafī language theory and the judgements of the rational mind. It is "drawing inference from the indication of a text" (*al-istidlāl bi-dalālat al-naṣṣ*). This is explained as observing what is established by the linguistic meaning of the composition, not by rational inference (*huwa mā thabata bi-maʿnā al-naẓm lughatan lā istinbāṭan bi-al-raʾy*). This explanation is not in itself very revealing, except to show that our authors are keen to differentiate it from the rational inference of *qiyās*. This shows that indeed there is a similarity between this and *qiyās* (legal analogy), hence our interest.[126] Al-Sarakhsī offers a few more words to distinguish the two:

> This is because a composition (*naẓm*) has a form (*ṣūrah*) that is known and a meaning (*maʿnā*) that is intended thereby. ... [The indication of the text] is not *qiyās*, because *qiyās* is a meaning (*maʿnā*) that is extracted by a [speculative] rational process (*bi-al-raʾy*)[127] ... so that a prescription can be applied to something concerning which sacred texts are silent, not an extraction by considering the linguistic meaning of the text. This is why it is the scholars (*ʿulamāʾ*) alone who know how to extract [sacred rulings] using a [speculative] rational process, whilst everyone with insight into the linguistic meanings of speech, whether a *faqīh* or not, shares in [knowing] the indication of the text (*dalālat al-naṣṣ*).[128]

Al-Sarakhsī then gives his first example: the Qur'anic prohibition, "Do not say 'uff' to [your parents]!" (Qur'an, 17:23) Al-Sarakhsī explains,

> Saying 'uff' (*taʾfīf*) has a known form [i.e. the word itself] and a meaning for the sake of which the prohibition was established, namely, causing harm (*al-adhā*). Thus the prohibition does not apply to the one who does not know that the word has this meaning, or is from a people in whose language this is a

[126] *Qiyās* is a form of legal analogy. A common example of legal analogy is "Wine is prohibited because it intoxicates, therefore beer is prohibited because it also intoxicates." We will see below that our Ḥanafī authors have a very particular way in which they understand *qiyās*. For an overview of *qiyās* in the non-Ḥanafī *uṣūl* tradition, see Weiss, *The Search*, 542-84.
[127] I call *raʾy* speculative to show that it is epistemologically weaker than the indication of the text, which is what is intended by the use of *raʾy* in this passage.
[128] Al-Sarakhsī, *Uṣūl*, 1:241.

> phrase to show respect. Therefore, by consideration of this linguistically known meaning, the prohibition is affirmed for all types of speech and actions that convey this meaning [of causing harm].[129]

It is important to note that the *dalālat al-naṣṣ* is not a case of *argumentum a fortiori* as understood by Hallaq and Zysow.[130] This is because the argument does not rest on other words and acts being *greater* in conveying harm than saying "uff" and therefore even more suited to the prohibition. Rather, it is simply an identification of the *meaning* of "uff" to which the prohibition is *actually* connected, which in this case is the causing of harm. Therefore, the verse is understood as saying, "Do not cause your parents harm!" Thus, the verse applies equally to all words and activities that cause harm, which might or might not include the word "uff" itself. For our Ḥanafī *uṣūlī*s, this wide application of the verse is the meaning of the text expressing itself. It is not *qiyās*.

Al-Sarakhsī explains that the indication understood from the linguistic meaning of a text is treated as an *'illah* (a cause that brings a ruling to exist) stated explicitly in a sacred text. He illustrates this with the statement of the Prophet regarding the purity of cat saliva, "They are but your regular visitors (*ṭawwāfūn 'alaykum*)", indicating that cat saliva is not ritually filthy (*najas*), as is the case with predatory animals, for the reason that they frequent people's homes and, thus, there would be hardship for people were their saliva considered filthy. This meaning conveyed by the text is applied by Ḥanafī jurists to other creatures that frequent homes (in primitive settings) such as mice and snakes. Applying the text to these other creatures, our *uṣūl* authors tells us, is not a process of *qiyās* – explained as

[129] Ibid., 241-2.
[130] Wael Hallaq, "Non-Analogical Arguments in Sunnī Juridical *Qiyās*", 290-1. To be fair to Zysow, he does not state that the *dalālat al-naṣṣ is* the *argumentum a fortiori*, but that it is the 'basis' for it: Zysow, *The Economy*, 57. However, as he gives no further explanation and refers several times to the Ḥanafī acceptance of the *argumentum a fortiori*, which he only explains through this term, the reader can only understand that the *dalālat al-naṣṣ* is this form of argument.

inference through an extra-textual rational process – but rather it is the indication of the text. In other words, the application of the text to these other creatures is understood by all who understand the language well and reflect on the words conveyed.

It might appear that the topic of *dalālat al-naṣṣ* is merely a rebranding of *qiyās*, disguising rational inference as linguistic exploration.[131] Yet, for our authors, the distinction is real and returns to epistemology. The *dalālat al-naṣṣ* operates in the more epistemologically secure arena of language, while *qiyās* requires a far more speculative investigation of the 'habit of the law' as we will see below. This difference means that there are areas of the law that our Ḥanafī jurists permit to be affirmed through the *dalālat al-naṣṣ* and not by *qiyāṣ*. These areas of the law include prescribed punishments and expiations.[132] I will reproduce examples from al-Sarakhsī below. They range from clear linguistic investigations to rational investigations where the line between *qiyās* and *dalālat al-naṣṣ* is blurred. Exploring the difference between *qiyās* and *dalālat al-naṣṣ* is directly relevant to our study, as it reveals two distinct epistemological levels awarded to human inference.

Al-Sarakhsī's first example of the use of *dalālat al-naṣṣ* to establish a prescribed punishment is the case of the accomplice (*al-rid'*) to highway robbery. Ḥanafī jurists apply the Qur'anic punishment[133] for highway robbery to the accomplice by *dalālat al-naṣṣ*, even though he himself did not take part in the actual act of killing and stealing:

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[131] This is an argument made by the Shāfi'ī al-Shīrāzī (d. 476/1083): Abū Isḥāq al-Shīrāzī, *al-Luma' fī uṣūl al-fiqh*, 101-2.
[132] Zysow offers an explanation why these and related matters may not be affirmed by *qiyās*: Zysow, *The Economy*, 232-3.
[133] "The only compensation for those who make war upon God and His Messenger and strive after corruption in the land is that they be killed or crucified, or have their hands and feet on alternate sides cut off, or be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom": Qur'an, 5:33.

> This is because the expression of the text (*'ibārat al-naṣṣ*) is *muḥārabah*. The form (*ṣūrah*) of this is actually fighting (*qitāl*), but its meaning (*ma'nā*), arrived at through its language, is overcoming opponents and frightening them so that the roads are not traversable. The accomplice actively takes part in the latter just like the one who actually fights, and that is why they both share in the booty [in the case of a military campaign]. It is from these points of view that the prescribed penalty is applied to the accomplice.[134]

Another example is punishment for homosexual intercourse (*liwāṭah*). Abū Ḥanīfah and his two companions disagreed whether the prescribed punishment for adultery[135] applies to homosexuality, with both sides of the debate presented as an exploration of the *dalālat al-naṣṣ*:

> Abū Yūsuf and Muḥammad – God have mercy on them! – said that the prescribed penalty is applied for homosexual intercourse upon the doer and the done-to by indication (*dalālah*) of the text of adultery. Adultery is a word for a meaningful act which has a purpose, namely, fulfilling lust by spilling sexual fluid in an unlawful fashion without any possibility [of it being lawful][136] – all of this is found in homosexual intercourse. ... Its objective is spilling fluid, since offspring cannot be conceived in this site. And the prohibition of this [act] is more severe than the act performed in the vagina, as this prohibition is not lifted in any circumstance. The only [difference] is that the name of the site has changed [from vagina to anus], so this ruling is established by the indication of the text and not by means of *qiyās*.
>
> Abū Ḥanīfah says that this falls short of the considered meaning for which the prescribed punishment was obliged. The prescribed punishment was ordained as a deterrent, and that is when physical inclination (*ṭab'*) calls one to it, and physical inclination calls both parties to the act in the vagina. As for in the anus, physical inclination calls the doer to it, but not the done-to. [The principle] in punishments is that a perfect description is sought, as a deficient description opens the possibility for absence [of the meaning for which punishment is ordained]. Furthermore, in adultery, lineage is ruined and the child is squandered. ... This meaning is not found in the anus, for that but leads to the squandering of fluid in a site where it cannot produce, and the [squandering of sexual fluid] can be permissible as in the case of coitus. *So we know it is weaker than adultery in the meaning for which the prescribed penalty was ordained*. In the determination of punishment, no consideration is given to one being more unlawful.[137]

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[134] Al-Sarakhsī, *Uṣūl*, 1:242.
[135] Stoning to death for the one who has been previously married (*muḥṣan*), and 100 lashes for the one who has not been married.
[136] Adultery is intercourse "in an unlawful manner, in which there is no doubt (*shubhah*)." If there is a possibility or even a semblance of lawfulness then there is no prescribed punishment. Causes for doubt considered here include a marriage contract without witnesses, a marriage contract with someone not lawful to marry such as a mother or sister, and intercourse believing that the other party was one's spouse when in reality they were not. See Ibn al-Humām, *Fatḥ al-qadīr lil-'ājiz al-faqīr*, 5:250-9.
[137] Al-Sarakhsī, *Uṣūl*, 1: 242-3.

In this passage, we see that the indication of the text requires exploring the meaning underpinning the legal ruling. We can see that what is meant by a linguistic inference is not simply drawing on linguistically-inspired insights, but rather an attempt to arrive at the underlying objective of the speaker.

There is a further example to illustrate the blurry line between the two forms of inference: textually-based rational inference – the effective meaning of *dalālat al-naṣṣ* – and extra-textual rational inference – the contrasting activity of *qiyās*. It is a lengthy passage pertaining to the disagreement between Ḥanafīs and Shāfi'īs over expiations for breaking the fast in Ramadan. (Expiations, along with punishments, we are told, cannot be prescribed by *qiyās*.) There are two reports whose implications are debated between the two camps. The first is the report of a desert Arab who performed intercourse while fasting in Ramadan, on whom the Prophet obliged the expiation of freeing a slave, fasting two consecutive months, or feeding sixty poor people. The Ḥanafīs, unlike the Shāfi'īs, extended this expiation to the one who eats during a Ramadan fast. The second report debated here is the saying of the Prophet to the one who ate forgetfully while fasting in Ramadan, "God has given you food and drink, so complete the fast." The Shāfi'īs, unlike the Ḥanafīs, extended the dispensation for forgetfulness to accidental ingestion (*khaṭa'*) and ingestion under compulsion from another person (*ikrāh*). The Ḥanafīs in both cases explain their position through applying the indication of the text – meaning nothing more than following the text – while they charge al-Shāfi'ī with applying *qiyās* in the latter case – meaning applying rational inference from outside of the text.

For the former report, al-Sarakhsī justifies the extension of the expiation to the act of eating by telling us that the desert Arab in question came to the Prophet distraught, saying, "I have perished, and I have made perish," (*halaktu wa-ahlaktu*),

> and we know that he was not referring to a sexual violation (*jināyah ʻalā al-buḍʻ*), as he had full right to intercourse [with his wife] so it is not a violation in itself. Do you not consider that had he forgotten that he was fasting, it would not be considered a violation altogether? So we know that his violation was against the fast in view of his violating an integral in the performance of the fast. And it is known that the integral of fasting is withholding from satisfying the lust of the stomach and the genitals, and that the expiation was obliged as a deterrent from violating the fast. Furthermore, physical inclination to satisfying the lust of the stomach is more apparent than to satisfying the lust of the genitals [considering] that fasting takes place in the time when the lust of the stomach is ordinarily satisfied, i.e. the day. As for satisfying the lust of the genitals, that is ordinarily by night, so the legal ruling is established by the indication of the text from this point of view.[138]

He strives in this passage to show that eating is even more worthy of expiation than intercourse. As mentioned above, this is not a form of *argumentum a fortiori*; but, rather, he seeks to show that eating is as complete a violation as intercourse since we are dealing with a case of expiation, and if the meaning is not perfectly present in eating, then there might not be a prescribed consequence of the violation.

We come now to the second report concerning fasting:

> And included in [the indication of the text] is his saying – upon him be peace – to the one who ate forgetfully in the month of Ramadan, "God has fed you and gave you drink, so complete your fast." We affirmed this ruling for the one who performs intercourse forgetfully by the indication of the text. Squandering an integral of the fast has a reality that doesn't change by forgetfulness and consciousness; however, forgetfulness has a meaning that is linguistically known, namely, that a person is drawn to an act without any conscious act of his own or of anyone else, so it is ascribed to the one who has the right [to forgo the violation, i.e. God].[139] Sexual intercourse while forgetful resembles eating with respect to this meaning, so the ruling is established in it by the indication of the text and not by *qiyās*. ...
>
> It might be objected that intercourse is not like eating in every respect, because the time the fast is performed [i.e. the day] is ordinarily the time of eating and of dealing with means that lead to eating such as handling food and related acts. A person is thus ordinarily tested with this. [On the contrary] it is not ordinarily a time for intercourse. Furthermore, fasting weakens a person from intercourse and does not increase lust for it like it increases the lust to eat. It is thus fitting that the intercourse of the one forgetful of fasting be treated as the eating of the one forgetful in the prayer [which invalidates the prayer], as each of these is rare.

[138] Ibid., 1:244-5.

[139] The Arabic phrase is *man la-hu al-ḥaqq*. I understand this to mean 'the one who has a right over this act', meaning the one with the right to forgo as the act is for him, and that, in the case of ritual worship, is God.

> We say in response: Yes, in intercourse there is this form of deficiency, but there is also a strength in the urging of physical nature to it. Physical lust might overcome a person to a degree that he cannot stay away from intercourse, and when physical lust overcomes a person, everything other than that objective leaves his heart; this form of physical lust is not found in eating. So this strength fills that deficiency, and equality is realised between the two ... [and this is not *qiyās*.]
>
> Rather, the path of *qiyās* is the one trodden by al-Shāfi'ī – God have mercy on him – whereby he treated the one compelled by another (*mukrah*) and the one who accidentally [broke the fast] (*mukhṭi'*) the same as the forgetful one (*nāsī*) in consideration of the shared trait of excused inability (*'udhr*). [This is *qiyās*] because compulsion and accidental performance differ from forgetfulness in both form and meaning. Therefore a ruling established for forgetfulness is not established for compulsion and accidental performance by indication of the text, but rather by means of *qiyās*, and it is an invalid *qiyās*. This is because [an act performed under] compulsion is ascribed to other than the one who has the right [to forgo the violation, i.e. God], [rather it is ascribed] to the compeller (*mukrih*). An accidental act is ascribed to the one who performed the accident (*mukhṭi'*), and it is something that can in principle be avoided, so it does not share the same meaning as something which the person has no act in whatsoever. Have you not considered that a sick person may pray sitting and does not need to repeat those prayers when he is cured, unlike a person tied up [by another who must repeat prayers because he was stopped by the act of a creature, not the Creator]?[140]

I have shared this lengthy passage as it shows very well the difficulty in distinguishing the two spheres of *qiyās* and *dalālat al-naṣṣ*, whilst affirming the conceptual difference. Both employ a process of rational reasoning to discover the ruling pertaining to a case not explicitly discussed in a sacred text. The difference is that in the case of *dalālat al-naṣṣ*, the rational inference is bound by the word, or words, employed in a particular text, and at times the approach to words is quite literal, as in the contrast between forgetfulness and accidents. With *qiyās*, we will see that it steps outside of the linguistic usage of a particular passage to a broader consideration of the law. This broader consideration renders it an epistemologically weaker form of inference than that drawn from the language of a text.

[140] Ibid., 1:245-6.

### 1.1.2 The Early Juristic Community

An understudied topic in secondary studies is the clear '*salaf*ism' – or deference to the earliest Muslim community – on which much of Ḥanafī legal theory is based. It is the practice and insights of the early juristic community that I suggest is a second pillar of Ḥanafī thought, a pillar that serves to constrain the role of the intellect, as it determines what may not be compromised of the legal framework. The role of the early scholarly community as the ultimate source of correct understanding and practice is most clearly presented in our *uṣūl* works in the chapters of the *sunnah*, scholarly consensus (*ijmā'*) and following Companions.

*The* Sunnah

Chapters of the *sunnah* across *uṣūl* texts are similar. They grade Prophetic reports from stronger to weaker, stronger reports bearing a greater probability of attribution to the Prophet. In non-Ḥanafī *uṣūl* works, a strong report is known by two matters in its chain of transmission: the quality of the narrators and the connectedness of the chain.[141] The Ḥanafī *uṣūl* works under study also give importance to differentiating a strong report from a weak one. However, there is a stark difference in how these matters are assessed. This stark difference points to a central tenet of Ḥanafī *uṣūl*, and it returns to the epistemic status of the verdicts of early jurists in Ḥanafī epistemology. It is to teasing out aspects of this status that the current section is directed.

Works of *uṣūl* generally divide Prophetic reports into two types: the *mutawātir* or mass-transmitted reports and the *khabar al-wāḥid*, meaning reports not mass-transmitted.[142] Our Ḥanafī *uṣūl* works, on the other hand, divide reports into three categories: the *mutawātir*, the *mashhūr* (lit. 'well-known') and the *khabar al-wāḥid*/*akhbār al-āḥād*. I will explain these terms in accordance with al-Sarakhsī's

[141] Weiss, *The Search*, 284-321.
[142] Ibid., 167.

presentation, where acceptable forms of *khabar al-wāḥid* are subsumed into the lowest level of the *mashhūr* while unacceptable forms are described as *gharīb mustankar*.[143] The advantage of al-Sarakhsī's breakdown is that reports are neatly divided into acceptable (*mutawātir* and *mashhūr*) and unacceptable (*gharīb mustankar*) with clear criteria for each.[144]

The *mutawātir* (lit. 'coming in continuous succession') is a report transmitted by such a large number, in each generation, that there can be no doubt as to its being a Prophetic utterance. The *mashhūr* is a report transmitted by a limited number of narrators in the first generation but then becomes widespread in the second and subsequent generations. The mark of its being widespread is that scholars accepted and practised it. The *mashhūr* report is treated as a reliable report, and, for all purposes, it carries a similar weight to the *mutawātir*, in that both are able to modify Qur'anic injunctions. We saw above that only texts on the same epistemological level can modify each other; otherwise, the stronger negates the weaker. Thus, for the purpose of modifying the Qur'anic text, the *mashhūr* is similar in epistemological weighting to the Qur'an. However, its weight comes from scholarly acceptance and practice.[145]

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[143] Al-Sarakhsī does not explicitly state that this is how he is dividing the *khabar al-wāḥid*, but this is what the discussion implies. He does return to then discuss the *khabar al-wāḥid*, not from the point of view of conditions for acceptance, but rather to provide a general breakdown of reports – whether from the Prophet or ordinary people – and how they can be utilised: al-Sarakhsī, *Uṣūl*, 1:333-8.

[144] Ibid., 1:282-295. It is surprising that Bedir presents Ḥanafī *ḥadīth* theory through the standard non-Ḥanafī breakdown by stating that reports are of two types: *mutawātir* and *khabar al-wāḥid*, and that the *mashhūr* is a subset of the *khabar al-wāḥid*: Bedir, "The Early", 127. I find no precedent for this division in the texts he is studying. The only author that might simplify them into two categories is al-Jaṣṣāṣ, but for him the *mashhūr* is a sub-category of the *mutawātir* (where he calls it *fī ḥayyiz al-tawātur* and *al-qism al-thānī min qismay al-tawātur wa-huwa mā yu'lamu siḥḥatuhu bi-al-istidlāl*), not the *khabar al-wāḥid*: See al-Jaṣṣāṣ, *al-Fuṣūl fī al-uṣūl*, 3:48-9.

[145] Both al-Sarakhsī and Abū al-Yusr are explicit in grounding the superior status of the *mashhūr* report in the acceptance of the early juristic community. Fakhr al-Islām, however, is not explicit, and instead emphasises that the *mashhūr* report is mass-transmitted in the second generation, apparently grounding the topic in numbers of narrators, not juristic acceptance. However, a closer inspection of his discussion, especially in the light of his colleagues' explanations, suggests that he too grounds it in early acceptance. See Sohail Hanif, "*Al-Ḥadīth al-Mashhūr*: A Ḥanafī Marker of Kufan Practice?"

Al-Sarakhsī tells us that *mashhūr* reports can themselves be graded from stronger to weaker into three levels, each of which reflects its degree of scholarly acceptance.[146] The first are reports that were subject to widespread agreement, such as the reports of stoning the adulterer. He tells us that there was no disagreement regarding these reports in the first and second generations, with the insignificant exception of the Khawārij. The denier of such a report is declared astray, but not an unbeliever.[147] The second are reports that were subject to disagreement in the first generation – that of the Companions – and then became a point of agreement, such as the wiping over footgear (*khuff*) in ritual ablutions. The denier of such a report is declared erroneous and possibly sinful, but not astray. The third are those that were subject to disagreement in every generation. Of these reports, a scholar must follow those he deems right. He may declare opponents erroneous but not sinful.

The topic of the *mashhūr* is our first indicator of the almost-sacred stature awarded to early jurists: Where a report corresponds to what they put into practice, it is given highest epistemic stature, regardless of its chain and the quality of its narrators. This is with the exception of the third level of *mashhūr* report which was subject to constant disagreement. Here a jurist will look for evidence to give preponderance to the report, and here the quality and connectedness of the chain will be considered. To this, we will return.

The *gharīb mustankar* (lit. 'strange, odious'), we are told, is a report that contradicts the Qur'an and was not practised by scholars of the first and second generations. Al-Sarakhsī tells us that the one who practises such a report is feared

[146] This breakdown is mentioned by al-Jaṣṣāṣ, who ascribes it to 'Īsā ibn Abān's *al-Radd 'alā Bishr al-Marīsī*: al-Jaṣṣāṣ, *al-Fuṣūl*, 3:48-9.
[147] There is debate concerning the status of one who denies such a report. Al-Jaṣṣāṣ holds him an unbeliever, ascribing this position to Abū Yūsuf, while al-Sarakhsī states that the sound position (*al-ṣaḥīḥ*) is that of 'Īsā ibn Abān – presented above – that the individual is astray and not an unbeliever: See al-Sarakhsī, *Uṣūl*, 1:291-2.

sinful. We see from this description that the practice of the third generation does not itself carry great weight. Only the practice of the first and second generations can strengthen a report that seems to contradict the Qur'an. It is in the absence of such a contradiction that the third generation's practice may be considered.

In this simple breakdown we are introduced to a theory of Prophetic reports that rests on the practice of early jurists. The only case where early practice is not the main consideration pertains to reports that were followed since the earliest generation but were subject to disagreement. These will be open to further investigation, which can include narrator analysis. In the absence of juristic practice, the Qur'an plays a key role in assessing the correctness of a report. We have seen the broad spectrum of meanings awarded to the Qur'anic text through our investigation of the *dalālat al-naṣṣ*. A report contradicting this broad spectrum if not also held up by early juristic practice is likely to be rejected.

When assessing the quality of *ḥadīth* narrators, the theory is equally unique.[148] Al-Sarakhsī tells us that narrators fit into two broad categories: known (*ma'rūf*) and unknown (*majhūl*). Known narrators are themselves of two types. The first are those "who were known for *fiqh* and sound opinion in *ijtihād*". Their reports are decisive in that they cause preponderant knowledge of their truth (*mūjibah lil-'ilm alladhī huwa ghālib al-ra'y*). Therefore, they must be followed, regardless of whether their reports agree with *qiyās* or oppose it. If they agree with *qiyās* (i.e. their content is rationally inferrable from a knowledge of the law), they strengthen this *qiyās*; and if they oppose it, the *qiyās* is left and the report followed. This group of narrators includes the Rightly-Guided Caliphs, the 'Abd Allāhs – Ibn Mas'ūd (d. 32/652-3), Ibn 'Umar (d.

[148] Al-Sarakhsī, *Uṣūl*, 1:338-58.

73/692-3), Ibn ‘Abbās (d. 68/687-8)[149] – Zayd ibn Thābit (d. 45/665-6), Mu‘ādh ibn Jabal (d. 17/638-9 or 18/639-40), Abū Mūsā al-Ash‘arī (d. 44/665) and ‘Ā’ishah (d. 58/678). The second type of known narrators are those “who were known for uprightness (*‘adālah*), precision (*ḥusn al-ḍabṭ*) and memory, but were little by way of *fiqh* (*lākinnahu qalīl al-fiqh*)”. These include Abū Hurayrah (d. 58/774-775 or 59/775-776) (the most prolific *ḥadīth* narrator) and Anas ibn Mālik (d. 93/711-2). Al-Sarakhsī supports this lower classification of Abū Hurayrah with reports from ‘Umar ibn al-Khaṭṭāb (d. 23/644) and Ibrāhīm al-Nakha‘ī (d. 96/714) (the leading Kufan jurist) that show their caution in accepting his reports. Al-Sarakhsī tells us that – out of closely following the approach of the *salaf* (the learned of the early Muslim community) to such reports – the Ḥanafīs say: If the reports of these narrators agree with *qiyās*, they are practised; and if they contradict *qiyās*, they are followed if the *ummah* accepted them; otherwise, the sacredly sanctioned *qiyās* (*al-qiyās al-ṣaḥīḥ shar‘an*) is given preference if there is no possible analogy that supports them (*fī mā yansaddu bāb al-ra’y fīhi*).[150] He explains that this is not in any way to demean these Companions, but, rather, because reports are often transmitted by meaning and not the exact wording of the Prophet. Only someone known for *fiqh* can be trusted to transmit the complete intended meaning with all its legal implications. Someone not known for *fiqh* might fall short in this, and this possibility justifies caution.

As for unknown narrators, they are also identified through this *salaf*-based theory of reports. We are told that the unknown narrator is the one not known to have

[149] The ‘Abd Allāh’s (*al-‘abādilah*) is a phrase employed by both Ḥanafī jurists and *ḥadīth* scholars, but they use the term differently. Ḥanafī jurists refer to the three ‘Abd Allāh’s mentioned above, while *ḥadīth* scholars refer to four younger Companions: Ibn ‘Abbās, Ibn ‘Umar, Ibn ‘Amr (d. 63/682-3 or 65/684-5) and Ibn al-Zubayr (d. 73/692). See al-Bābartī, *al-‘Ināyah sharḥ al-Hidāyah*, 3:17.

[150] The phrase “in that for which the doors of *ra’y* are closed” is explained to mean that no possible *qiyās* supports the content of the report. If there are conflicting analogies, some supporting and some opposing, then this report is followed. This is in contrast with the unknown (*majhūl*) reporter, whose reports may be left in such a case. See al-Bukhārī, *Kashf al-asrār*, 2:379-80. Ṣadr al-Sharī‘ah presents the concept lucidly in Ṣadr al-Sharī‘ah al-Maḥbūbī, “*al-Tawḍīḥ*”, 2:11.

kept the company of the Prophet for an extended period. Rather, he is only known by his narrating a *ḥadīth* or two, such as Wābiṣah ibn Ma'bad (d. *c*. 60/679-80), Salamah ibn al-Muḥabbiq (d. ?) and Ma'qil ibn Sinān al-Ashja'ī (d. 63/683). Their narrations are divided into five categories. The first are unknown narrators who have become well-known due to the *fuqahā'* accepting their reports and narrating from them. These narrators are treated as known narrators. The second are those whose reports became widespread, yet the *fuqahā'* refrained from criticising them. Their silence shows approval, so these narrators are also treated as known. The third are those whom the *fuqahā'* disagreed over, with some criticising and others accepting. These are also treated as known narrators because if some *fuqahā'* accepted the report, then it is as if they themselves narrated those reports. The fourth are those whose narrations the *fuqahā'* all agreed to criticise. It is impermissible to follow such narrations. The fifth are those whose narrations did not spread amongst the *fuqahā'*, nor were they criticised by them. Such reports do not need to be practised, but may be practised if they agree with *qiyās*. They may be practised because we are told that uprightness is the assumed state in the first generation. Al-Sarakhsī concludes this discussion: "The narration of an unknown narrator does not constitute proof for practice unless it is given support by what is able to support it, namely, that the *salaf*, or some of them, accepted his narration."[151]

The emphasis on the *fiqh* of the narrator also finds its way into the definition of *ḍabṭ* or precision. Non-Ḥanafī *uṣūl* works tell us that a reliable narrator is one known for precision, which typically means that he is known for having a good memory.[152] Our Ḥanafī *uṣūl* works provide a further detail. Al-Sarakhsī tells that precision is of two types, outer and inner: "The outer is knowing the words of the

[151] Al-Sarakhsī, *Uṣūl*, 1:345.
[152] Weiss, *The Search*, 301.

heard [report] and understanding its linguistic meaning. The inner is understanding the meaning of the words in relation to sacred judgements that are based on it, this being *fiqh*."[153] This definition coincides with the importance given to the understandings and practice of jurists.

Another topic studied in *uṣūl* works is the connectedness of chains. Our Ḥanafī *uṣūl* writers offer no positive treatment of connectedness; rather, they present a negative treatment under the section of disconnectedness or *inqiṭā'*.[154] We are told that disconnectedness can be in form (*ṣūrah*) or in meaning (*ma'nā*). Disconnectedness in form is the *mursal* report. In non-Ḥanafī *uṣūl* works, we are told that the *mursal* is where the chain is intact except at the end, where the name of the Companion is omitted; such a report is considered weak.[155] Ḥanafī *uṣūl* authors, on the other hand, widen this definition and give more weight to such reports. They state that the *mursal* report is accepted from the first three generations, meaning that if they omit the chain that connects them to the Prophet, their reports may still be accepted. After the first three generations, we are told that there is a disagreement amongst Ḥanafī jurists. The best opinion on this, according to al-Sarakhsī, is that of al-Jaṣṣāṣ, that the *mursal* of those after the third generation is accepted only if they are known to relate from reliable narrators. We see here that the connectedness of the chain is not a priority for our jurists, who make up for the uncertainty this creates from the aforementioned emphasis on the practice and acceptance of early jurists.

The second form of disconnectedness – disconnectedness in meaning – is not really a case of disconnectedness at all. Rather, reports are deemed to be disconnected if we have reason to believe that they are wrong, even if the narrator narrates it with a full, connected chain of transmission. This is for one of two reasons. The first is that it

[153] Al-Sarakhsī, *Uṣūl*, 1:348.
[154] Ibid., 1:359-74.
[155] Weiss, *The Search*, 318-21.

opposes what is stronger than it. This includes the Book of God, a *sunnah* deemed *mashhūr*, or that the early generation of scholars did not quote it for an issue regarding which it would have been needed. The second reason for a disconnectedness in meaning is due to deficiencies in the narrator. These include his being uncritiqued (*mastūr*), morally corrupt, an unbeliever, a child, insane, heedless, careless or a person of innovation. We are also told that a *ḥadīth* is rejected if the narrator did not practise it or if it was not practised by one of the leading Companions after their knowledge of it.[156]

The preceding summary of the treatment of the *sunnah* in our Ḥanafī *uṣūl* works shows how they used a paradigm shared amongst *uṣūlī*s: All spoke of narrators and their qualities; all spoke of connectedness of chains; all spoke of the need to prefer strong reports over speculative inference from sacred texts. Yet, this shared vocabulary has been applied in a very different way in this Ḥanafī *uṣūl* tradition, the primary difference being the epistemological underpinning of the topic. Ḥanafī *uṣūlī*s maintained a communal understanding of the term *sunnah*, a communal understanding that reflects the earliest understanding of the term: Secondary scholarship tells us that the *sunnah* was originally conceived as the practice of the community, and that it was after al-Shāfi'ī that authoritative *sunnah* came to be associated primarily with Prophetic reports.[157] We see in our Ḥanafī theory works that the language of the traditionalist project has been utilised to support an understanding grounded in the earlier conception of a communal approach to *sunnah*. The weight given to this community in determining the *sunnah* is also reflected in the topic of *ijmā'* or scholarly consensus.

[156] Al-Sarakhsī, *Uṣūl*, 2:3-7.
[157] See Wael Hallaq, *Sharī'a: Theory, Practice, Transformations*, 39-48, and Joseph Schacht, *The Origins of Muhammadan Jurisiprudence*, 58-81.

*Scholarly Consensus and Following Companions*

Consensus is a source of law accepted by all mainstream Sunnī theorists.[158] Consensus is commonly defined as the agreement of all scholars in a particular time over a particular issue. This agreement is held to be binding on later generations. Our Ḥanafī *uṣūl* works share this understanding, but they give the topic wider application, awarding greater authority to the positions of earlier jurists. Zysow notes that "[t]he classical Ḥanafī theory is entirely in favor of *ijmā'* and consistently adopts those positions that were felt to facilitate the application of the doctrine."[159]

An example of facilitating consensus is the Ḥanafī support for what is termed a 'silent consensus' (*ijmā' sukūtī*). This is where only some jurists might have practised or said something; if the rest of the jurists of this generation remained silent on the issue then this was considered a silent consensus. Ḥanafī theorists also hold that if the jurists of a particular age offer different answers to a particular question, this is considered a consensus from them that the true answer lies in one of their answers. In other words, later generations are not free to offer an answer outside of those presented in an earlier generation. Ḥanafī theorists also permit a subsequent consensus to occur after a previous disagreement.[160] This would be by a later generation agreeing to support one of several earlier disputed positions. In all of these cases, Ḥanafīs present themselves as most liberal in facilitating the occurrence of consensus.[161]

In the related discussion on the status of following a Companion, we are told that if a Companion holds a position, without an opposing opinion from his generation being known, he is to be followed, even if his opinion contradicts what is inferrable

[158] Ẓāhirī and Ismā'īlī writers were opposed to the concept: See Zysow, *The Economy*, 115.
[159] Ibid., 114. See also ibid., 142-6, 157.
[160] Ibid., 142-6.
[161] Ibid., 113-46; al-Sarakhsī, *Uṣūl*, 1:295-333.

by *qiyās*. This is the position of 'our teachers (*mashāyikh*)' notes al-Sarakhsī,[162] who presents case studies to show that following the position of a solitary Companion was practised by Abū Ḥanīfah's circle, although in some cases, members of this circle differed, with some following the Companion, and others following *qiyās*. This importance given to following a single Companion where no alternative Companion opinion exists is explained by the Companion's opinion either being based on something heard from the Prophet, in which case it is treated as a report, or being based on the Companion's rational consideration (*ra'y*), which is stronger than that of later jurists. We are told that the opinions of Followers do not hold the same status as they were further removed from the Prophet. Thus no consideration is given to a Follower who disagrees with the Companions, as he is not considered part of their consensus. But then we are told something important: Followers who witnessed the age of the Companions (*adraka 'aṣr al-ṣaḥābah*) such as al-Ḥasan al-Baṣrī (d. 110/728), Sa'īd ibn al-Musayyib (d. 94/712-3) and Ibrāhīm al-Nakha'ī are considered part of the consensus of the Companions, meaning their disagreement means the absence of a consensus.[163] This is a fascinating point considering that Ibrāhīm al-Nakha'ī was the mentor of Ḥammād ibn Abī Sulaymān (d. 120/737-8), the mentor of Abū Ḥanīfah. It awards al-Nakha'ī the status of a Companion because he was a recognised jurist when some Companions were still alive. Where then does this place Abū Ḥanīfah?

Here we find the special dual status awarded to Abū Ḥanīfah which lies at the heart of this juristic enterprise. We find that Abū Ḥanīfah – whose existence is implicit in every discussion of our *uṣūl* books as they are ultimately expositing the principles of his legal system – is understood to be approaching the sources of law

[162] It is also the position of the Iraqi Abū Sa'īd al-Barda'ī (d. 317/929-30), although his student al-Karkhī (d. 340/952 ) was of an opposing opinion: ibid., 2:105.
[163] Ibid., 2:114.

through this *salaf*-based approach to *sunnah* and inherited tradition. Yet, we find him occasionally referred to as a member of the august, authoritative group of the *salaf*, himself.[164] He inherits a unique middle-ground: With respect to the first two generations, who are the absolute authority on transmitted *sunnah*, he is the faithful interpreter, taking directly from the second generation of jurists and inheriting their approach to the legal project. This awards him a special status with respect to those after him: He is the door to the *salaf*, and he is, considering his taking directly from the second generation of jurists, one of the esteemed *salaf* himself. His positions and practice are the means of knowing strong reports from weak and valid methods from invalid. This insight is essential to understanding the relation of Ḥanafī commentators, such as al-Marghīnānī, to their source texts, as we will see.

### 1.1.3 The Habit of the Law

The habit of the law, I argue, is the third anchor of rational inference in Ḥanafī thought. It is the pillar underpinning the topic of *qiyās* (often rendered 'legal analogy'), a topic dealt with at length in Ḥanafī *uṣūl* works. Throughout these works, we are reminded that *qiyās* is the last resort, only turned to in the absence of an indicator in one of the three *uṣūl*: the Qur'an, *sunnah* and *ijmā'*. *Qiyās* lies at the bottom of the epistemological ladder. This is because of the added probability and uncertainty in identifying the precise cause (*'illah*) that brings about a legal qualification in a particular legal case and in carrying this across to another legal case.

[164] The clearest example of this is a discussion in the section of *qiyās*. Al-Sarakhsī states that for a *qiyās* to be valid, the proposed *'illah* must correspond to the *'illah*s transmitted from the *salaf*. In the course of a dialectical exchange to explore this topic, he clearly holds Abū Ḥanīfah as from the *salaf*, meaning the group whose *'illah*s are intrinsically authoritative. See Ibid., 2:217. Furthermore, al-Sarakhsī in his introduction mentions the importance of following the early imams (*al-a'immah al-mutaqaddimīn*), that the Prophetic Companions were the role-models (*qudwah*) of later scholars (*al-muta'akhkhirīn*) and that complete *fiqh* was the way of '*our* early imams (*al-mutaqaddimīn min a'immatinā*). The conflation of terms gives 'our imams' a special rank between the Companions and later scholars: ibid., 1:9-10. Al-Bazdawī applies the term 'our *salaf*' to Abū Ḥanīfah's circle in his introduction: Fakhr al-Islām, "*Uṣūl*", 1:7.

In this topic too, Ḥanafī jurists adopted an approach that minimises this probability and seeks to put *qiyās* on the strongest epistemological foundation, and they rejected all other methods as unsatisfactory. This Ḥanafī theory of *qiyās*, with its "methodological monism"[165] – accepting only the strongest form of *qiyās* – places them as the most conservative school in theorising *qiyās*. In fact, al-Sarakhsī remarks that three-quarters of what people call *qiyās* is not *qiyās* at all.[166] Due to this narrower usage of *qiyās* in Ḥanafī texts, I leave the term untranslated and allow the following discussion to define it.[167] This epistemologically secure form of *qiyās* confines rational inference within the habit of the law. The law, according to this insight, is assumed to be internally consistent and coherent. A *qiyās* that agrees with the internal rationality of the law is accepted. Approaches to *qiyās* that do not strive to fit a proposed *qiyās* within the remainder of the law are insufficient.

The main aspect of Ḥanafī *qiyās* theory that sets them apart from others is the theory of *ta'thīr* or 'effectiveness'. The topic of *ta'thīr* deals with the most central aspect of *qiyās*, namely, identifying the correct *'illah*. The *'illah* is a feature in a legal case to which its legal qualification (e.g. being licit or illicit, valid or invalid) is tied. The bulk of the discussions in the chapter of *qiyās* pertain to identifying a correct *'illah* and the rules for this. And it is here that the Ḥanafī theory of *ta'thīr* is mentioned as the only true way to produce a demonstrably strong *'illah*.

To explain the theory of *ta'thīr*, Ḥanafī jurists contrast it with an opposing theory, that of *ṭard* or coexistence. The proponents of *ṭard*, or the *ahl al-ṭard* as they

[165] A term applied to Ḥanafī *qiyās* theory by Zysow, *The Economy*, 198.
[166] Al-Sarakhsī, *Uṣūl*, 2:193-4.
[167] Wael Hallaq also insists on leaving the term untranslated. His reason is that a number of rational methods are subsumed under the term that cannot be properly classified as 'analogy': Wael Hallaq, "A Tenth-Eleventh Century Treatise on Juridicial Dialectic", 205-6. He states that understanding *qiyās* to be analogy is a common mistake in an article devoted to non-analogical methods subsumed under *qiyās*: Wael Hallaq, "Non-Analogical", 288. On forms of *qiyās* unnacceptable to Ḥanafīs, see also Zysow, *The Economy*, 192-6.

are referred to (denigratingly),[168] hold that a proposed *'illah* is true if it is coexistent with the ruling in question, meaning that the legal qualification occurs when the *'illah* does, and is absent when the *'illah* is absent.[169] Crucially, the *ahl al-ṭard* assert that the *'illah* need not be an intelligible meaning; rather, it is sufficient to observe coexistence. Al-Sarakhsī responds to this:

> The majority of jurists have said that the absence of a legal qualification upon the absence of the *'illah* is not a proof of the validity of the *'illah* and that the existence of the legal qualification upon the absence of the *'illah* is not a proof for the invalidity of the *'illah*. Rather, the proof of the validity of the *'illah* is that it is eligible (*ṣāliḥ*) and then declared upright. [This is] just like a witness [in court]: he must be eligible to testify by satisfying what is required to be capable of testifying, and then he must be declared upright by his moral uprightness (*'adālah*) being affirmed upon examination. ...
>
> There is no disagreement between us and al-Shāfi'ī – God have mercy on him – that the trait through which the *'illah* is eligible is its conformity (*mulā'amah*). The meaning of this is that it conforms with the *'illah*s that have been transmitted from the Messenger of God – God bless him and give him peace – and the Companions, not diverging from their method in identifying *'illah*s. ... Then the disagreement after that concerns its uprightness. Our scholars say that the uprightness of an *'illah* is known by its effect (*athar*): When it is effective in the case whose *'illah* is sought, it is an upright *'illah*. Now, it may be acted upon before its effectiveness is evident, but it is only incumbent to act upon it once its effectiveness is known, while it is impermissible to act upon it without [estabilishing its] eligibility from its conformity. This is just like testimony: It is impermissible to act upon the testimony of a witness before his eligibility is established, and after it is established, his testimony may be acted upon before knowing his uprightness, as in the case of the unexamined witness (*mastūr*), though it is not incumbent. If a judge were to pass a judgement based on the testimony of the unexamined witness, his judgement would pass.[170]

The *'illah* must be intelligible. What does it mean to be intelligible? Simply that it not diverge from the *'illah*s that have reached us from the Prophet and his Companions.

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[168] They are contrasted with *ahl al-fiqh*, implying that they are devoid of deep understanding: See Zysow, *The Economy*, 218-9. Al-Sarakhsī laments that while the jurists of the *salaf* would spend considerable time thinking about a legal question, to then arrive at only one or two possible *'illah*s, one of these later scholars who follow the doctrine of coexistence can come up with fifty *'illah*s in a single sitting: al-Sarakhsī, *Uṣūl*, 2:228.

[169] Unfortunately, the phenomenon of a legal qualification's occurring with the occurrence of the *'illah* (termed *ṭard* properly speaking) and its absence with the absence of the *'illah* (termed *'aks*) can be called 'effectiveness" (*ta'thīr*) in non-Ḥanafī works. See, for example, al-Shīrāzī, *al-Luma'*, 111-12. This understanding of 'effectiveness' bears no relation to the understanding presented here from our Ḥanafī sources.

[170] Al-Sarakhsī, *Uṣūl*, 2:176-7.

Without being given a more precise definition, we must assume that it simply seem like an *'illah* to a jurist familiar with the *qiyās* of the early community. This striving for congruence, of fitting within the larger legal project, is at the heart of the Ḥanafī theory of *qiyās*. Its lower level is the congruence of *mulā'amah*, that it fit with early instances of *qiyās* in a general sense. At the higher level of striving for congruence is the theory of *ta'thīr* or effectiveness, which states that the proposed *'illah* must have an effect. The effect is detected from cases other than the case under consideration. If we can see the *'illah* has a proven effect in other cases, in other parts of the law, then we know that this really is an existent *'illah* in the law of God. We are regularly reminded that this cautious approach to *qiyās* is modeled on the approach of the *salaf*.[171]

Our *uṣūl* books do not present a detailed theory of effectiveness. Rather, as is their habit, they illustrate the meaning of effectiveness through examples from legal cases.[172] The first example al-Sarakhsī presents is of the Prophetic report concerning the status of cat saliva, discussed above. The general rule is that the saliva of predatory animals is considered ritually filthy (*najas*) for the purposes of ritual worship. However, the Prophet made an exception for cats, saying, "They are but your regular visitors (*ṭawwāfūn*)." This Prophetic report ties the purity of cat saliva to their regular visitation of people's homes. Is the *'illah* of visitation an effective *'illah* in leading to the purity of what should otherwise have been considered ritual filth? We are told that it is. This is because it is an expression of widespread affliction (*'umūm al-balwā*) and necessity (*ḍarūrah*). The effectiveness of necessity in removing unlawfulness is demonstrated by the sacred text of the Qur'an: "Whosoever is compelled (*uḍṭurra*), neither desiring nor returning, then there is no sin on him,"

[171] See, for example, al-Sarakhsī, *Uṣūl*, 2:193, 199, 227.
[172] Ibid., 2:186-92.

(Qur'an, 2:173) a verse permitting the consumption of unslaughtered meat in a case of necessity. The fact that necessity renders filthy unslaughtered meat pure for consumption shows that necessity is *effective* in rendering pure what was originally filthy. Therefore, since 'regular visitation' of cats is an indicator of necessity – as cat saliva cannot be avoided easily due to this regular visitation – it is subsumed under the effective *'illah* of necessity.[173] It should be noted that this is an example of an effective *'illah* but not an example of *qiyās*, because the text states the *'illah* directly. The application of this *'illah* to the purity of cat saliva is the expression of the text (*'ibārat al-naṣṣ*), and its application to other predatory animals that regularly visit homes is from the indication of the text (*dalālat al-naṣṣ*), as mentioned above. *Qiyās* is extracting an *'illah* from other than the language of a text.

Al-Sarakhsī provides another example through a debate between the Ḥanafīs and Shafi'īs concerning ritual ablutions. Al-Shāfi'ī held it *sunnah* (highly recommended) in ablutions to wipe the head three times, whereas the Ḥanafīs said the *sunnah* is to wipe the entire head once. Both agree that the minimum obligation in wiping the head is wiping a part of the head once. Shāfi'ī jurists argue that wiping the head is an essential integral (*rukn aṣlī*) of ritual ablutions, like the limbs that are washed – the face, arms and feet; both parties agree that the *sunnah* is to wash these three times, so the head which is an essential integral like them should also be cleansed thrice. Ḥanafī jurists respond to this by arguing that it is not wiped multiple times because it is a case of wiping, just as in the cases of dry ablutions (*tayammum*) and footgear (*khuff*), each of which is wiped once.

Here are two proposed *'illah*s: 'integrality' and 'wiping-ness'. Each leads to a different solution to the question of how to perform the *sunnah* of head-wiping.

[173] Al-Sarakhsī, *Uṣūl*, 2:186-7.

Which of these is the effective *ʻillah*? Al-Sarakhsī tell us that 'wiping' is the effective *ʻillah*. This is because the very word 'wiping' implies a lightening (*takhfīf*) of the prescription[174] for the sake of ease, as wiping is doubtlessly easier than washing. The fact that wiping the entire head (*istīʻāb*) is not a condition – according to both parties – unlike the case of washing limbs also proves a lightening of the prescription. So wiping is effective in lightening the prescription; integrality does not negate this. Furthermore, the essence of *sunnah*-acts, we are told, is performing more than the minimum (*ikmāl*, lit. 'perfecting'), and since wiping the entire head is not a condition, then by wiping its entirety once, a person performs more than the minimum, and thus the meaning of the *sunnah* is fulfilled. Washed limbs, on the other hand, are washed in their entirety to fulfill the obligation, thus going beyond the minimum is only achieved by washing multiple times. The word 'integrality' does not indicate this difference, whereas the word 'wiping' does; thus, it is the effective *ʻillah*.[175]

Although textbook examples of *qiyās* always involve an original case (*aṣl*) from which the *ʻillah* is extracted and then applied to the subsidiary case (*farʻ*), we are told that this is not necessary. This is because an effective *ʻillah* might be known by its effect in many chapters of the law, so there is no need to mention a particular original case. Al-Sarakhsī tells us this in a further example of *taʼthīr*: the disagreement between Ḥanafīs and other jurists regarding a father marrying off his daughter. All parties agree that a father may marry off his minor, virgin daughter, but what is the *ʻillah* of this case? And based on this, may a father marry off his adult, virgin daughter? Ḥanafīs say that the *ʻillah* is her being a minor, thus the father may not marry off his adult, virgin daughter, while Shāfiʻīs say that the *ʻillah* is virginity, and thus a father may marry off his adult, virgin daughter. Al-Sarakhsī tells us it is the

[174] I use 'prescription' for forms of sacred injunction such as washing and wiping in our example.
[175] Ibid., 2:189-90.

Ḥanafī *'illah* that is effective. This is because this form of guardianship (*wilāyah*) – where the guardian takes charge of contracts on behalf of his ward (*mūlā 'alayh*) – is undertaken because of the ward's inability to do so him/herself, while being in need of these contracts. This is also the case regarding financial maintenance (*nafaqah*). The effective feature there is whether someone is a minor, not whether someone is a virgin. Similarly, in other places connected to guardianship – guardianship over money and over males – it is minor-hood, not virginity, that is effective. Al-Sarakhsī concludes, "So we know we have trodden the way of the *salaf* in drawing inference from the effective feature [of the case]."[176]

These three examples give an insight into the meaning of effectiveness. It is an investigation into whether a proposed *'illah* explains and upholds related cases.[177] The emphasis placed on the effective *'illah* reveals a great deal of the underpinning philosophy of the Ḥanafī legal project, specifically, the weight given to the prevalent logic of the legal system. The assumption is that new rules will be subsumed into the prevalent logic of the system. The weight given to the prevalent logic we saw in the topic of reports. Reports not widely practised by early jurists and not narrated initially by a jurist-Companion are only accepted if they agree with the *qiyās*. We should now understand what this means. Such reports do not have sufficient epistemological weight to independently establish the likelihood of their originating as a Prophetic utterance. They are in need of corroborative evidence. This corroborative evidence is the rest of the law: If the prevalent logic of the law supports the content of the report, it is strengthened thereby and accepted. We saw this in the report concerning the

[176] Ibid., 190-1.

[177] I explain this slightly differently than Zysow who emphasises that effectiveness compares a proposed *'illah* to *'illah*s directly found in the Qur'an, *sunna* and *ijmā'*. My explanation in no way contradicts his, but emphasises that this is not simply a comparison of proposed *'illah* with established *'illah*, but rather an exploration of related cases and whether this *'illah* effects them and offers an explanation of why they work the way they do. This is shown by the examples provided by the *uṣūl* works consulted. To further illustrate, two more examples will follow in the section on *jadal* below.

purity of cat saliva due to cats frequently visiting people's homes. This report was not accepted on face value. The reason mentioned in the report– the *'illah* – accorded with the larger logic of exceptions taken out of necessity. This fit with the law's prevalent logic strengthened the report.

The theory of *qiyās* is a theory of the internal coherence of the law. All schools of law are based on an understanding of this. What demarcates the Ḥanafī understanding of this is how this internal coherence is weighed during a conflict among indicators of the law. We find in Ḥanafī legal theory that prevalent logic, meaning the recurring rationale found in the rulings of sacred law, is the strongest of the probabilistic forms of evidence.[178] It is only overridden by a source of law that is *mutawātir* – i.e. the Qur'anic text – or that is practised by early jurists – i.e. the *mashhūr* report or a statement from a jurist Companion.[179] Ḥanafī *uṣūl* works are not at all explicit in stating this. Rather, they consistently present *qiyās* as the weakest of the sources of law, pursued when all other avenues have failed. Only by carefully regarding the role of the law's prevalent logic in all the chapters of *uṣūl* can we discern what they mean. *Qiyās* is weaker than a clearly established *sunnah* or *ijmā'*. If a report is not clearly established, the prevalent logic will determine the degree of its acceptance. This is why I have suggested that there are three pillars in Ḥanafī theory: a literal theory of language, the early juristic community and the law itself. Ḥanafī

[178] This is how I believe we should understand Zysow's observation that the Ḥanafī theory of effectiveness allows for a greater scope for *qiyās*: Zysow, *The Economy*, 212. Effectiveness is poor at generating new *'illah*s. Other methods are better suited for that. But what effectiveness allows for is greater confidence in the *'illah*s discovered. This greater confidence gives these *'illah*s much wider application in the law as illustrated here.

[179] In the section on *qiyās*, al-Sarakhsī makes an interesting statement about Prophetic reports. In the course of arguing with the *ahl al-ṭard*, who hold that if several texts attest that a particular feature is the *'illah*, then this proves that it is, al-Sarakhsī responds, "It is not like this. Rather, each text (*aṣl*) is a witness, so several texts are like a group of witnesses, or a number of narrators for a report (*khabar*). *The proof of the correctness of a report and its being a decisive evidence (*ḥujjah*) is only found in the text (*matn*) of the* ḥadīth. Effectiveness of the feature is like the proof of correctness from the text of the *ḥadīth*": al-Sarakhsī, *Uṣūl*, 2:186. The rule of thumb with the *khabar al-wāḥid* is that its correctness is found in its *matn*. What is the proof in the *matn* of a Prophetic report that supports its validity other than how it fits in with the rest of the law? Thus, the prevalent logic functions as the arbiter in assessing reports not supported by early juristic practice.

language-theory ensures epistemologically secure interpretation. The early juristic community establishes accepted *sunnah*. The prevalent logic of the law guides whether all other forms of inference and transmitted knowledge are accepted or not.[180]

We should note that a theory that awards such importance to identifying a prevalent logic when addressing cases of law, and gives this prevalent logic such weight, is in need of a theory of exceptions. We have seen that a strongly transmitted *sunnah* – meaning one practised by the early community of jurists – overrides *qiyās*, meaning the prevalent logic of a particular topic. We have also seen the case of cat saliva. The prevalent logic – or the *qiyās* – pertaining to animal saliva indicates that cat saliva should be deemed filthy, as with all predatory animals. However, out of the necessity caused by the frequent visitation of cats into people's homes an exception was made. We have seen how this exception itself was held to fit into a larger rule of exceptions, showing it to be the kind of exception the Lawgiver (*al-shāri'*) would make. A theory of exceptions is essential to lay out the limits of prevalent logic in a system where the weight awarded to prevalent logic is its defining feature. Ḥanafī *uṣūl* works do indeed provide a theory of exceptions. Unfortunately, they call it *istiḥsān*.

I call this unfortunate because the name is distracting. *Istiḥsān* translates as 'preference', or literally 'deeming something to be beautiful'. Saying that a jurist arrived at a rule due to *istiḥsān* would seem to imply that he exercised a subjective personal judgement in its favour. The term also draws one into early polemics surrounding the use of the term in the formative period, directed against its use in Abū Ḥanīfah's circle. The term naturally invites researchers to investigate this early polemic and whether Ḥanafī *uṣūlī*s were redefining *istiḥsān* to deflect such criticisms

[180] Zysow presents the Ḥanafī approach to *qiyās* as a paradox. They are the most restrictive of all schools in the theory of *qiyās*, yet the strength of their attachment to *qiyās* sets them apart from other schools: Zysow, *The Economy*, 196.

from Abū Ḥanīfah. No doubt, this is an important line of investigation.[181] However, it mustn't cloud another investigation, namely, studying the theory of exceptions as an essential part of Ḥanafī legal theory, regardless of its name. This is because the very fact of a theory of exceptions underscores the real epistemological status and meaning of the habit of the law.

In brief, the theory of exceptions tells us that the prevalent logic of *qiyās* is left for two main reasons.[182] The first is due to evidence that supports a legal ruling that opposes the *qiyās*. This may be due to three forms of evidence: a sacred text, scholarly consensus, or necessity (*ḍarūrah*). An example of a sacred text is the *ḥadīth* which states that the fast of one who eats forgetfully is not broken. The *qiyās*-position is that the fast would be broken, as this person has violated the main integral of fasting by ingesting food. Ḥanafī texts express such a contrast by saying that according to *qiyās*, his fast is broken, but according to *istiḥsān*, it is not. An example of scholarly consensus is the manufacturing contract (*istiṣnāʿ*), whereby a person is paid to make something. The *qiyās*-position is that this is impermissible, as something non-existent may not be subject to a sale. However, this contract is permitted by scholarly consensus, so the *qiyās* is left, and the contract is affirmed by *istiḥsān*. An example of necessity is the purification of wells. A well with ritually filthy water can never be purified according to the *qiyās*-position, because the walls will remain filthy and new water poured into it would become filthy by contact with the walls. However, by necessity – the need for water – wells were held to be purified by removing water. Another example is the aforementioned example of cat saliva, which was deemed pure out of necessity, as confirmed by a *ḥadīth* on the topic.

[181] Bedir summarises modern and classical polemics around the term: "The Early", 211-2. See also Zysow, *The Economy*, 240-2. For developments in the theory of *istiḥsān* in Ḥanafī *uṣūl al-fiqh* works, see Murtaza Bedir, "The Power of Interpretation: Is Istiḥsān Qiyās?"
[182] Al-Sarakhsī, *Uṣūl*, 2:199-208.

These examples of *istiḥsān* are exceptions from the prevalent logic governing a topic of law. As such, there is a special rule that pertains to them: An exception remains an exception and does not become a rule. A case which is an exception from a prevalent rule may not be taken as a basis for analogy by *qiyās*, because its existence defies the general rule. Only a case that resembles the exception in every aspect may be allowed to share the legal ruling pertaining to the exception. This sharing of the legal ruling is not called *qiyās*, because an *'illah* may not be extracted from the exception by virtue of its status as an exception. Rather, our authors tend to call such a procedure *ilḥāq* or treating something similar to the exceptional case.[183] We will see examples of this in our study of the *Hidāyah*.

There is one further form of *istiḥsān*. This further form is not actually an exception; it only appears to be one. Rather, it is termed a hidden (*khafī*) *qiyās*. Al-Sarakhsī explains,

> It is the indicator (*dalīl*) that opposes the apparent *qiyās* which hastens to the imagination before careful reflection. ... But after careful reflection on the ruling pertaining to the case and cases that resemble it in the *uṣūl* [Qur'an, *sunnah*, *ijmā'*] it becomes evident that the indicator that opposes [the apparent *qiyās*] is above it in strength, so it is the one that must be acted upon. They called this *istiḥsān* to distinguish between this form of indicator and between the apparent one which hastens to the imagination before careful reflection.

He explains this with the following example pertaining to the leftover drinking water (*su'r*) of birds of prey:

> The *qiyās* in this is that it is ritually filthy in consideration (*i'tibār*) of the leftover drinking water of predatory land animals, the *'illah* being the impermissibility of eating them. However, according to *istiḥsān* this water is not ritually filthy. This is because we know that predatory animals may be used and benefitted from, so they are not filthy in essence (*najas al-'ayn*). Rather, the leftover drinking water of predatory land animals is [filthy] out of

[183] It is not in the section of *istiḥsān* that our authors use the word *ilḥāq* in such a way, or suggest that the legal ruling may be carried across if another case resembles it completely. Rather, they mention it casually in other sections. This aspect of the doctrine of *istiḥsān* is essential for understanding its scope, as we will see in the *Hidāyah*. See ibid., 1:334, where al-Sarakhsī states this rule in the negative: "[Regarding] what is established by a text that opposes the *qiyās*, nothing else may be attached to it (*lā yulḥaq bihi*) which does not share its 'meaning' in every respect (*mā laysa fī ma'nāhu min kulli wajh*)."

> considering that they are unlawful to eat, and because they drink with their tongues, which are moist from their saliva, their saliva being formed from their meat. This does not exist in predatory birds because they take water from their beaks and then swallow it. The beak is a dry bone [so it is not filthy]. Even the bone of a dead animal is not filthy, so how so from a living animal?[184]

This form of *istiḥsān* is not an exception to the prevalent rule. It merely appears to be an exception from what the answer would have been expected to be upon first reflection. Thus, this form of *istiḥsān* is not treated as an exception, and it may be taken as the basis for another *qiyās*.

With this we conclude our exploration of the epistemology of Ḥanafī *uṣūl al-fiqh* and our attempt to highlight its main underlying foundations. It is important to note that our conclusions cannot be assumed to directly reflect the jurisprudence of Abū Ḥanīfah himself, which is in need of further study. Nor can they be assumed to directly reflect the Ḥanafī school through all periods of its development. What we do know is that our conclusions reflect how this legal school was understood and theorised in the early classical period under study. We are now ready to take a step backwards and, in the light of the preceding discussion, reflect on what *fiqh* actually is.

### 1.1.4 What is *Fiqh*?

The word '*fiqh*' denotes the "science of religious law in Islam".[185] Works of *uṣūl al-fiqh* often commence with a technical definition of the term. The most common definition given to *fiqh* in the late *uṣūl al-fiqh* tradition is "knowledge of sacred rulings of practical important, acquired from specific evidence" (*al-'ilm bi-al-aḥkām al-shar'īyah al-'amalīyah al-muktasab min addillatihā al-tafṣīlīyah*).[186] This common *uṣūlī* definition presents *fiqh* as knowledge of sacred rulings pertaining to practice –

[184] Ibid., 2:204.
[185] *Encyclopaedia of Islam*, 2nd edition, s.v. "Fiḳh", by Ignaz Goldziher and Joseph Schacht.
[186] See, for example, al-Zarkashī, *al-Baḥr al-muḥīṭ fī uṣūl al-fiqh*, 1:21.

such as "prayer is obligatory" and "wine is unlawful" – and that this knowledge derives directly from sacred sources. Both al-Sarakhsī and Fakhr al-Islām appear to present a similar understanding in the introductions to their works, though not in the form of a precise definition. They tell us that *fiqh* is the knowledge of divinely ordained matters (*mashrū'āt*), that mastery of it is by knowing the derivation of these from their sources, and that the full realisation of it is by applying these divinely ordained matters in practice.[187] Abū al-Yusr, however, presents a very different angle to the term.

I will translate Abū al-Yusr's explanation at length as it provides an understanding of *fiqh* that will help greatly in our study of the *Hidāyah*, and is the most detailed answer offered by the texts consulted to explain what is meant by *fiqh*.[188] I will present the complete translation followed by explanation and discussion. Abū al-Yusr states:

> [*Fiqh*] is knowledge of that which underpins[189] sacred rulings stored in the Book of God – Most High – the *sunnah* of His Messenger – on whom be peace – and the consensus of the *ummah* (*al-'ilm bi-mā 'ulliqa bihi al-aḥkām al-shar'īyah al-mūda' fī kitāb Allāh ta'ālā wa-sunnat Rasūlihi 'alayhi al-salām wa-ijmā' al-ummah*). — §1 Definition of *fiqh*
>
> The *uṣūl* [lit. sources] of *fiqh* are these three things: [the Qur'an, the *sunnah*, the consensus of the *ummah*]. They are called the 'sources of *fiqh*' (*uṣūl al-fiqh*) because *fiqh* is in them. — §2 Meaning of '*uṣūl al-fiqh*'
>
> Furthermore, that which underpins sacred rulings is [also] called *fiqh* even though it is not *fiqh* itself, because it is the object [of *fiqh*]. The Arabs [sometimes] denote the object and the doer with the verbal noun. ... The *fuqahā'* have concurred that the meaning of *fiqh* is what we have mentioned. — §3 Alternative usage of '*fiqh*'
>
> This is what is indicated by the Book of God ...: "He gives wisdom to whomever He wills." (Qur'an, 2:269) The People of Exegesis have said, "Wisdom is *fiqh*." It is knowledge of the realities of things; whoever discovers their true meanings is called a *faqīh*.[190] Whoever memorises legal cases — §4.1 *Fiqh* as wisdom; §4.2 Memorising cases only figuratively *fiqh*

[187] Al-Sarakhsī, *Uṣūl*, 1:10; Fakhr al-Islām al-Bazdawī, "*Uṣūl*", 1:12.
[188] Abū al-Yusr al-Bazdawī, *Ma'rifah*, 23-30.
[189] 'Underpin' is perhaps the most idiomatic way to render '*ma 'ulliqa bihi*', which literally means, "From which [sacred rulings] are suspended". To suggest that a ruling suspends from a particular idea means that the idea underpins it, with the implication that were it not for this idea, there would be no ruling.
[190] The equating of *fiqh* with *ḥikmah* can be found in al-Dabūsī: Nabil Shehaby, "*'Illah* and *Qiyās* in Early Islamic Legal Theory", 29.

(*masā'il*) and exegeses and does not discover these meanings is only figuratively called a *faqīh* due to his memorising that which is established by the *fiqh* which underpins the rulings in the text.

§5 Synonyms of *fiqh*'s alternative meaning from §3

Just as this [underlying reality] is called *fiqh*, it is also called 'meaning' (*ma'nā*), and ... 'analogy' (*qiyās*),[191] and ... 'cause'[192] (*'illah*), and ... 'occasion' (*sabab*), and ... 'intelligible' (*ma'qūl*), and ... 'subtlety' (*nuktah*), and ... 'indicator' (*dalīl*), and ... 'consideration' (*naẓar*), and ... 'opinion' (*ra'y*), and ... 'decisive proof' (*ḥujjah*), and ... 'demonstration' (*burhān*).

§6 'Meaning'

It is termed 'meaning' because *ma'nā* is the verbal noun from the [past-tense verb] *'anā* and [present-tense verb] *ya'nī*, [with the verbal nouns] *'ināyah* [and] *ma'nā*. The Arabs can refer to an object with the verbal noun, so they mention 'meaning' (*ma'nā*), and what they mean is 'the thing meant' (*ma'nī*).

§7 'Cause'

It is termed 'cause (*'illah*) because the ruling changes by it when it is discovered, from specificity to generality, in some circumstances not in all. When [the ruling] changes, it is an *'illah*; when it does not change, it is not an *'illah*, because the *'illah* is that through which the state of something changes.[193]

§8 'Indicator'

It is called 'indicator' (*dalīl*) because it indicates the establishment of the legal qualification in other than the original ruling.

§9 'Consideration'

It is called 'consideration' (*naẓar*) because it is discovered by considering other than it, since non-sensual matters are known through other than them, not through themselves. This is because there are three ways to know things: the sensory, reports (*khabar*) and inference (*istidlāl*). It is rare for a report to address this [underlying reality], so inference is what remains. ...

§10 'Opinion'

It is termed 'opinion' (*ra'y*) because it is known by the heart when considering other than it. *Ra'y* is vision (*ru'yah*), and what is meant by it here is the vision of the heart.

§11 'Analogy'

It is termed 'analogy' (*qiyās*) because upon beholding the meaning, a person becomes one who draws an analogy (*qayyās*) – only in some cases, not in all, as we shall explain. [Analogy] is that he brings together the original case (*aṣl*) and a subsidiary case (*far'*) with respect to a legal qualification.

§12 'Decisive proof'

It is termed a 'decisive proof' (*ḥujjah*) because linguistically it is the avenue (*wajh*) through which a person becomes victorious in a debate (*khuṣūmah*). ... The word *ḥujjah* can be applied to the *uṣūl* [Qur'an, sunnah and *ijmā'*] just like it can be applied to the meanings that these contain. Likewise for the word *dalīl*. As for *fiqh*, *ra'y*, *naẓar*, and *qiyās*, these do not apply to the *aṣl* [i.e. Qur'an, *sunnah*, *ijmā'*].

§13 'Demonstration'

It is termed 'demonstration' (*burhān*) because *burhān* linguistically means *ḥujjah*. ...

§14 'Occasion'

It is termed 'occasion' (*sabab*) because *'illah*s have the meaning of occasions (*asbāb*). ... These meanings have been made occasions for rulings,

[191] I translate *qiyās* as analogy in this passage for the sake of contrast with these other translated terms and because his intention appears more general here than pinpointing a specific theory of *qiyās* as presented above.

[192] I translate *'illah* here as 'cause' following Zysow. I will mention an inconsistency in how the term is used, and hence leave it untranslated for most of the thesis.

[193] This is a reference to the linguistic meaning of *'illah*. Lexicons inform us that the underlying meaning of *'illah* is that which changes the state of something, and this is why a sickness is called an *'illah*: See for example al-Jurjānī, *Mu'jam al-ta'rīfāt*, 129-30.

just as murder is the occasion for the obligation of bloodmoney, even though the one who gave death and removed the spirit was God, Most High.

It is called 'intelligible' (*ma'qūl*) because it is only known by the intellect. §15 'Intelligible'

The most important point to note from this long explanation is that *fiqh* is neither memorising legal cases (§4.2), nor is it simply a knowledge of sacred texts in which these legal cases are stored. This explanation is therefore at odds with the standard non-Ḥanafī definition provided above. For Abū al-Yusr, *fiqh* is something entirely different: It is a knowledge of matters that *underpin* sacred rulings. This is not a reference to the sacred texts themselves, because he notes that these underpinning matters are rarely found explicitly in sacred texts, so need to be rationally inferred (§9). This is because these matters are intelligible (§15). He provides several synonyms for these underpinning matters (§5). Through the explanation he gives to these terms, along with what we know of the employment of some of these terms in *uṣūl al-fiqh* discussions, we can note that these are not actual synonyms, but rather different aspects of these underpinning matters. We can note, then, that these underpinning matters that are the subject-matter of *fiqh* are abstract ideas that relate in a variety of ways to legal rulings found in sacred texts. It is to give an insight into this variety of relations that he presents alternative names for these abstract ideas. We can take a brief look at each of these names.

The first name he gives these abstract ideas is *fiqh*, itself. He points out that these abstract ideas are not *fiqh* in reality, as they are the object of *fiqh* (§3). The application of the word '*fiqh*' is telling, because *fiqh* literally means 'deep understanding'; the implied meaning is that these matters underpinning sacred rulings are the very deep understanding of these rulings. The second name is 'meaning'. Here he gives only linguistic information to show that the meaning is what is actually meant by something. Again, its application to the abstract ideas in question implies

that they are ultimately what is meant by a particular divine ruling. The third name is 'cause', a translation of the Arabic *'illah* that we studied above in the topic of *qiyās*. His explanation here is somewhat confusing as he first suggests that all such underpinning matters are *'illah*s, but then explains that only some are, namely, those that can pass onto a subsidiary case in *qiyās*. In any case, we can note that the various *'illah*s we saw above in our discussion of *qiyās* are to be included amongst these underpinning matters. The fourth name is 'indicator' (*dalīl*), showing that inferred abstract ideas, such as *'illah*s, are themselves indicators of a sacred ruling. This is noteworthy considering that the word *dalīl* is often associated with scriptural evidence, yet, here, it is equated with a form of rational inference. With the fifth name, 'consideration', he emphasises that such abstract ideas are primarily discovered through inference and are not explicitly stated in sacred texts. He repeats this with the sixth name, 'opinion', where he points out that the locus of the activity of discovering these underpinning matters is the human heart. He then gives an important clue about the process of discovering these abstract ideas: Such abstract ideas underpinning the law are only discovered by considering the rest of the law and its underpinning ideas, reminiscent of our discussion of the habit of the law, above. This leads smoothly into the seventh name, *qiyās*. We are told that this abstract idea is carried across from one case to another, but as he mentioned in *'illah* above, this does not hold true in every case. In reminding us of this, he is telling us that the process he is describing as *fiqh* includes *qiyās*, but is broader than it in implication. The eighth and ninth names, 'decisive proof' and 'demonstration', introduce a new angle, that of debate. These abstract ideas, the subject of *fiqh*, are themselves the subject of debate. This is understandable given that these ideas are derived from the subjective process of human inference. He highlights here that a person knows he has really discovered the

key factor underpinning the law when he defeats opponents with it in debate. The tenth name, 'occasion', seems slightly out of place in the order being observed, as his explanation takes the discussion back to the *'illah*. The *sabab* and *'illah* are normally given two different explanations in *uṣūl* works, a distinction made clear by Zysow's translations that I have followed here: The *'illah* is seen as an actual 'cause' that brings about the resultant legal qualification, whilst the *sabab* is merely an 'occasion', an external marker for us to know that a particular legal ordinance must be fulfilled. In the explanation offered here, however, Abū al-Yusr equates the two, giving the idea that he is seeking to explain an idea that is broader than these technical categories. The final name points out that the abstract ideas in question are 'intelligible', and therefore *fiqh*, which is the knowledge of such ideas, is an inherently rational process.

We have seen examples in our preceding discussions that can help us understand what Abū al-Yusr is describing. Consider the previously discussed prohibition of saying "uff" to parents. Applying Abū al-Yusr's explanation to that discussion, we can note that it is only figuratively considered *fiqh* for a person to know that it is prohibited to utter this word to parents (§4.2). Similarly, *fiqh* does not pertain to knowing that this prohibition derives from a particular Qur'anic verse, or even that the negative command – "Do not say!" – is from where we derive the prohibition, a basic hermeneutic investigation in *uṣūl al-fiqh*. Rather, *fiqh* is knowing the meaning that underpins this ruling: Why is this word prohibited; what is the underlying *meaning* being conveyed? This underlying meaning, we were told above in our discussion of the *dalālat al-naṣṣ*, is the causing of harm. Knowing that causing harm is the meaning underpinning this prohibition is called *fiqh*. This knowledge enables the jurist to address the related issues of beating parents or cursing them (§7,

§8, §11). However, addressing these related issues is not technically termed *qiyās*, as it is a case of *dalālat al-naṣṣ*, a distinction we explored above. This is apparently why Abū al-Yusr wanted to term all such notions *'illah*s, but then pointed out that technically they may not always be called *'illah*s (§7).

We saw the purity of cat saliva. Again, according to Abū Yusr's explanation, *fiqh* only figuratively applies to the knowledge that this saliva is ritually pure, or to this being derived from a particular Prophetic report. Rather, *fiqh* is knowing the meaning underpinning this ruling. The particular report pertaining to cat saliva is an example of one of the rare texts that explicitly provides this underpinning meaning (§9), namely, that it is because cats frequent people's homes. We saw in our discussion of the effective *'illah* that the underpinning meaning mentioned in this report was open to an investigation of its own underpinning meaning. The underpinning meaning of the stated underpinning meaning was necessity (*ḍarūrah*) – frequenting peoples homes is a expression of necessity – an idea that was seen to be utterly in line with a filthy item being treated as pure. Again, we saw that the application of this meaning to related cases, such as the purity of snake and mouse saliva, cannot be termed *qiyās* as it is an instance of *dalālat al-naṣṣ*.

The examples of *qiyās* explored above can also be presented in such terms. The meaning of 'wiping-ness' was seen as underpinning the wiping of the head, a meaning that was itself underpinned by the idea of 'lightening' (*takhfīf*), making the ritual easier; this was brought together with the idea underpinning *sunnah* acts of ablutions, namely, 'perfection' (*ikmāl*). By bringing together a number of underpinning meanings, we were able to note that the *sunnah* of wiping the head is to wipe it once completely, as wiping it multiple times would not be a true expression of this collection of underpinning meanings that intersect on the question of wiping the

head. The remaining examples from our discussion of *qiyās* above may be presented similarly.

Abū al-Yusr commences his explanation of *fiqh* by pointing out that *fiqh* is arrived at by the study of the legal cases found in the *three* sources of *fiqh*: the Qur'an, *sunnah* and *ijmā'*. It is worth noting here that *qiyās* is not listed as one of these sources; and this absence of *qiyās* is completely consistent with his explanation, as *qiyās* is an expression of *fiqh* itself, not a source of it. It is also completely consistent with our preceding investigation of the role of the human mind in Ḥanafī legal theory; the mind approaches the three sources of *fiqh* bound by the three pillars of Ḥanafī thought: a literal and confident language theory, deference to the early juristic community and to the habit of the law. The mind's activities within this protective sphere is *fiqh*, and it is authoritative because it is an extension of these three foundational pillars of Ḥanafī legal epistemology. Activity undertaken by the mind in this protective sphere is what Abū al-Yusr is describing as *fiqh*.

We notice in Abū al-Yusr's description a difficulty in giving these underpinning matters a single name. They act like *'illah*s a lot of the time, but we cannot always give them this name. The meaning underpinning the purity of cat saliva, for example, cannot technically be termed an *'illah* as it underpins a case of *istiḥsān*, an exception to the general rule that the saliva of predatory animals is ritually filthy; an exception may not be taken as the basis for a *qiyās*, and therefore, by definition, the meaning underpinning such a case may not be termed an *'illah*.[194] This is what Abū al-Yusr means in §7 above when noting that this underpinning idea is only called an *'illah* if it leads to a generality, i.e. its application to other cases. Cases of *istiḥsān*, by definition, cannot be the basis for analogy and therefore are not

[194]Al-Sarakhsī, *Uṣūl*, 2:149-50.

underpinned by *ʻillah*s. But they are stilled underpinned by 'ideas' that can be grasped by the intellect and are sought out in this activity called *fiqh*. So what to call these 'ideas'?

Due to the difficulty of using terms like *ʻillah* to describe such ideas, we need to coin a global term to encompass all such underpinning matters that are the object of *fiqh* so that we can investigate what commentators such as al-Marghīnānī seek through such investigations without being taxed by the technicalities of terms such as *ʻillah* and *sabab*. A reading of the Ḥanafī literature explored in the current study – our three *uṣūl* texts and the *Hidāyah* – reveals that the most used generic terms for these underpinning ideas are two, the first two: *fiqh* and *maʻnā*. Al-Marghīnānī often uses the word *fiqh* to mean the subtle, deep, penetrating understanding of the inner workings of a legal case. However, it clearly would not suit our purposes to say that *fiqh* is a study of *fiqh*, even though the first *fiqh* is the human rational activity and the second *fiqh* is the idea underpinning legal rulings, because of the apparent circularity of the phrase. Nor is *fiqh* his usual term for these ideas; rather, he appears to reserve *fiqh* for a reference to extra precision and depth in insight. The most used term in the *Hidāyah* for these underpinning ideas is simply 'meaning'.

Althought *maʻnā* seems a non-technical term, it is the most often used generic term for the idea underpinning legal cases. The *Hidāyah* employs it almost 250 times,[195] most of these being a reference to the legal meaning underpinning cases as intended by Abū al-Yusr. To distinguish this form of 'meaning' from the general usage of the word, I will refer to it, in the remainder of this study, as the 'legal

[195] This number is identified from a search on an electronic copy of the book using *al-Maktabah al-shāmilah*.

meaning'. *Fiqh*, therefore, is the study of legal meanings underpinning sacred rulings.[196]

We should note that in order to 'do *fiqh*' based on this explanation, a person must be aware of the legal rulings found in sacred scriptural sources, as Abū al-Yusr himself points out in the opening sentence of this passage. So we cannot say that *fiqh* is not directed to the knowledge of legal cases and the scriptural sources from which these are derived, but that, according to this passage, *fiqh* is a further activity after this. This is certainly what Abū al-Yusr is describing. Can we take this understanding to represent the concerns of the early classical Ḥanafī tradition?

Abū al-Yusr certainly thinks we can. He states that this understanding he is conveying is a point of consensus amongst jurists: "The *fuqahā'* have concurred that the meaning of *fiqh* is what we have mentioned" (§3). This is one amongst many passages in the Ḥanafī *uṣūl* literature that seems to equate '*fuqahā'*" with Ḥanafīs; I am not aware of non-Ḥanafī theorists presenting *fiqh* in such terms. Furthermore, we saw Ibn Khaldūn, above, refer to Ḥanafī theorists as the '*fuqahā'*" in contrast with '*mutakallimūn*', which he applied to theorists of other legal schools. Thus, we can understand that Abū al-Yusr claims that this description of *fiqh* is a point of consensus amongst Ḥanafīs. However, we do not find an exploration of the term '*fiqh*' in such terms in both the *uṣūl* works of al-Sarakhsī and al-Bazdawī, who simply state, as mentioned above, that *fiqh* is a knowledge of sacred rulings and the texts in which these rulings are found, along with the 'meanings' of these texts, and implementing these rulings in practice. We are able to note that Abū al-Yusr's explanation is not

[196] I find it too restrictive to use 'property' for this technical usage of *ma'nā* (as translated in Walter Young, "The Dialectical Forge: Proto-System Juridical Disputation in the *K. Ikhtilāf al-'Irāqiyyīn*", 180) – implying a particular feature present in the legal ruling – or 'reason' (as translated in Shehaby, "*'illah*", 33, and Zysow, *The Economy*, 57) – implying a motive of the Lawgiver served by the case – since *ma'nā* can be used for each of these, as well as allowing for further relations between an underpinning idea and the sacred ruling in question. See also ibid., 160 n. 3, for the preference of *ma'nā* over *'illah* in early juristic circles.

necessarily at variance with theirs, but rather gives greater detail in contrast to their extreme brevity. Furthermore, we can note that Abū al-Yusr's explanation is completely consistent with the explorations of *uṣūl al-fiqh* in these works and the role of the rational mind in this legal system, as summarised in our study of Ḥanafī epistemology above. Finally, we can note that Abū al-Yusr's explanation is completely consistent with the concerns of Ḥanafī legal commentators, as we will see in our study of the *Hidāyah*. I therefore consider Abū al-Yusr's explanation as a point of agreement amongst these jurists on what it means to 'do *fiqh*'. And if a disagreement were to exist between them on this point, it would only pertain to the best employment of the word '*fiqh*', not to the fact that identifying legal meanings underpinning legal cases is a central juristic activity in Ḥanafī legal theory, as attested to by the long relevant discussions in these *uṣūl* works as summarised above. Thus any conceivable debate remaining between Abū al-Yusr and his two peers on this point is purely verbal.

We conclude here our investigation into the epistemological foundations of Ḥanafī legal theory and the role the intellect plays in this system. This forms the basis of our theory lens. We turn now to the two remaining points of legal theory presented by Ibn Khaldūn: *jadal* and *khilāfīyāt*. These are not points of theory, but rather avenues for the exploration of this theory. Since they feature prominently in the *Hidāyah*, we will undertake a brief exploration of each.

## 1.2 *Jadal*

The marks of dialectical reasoning may be found throughout the entire Islamic scholarly tradition, although as a discipline the term *jadal* came to be associated particularly with works that taught the manners and modes of acceptable disputation

in matters of *uṣūl al-fiqh*.[197] Conceptually, *jadal* is a separate field of enquiry from *uṣūl al-fiqh* as its subject matter is either how to expose a fault in an opponent's position, or defend one's own position from such an attack. As a literary genre, however, it does not seem to have been long lived as an independent pursuit. Works providing a complete coverage of juristic *jadal*[198] only emerge in the fifth Islamic century. These include the works of Abū Isḥāq al-Shīrāzī,[199] his students – Abū al-Walīd al-Bājī (d. 474/1081)[200] and Abū al-Wafā' 'Alī ibn 'Aqīl (d. 513/1119)[201] – and Imām al-Ḥaramayn Abū al-Ma'ālī al-Juwaynī (d. 478/1085).[202] We know very little about complete works on *jadal* from other authors.[203] Rather, topics of juristic dialectic were routinely incorporated into works of *uṣūl al-fiqh*, being seen as a topic to serve these *uṣūl*. This was not typically seen as one discipline being incorporated into another, although some *uṣūl al-fiqh* works did acknowledge this duality, such as

[197] As mentioned in Ibn Khaldūn*, Muqaddimah*, 2:203. See also the editor's introduction to Abū al-Walīd al-Bājī, *al-Minhāj fī tartīb al-ḥijāj*, 6. In its origin, the dialectical impulse appears to have been a result of the prevalent learning culture in the ancient Near East: See Alexander Treiger, "Origins of *Kalām*". Treiger addresses theology, but the idea of dialectical enquiry as a living tradition in the ancient Near East had an impact on all fields of Islamic learning. See also Walter Young, "The Dialectical", 19-21. This living dialectical tradition was augmented with translations of dialectical theory from Greek works: See Wael Hallaq, "A Tenth-Eleventh", 197, and Larry Miller, "Islamic Disputation Theory: A Study of the Development of Dialectic in Islam From the Tenth Through Fourteenth Centuries", 52 ff., on the translation of Aristotle's *Topics* under the title *Kitāb al-Jadal* and its influence on Arab philosophers. For Miller, it is only after the adoption of formal dialectic in philosophy and *kalām* that it entered the juristic tradition. Walter Young challenges this notion, arguing that formal dialectic was part of the earliest known juristic discourse and must have been adopted by jurists independently of developments in *kalām*: Young, "The Dialectical".

[198] I say "complete coverage" to exclude short treatises dealing with sub-topics of disputation such as the *Kitāb al-Qiyās al-shar'ī* of Abū al-Ḥusayn al-Baṣrī (d. 436/1044). We do have works on *jadal* attributed to fourth-century Shāfi'ī authors, but unless these texts are discovered, we cannot be sure what relation they bear to the complete works of the fifth century. Fourth-century works on *jadal* by jurists include Abū 'Alī al-Ḥasan ibn Qāsim al-Ṭabarī al-Shāfi'ī (d. 350/961-2), *Kitāb fī al-jadal*: al-Baghdādī, *Hadīyat al-'ārifīn*, 1:270, and al-Ḥasan ibn Aḥmad al-Jallābī al-Ṭabarī al-Shāfi'ī (d. 375/985-6), *al-Madkhal fī al-jadal*: ibid., 1:271. See also Young, "The Dialectical", 92-3.

[199] He authored *al-Ma'ūnah fī al-jadal* (published) and *al-Mulakhkhaṣ fī al-jadal*: al-Baghdādī, *Hadīyah*, 1:8.

[200] *Al-Minhāj fī tartīb al-ḥijāj* – referenced previously and studied below.

[201] Published in Cairo, without a date, as Ibn 'Aqīl, *Kitāb al-Jadal 'alā ṭarīqat al-fuqahā'*. Walter Young notes that this edition is an unattributed reproduction of "Le Livre de la dialectique d'Ibn 'Aqīl", edited by George Makdisi.

[202] Al-Juwaynī, *al-Kāfiyah fī al-jadal* (published). The attribution of the work to al-Juwaynī has been contested by Daniel Gimaret. For a summary of his argument and a response to it, see Young, "The Dialectical", 90-1.

[203] Wolfhart Heinrichs has edited the Ḥanbalī Najm al-Dīn al-Ṭūfī's, *'Alam al-jadhal fī 'ilm al-jadal*.

Ibn al-Ḥājib's renowned *uṣūl al-fiqh* work entitled *Muntahā al-su'l wa-al-amal fī 'ilmay al-uṣūl wa-al-jadal* ('The Utmost of Requests and Hopes Concerning the Two Sciences of *Uṣūl* and *Jadal*') and 'Abd al-Mu'min ibn 'Abd al-Ḥaqq al-Ḥanbalī's (d. 739/1338-9) *Taḥqīq al-amal fī al-uṣūl wa-al-jadal* ('Realising the Hope in *Uṣūl* and *Jadal*').[204] This duality also worked in the reverse direction: Abū Isḥāq al-Shīrāzī in his renowned *uṣūl al-fiqh* work, *al-Luma' fī uṣūl al-fiqh*, refers readers to his work on *jadal* where he says he explains several *uṣūl al-fiqh* concepts in greater detail.[205]

For a flavour of a complete *jadal* work, we can consider al-Bājī's *al-Minhāj fī tartīb al-ḥijāj*. The layout of the work follows the general layout of *uṣūl* topics. It commences with presenting the sources of law and explaining the main terms of *uṣūl al-fiqh*. This is followed by explaining five main questions the questioner is to ask the respondent. The book then presents the sources of law, one by one, with arguments that can be made against each depending on how it is being employed by the respondent. Arguments are presented in a specific order: The questioner is expected not to apply an objection lower in the list before considering a former objection. Throughout, he also presents advice on what the respondent can do to answer these objections.

In *uṣūl al-fiqh* works, it is primarily in the chapter of *qiyās* that sections on *jadal* are found, as it is here that the most subjective legal activity occurs. Walter Young notes that there are no studies of the presentation of *jadal* in *uṣūl* works, even though it is in *uṣūl* works such as *al-Fuṣūl fī al-uṣūl* of al-Jaṣṣāṣ that we find our first written discussions of juristic dialectic.[206] It is not the goal of the present summary to offer a detailed presentation of *jadal* in Ḥanafī *uṣūl* works. This is because dialectical sequences employed in the *Hidāyah* are exceedingly brief; identifying which form of

[204] Al-Baghdādī, *Hadīyah*, 1:631.
[205] Al-Shīrāzī, *al-Luma'*, 98-9, 103, 113.
[206] Young, "The Dialectical", 92-3.

dialectical sequence al-Marghīnānī employs as categorised in *jadal* treatises will not directly help us in our current investigation, as it pertains to form rather than meaning. Rather, our interest in the current section is to appreciate the role played by *jadal* as an avenue for exploring the law, which in Ḥanafī *uṣūl* works is utterly subordinate to the epistemology of Ḥanafī *uṣūl* presented above. For this purpose, I will present a brief overview of the topic of *qiyās*-based *jadal* from the *Uṣūl* of Fakhr al-Islām, contrasting it with *qiyās*-based *jadal* in al-Bājī's work, to show how the Ḥanafī theory of *qiyās* presented above was filtered into the argumentative procedure that jurists were trained in. This will enhance our appreciation of Ḥanafī *qiyās*-theory, which we have identified as being at the heart of 'doing *fiqh*', and show the dialectical processes it was to feed into. The following two diagrams summarise the topic of *qiyās* in the two works. Both works present the topic as a series of guidelines for the questioner in his attempt to dismantle the *qiyās* proposed by the respondent. Again, our interest is only in a general conception of the relation between *qiyās* and *jadal*, not a detailed exploration of the various dialectical methods indicated in these charts.

*Figure 3: Objections to* qiyās *in al-Bājī's* al-Minhāj fī tartīb al-ḥijāj

Seeking Clarification (*muṭālabah*) (regarding the validity of the proposed *qiyās*)

The questioner argues that

1. the case in question cannot be established by *qiyās*
   - such as its being a) something only known through experience (*'ādah*), b) prescribed punishments and expiations, c) linguistic meanings
2. the primary case (*aṣl*) is not fit for being a primary case
   - Such as: a) its being abrogated, b) its *'illah* being is unknowable
3. the cited *'illah* cannot be the *'illah*
   - It violates a rule, such as: a) a later agreement being the *'illah* for an earlier ruling, b) a later disagreement being the *'illah* for an earlier ruling
4. the cited legal qualification cannot be the legal qualification
   - Such as: a) stating that the legal qualification in the secondary case resembles the primary without stating the similarity in question.
5. he does not accept the primary case
6. he does not accept the existence of the feature (*waṣf*), whether in the primary or secondary case, or both
7. he demands that the *'illah* be verified – by a specific sacred text or a rational derivation

Seeking clarification occurs before objection. If these steps are omitted, it means the questioner acknowledges the validity of the proposed *qiyās* in principle.

Objections (*i'tirāḍāt*)

1. Arguing that the proposed *'illah* supports the position of the questioner (*al-qawl bi-mūjib al-'illah*)
2. Objecting by inversion (*qalb*), where the opposite legal qualification is shown to be supported by the same *'illah*
3. Pointing out invalidity within the *qiyās* (*fasād al-waḍ'*), by arguing that the *'illah* upholds the opposite of what it entails, or that there is a fundamental difference between the primary and secondary case
4. Objecting that the ruling does not always exist upon the existence of the *'illah* (*naqḍ*)
5. Deconstructing the *qiyās* by replacing or omitting a feature in the *'illah* (*kasr*)
6. Objecting that the '*illah* has no effect on a case similar to the primary case
7. Objecting that the *'illah* is not effective, with the meaning that the judgement is not negated by the negating of the *'illah*

The questioner must expose flaws within the respondent's *qiyās* through these objections, and only if these are exhausted or not applicable does he then present his own opposing argument.

Opposition (*mu'āraḍah*)

1. Presenting opposing evidence
   - Such as a) an opposing sacred text, b) an opposing *'illah* that the questioner will defend, c) showing an underlying difference (*farq*) between primary and secondary case

The roles switch, as the questioner defends his position.

*Figure 4: Objections to* qiyās *in Fakhr al-Islām's* Uṣūl

Warding off (*daf'*) effective *'illah*s (*'ilal mu'aththirah*)

**Invalid** methods against effective *'illah*s

1. A charge of contradiction (*munāqaḍah*) by arguing that the ruling does not always exist upon the existence of the *'illah*
2. A charge of invalidity within the *qiyās* (*fasād al-waḍ'*)
3. Objecting that the ruling can exist with the absence of the *'illah* (the opposite of *munāqaḍah*)
4. Objecting due to a difference (*farq*) between the primary and secondary cases

Warding off coexistent *'illah*s (*'ilal ṭardīyah*)

1. Accepting the *'illah*, showing that it upholds the questioner's position (*al-qawl bi-mūjib al-'illah*) *
2. Denial (*mumāna'ah*) of either the existence of the feature (*waṣf*) or that the feature causes the ruling in question
3. A charge of invalidity within the *qiyās* (*fasād al-waḍ'*) by fundamentally opposed concepts being treated as similar
4. A charge of contradiction (*munāqaḍah*) by arguing that the ruling does not always exist with the existence of the *'illah* *

* Respondent forced to produce an effective *'illah*

**Valid** methods against effective *'illah*s

1. Denial (*mumāna'ah*)
    a. Denying the basis of the argument (*mumāna'ah fī nafs al-ḥujjah*)
    b. Denying a feature (*mumāna'ah fī al-waṣf*), meaning denying what the opponent claims it signifies
    c. Denying a condition (*mumāna'ah fi al-sharṭ*), by arguing that the respondent has violated one of the conditions of arriving at an *'illah*
    d. Denying a meaning (*mumāna'ah fī al-ma'nā*), namely, that the *'illah* is effective, by asking the respondent to clarify its effectiveness
2. Opposition (*mu'āraḍah*)
    a. Opposing by inversion (*qalb*) – by either interchanging the *'illah* and the legal ruling it causes (*ma'lūl*) or by showing that the *'illah* supports the questioner's position
    b. Pure opposition (*mu'āraḍah maḥḍah*)
        - There are five types of opposition against the secondary case, including opposing with its exact opposite, or with a ruling that opposes part of the proposed secondary case
        - There are three types of opposition against the primary case (each of which Fakhr al-Islām finds unsatisfactory)

These two charts enable us to contrast the linear approach to the topic taken by al-Bājī with the more complex, dual-layered approach of Fakhr al-Islām. This is not a difference between two authors, but between two conceptions of *qiyās*, the non-Ḥanafī versus the Ḥanafī. For al-Bājī, something is either *qiyās* or it is not. The first seven questions for seeking clarification (*muṭālabah*) are to determine that indeed it is *qiyās*. The next seven objections (*i'tirāḍāt*) are to expose weaknesses in the proposed *qiyās*. The final step, opposition (*mu'āraḍah*), is to present an alternative *qiyās*. A detailed explanation of the chart based on al-Bājī's work can be found in al-Bājī's *Minhāj* and in Young's study.[207]

In contrast to the simple linearity of al-Bājī's presentation – something is either *qiyās* or it is not – Fakhr al-Islām presents three distinct levels: effective *qiyās*, other *qiyās* and non-*qiyās*. A *qiyās* with an effective *'illah* is altogether different from a *qiyās* with an *'illah* that is merely coexistent. The effective *qiyās*, we are told, is, by definition, immune to most forms of objection. Clearly there is polemic embedded in this presentation and an acknowledgement of a wider *jadal* discourse from which this Ḥanafī tradition is excluding itself: Just as three-quarters of *qiyās* are not really *qiyās*, as al-Sarakhsī reminded us above, many of the *qiyās*-related manoeuvres in *jadal* are not really relevant. The Ḥanafī disputatant is trained to ward off these objections to his effective *qiyās* simply on the grounds that they do not apply.

Fakhr al-Islām starts with four forms of invalid objection against the effective *'illah*. The first is contradiction (*munāqaḍah*), where the questioner argues that the sacred ruling does not always exist upon the existence of the *'illah*. The Ḥanafī disputant is told to respond that his is an effective *'illah* whose effect has been established by the Book and the *sunnah*, so contradiction is inconceivable. Cases

[207] Al-Bājī, *al-Minhāj*, 148-218; Young, "The Dialectical", 150-78.

where the *ʻillah* appears to be present while having no effect are to be explained by showing that the *ʻillah* is present only in appearance, but in reality is absent.[208] The second is invalidity within the *qiyās* (*fasād al-waḍʻ*). The response is that this too is inconceivable because effectiveness is established through the Book and the *sunnah*, and these cannot be charged with invalidity (*fasād*). The third is objecting that the sacred ruling can exist with the absence of the *ʻillah* – the opposite of *munāqaḍah*. This, we are told, does not hurt the respondent because it is possible that there is another *ʻillah* that brings the ruling about in such a case. The fourth is objecting due to a difference (*farq*) between the primary and secondary cases. This, the respondent is told, is not acceptable because it violates the procedure of the disputation without addressing the core issue, because it turns the questioner into a claimant defending his own opinion and takes the dispute away from discussing the subsidiary case. Each of these methods presented as invalid against the effective *ʻillah* is mentioned by al-Bājī above as a valid form of disputation.

We are then told of the only two valid objections to the effective *ʻillah*. The first is denial (*mumānaʻah*), and the chart shows four possible parts of the respondent's argument that can be denied. Denial, we are told, is the basis of the debate, because the questioner's role is to deny and reject the claims of the respondent. The second valid objection is opposition (*muʻāraḍah*). Opposition is where the questioner presents an opposing *qiyās* to the one presented by the respondent. This takes a number of forms that are summarised in the chart; further

[208] There is a debate over how the absence of a sacred ruling despite the presence of the *ʻillah* is to be explained. Earlier Muʻtazilī-inclined Ḥanafīs said that the *ʻillah* was present but impeded from having an effect by an impediment (*māniʻ*). This doctrine came to be known as *takhṣīṣ al-ʻillah*. Māturīdī-inclined Ḥanafīs rejected this explanation and said that in such cases the *ʻillah* is not truly present as the case in question has revealed a further condition for the *ʻillah* that has not been satisfied. This position is defended strongly by Fakhr al-Islām. Later Ḥanafī scholarship appears to have inclined back to the doctrine of *takhṣīṣ al-ʻillah*. See Zysow, "Muʻtazilism", 248-51.

explanation with examples can be found in Fakhr al-Islām's *Uṣūl*.[209] What is most interesting for our purposes is the method for opposing merely coexistent *'illah*s.

We are told that if the objection is against the merely coexistent *'illah* (*'illah ṭardīyah*), then four objections are made. It is here that the Ḥanafī disputant is trained to move the debate towards effectiveness, the cornerstone of Ḥanafī *qiyās*-theory. The first objection is accepting the *'illah* and showing that it supports the questioner's opinion (*al-qawl bi-mūjib al-'illah*). This is as mentioned above by al-Bājī (the first of his seven forms of objection). However, Fakhr al-Islām adds a further dimension, namely, forcing the people of *ṭard* to accept legal meanings (*al-qawl bi-al-ma'ānī al-fiqhīyah*). An example here would be helpful to see this move from coexistence to effectiveness, or *ṭard* to *ta'thīr*, or non-Ḥanafī *qiyās* to Ḥanafī *qiyās*.

We are given the example of the previously mentioned debate on wiping the head in ritual ablutions: Is it *sunnah* to perform this three times? We saw above that the Shāfi'īs reply in the affirmative, while the Ḥanafīs reply in the negative and hold that the *sunnah* is to wipe the entire head once. The argument presented for the Shāfi'ī opinion is, "[Wiping the head] is an integral (*rukn*) in ritual ablutions, so it is a *sunnah* to do it three times, as [is the case with] washing the face." The response to this, based on the *mūjib al-'illah*, is, "[Yes], it is a *sunnah* to do it three times," thereby accepting the conclusion their *'illah* led to. But this is then explained by the fact that the minimum amount of the head that must be wiped is a quarter according the Ḥanafīs and less than that according to the Shāfi'īs, so wiping the whole head once constitutes performing the obligatory amount three times and more. The opponent, we are told, might then change the phrase to, "The *sunnah* is performing it *multiple times* (*takrār*)." The existence of this in the primary case, we are told, is not to be conceded:

[209] For details and examples of *mumāna'ah* and *mu'āraḍah*, see Fakhr al-Islām, "*Uṣūl*", 4:49-68.

> It is not repetition that is the *sunnah* in the primary case, but, rather, the *sunnah* is perfecting it (*takmīl*). This is the basis with integrals (*arkān*) [in ritual worship]. This perfection is by prolonging it in its site (*maḥall*) [i.e. the site of purification such as the face and head] if that is possible, just like the lengthening in standing, bowing or prostration [is *sunnah* in ritual prayer]. However, because the minimum obligation exhausted the site [in the case of washing the face], we were forced to repetition as a replacement for the basic rule [of perfection (*takmīl*)]. But this basic rule is possible here in wiping the head due to the vastness of the site, so the replacement [i.e. repetition] is nullified. Through this, the inner meaning of the case (*fiqh al-mas'alah*) becomes evident, namely, that integrality has no effect on repetition (*takrār*) at all, as with the integrals of prayer, nor does it have a necessary effect on perfection (*takmīl*). Is it not seen that wiping the head shares with wiping footgear (*khuff*) in its being *sunnah* to wipe it completely, even though [the latter] is a dispensation (*rukhṣah*) and not an integral? Likewise rinsing the mouth [shares with washing the face in repetition although it is not an integral]. But as for wiping, it has a necessary effect on lightening (*takhfīf*) [the prescription]. This is because [wiping] is not an intelligible (*ma'qūl*) form of purification. Since that is the case, then it is prolonging that is the *sunnah*, not perfecting it through repetition. Is it not seen that perfecting through repetition might lead to what is interdicted, namely, [that it constitute] washing? So how can this be considered perfecting [the original act]? As for washing, it was legislated for intelligible purification, so repetition constitutes perfection and is not interdicted.[210]

I quote this example at length as it illustrates how the rules for disputation are built upon the theory of *qiyās* that we explored above, namely, the search for the prevalent logic through neighbouring cases and not simply what seems to cause the case at hand. If the respondent understands this approach, the questioner must simply deny the premises and not argue for his own case; once denial has not led the respondent to improve his position in the eyes of the Ḥanafī questioner, or if the respondent has a deficient understanding of *qiyās* by focusing only on coexistence between the *'illah* and the ruling, here the Ḥanafī questioner is instructed to force upon the opponent the case for effectiveness as demonstrated here. The example is lengthier than examples in al-Bājī's work because of the extra demonstration required, and presents not only the simple argumentative technique that the respondent's *'illah* supports the questioner (*al-qawl bi-mūjib al-'illah*), but then brings into the discussion the very

[210] Ibid., 4:104-5.

role of the *sunnah* in ritual acts, striving for a single rule to cover the cases of prayer and purity, namely, the rule of perfecting an integral (*takmīl*).

The second method against merely coexistent *'illah*s is denial (*mumāna'ah*). This is either a denial of the existence of the feature (*waṣf*) in the case at hand – a discussion that ends with Fakhr al-Islām instructing that every feature that is not shown to be effective will be denied – or a denial of the ascription of the ruling to the feature. The third is objecting due to invalidity within the analogy (*fasād al-waḍ'*) – by treating fundamentally opposed concepts as similar. The fourth and final method is contradiction (*munāqaḍah*) – showing that the ruling does not always exist with the existence of the *'illah*. This is as described by al-Bājī, but it has the further dimension of forcing the defendant to argue on the level of the *'illah*'s effectiveness. I will translate one of his examples as a final illustration of how our authors envisage disputation and effectiveness – a central topic to our conception of *fiqh* that is only explained through such examples. It concerns the debate between the Ḥanafīs and Shāfi'īs on the need for an intention to purify oneself in ritual ablutions with water (*wuḍū'*). The Shāfi'īs say that the intention is a condition for the validity of ritual ablutions, while the Ḥanafīs do not. Interestingly, the Ḥanafīs agree with the Shāfi'īs that intention is a condition for the validity of dry ablutions with dirt (*tayammum*).

> [Al-Shāfi'ī argues, '*Wuḍū'* and *tayammum*] are both forms of purification, so how are they dissimilar?' If [al-Shāfi'ī] means they must be equivalent, this is doubtlessly invalid, because they are dissimilar in the number of limbs [purified], in the amount this is done and in the very nature of the act. If he says they must be equivalent in intention, this contradicts the washing of the clothes and body from physical filth (*najāsah*) [which al-Shāfi'ī concurs is valid without an intention]. He is thus forced to clarify the legal meaning underlying the case (*fiqh al-mas'alah*), namely, that *wuḍū'* is a symbolic purification (*taṭhīr ḥukmī*) because the eye cannot see ritual filth, so it resembles *tayammum* in needing an intention so that ritual worship (*ta'abbud*) through it may be realised, as opposed to washing physical filth.

Here the charge of contradiction has forced the opponent to speak on the level of the legal meaning underlying his argument. So now the argument will shift to legal meanings and effectiveness, which is the goal of the disputation:

> We respond that water in this topic works through its own nature. [The rule of ritual ablutions] according to *qiyās* should be washing the whole body, because the exit point of filth [i.e. the private parts] are not described with ritual impurity (*ḥadath*) [i.e. they are not washed for ritual ablutions]; rather, it is the body that is thus described, so all of it should be washed. However, the sacred law limited the [ritual impurity] to the four limbs of the body – which function as the limits and main members of the body – to facilitate ease (*taysīr*) in matters that occur frequently and are regularly repeated, while affirming the *qiyās* [of washing the whole body] in matters that have no such hardship, namely, [after] seminal fluid, menstrual blood and post-natal bleeding. The necessity of washing only moved from the place of ritual impurity [i.e. the private parts] to the whole body out of *qiyās* [i.e. it is intelligible]. Thus, when we describe the Qur'anic text [which explains ritual ablutions] as non-intelligible, we mean [only] the parts of the body specified with ritual impurity. As for water, it works by its nature. Intention only applies to the act performed with water, not to the description of the site [as being ritually impure], so it is like washing physical filth, as opposed to [purification with] dirt (*turāb*). Dirt is not intelligible as a purifying substance, and only becomes such when prayer is intended. Once the intention is there, and it has become purifying, the intention is no longer needed. And as for the wiping of the head, this is adjoined (*mulḥaq*) to washing because it takes its place, with washing moved to wiping due to a form of hardship, so it is clear that intention is not necessary [for it either]. ...
>
> We concede that the intention is a condition for it to be considered an act of devotion, but we do not concede that it was only legislated to be an act of devotion. Rather, it was legislated with a meaning of devotion and a meaning of purification as well, like washing clothes [from physical filth]. The ritual prayer is in no need of the meaning of devotion; it only has a need for the meaning of purification. Thus, [as al-Shāfi'ī concurs], whoever performs ritual ablutions for a supererogatory prayer can offer obligatory prayers with it, and whoever performs it for a particular obligatory prayer can offer other prayers like it too.[211]

This is a long and fascinating argument which seeks to arrive at the boundary between the intelligible and the non-intelligible in matters of ritual purity, after forcing the opponent to admit that his underlying legal argument is based on the non-intelligibility of ritual ablutions. By drawing this boundary, Fakhr al-Islām is able to assert a stronger similarity between ritual ablutions and washing physical filth than

[211] Ibid., 4:125-9.

between ritual ablutions and *tayammum* as sought by the respondent. In so doing, he has produced an argument that provides the prevalent logic of all the chapters of ritual purity – *wuḍū'*, *ghusl*, washing, wiping, *tayammum*, removing ritual and physical filth – explaining why these chapters work as they do. In this case, the prevalent logic was not presented to support a particular *'illah* of the Ḥanafī questioner, but rather to establish one similarity – between washing in *wuḍū'* and removing filth – and negate another – between washing in *wuḍū'* and wiping in *tayammum*. The term 'prevalent logic' is perhaps more helpful in understanding the topic than 'effective *'illah*' as what is sought is an explanation of related cases and their rationale. This rationale is then used in different ways depending on how it is employed, and this is where the categories of *jadal* are helpful: This rationale can serve to propose an *'illah*, negate an *'illah*, support a subsidiary case while modifying its *'illah* – as in the example of head-wiping, above – or establish similarities for the purposes of analogy – as in the last example.

Disputation theory builds on the legal theory that it is constructed to serve. A different conception of a topic of legal theory – the example here being *qiyās* – leads directly to a different ordering and defining of the terms and methods of juristic dialectic. The same methods and terms are found in Ḥanafī texts as in other legal texts, but are organised and defined to present the *fiqh* project as one concerned with discovering and giving greatest weight to the prevalent logic of established legal rules and is completely consistent with the understanding of *fiqh* presented by Abū al-Yusr, above.

## 1.3 *Khilāfīyāt*

Works dedicated to disagreements amongst jurists are of the earliest works of Islamic law, such as the *Ikhtilāf Abī Ḥanīfah wa-Ibn Abī Laylā* attributed to Abū Yūsuf[212] – where he contrasts opinions of his two teachers, Abū Ḥanīfah and Ibn Abī Laylā (d. 148/765), with supporting arguments – and several of the books of al-Shāfi'ī's *al-Umm*.[213] At the rise of the *madhhab*, a genre of texts arose that were dedicated to stating the disagreements amongst *madhhab* founders, with arguments to defend the positions of the author's *madhhab*. Ibn Khaldūn tells us that this genre was primarily concerned with debates between Shāfi'īs and Ḥanafīs, due to their close proximity to each other.[214]

We are still in need of a dedicated study of the objectives, methods and developments of the genre, or genres, of *khilāf* literature.[215] As a step towards helping us understand this literature, I have compiled a list, in Appendix A, of works identified as works of *khilāf* or *ikhtilāf,* from the third Islamic century and later, identified as such in the two bibliographic works of Kātib Çelebī (d. 1067/1657) and Ismā'īl Pāsha al-Baghdādī (d. 1339/1920-1).[216] Of course, the list is not perfect. There are renowned works of *khilāfīyāt* that were not identified as such by the bibliographers consulted – such as the *Bidāyat al-mujtahid* of Ibn Rushd (d. 594/1198 or 595/1199) and the *Iṣṭilām* of Abū al-Muẓaffar al-Sam'ānī (d. 486/1093)[217] – and

[212] I have an article in progress in which I present a transmission history of the text and argue for the likelihood of its dating back to Abū Yūsuf.
[213] Such as the *Iktilāf al-'irāqīyayn* – al-Shāfi'ī's comments on Abū Yūsuf's *Ikhtilāf Abī Ḥanīfah wa-Ibn Abī Laylā – Ikhtilāf Mālik wa-al-Shāfi'ī*, *Ikhtilāf 'Alī wa-'Abd Allāh ibn Mas'ūd*, *al-Radd 'alā Muḥammad ibn al-Ḥasan*. Ahmed El Shamsy has defended al-Shāfi'ī's authorship of the *Umm* and its various books: Ahmed El Shamsy, "Al-Shāfi'ī's Written Corpus: A Source Critical Study".
[214] Ibn Khaldūn*, Muqaddimah*, 2:202-3.
[215] Young has a helpful section on the topic: Young, "The Dialectical", 70-89.
[216] A list of known manuscripts of *khilāf* works is provided by Ṣaghīr Ḥasan Ma'ṣūmī, "Imām Ṭaḥāwī's 'Ikhtilāf al-Fuqahā': I", 216-9.
[217] Two of al-Sam'ānī's works were described as works of *khilāf* by al-Baghdādī, but not the *Iṣṭilām* which al-Baghdādī describes as a refutation of Abū Zayd al-Dabūsī: al-Baghdādī, *Hadīyah*, 2:473. The

not all works identified can be said to share the same sense of genre. The advantage of such a list lies simply in identifying trends and developments.

The list shows that although the genre has persisted throughout the history of Islamic legal writings, there are distinct phases of activity that are worth noting. Texts from the fifth, sixth and seventh Islamic centuries stand out from earlier and later texts in several ways. The first difference is in quantity: these three centuries produced a total of sixty-three works – twenty-five, twenty-six and twelve respectively – versus a total of twenty-nine works in other centuries combined. The second is the predominance of the word *khilāf* over the word *ikhtilāf*. In these three centuries, of the forty-nine works with one of these two words in the title, only three used the word *ikhtilāf*, the rest used *khilāf*. This contrasts with all other periods where, out of twenty-four works that used one of these two words, eighteen used the word *ikhtilāf*, and six used *khilāf*. The relevance of this observation returns back to the meaning of these two words. Whilst both imply difference, their connotation is not the same: The form VIII, *ikhtilāf*, implies mutual difference (such as the differing hues of honey mentioned in the Qur'an, "*mukhtalifun alwānuhu*" [Qur'an, 16:69]); whereas the form III, *khilāf*, implies opposition, as the act has a direct object to whom this disagreement is directed.[218] The prevalence of the word *khilāf* in these centuries ties in well with our general understanding of the development of Islamic legal thought. Christopher Melchert tells us that it was towards the end of the fourth Islamic century that the fully mature *madhhab* emerged, with a developed social identity, interest in documenting master-student relations, and development of a genre of commentary on

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*Iṣṭilām* is clearly a work of *khilāf* dedicated to arguments between Ḥanafīs and Shāfi'īs: See al-Sam'ānī, *al-Iṣṭilām fī al-khilāf bayna al-imāmayn al-Shāfi'ī wa-Abī Ḥanīfah raḥimahumā Allāh*.

[218] Compare, for example, the explanation of both forms in Edward Lane, *An Arabic-English Lexicon*, 2:794-5.

canonised school texts.[219] It is only once these complex social entitities were formed that the need for each *madhhab* to defend itself against opposing *madhhab*s became of the utmost importance. Indeed, the ability to do this was the crowning part of a jurist's training. George Makdisi notes that jurists would often present a defence of their schools in works entitled *ta'līqah*s or *ṭarīqah*s, typically presented as commentaries on a selection of legal rulings. These were produced by students, either as original works or as summaries of a professor's notes, and these often marked the completion of training.[220] This observation leads us to the third trend that separates works in the fifth, sixth and seventh centuries from other periods, and that is the prevalance of *ta'līqah* and *ṭarīqah* in their titles. Of the sixty-three works in this period, three were entitled *ta'līqah fī al-khilāf* in the fifth century, ten in the sixth, and eight in the seventh. There are no works with such a title in any other period. There was one work entitled *ṭarīqah fī al-khilāf* in the fifth century, one in the sixth, and five in the seventh with no such work in any other century.

The preceding observations show *khilāf* literature in these three centuries to reflect the antagonistic relationship between schools and the centrality of debate in juristic training. While *jadal* works present rules of dialectic organised according to *uṣūl al-fiqh* chapters, *khilāf* works employ these techniques for the defence of the detailed cases of the law. After this period, the *madhhab*s entered a phase of mutual acceptance.[221] *Ikhtilāf* works dealt with differences in such a climate.[222] Thus I

[219] Christopher Melchert, *The Formation of the Sunnī Schools of Law, 9th-10th Centuries C.E.*
[220] George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, 111-25.
[221] See Yossef Rapoport, "Legal Diversity in the Age of *Taqlid*: the Four Cheif *Qadi*s Under the Mamluks", 210-28.
[222] Many of the *Ikhtilāf* works from this period are explicit in surveying the opinions of the 'four imams'. Even in works within the age of *khilāfiyāt* – the fifth to seventh centuries – the title *ikhtilāf* when it did appear was often followed with a term of respect for those whose *ikhtilāf* was documented. See Appendix A. It should be noted that this distinction between works entitled *khilāf* and *ikhtilāf* is an approximation. It reveals meaningful trends, but cannot definitively inform of the features of a particular work.

suggest the genre conceived of as *khilāfīyāt* should primarily refer to the works of the fifth, sixth and seventh centuries.

The interest of the current thesis in this periodisation is that this period of the *khilāfīyāt* corresponds to what I have referred to as the early classical phase of the Ḥanafī school in which we find al-Marghīnānī. The concerns of this period that are reflected by *khilāf* literature is of direct interest to our study. Legal debates are central to the exploration of law in the *Hidāyah*, so it is helpful to be aware of Ḥanafī *khilāf* literature before al-Marghīnānī. A detailed engagement with this literature is not the purpose of this brief section, but rather to provide a general awareness of what *khilāf* literature offers and how it might help situate discussions we will find in the *Hidāyah*.

Three Ḥanafī texts of *khilāf* may be highlighted for a brief survey. These are the *Tajrīd* of the Iraqi al-Qudūrī, the *Ta'sīs al-naẓar* of the Bukharan al-Dabūsī and the *Manẓūmah fī al-khilāfīyāt* of the Samarqandi 'Umar al-Nasafī. Each of these three works differs from the others in significant ways, showing various objectives of *khilāf* works.

Al-Qudūrī's work is most like a generic *khilāf* work. He identifies cases of disagreement between Abū Ḥanīfah and al-Shāfi'ī and provides prolonged arguments for each side, defending the view of Abū Ḥanīfah. He stands out from the two Central-Asian authors in not giving much importance to Abū Ḥanīfah's companions, whom he only mentions if they agree with Abū Ḥanīfah or al-Shāfi'ī. This is very different from the works of al-Dabūsī and al-Nasafī whose primary interest is in the disagreements between Abū Ḥanīfah and his companions. Thus, although al-Shāfi'ī remains the main opponent in these works, the two Central Asian works are not authored primarily to defend the school against the followers of this opponent. Why

the primary interest in internal disagreement? Our two Central Asian works point to two different reasons.

Al-Dabūsī's main interest is in identifying the underlying legal insights that the Ḥanafī founding imams disagreed over, leading to their disagreements in several legal cases. He first states a legal principle (a form of 'legal meaning' as defined above), followed by cases of disagreement that can be explained through the principle. Occasionally, the principle in question is a principle of *uṣūl al-fiqh*; although this is very rare.[223] Needless to say, al-Dabūsī's legal discussions differ greatly from al-Qudūrī's. While al-Qudūrī presents lengthy exchanges with a focus on derivation from the primary texts of the Qur'an and *sunnah*, al-Dabūsī focuses only on legal meanings as explained above. This combined with his focus on internal *khilāf* shows a great difference between these two works in purpose: Whereas one is directed at presenting a complete defence of Ḥanafī doctrine against the Shāfi'ī school, the other is directed at training Ḥanafī jurists in the art of jurisprudence, using *khilāf* – particularly internal *khilāf* – as an opportunity to focus on the interplay of legal meanings in explaining different approaches to a group of similar cases.

Al-Nasafī's work suggests a further reason for the focus on internal *khilāf*. His renowned poem pertaining to juristic disagreement, often referred to as *Manẓūmat al-Nasafī* or *Manẓūmat al-khilāf*, provides only legal cases, not arguments. It thus presents a third model of a *khilāf* work circulating amongst our Ḥanafī jurists. Interestingly, he says in the introduction that he spent five years on the work, implying that a great deal of effort and thought went into the work.[224] This can only be effort in precisely identifying the exact positions of the jurists whose opinions are quoted: Al-Nasafī's text attempts to provide an authoritative statement of the main

[223] Al-Dabūsī, *Ta'sīs*, 99, 113, 131, 139 (this does not seem a direct *uṣūl al-fiqh* discussion, but it presents an important principle about the *'illah*), 156.
[224] Al-Nasafī, "*Manẓūmat al-Nasafī fī al-khilāf*", folio 1b.

positions ascribed to Abū Ḥanīfah's circle. This would certainly explain the influence of al-Nasafī's *manẓūmah* on the authors of Ḥanafī *mukhtaṣar*s in following generations, several of whom included the *manẓūmah* amongst the most authoritative sources of Ḥanafī doctrine.[225] Al-Nasafī does not appear to base the work on either of the two preceding texts and sometimes presents opposing positions to those presented by al-Dabūsī.[226]

To conclude this very short foray into the world of Ḥanafī *khilāfīyāt*, we can see that there was strong interest in the study of juristic disagreement in the period of al-Marghīnānī's teachers. While the general purpose of *khilāf* literature was to defend a school against opposing schools, our two Central-Asian texts display particular interest in internal debates in Abū Ḥanīfah's circle; this was for two key reasons. The first was to use cases of disagreement as an opportunity to arrive at the subtle insights, or legal meanings, in the mind of an individual jurist that would explain his answering several questions in a similar way. This form of investigation enabled jurists to enter the mind of these earlier jurists with the goal of enabling them to answer new questions in accordance with the thought of these early masters; this is certainly how al-Dabūsī justifies the project in his introduction.[227] The second goal of these works is to precisely identify the positions of these jurists from amongst the various positions attributed to them. Al-Nasafī seems to have produced the most successful statement of

[225] It was one of the sources of Ḥāfiẓ al-Dīn al-Nasafī's (d. 710/1310) *al-Wāfī*, which he abridged in his renowned *mukhtaṣar*, *Kanz al-Daqā'iq*: Kātib Çelebī, *Kashf al-ẓunūn 'an asāmī al-kutub wa-al-funūn*, 2:1997. It was one of two source texts on which Ibn al-Sā'ātī (d. 694/1294-5) based his *mukhtaṣar*: Ibn al-Sā'ātī, *Majma' al-baḥrayn wa-multaqā al-nayyirayn*, 57-8.

[226] The selection and ordering of topics mentioned is different in each book, suggesting that al-Nasafī was not taking al-Dabūsī's work as a basis for his own. Furthermore, there are different opinions chosen by each author. For example, regarding whether Abū Ḥanīfah held that a person must initiate a conscious action to leave the prayer, al-Nasafī presents the interpretation of Abū Ḥanīfah's doctrine offered by al-Barda'ī (al-Bābartī, *al-'Ināyah*, 1:386), that a person must initiate a conscious act when wishing to leave the prayer: al-Nasafī, "*Manẓūmah*", folio 2b, while al-Dabūsī presents the interpretation of Abū Ḥanīfah's doctrine offered by al-Karkhī (al-Bābartī, *al-'Ināyah*, 1:387), that a person need not initiate such an act: al-Dabūsī, *Ta'sīs al-naẓar*, 11.

[227] Ibid., 9.

these main cases, as is seen by the standing of his *manẓūmah* amongst later generations. We will see that al-Marghīnānī was deeply influenced by the approach to *khilāf* represented by these Central-Asian works.

## 1.4 Conclusion: Theory Lens Summarised

This chapter has provided us a legal-theoretical lens through which to analyse the construction of arguments in the *Hidāyah*. At the heart of this lens is a particular conception of *fiqh* presented clearly by Abū al-Yusr al-Bazdawī: *Fiqh* is the knowledge of legal meanings underpinning sacred rulings found in scriptural sources. The term legal meanings encompasses all abstract ideas said to be expressed through a particular legal case. At times these legal meanings are rationales; at others, they are causes that bring a particular ruling to exist, or occasions for its existence. This quest for underlying legal meanings is a rational one. The human mind must grasp these meanings after deep reflection. These meanings then guide the jurist in accepting or rejecting various forms of probabilistic evidence and in determining new statements of law. But how can a human process be the means to determining divine law? Ḥanafī legal theory constrains the mind within particular foundational 'pillars' of its epistemology. As long as the mind observes these constraints, its conclusions will be seen as extensions of these foundational pillars. The first is a highly confident, highly literal theory of language. Ḥanafī *uṣūl* works explore the boundaries of this language theory in depth, providing a secure space for discovering the underlying meanings of divine speech (*dalālat al-naṣṣ*) by rational activity grounded in language theory. The second is a particular view of tradition, whereby authoritative *sunnah* is only accessed through the transmissions and legal positions of early jurists. There is no human rational exploration tied directly to this pillar; rather, its purpose is to provide the boundaries of acceptable law, within which the mind must operate, outside of which

rational conclusions have no legitimacy. The third pillar is the habit of the law. This provides the sphere for operation of the human intellect to determine the answers to matters not directly addressed in sacred texts. The weight given to the habit of the law is revealed by two key discussions: *ta'thīr* and *istiḥsān*. The former, *ta'thīr* (effectiveness), is perhaps the best window onto Ḥanafī rationalism. It is a theory that at once constricts the freedom of the mind – more than competing theories of *qiyās* – while giving tremendous weight to the mind's conclusions. We have seen in the examples of *ta'thīr* presented above, most clearly in the two examples from Fakhr al-Islām's *Uṣūl*, that the search for the effective *'illah* is ultimately the search for a satisfactory philosophy behind a particular topic of the law. The effective *'illah* is the one that ties together related cases and sub-topics by providing the best explanation for why they function as they do. We saw in Fakhr al-Islām's two lengthy examples that this search for effectiveness was nothing short of seeking a global philosophy of ritual purity, in one example, or of *sunnah* acts of ritual worship, in another. This notion of the effective *'illah* combined with the explanation of *fiqh* provided above gives great insight into the form of rational activity Ḥanafī legal theory guides and preserves. The topic of *istiḥsān* also serves as a crucial insight into the habit of the law as it represents a developed theory of exceptions to the prevalent logic of the law, underscoring the general force given to this prevalent logic in Ḥanafī thought. This summary of the three pillars of Ḥanafī thought and the form of rational activity they enable functions as our theory lens which we will use to study the range of argumentation in the *Hidāyah* to better understand al-Marghīnānī's assumptions, methods and objectives, as well as to note possible departures from this theory and what such departures might imply.

The survey of *jadal* (juristic dialectic) and *khilāfīyāt* (juristic disagreement) was presented here to complete our appreciation of legal theory in al-Marghīnānī's milieu. These two fields do not represent alternative theories of the law, but primary avenues for the exploration and expression of Ḥanafī legal theory. *Jadal* in Ḥanafī *uṣūl* works is organised to instruct a jurist in the formulation and defence of effective *'illah*s. *Khilāf* works are presented at times to defend the school against opposing schools, and at times to explore the legal meanings observed by members of Abū Ḥanīfah's circle for the purpose of juristic training. The two fields of *jadal* and *khilāf* form a part of our theory lens in as much as they are methods through which this theory is explored.

A final point must be raised here. While Abū al-Yusr spoke of *fiqh* being an exploration of sacred rulings stored in the primary scriptural sources, we must note that Ḥanafī jurisprudence is founded on exploring the law through legal cases attributed to Abū Ḥanīfah's circle. *Fiqh* within the Ḥanafī tradition is therefore a study of these cases of Ḥanafī precedent for the aims described by Abū al-Yusr. It is also important to repeat that this deep exploration of the meanings underpinning legal cases is only possible if these legal cases are known, in addition to relevant scriptural sources to which they might be tied. Otherwise, without a vast knowledge of legal cases, how can an effective meaning underpinning a particular legal case be identified? Likewise, without a knowledge of relevant sacred texts, how can the intended meaning underpinning a particular sacred injunction be arrived at? We can conclude from this that 'doing *fiqh*' within the Ḥanafī tradition entails a vast knowledge of the legal cases upheld as authoritative within this tradition, a sufficient knowledge of sacred texts that relate to these legal cases, and a deep exploration of the meanings underpinning these legal cases. We are forced to insert the medium of

‘Abū Ḥanīfah’s legal cases’ into this understanding, because if these legal cases are bypassed, we are no longer engaged in Ḥanafī jurisprudence, but *fiqh* in only its most general sense. And because this entire system can be seen as an engagement with the set of cases that make up authoritative Ḥanafī precedent, it is here that we must commence our study of the *Hidāyah*: What are the legal cases on which al-Marghīnānī is commenting and why were they seen as authoritative? It is to these questions we now turn.

# Chapter Two

## Legal Doctrine in the *Mukhtaṣar*: The Passage of Legal Rules to the *Bidāyat al-Mubtadī*

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The genre of legal commentary presupposes the existence of another genre: the *mukhtaṣar*, translated variably as 'epitome', 'digest', 'compendium' and 'primer'. *Mukhtaṣar*s are short works of law that provide an organised core of legal cases that are exposited in teaching sessions and works of legal commentary. These legal cases typically occupy the highest epistemic level in the commentary, meaning that, for the commentator, they represent the surest expression of the law, the surest explanation of the revelation, the surest transmission of the *sunnah*. The commentator demonstrates this surety by providing arguments to show how these cases reflect a faithful application of scripture and rational inference. The *mukhtaṣar* on which al-Marghīnānī comments in the *Hidāyah* is the *Bidāyat al-mubtadī*, a work of his own authorship. We commence our study of the *Hidāyah* with a closer inspection of this *mukhtaṣar*.

Our interest in the current chapter is to assess the cases of the *mukhtaṣar*: Are they only the cases of Abū Ḥanīfah's generation, or do they represent a cumulative experience of this Ḥanafī community? And are they arrived at by consulting a particular set of written texts, or are they the result of more complex processes? Analysing the passage of these cases from their origins to our *mukhtaṣar* is very much a part of our epistemological study, as investigating transmission of law reveals an understanding of *madhhab* authority: If these cases define this legal tradition at the

highest epistemic level, then the processes and texts that determine which cases are to be taken as authoritative can be seen as underpinning the entire system.

The *Bidāyat al-mubtadī* is not an original work. Al-Marghīnānī states in his introduction to this *mukhtaṣar* that he compiled it from two earlier works: the *Mukhtaṣar* of Aḥmad ibn Muḥammad al-Qudūrī and the *Jāmi' al-ṣaghīr* of Muḥammad al-Shaybānī, Abū Ḥanīfah's student.[228] Our investigation is therefore directed to these two works and from whence they draw their authority. The earlier of the two, *al-Jāmi' al-ṣaghīr*, is a short work of legal rules that was the subject of a great many commentaries. Section 2.1 introduces the work and the interest shown to it in al-Marghīnānī's milieu. The bulk of this chapter, however, addresses the later of the two, the *Mukhtaṣar* of al-Qudūrī.

Al-Qudūrī's *Mukhtaṣar* can be considered the first 'grand *mukhtaṣar*' of the Ḥanafī school, as it eclipsed most earlier works and was the basis for subsequent Ḥanafī *mukhtaṣar*s. The story of al-Qudūrī's text is therefore intimately tied to the story of the *madhhab*, as *mukhtaṣar*s serve the purpose of presenting core authoritative doctrine around which a *madhhab* develops. Unfortunately, we do not have statements from al-Marghīnānī explaining what form of legal authority he perceived the text to hold. We can only speculate about why he felt this fifth-century

[228] A critical edition of the *Bidāyat al-mubtadī* is now available, edited by Sā'id Bakdāsh (2016). Bakdāsh relies on eight manuscripts, his earliest dating to 633/1235-6, just forty years after al-Marghīnānī's death. (Unfortunately, he rarely points out differences between these manuscripts; in several places, some highlighted below, there seems to be clear interpolation from the *Hidāyah* into his text, but as he gives no references to his manuscripts, it is hard to investigate this further.) Bakdāsh points out that previous printed editions of the *Bidāyah* are unreliable, as they are mere extractions of the *mukhtaṣar* from the text of the *Hidāyah*. Unfortunately, separating commentary from *mukhtaṣar* in the *Hidāyah* is very difficult and generally all such demarcations in printed editions of the *Hidāyah* should be taken with caution. It is interesting to note that in a manuscript scribed approximately sixty years after al-Marghīnānī's death (MS Arab 265, Houghton Library, Harvard University, dated 657/1259), there is no demarcation between *mukhtaṣar* and commentary at all, suggesting that perhaps all such demarcations reflect later efforts and that the original text was simply studied as a singular whole.

*mukhtaṣar* could be treated as an equal to the second-century work of Abū Ḥanīfah's direct student. It is this speculation to which most of the current chapter is directed.

As we do not have al-Marghīnānī's own insights into the importance of al-Qudūrī's text, our best avenue to grasp the significance of the work is to study it in its own context. There are actually several contexts in which the text can be situated, each revealing an important feature of the text. The first is situating al-Qudūrī's *Mukhtaṣar* amongst early *mukhtaṣar*s across legal schools. The second is situating al-Qudūrī's *Mukhtaṣar* amongst early Ḥanafī *mukhtaṣar*s. The third is the most central to our study, and it is assessing the sources of Ḥanafī doctrine that contributed to the cases of the *mukhtaṣar*. Finally, the fourth assesses the impact of al-Qudūrī's *Mukhtaṣar* on the later school tradition. By studying al-Qudūrī's *Mukhtaṣar* in these four contexts, we will have a very good idea of the weight this text would have held in al-Marghīnānī's milieu, as well as the processes by which this set of legal cases were considered authoritative. Section 2.2 presents these studies of al-Qudūrī's *mukhtaṣar*.

Section 2.3 concludes the chapter by bringing together these studies of the two source texts of the *Bidāyat al-mubtadī*, suggesting that they show two distinct notions of authority construction in determining core Ḥanafī precedent: Al-Qudūrī's authority draws from a oral teaching tradition, whilst the *Jāmi' al-ṣaghīr*'s authority draws from a canonised textual tradition. In bringing these two sources together, we will see an interest in al-Marghīnānī's generation of jurists to base the school on both the conclusions of an earlier oral teaching tradition and a subsequently canonised textual tradition.

## 2.1 The *Jāmi' al-ṣaghīr*

Christopher Melchert identifies the formation of the classical schools of law ('classical school' being his term for the *madhhab* as a functioning guild) by the

presence of particular features, among which is the growth of a commentary tradition around core school texts.[229] Within the Ḥanafī school, the texts that first provided a core of authoritative Ḥanafī doctrine around which the commentary tradition developed were the two *Jāmi'*s attributed to Muḥammad al-Shaybānī: *al-Jāmi' al-ṣaghīr* and *al-Jāmi' al-kabīr*. A flurry of commentary activity around these two works took place in the fourth century, leading Melchert to identify this century as the period in which the classical Ḥanafī school was formed.[230] These texts maintained their authoritative status into the sixth-century Transoxiana of al-Marghīnānī. We saw in al-Marghīnānī's biography that a study of al-Shaybānī's main written works, including these two *Jāmi'*s, was a central part of the Transoxianan teaching curriculum: Al-Marghīnānī studied these texts with both Mi'rāj al-Sharī'ah Muḥammad ibn Muḥammad and Shaykh al-Islām 'Alī ibn Muḥammad al-Isbījābī in the formative period of his education.[231] Furthermore, al-Marghīnānī justifies his incorporation of *al-Jāmi' al-ṣaghīr* into the *Bidāyat al-mubtadī* by noting, "I saw the great ones of the age in the lands of Transoxiana encouraging the young and the old to memorise *al-Jāmi' al-ṣaghīr*,"[232] highlighting the active role played by the text in the Transoxianan teaching curriculum.

Accordingly, commentaries on the *Jāmi' al-ṣaghīr* were prevalent in his milieu.[233] Al-Marghīnānī authored a commentary, as did leading contemporaries, including Qāḍīkhān and Aḥmad ibn Muḥammad al-'Attābī. His teacher al-Ṣadr al-Shahīd 'Umar ibn Māzah authored two or three commentaries on the work, including

[229] Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.*, 60.
[230] Ibid., 60-7.
[231] See pages 16-17, above.
[232] Al-Marghīnānī, *Bidāyah*, 41.
[233] Many of the following observations about the text are taken from the helpful study presented by Mehmet Boynukalın with his critical edition of the book (2011). Indications to this study are henceforth referenced as 'Boynukalın'. Boynukalın has also published this study separately: Mehmet Boynukalın, "*Al-Jāmi' al-ṣaghīr lil-Imām Muḥammad ibn al-Ḥasan al-Shaybānī: dirāsah tawthīqīyah taḥlīlīyah naqdīyah*". For a list of works on the book, including commentaries, reorganisations and versifications, see Boynukalın, 20-40.

one of its most renowned commentaries. There were also works on the *Jāmi‘ al-ṣaghīr* from leading Transoxianan grand-teachers, including Shams al-A’immah al-Ḥalwānī, Abū Manṣūr al-Māturīdī, Abū al-Mu‘īn al-Nasafī, Shams al-A’immah al-Sarakhsī, Fakhr al-Islām al-Bazdawī and Abū al-Yusr al-Bazdawī, all of whom are in al-Marghīnānī’s direct line of teachers.[234]

The *Jāmi‘ al-ṣaghīr* is a short work of legal rules organised into forty chapters. The organisation of the chapters is attributed to Muḥammad ibn al-Ḥasan; this is certainly what al-Marghīnānī believed, as he states in the introduction to the *Bidāyat al-mubtadī*: “I saw the organisation of *al-Jāmi‘ al-ṣaghīr* to be superior [to the organisation of the *Mukhtaṣar* of al-Qudūrī], so I followed it out of seeking blessings through that which was chosen by Muḥammad ibn al-Ḥasan.”[235] However, the cases within chapters were not presented in a topic-wise order; for example, topics of ritual purity appear at seemingly random points amongst topics of ritual prayer in the opening *Kitāb al-Ṣalāh*.[236] Several early Ḥanafīs reorganised the cases in a more topic-based fashion, the most renowned reorganisation being that of Abū Ṭāhir al-Dabbās (d. 340/951-2).[237]

The work was not intended to be a complete coverage of *fiqh*. The only discussions pertaining to ritual ablutions, for example, are three obscure cases about the invalidation of ablutions through (1) vomiting a mouthful of several different substances, (2) the exiting of fluids from a peeled boil, and (3) the emergence of a

[234] See Figures 1 and 2, above; two jurists not represented in those charts are al-Ḥalwānī and al-Māturīdī. The former was the teacher of al-Sarakhsī and the Bazdawī brothers, the latter was a grand-teacher to whom many Samarqandī chains can be returned. One such chain is al-Marghīnānī< Najm al-Dīn ‘Umar al-Nasafī<Abū al-Yusr al-Bazdawī<Ismā‘īl ibn ‘Abd al-Ṣādiq al-Khaṭīb al-Banārī (d. ?)<‘Abd al-Karīm ibn Mūsā al-Bazdawī (d. 390/1000) (Abū al-Yusr’s and Fakhr al-Islām’s grandfather)<Abū al-Manṣūr al-Māturīdī.
[235] Al-Marghīnānī, *Bidāyah*, 42.
[236] The original order is maintained in the commentaries of al-Sarakhsī, Fakhr al-Islām al-Bazdawī and Muḥammd ibn Aḥmad al-Isbījābī (d. *c.* 500/670-1): Boynukalın , 26-7. The observation of the ordering of topics in the *K. al-Ṣalāh* was made from a manuscript of Fakhr al-Islām al-Bazdawī’s commentary.
[237] All extant manuscripts of the text are based on this reorganisation: ibid., 18.

worm from a wound.[238] It is a short work which invites the reader to consider the rationale behind such subsidiary cases of the law. This is why recollection of the text and its underlying meanings was a mark of one's training in this Ḥanafī tradition. Al-Ṣadr al-Shahīd 'Umar ibn Māzah states in the introduction to his shorter commentary on the work:

> Our teachers would venerate this book to a great degree, and they would give it preference over all other books, to the extent that they held it unfitting for someone who does not memorise its cases to assume a judgeship, because these are the foundational cases of our associates (*āṣḥābinā*) [i.e. Abū Ḥanīfah and his circle] and their wellsprings (*'uyūnihā*). ... So whoever encompasses its meanings (*ma'ānī*) and comprehends its words becomes from the highest rank of jurists and is capable of issuing *fatwā*s and assuming judgeships.[239]

A jurist's standing in this tradition was tied to his ability to properly recall and explain the cases of the book by demonstrating a deep grasp of the legal meanings underpinning its cases. Al-Sarakhsī quotes his master, al-Ḥalwānī, as noting, "No one should belittle *al-Jāmi' al-ṣaghīr*."[240] Al-Shaybānī was understood to have crafted the work explicitly for the purpose of advanced juristic training: He reportedly said, "Whoever learns *al-Jāmi' al-ṣaghīr in its reality* (*'alā al-ḥaqīqah*) is permitted to issue *fatwā*s."[241]

The book was held as a work of al-Shaybānī's direct authorship.[242] This explains its status as a foundational text in the transmission of school doctrine. Interestingly, the author makes a point to introduce its cases with a recurring chain of

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[238] Al-Shaybānī, *al-Jāmi' al-ṣaghīr*, 62-3.
[239] Al-Ṣadr al-Shahīd 'Umar ibn Māzah, *Sharḥ al-Jāmi' al-ṣaghīr*, 113. Boynukalın points out that this edition is al-Ṣadr al-Shahīd's shorter commentary: Boynukalın, 30.
[240] Ibid., 45.
[241] Ibid.
[242] Norman Calder has cast doubt over the authenticity of books ascribed to Muḥammad al-Shaybānī: Norman Calder, *Studies in Early Muslim Jurisprudence*, 39-66. There have been several responses to Calder's redating of early legal texts. With regards to al-Shaybānī's works, only two texts have been provided a sustained defence of their ascription to al-Shaybānī: Behnam Sadeghi, "The Authenticity of Two 2nd/8th Century Ḥanafī Legal Texts: the *Kitāb al-āthār* and the *Muwaṭṭa'* of Muḥammad ibn al-Ḥasan al-Shaybānī". It is sufficient for our purposes in the current study to know that the *Jāmi' al-ṣaghīr* was believed to be a text of al-Shaybānī's, as it is this belief that informs epistemology. The various transmission details and anecdotes in Boynukalın's study suggest the text to have reached a completed form in al-Shaybānī's life.

transmission: *Muḥammad ʻan Yaʻqūb* [i.e. Abū Yūsuf] *ʻan Abī Ḥanīfah*, causing Fakhr al-Islām al-Bazdawī to boast in the introduction to his commentary,

> Each of its cases is given a chain of transmission, as with the *ḥadīth*s and the *sunan*. The chain is provided by the foremost of imams in grasping legal meanings (*maʻānī*), the roots of the sacred law and its branches [i.e. al-Shaybānī], to the imam who is the leading memoriser of the known reports (*āthār*) and *sunan* and the most firm in the points of argumentation and defence [i.e. Abū Yūsuf], to the imam of imams, the lamp of the nation, Abū Ḥanīfah.[243]

This focus on transmission, in the manner of *ḥadīth* works, also underlines the intended role of the work as one to document authoritative transmission of Ḥanafī doctrine.[244]

The text appears to have generated great interest across early learning circles. Even leading *ḥadīth* scholars such as Yaḥyā ibn Saʻīd al-Qaṭṭān (d. 198/813) and Yaḥyā ibn Maʻīn (d. 233/848) studied the text, the former with Abū Yūsuf,[245] the latter with al-Shaybānī.[246] Al-Shāfiʻī's (d. 204/820) student al-Ḥasan ibn Muḥammad al-Zaʻfarānī (d. 260/874) notes,

> We would attend the gathering of Bishr al-Marīsī (d. 219/834-5 or 228/842-3) [Abū Yūsuf's student], but we were unable to debate with him. So we walked to Aḥmad ibn Ḥanbal (d. 241/855) and said to him, 'Permit us to memorise Abū Ḥanīfah's *al-Jāmiʻ al-ṣaghīr* so we can delve with them when they delve.' 'Be patient,' he replied.[247]

The text, in this quotation, is ascribed to Abū Ḥanīfah, as it is his doctrine that is being conveyed. Al-Zaʻfarānī's anecdote supports the preceding observation regarding the nature of the text, namely, that it was not authored merely for the sake

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[243] Boynukalın, 44.
[244] The presence of this chain of transmission can also be explained by anecdotal reports that al-Shaybānī authored the work upon the request of Abū Yūsuf, who wanted a work containing only legal cases al-Shaybānī had heard from Abū Yūsuf: ibid., 12-13.
[245] After it was authored, Abū Yūsuf reportedly approved greatly of the work and kept it with him even when travelling: al-Laknawī, *al-Jāmiʻ al-ṣaghīr maʻa sharḥihi al-Nāfiʻ al-kabīr*, 32. This report of Yaḥyā al-Qaṭṭān suggests he also taught it.
[246] Ibid., 44; the Yaḥyā al-Qaṭṭān report is in Ibn ʻAbd al-Barr, *Jāmiʻ bayān al-ʻilm wa-faḍlihi*, 2:1082; and the Yaḥyā ibn Maʻīn report is in al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 2:561.
[247] Ibid., 43, quoting from Yāqūt al-Ḥamawī, *Muʻjam al-udabāʼ: irshād al-arīb ilā maʻrifat al-adīb*, 6:2405.

of presenting rules, but for these rules to be used as instances for reflection on their deeper implications. Thus, those who had studied the text were able to debate about the law with a sophistication that their contemporaries struggled to match. By all accounts, al-Shaybānī's *al-Jāmi' al-ṣaghīr* appears the first concise book of legal rules to have been authored for this purpose.

The majority of commentaries authored on the two *Jāmi'*s in the fourth century – where Melchert situates the formation of the Ḥanafī classical school – were from Iraq.[248] It would be assumed that al-Qudūrī, an Iraqi jurist from the end of the fourth century, would have taken these texts of al-Shaybānī as the basis for his *Mukhtaṣar*, his own short summary of Ḥanafī rules. We will see, however, that for al-Qudūrī, determining authoritative Ḥanafī doctrine required negotiating a greater set of sources. We turn now to a broad study of al-Qudūrī's famous *Mukhtaṣar*.

## 2.2 Situating the *Mukhtaṣar* of al-Qudūrī in its Contexts

Al-Qudūrī's *Mukhtaṣar* started generating commentaries in Transoxiana in the generation of al-Marghīnānī's teachers' teachers. There are four Transoxianan commentaries known to have preceded him: the commentaries of 'Alā' al-Dīn al-Samarqandī,[249] Muḥammad ibn al-Ḥusayn (d. 483/1090), known as Bakr Kh$^{w}$āharzādah,[250] 'Abd al-Karīm ibn Muḥammad al-Ṣabbāghī (d. ?),[251] a student of Abū al-Yusr al-Bazdawī, and a commentary attributed to Fakhr al-Islām al-Bazdawī.[252] Amongst al-Marghīnānī's Transoxianan contemporaries, there are the

[248] Melchert, *The Formation*, 66.
[249] Kātib Çelebī refers to it as an expansion on the *Mukhtaṣar* of al-Qudūrī: Kātib Çelebī, *Kashf al-ẓunūn 'an asāmī al-kutub wa-al-funūn*, 1:371.
[250] Al-Baghdādī, *Hadīyat al-'ārifīn*, 2:76.
[251] Ibid., 1:608.
[252] This is mentioned in Talal al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition*, 65, although I have not been able to find mention of it in the references he provides. It is not mentioned by Kātib Çelebī, Ismā'īl Pāsha al-Baghdādī or 'Umar Kaḥḥālah. I have found it mentioned in 'Abd al-Laṭīf Riyāḍ Zādah, *Asmā' al-kutub al-mutammim li-kashf al-ẓunūn*, 251, where it is given the title *al-Lubāb*.

commentaries of Abū al-Ma'ālī Muḥammad ibn Aḥmad al-Isbījābī (d. *c.* 600/1203-4)[253] and Naṣr ibn Muḥammad al-Khatlī (d. *c.* 600/1203-4).[254] However, the text seems not to have been a central text in the Transoxianan teaching tradition. We can tell this from al-Marghīnānī's own studies, in which the text is not mentioned at all, and from his introduction to *Bidāyat al-mubtadī*, where he attributes his interest in the *Mukhtaṣar* to a trip he made to Iraq: "When it so occurred that I journeyed through Iraq, I found the *Mukhtaṣar* ascribed to al-Imām al-Qudūrī – God have mercy on him – to be a most beautiful book, in the very best of brevity and splendour."[255] This stands in contrast with the following sentence: "And I saw the great ones of the lands of Transoxiana encouraging the young and old to memorise *al-Jāmi' al-ṣaghīr*." His introduction gives the impression that the Transoxianans were fully devoted to the *Jāmi'*, while it was the Iraqis who were interested in the *Mukhtaṣar*. Be that as it may, al-Qudūrī's *Mukhtaṣar* was soon to be the basis for subsequent Transoxianan *mukhtaṣar*s, and it would command an authority not commanded by any other book authored after al-Shaybānī. In this section, we will attempt to account for the factors that contributed to the great status enjoyed by this short work and to uncover the processes behind the determination of its legal cases. We start by situating it amongst *mukhtaṣar*s across legal schools.

### 2.2.1 An Introduction to *Mukhtaṣar* Works Across Schools

The *mukhtaṣar* as a genre of legal writing has been the subject of several important studies. Norman Calder has studied Ḥanafī *mukhtaṣar*s from the classical period, ranging from the sixth to the eighth century. He shows them to represent a largely stable statement of rules that draw from the earliest written Ḥanafī sources and,

[253] Kātib Çelebī, *Kashf*, 2:1631; al-Baghdādī, *Hadīyah*, 2:105-6.
[254] Kātib Çelebī, *Kashf*, 2:1631; al-Baghdādī, *Hadīyah*, 2:491.
[255] Al-Marghīnānī, *Bidāyah*, 41.

therefore, reflect little the social circumstances of their authors and periods.[256] Mohammad Fadel has studied *mukhtaṣar*s from the seventh and eighth centuries that exerted great influence in the late classical period. These texts present a highly sophisticated language of *tarjīḥ*, or preference between opinions, and a culmination of school doctrine in, what he terms, a codified common law.[257] His focus on Mālikī and Shāfi'ī texts is complemented by Şükrü Selim Has's study of *Multaqā al-abḥur*, a late Ḥanafī *mukhtaṣar* sharing this focus on *tarjīḥ*.[258] These studies of *mukhtaṣar*s from the classical period inexorably study the *mukhtaṣar* as a marker of developing notions of legal authority within the *madhhab* tradition.

Studies of pre-classical *mukhtaṣar*s assess notions of legal authority in the formative era of the *madhhab*s. These include Jonathan Brockopp's studies of the *mukhtaṣar*s of Ibn 'Abd al-Ḥakam (d. 214/829),[259] the student of Mālik ibn Anas (d. 179/795), and Ahmed El Shamsy's study of the *Mukhtaṣar* of al-Buwayṭī (d. 231/846),[260] the student of al-Shāfi'ī. These studies analyse the degree of loyalty these authors showed to their teachers and the form of doctrinal development their texts displayed.

At the intersection of the formative and the classical, we have Nimrod Hurvitz's study of the Ḥanbalī *Mukhtaṣar* of al-Khiraqī (d. 334/945-6). This is also a study of legal authority in the *madhhab* tradition, but, in this case, to show the unique

[256] Calder, *Islamic Jurisprudence*, 23-35.
[257] Mohammad Fadel, "The Social Logic of Taqlīd and the Rise of the Mukhtaṣar".
[258] Şükrü Selim Has, "A Study of Ibrāhīm al-Ḥalabī With Special Reference to the *Multaqā*",
[259] Jonathan Brockopp, "Early Islamic Jurisprudence in Egypt: Two Scholars and Their Mukhtasars"; idem, "The Minor Compendium of Ibn 'Abd al-Ḥakam (d. 214/829) and Its Reception in the Early Mālikī School"; idem, *Early Mālikī Law: Ibn 'Abd al-Ḥakam and His Major Compendium of Jurisprudence*.
[260] Ahmed ElShamsy, "The First Shāfi'ī: The Traditionalist Legal Thought of Abū Ya'qūb al-Buwayṭī".

synthesis by al-Khiraqī of the various narrations from Aḥmad ibn Ḥanbal to offer a definitive statement of Ḥanbalī law.[261]

Each of these studies treats the *mukhtaṣar* as a window onto the inner workings of the schools of law at various stages of their development and maturity. Perhaps the most fascinating of these periods is the intersection between the formative and the classical, as it is here that questions about *madhhab* formation are best answered. It is at such an intersection that we find the Ḥanafī *Mukhtaṣar* of Aḥmad ibn Muḥammad al-Qudūrī, the leading Ḥanafī authority of the Baghdad of his time,[262] identified by Ya'akov Meron as the first text of the classical Ḥanafī school.[263] This sentiment is supported by Norman Calder's study, which shows that classical Ḥanafī *mukhtaṣar*s were grounded in the foundational text of al-Qudūrī.[264] If it is true that it lies at the nexus between the formative and classical periods, then a study of it can contribute much to our knowledge of *madhhab* formation.

A helpful start to the study of a *mukhtaṣar* said to mark a transitional stage is situating it amongst the larger trends of *mukhtaṣar*s authored up to its time. For this purpose a list of *mukhtaṣar*s, found in Appendix B, was compiled from several sources: Sezgin's *GAS,* Ibn al-Nadīm's (d. 438/1047) *Fihrist*, al-Baghdādī's *Hadīyat al-'ārifīn*, and Kātib Çelebī's *Kashf al-ẓunūn*. Numbers of commentaries recorded for them were also noted. We must also bear in mind that in the formative period, the notion of '*mukhtaṣar*' as a well-defined genre is absent. This list reveals helpful trends, but notable differences will exist between these works in length, content and purpose.

[261] Nimrod Hurvitz, "The Mukhtaṣar of al-Khiraqī and Its Place in the Formation of Ḥanbalī Legal Doctrine".
[262]For a detailed biography, see Al-Azem, *Rule-Formulation*, 23-36.
[263] Ya'akov Meron, "The Development of Legal Thought in Hanafi Texts", 78-9.
[264] Calder, *Islamic Jurisprudence*, 23-35.

The list shows that legal works entitled *mukhtaṣar*s, from the earliest times, were tied to schools that eventually formed *madhhab*s. Twenty-seven of the thirty-one works mentioned belonged to the three main Sunnī schools: the Ḥanafī, Shāfi'ī and Mālikī. Of course, works of other schools would be expected to have been lost and forgotten as they did not form lasting *madhhab*s. However, as the sources consulted mention the *mukhtaṣar* of the Khārijī Jubayr ibn Ghālib (d. late first/early second century), the *mukhtaṣar* of al-Ṭabarī (d. 310 /923) representing his own unique school and as Ibn al-Nadīm, himself a Shī'ī,[265] records no *mukhtaṣar* for the proto-Shī'īs, it can be assumed that these other *mukhtaṣar*s were few compared to those of the three main schools. Furthermore, these *mukhtaṣar*s began to be authored in the generation immediately following the founders of these schools, including direct students of al-Shāfi'ī, Mālik, and al-Shaybānī.

The most represented location for early *mukhtaṣar*s of the third century was Egypt and then Iraq. In the fourth and fifth centuries, Baghdad was most prominent, with twelve of the twenty-two authors being from Baghdad, either in training or residence. This reflects the expected centrality of the Abbasid capital and possibly shows an interest in the capital to produce epitomes to be taught and commented on in other areas of the empire. This certainly was the case with the *Mukhtaṣar* of al-Qudūrī, which was said to be amongst four *mukhtaṣar*s commissioned by the Caliph al-Qādir (d. 422/1031), one for each Sunnī school.[266] However, this accounts only in part for al-Qudūrī's success, as none of the other *mukhtaṣar*s commissioned by al-Qādir appear to have left a mark on the commentary tradition.[267]

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[265] *Encyclopaedia of Islam*, 2nd Edition, s.v. "Ibn al-Nadīm", by J.W. Fück.
[266] Yāqūt al-Ḥamawī, *Mu'jam al-udabā'*, 5:1956.
[267] Yāqūt (d. 626/1228-9) states that the commissioned Shāfi'ī text was the *Iqnā'* of al-Māwardī (d. 450/1058), for which no commentaries were found in the sources consulted, and that the Mālikī text was authored by an 'Abd al-Wahhāb ibn Muḥammad ibn Naṣr. This appears an erroneous reference to 'Abd al-Wahhāb ibn 'Alī (d. 422/1031), a Baghdadi Mālikī *qāḍī* who authored a *mukhtaṣar* entitled *al-*

Another important observation from this data is that the majority of the *mukhtaṣar*s of the first five centuries had little effect on the commentary literature. Rather, commentaries grew around later texts, presumably because they represented the refined insights of the *madhhab* after this period. This is with the notable exception of four *mukhtaṣar*s that caused a lasting flurry of activity. These are the third-century *mukhtaṣar* of the Shāfi'ī al-Muzanī (d. 264/878), the fourth-century *mukhtaṣar* of the Mālikī al-Qayrawānī (d. 386/996-7 or 389/999) and the most successful of all, the fifth-century *mukhtaṣar*s of the Shāfi'ī al-Shīrāzī (d. 476/1084) and al-Qudūrī. Why did these stand out? We will attempt to answer this for the case of al-Qudūrī.

An important observation from the list is that works characterised as *mukhtaṣar*s in these three to four centuries are of two types. The first are abridgements of larger works – such as al-Qayrawānī's Mālikī *mukhtaṣar* of the *Mudawwanah*, or al-Ḥākim al-Shahīd al-Marwazī's (d. 334/945) Ḥanafī *mukhtaṣar* from the books of al-Shaybānī – and the second are collections of rulings selected by their authors from multiple sources. We should differentiate between these as they represent two distinct forms of activity. While both bear the marks of their authors' editorial and jurisprudential insights, the latter form of *mukhtaṣar* also reflects the far more difficult task of negotiating multiple sources of school doctrine, which often ascribe contradictory positions to school-founders. As the *madhhab* matured, this latter form of *mukhtaṣar* was the most produced and most commented on, as the collective scholarly enterprise represented by the *madhhab* was not tied to any one book that could be summarised.

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*Talqīn* for which one commentary was mentioned in the sources consulted above. Yāqūt does not name the Ḥanbalī *mukhtaṣar* author. Christopher Melchert guesses him to be either Ibn Ḥamīd (d. 403/1012-13), chief of the Ḥanbalī school in Baghdad, or his successor, Abū Ya'lā ibn al-Farrā' (d. 458/1065), neither of whose works was recorded, in the sources consulted, as a *mukhtaṣar* or had identifiable commentaries: See Melchert, "Māwardī, Abū Ya'lā and the Sunnī Revival", 45.

There are four Ḥanafī *mukhtaṣar*s found in the list for which commentaries were identified: the *mukhtaṣar*s of al-Ṭaḥāwī, al-Karkhī, al-Qudūrī and al-Ḥākim al-Shahīd. The first three are *mukhtaṣar*s consisting of legal rulings selected by their authors, whilst the last is a work of abridgement whereby the author sought to abridge the main written books of al-Shaybānī. The last should be seen to belong to a distinct sub-genre of *mukhtaṣar*s. The distinct nature of this text can be seen in al-Sarakhsī's (d.483/1090) commentary on the work, where the author is treated as a transparent entity through whom al-Shaybānī is speaking.[268] It is the form of *mukhtaṣar* to which the other three texts belong that is more significant as it is intertwined with the collective activity that formed the *madhhab*.

### 2.2.2 Three Ḥanafī *Mukhtaṣar*s in Contrast: al-Ṭaḥāwī, al-Karkhī and al-Qudūrī

The two *Mukhtaṣar*s of al-Ṭaḥāwī and al-Karkhī were the forerunners of the *Mukhtaṣar* of al-Qudūrī: Both were collections of rulings selected by their authors, and not merely abridgements, and both were the focus of a commentary tradition. The classical[269] bibliographic sources consulted above mention thirty-eight works on al-Qudūrī's *Mukhtaṣar* – including commentaries, versifications and abridgements – eleven on al-Ṭaḥāwī and three on al-Karkhī. It is surprising to note the little interest in the *Mukhtaṣar* of al-Karkhī given that the large number of students recorded for him led Christopher Melchert to identify him as the founder of the classical Ḥanafī school.[270] The above-named classical sources mention only three commentaries:[271]

[268] This is clear from the opening pages. Al-Sarakhsī explains the organisation of the opening chapter as the choice of al-Shaybānī, not al-Ḥākim al-Shahīd. In the description of ablutions, al-Sarakhsī again treats it as the description of al-Shaybānī. See al-Sarakhsī, *al-Mabsūṭ*, 1:3-6. A search on an electronic copy of the book showed al-Ḥākim al-Shahīd to only be mentioned five times in the book, once in the introduction, and four times to quote his legal opinions, not to refer to him as the author.
[269] By classical, I am excluding Sezgin for the problem discussed in the note after next.
[270] Melchert, *The Formation,* 125-8.

two by direct students, al-Jaṣṣāṣ (d. 370/981) and al-Ḥusayn ibn ʻAlī al-Baṣrī (d. 334/945),[272] and the third by al-Qudūrī.[273] A search through a wider number of sources produced only one possible further work by Abū Mūsā al-Ḍarīr (d. 334/945)[274] to whom is ascribed a *mukhtaṣar* of the *Kitāb* of al-Karkhī,[275] which appears a reference to his *Mukhtaṣar*. It is further surprising to note that the earlier *Mukhtaṣar* of al-Ṭaḥāwī enjoyed lasting interest, inspiring notable commentators well into the classical era, including the likes of al-Sarakhsī, ʻAlī ibn Muḥammad al-Isbījābī (d. 535/1141), and even the Mamlūk-period author Qāsim ibn Quṭlūbughā. The following comparison between these texts will help explain this peculiarity.

A problem when comparing these *mukhtaṣar*s is identifying the text of al-Karkhī's *Mukhtaṣar*, which has been preserved in al-Qudūrī's commentary.[276] Unfortunately, al-Qudūrī makes no attempt to separate the words of al-Karkhī from his own except occasionally, and sometimes explicitly omits them. There are parts clearly al-Karkhī's, by al-Qudūrī's explicit statements; parts likely to be his, based on the content and the commentator's interaction; and parts that might be but are unverifiable. We are able to make useful insights into al-Karkhī's work, but are currently unable to conduct a detailed investigation.

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[271] I ignore two authors mentioned by Sezgin: Aḥmad ibn Manṣūr al-Isbījābī (d. *c.* 480/1087-8) and Abū al-Faḍl al-Kirmānī (d. 543/1149), as both were renowned authors, yet other sources make no mention of these works. Furthermore, Sezgin, himself, implies that the *mukhtaṣar* of al-Karkhī has only remained in the commentary of al-Qudūrī. Further study of these two manuscripts is therefore required. See Sezgin, *Tārīkh al-turāth al-ʻarabī*, 102.

[272] On his being a student of al-Karkhī, see Ibn al-Jawzī, *al-Muntaẓam fī tārīkh al-mulūk wa-al-umam*, 14:272.

[273] Kātib Çelebī, *Kashf*, 2:1634; al-Baghdādī, *Hadīyah*, 1:307.

[274] He was a *qāḍī* of the Sharqīyah in Baghdad and likely an associate of al-Karkhī. See Ibn al-Jawzī, *al-Muntaẓam*, 14:49, where he is named Muḥammad ibn ʻĪsā. This is the same person as he was the *qāḍī* appointed under al-Muttaqī lillāh (d. 357/958): See al-Ṣūlī, *Akhbār al-Rāḍī bi-Allāh wa-al-Muttaqī lillāh*, 191.

[275] Riyāḍ Zādah, *Asmāʼ al-kutub*, 121.

[276] Two Phd dissertations have edited parts of the work: al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī li-Abī al-Ḥusayn al-Qudūrī: min awwal al-kitāb ilā nihāyat kitāb al-zakāh*", and al-ʻAbd al-Qādir, "*Sharḥ Mukhtaṣar al-Karkhī li-Abī al-Ḥusayn al-Qudūrī: min awwal kitāb al-ḥudūd ilā nihāyat kitāb al-ḥawālah*".

The first observation from this comparison is the difference in ordering the material. The indebtedness of al-Ṭaḥāwī's *Mukhtaṣar* to the Shāfi'ī *Mukhtaṣar* of al-Muzanī, his maternal uncle, has long been noted.[277] In his *Kitāb al-Ṭahārah*, al-Ṭaḥāwī follows the ordering observed by al-Muzanī, differing only in combining some chapters. Al-Karkhī and al-Qudūrī, in their respective *K. al-Ṭahārah*s, show clear moves to organise the material more logically. Many of al-Karkhī's insights are copied by al-Qudūrī, who further improves the order and provides a remarkably simple organisation: Compared with al-Muzanī's eighteen section headings, al-Ṭaḥāwī's eight, and al-Karkhī's fourteen, al-Qudūrī provides only five. The table in Appendix C shows a comparison of chapter organisation between the four *mukhtaṣar*s in their respective *K. al-Ṭahārah*s.

A careful inspection shows the movement to organise the material, with al-Karkhī acting as a transitional figure. For example, al-Karkhī brought the discussions on purifying filth into the chapters of *K. al-Ṭahārah* and out of *K. al-Ṣalāh* as placed by al-Ṭaḥāwī, and, furthermore, grouped all the scattered discussions that deal with removing filth into consecutive chapters. Al-Qudūrī furthered this by grouping these cases under a single chapter heading. Similarly, al-Karkhī placed wiping bandages in its own chapter after wiping footgear, both entailing wiping for ritual purity, as opposed to al-Ṭaḥāwī, who placed it in the chapter of the *tayammum*, presumably because wounds are a reason for performing the *tayammum*. Al-Qudūrī followed al-Karkhī in this, but placed these cases in the very chapter of wiping footgear. Interestingly, al-Karkhī called the bandage chapter *Bāb al-tayammum lil-'udhr*, making it reminiscent of al-Ṭaḥāwī's originally grouping it into the cases of *tayammum*. Al-Qudūrī breaks this connection altogether.

[277] Kātib Çelebī, *Kashf*, 2:1627.

Al-Quduri did not follow al-Karkhī, however, where he overcomplicated chapters. Al-Karkhī placed the discussions of wiping footgear (*khuffayn*) in the very chapter of *tayammum*, presumably as both are forms of purity by wiping. This, for al-Qudūrī, overcomplicated the chapter of *tayammum*, so he separated wiping footgear in a chapter after *tayammum*. Al-Karkhī, likewise, placed the topic of menstruation into the causes for the ritual bath. This again is logically sound, as menstruation connects to purity only in necessitating a ritual bath. However, for al-Qudūrī, this made the chapter overly complex. He placed the cases of menstruation and related matters into their own chapter after ritual purity and before physical filth.

To conclude this first observation, al-Ṭaḥāwī reflected his Egyptian context, producing a *mukhtaṣar* that would mimic that of his Shāfi'ī peers, but providing doctrine transmitted from the founding imams of the Ḥanafī school. Al-Karkhī was clearly influenced by al-Ṭaḥāwī's work, but reorganised material more logically, not to respond to or mimic another text. In the process, he combined unrelated material. Al-Qudūrī furthered al-Karkhī's organisational insights, but with a further imperative to simplify: For him, chapters should not be overcomplicated with unrelated topics even if they related at a higher level of legal reasoning.

When looking at the choice of cases, and the internal organisation of chapters, the trends are similar. Al-Ṭaḥāwī is concerned with the polemical relationship of his *Mukhtaṣar* with interlocutors, emphasising points of disagreement.[278] The resulting text is not ideally suited to practice. For example, when discussing ritual ablutions (*wuḍū'*), al-Ṭaḥāwī does not mention how to perform valid ablutions. Of the obligatory elements, al-Ṭaḥāwī mentions only the obligation to wipe the amount of the forelock (*nāṣiyah*) from the head, a point of disagreement with al-Shāfi'ī and

[278] Aḥmad ibn 'Alī al-Warrāq (d. ?) commences his commentary on al-Ṭaḥāwī's *Mukhtaṣar* by praising the text for its focus on juristic disagreement (*khilāf*): ibid., 2:1627.

others; the obligation to wash what is between the sideburns (*'idhār*) and the ears, a point of disagreement with Abū Yūsuf; and the obligation to wash the elbows and ankles, a point of disagreement with Abū Ḥanīfah's student Zufar ibn Hudhayl (d. 158/774-5).[279]

Al-Karkhī, in what is identifiable of his *Mukhtaṣar*, shows a move to a more thorough and organised presentation of each topic, while still retaining a polemical focus. For example, he is clear in stating the obligatory and *sunnah* (highly recommended) elements of ritual ablutions. Yet, when listing acts that negate ablutions, al-Karkhī states, "Ablutions are not required for touching anything with lust, whether the genitals or anything else."[280] This is not a positive statement of the law; rather, it is a statement to show a departure from the doctrine of interlocutors.

Al-Qudūrī's *Mukhtaṣar*, again, completes the transition that al-Karkhī marks. Firstly, his chapters are well organised. For ritual ablutions, he clearly identifies and separates obligatory elements from highly recommended elements. Unlike al-Ṭaḥāwī, who presents non-obligatory elements only as points of disagreement with those who hold them obligatory, al-Qudūrī presents them within a positive statement of the law. Secondly, purely polemical statements are absent. He avoids negative statements of the law, such as a mention of acts that are unnecessary, or what does not negate ritual acts, as we find in both of his predecessors. This is an important point to note. It reflects the presence of a clearly defined *madhhab* to which al-Qudūrī belongs, and to the fact that this was still being formed in the milieu of his predecessors.

We can see, then, that al-Qudūrī was providing a manual that summarised the teachings of a recognised *madhhab*. If providing negative cases to highlight points of disagreement reflects an era of rivalry and the insecurity that such rivalry brings, then

[279] Al-Ṭaḥāwī, *Mukhtaṣar al-Ṭaḥāwī*, 17-18.
[280] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 173.

his focus on positive cases shows the settling of this rivalry. Settling here does not mean absence of rivalry, as rivalry was rife in the following centuries, but rather that the various *madhhab*s had become mature and entrenched. An author could safely write for his group, knowing that a wide readership existed for his exposition of the *madhhab*, without needing to state opinions of opposing schools in this simple exposition. In this regard, al-Qudūrī's *Mukhtaṣar* can truly be considered the first *mukhtaṣar* of the mature Ḥanafī *madhhab*. All *mukhtaṣar*s authored before him reflected stages on the way to a fully-realised, self-aware identity.

*Al-Ṭaḥāwī's and al-Karkhī's* Mukhtaṣar*s in the Memory of the School*

To complete our comparison, we will compare the stature awarded these *mukhtaṣar*s in the later memory of the school. If we state that al-Qudūrī's *Mukhtaṣar* is the first of the mature *madhhab*, what importance did this mature *madhhab* award the two earlier *mukhtaṣar*s? For this, we can note their reception in the commentary tradition. A close look at al-Sarakhsī's interaction with these *mukhtaṣar*s in his famous legal commentary, *al-Mabsūṭ*, is revealing.

The first surprising insight is that al-Qudūrī is not mentioned even once in the entire work,[281] whilst al-Ṭaḥāwī and al-Karkhī are mentioned numerous times. As it is not easy to precisely identify the *Mukhtaṣar* of al-Karkhī, it is not clear if al-Sarakhsī is quoting his *Mukhtaṣar*. Al-Ṭaḥāwī is the easier source for this investigation.

We find that al-Sarakhsī does not treat al-Ṭaḥāwī's work as simply a short presentation of Ḥanafī doctrine. Rather, he treats it as an important foundational source for this doctrine, on a par with the statements of direct students of Muḥammad ibn al-Ḥasan al-Shaybānī, the main transmitter of Abū Ḥanīfah's doctrine, and even on a par with the books of al-Shaybānī himself. An example of the latter is the case of

[281] This was determined by searching an electronic copy of the book in the software programme *al-Maktabah al-shāmilah*. While room must be allowed for textual errors, the fact that his name was not found even once is significant.

an imam leading a group prayer while standing on a raised platform. Both al-Shaybānī's *Aṣl* and al-Ṭaḥāwī's *Mukhtaṣar* state this to be disliked. When discussing the opposite, that is the group being on a raised platform and the imam leading from below, the *Aṣl* and al-Ṭaḥāwī differ. In what al-Sarakhsī refers to as the '*riwāyah*' of the *Aṣl*, it is also disliked. However, in the '*riwāyah*' of al-Ṭaḥāwī, it is allowed.[282] Al-Sarakhsī's discussion reveals al-Ṭaḥāwī's *Mukhtaṣar* as a primary source of *riwāyah*, or transmission, from school-founders.

Al-Sarakhsī contrasts al-Ṭaḥāwī's *Mukhtaṣar* with the statement of al-Ḥasan ibn Ziyād (d. 204/819-20), a direct student of Abū Ḥanīfah, in an issue related to the call (*adhān*) to the Friday prayer. It is agreed, as Ḥanafī doctrine, that buying and selling are prohibited after the call to the Friday prayer. The subsequent disagreement is whether this prohibition takes place after the first call, performed outside the mosque, or the second call, performed before the pulpit prior to the sermon. Al-Ḥasan said the former and al-Ṭaḥāwī the latter. Al-Sarakhsī gives these opinions equal weight, and states the most correct opinion as being the first of these that occurs in the time of the noon (*ẓuhr*) prayer. [283]

In transmitting the opinion of al-Shaybānī, again al-Ṭaḥāwī is on a par with al-Shaybānī's direct students. In the case of someone who catches the Friday prayer in the final sitting, Al-Shaybānī said he must stand and pray four cycles, instead of the customary two for the Friday prayer. Al-Ṭaḥāwī conveys from al-Shaybānī that the prayer is valid only if he sits in the first sitting of this four cycle prayer, while al-Shaybānī's student al-Muʿallā ibn Manṣūr (d. 211/826-7) narrates the contrary. Al-Sarakhsī gives both transmissions equal weight.[284]

[282] Al-Sarakhsī, *al-Mabsūṭ*, 1:40; al-Ṭaḥāwī, *Mukhtaṣar*, 33.
[283] Al-Sarakhsī, *al-Mabsūṭ*, 1:134; al-Ṭaḥāwī, *Mukhtaṣar*, 34.
[284] Al-Sarakhsī, *al-Mabsūṭ*, 2:35; al-Ṭaḥāwī, *Mukhtaṣar*, 35.

Al-Ṭaḥāwī is also contrasted with Abū ʻIṣmah (d. 210/825-6), the author of the earliest known Ḥanafī *mukhtaṣar*, in the case of the imam whose ablutions are negated during prayer and leaves to renew ablutions without appointing an imam to replace him. They both agree that the prayer of the group is invalidated, but al-Ṭaḥāwī states that the prayer of the imam is also invalidated, while Abū ʻIṣmah states it is not. Al-Sarakhsī prefers the opinion of Abū ʻIṣmah.[285]

An important verb used by al-Sarakhsī to describe al-Ṭaḥāwī's activity in the *Mukhtaṣar* is *ikhtiyār* ('selection'). This verb presents al-Ṭaḥāwī as an authority in actively selecting between possible school positions in addition to being a transmitter of the opinions of school founders.[286]

In al-Sarakhsī's references to al-Karkhī, he often contrasts him with al-Ṭaḥāwī. He usually contrasts the legal positions of each scholar. In this sense, al-Karkhī is on an equal footing with al-Ṭaḥāwī, and their chosen opinions, or *ikhtiyār*s, are treated as equally authoritative.[287] Al-Karkhī is also quoted as an authority in identifying the positions of Abū Hanīfah's companions, and is sometimes contrasted with al-Ṭaḥāwī in this regard.[288] This identification is also a form of *ikhtiyār*, as each scholar must choose between a range of possible transmissions. What occurs far less frequently is his presenting al-Karkhī as a source of independent transmission: He is never contrasted with the other students of Abū Ḥanīfah or with the narrators of al-Shaybānī's books, unlike al-Ṭaḥāwī.

What one can draw from all of this is that both al-Ṭaḥāwī and al-Karkhī were seen as heirs of the legacy of the all important third century that separated them from the school's founders. It was the century of the students of Abū Ḥanīfah's

[285] Al-Sarakhsī, *al-Mabsūṭ*, 1:176; al-Ṭaḥāwī, *Mukhtaṣar*, 32.
[286] Al-Sarakhsī, *al-Mabsūṭ*, 2:29, 57; 6:176; 9:197; 23:176; 26:120.
[287] Ibid., 2:57; 3:152; 9:197; 10:9; 13:20; 26:74.
[288] Ibid., 3:60; 4:219; 10:70, 159; 11:40; 13:4; 30:193.

companions, their students and their students. It was the century of a vast spread of narrations from the main members of Abū Ḥanīfah's circle, a century of new opinions based on this loosely defined school, a century of coming to terms with this legacy. Al-Ṭaḥāwī and al-Karkhī came at the end of this period and at the dawn of the *madhhab*; the unique authority awarded to them reflects this. And between the two of them, al-Ṭaḥāwī is the earlier figure, firmly planted in the activities of the third century. As seen above, he was treated as an equal with figures who died a century before him, whether Abū 'Iṣmah, the author of the first *mukhtaṣar* of this loosely defined school, or Mu'allā, the narrator of Muḥammad's *Nawādir*.[289] His *ikhtiyār*s were also considered important as they belonged to this early pre-*madhhab* heritage. Al-Karkhī, in this regard, is yet again a transitional figure. This best explains the little interest given to his *Mukhtaṣar* compared with those of al-Ṭaḥāwī and al-Qudūrī. Al-Ṭaḥāwī offered a concise work presenting transmissions and opinions from the pre-*madhhab* era and focusing on cases of juristic disagreement that commentators delighted in for centuries, and al-Qudūrī offered the first summary of the doctrine of the mature, fully-realised *madhhab*, whereas al-Karkhī's text was not perfectly either. And because al-Qudūrī represents the *madhhab* as understood and accessed independently by al-Sarakhsī, he is not treated by him as an authority figure.

About one-hundred years after al-Sarakhsī, we have another Central-Asian encyclopaedic commentary work in the *Badā'i' al-ṣanā'i'* of 'Alā' al-Dīn Abū Bakr ibn Mas'ūd al-Kāsānī (d. 587/1191). In this work we find over one-hundred references to al-Qudūrī, but these are predominantly to his commentary on al-Karkhī's *Mukhtaṣar* and very few to his own *Mukhtaṣar*.[290] This further supports the

[289] Al-Baghdādī, *Hadīyah*, 2:466.
[290] Explicit references to the *Mukhtaṣar* are al-Kāsānī, *Badā'i' al-ṣanā'i' fī tartīb al-sharā'i'*, 5:28, 175. Likely references to the *Mukhtaṣar* are ibid., 1: 53, 96, 111, 112, 141, 127. Possible references are ibid., 3:20, 80, 116; 5:249; 6:35, 42.

notion that al-Qudūrī was seen by the likes of al-Sarakhsī as almost an equal, and a century later, by the likes of al-Kāsānī, as a senior scholar, but not significantly senior. His *Mukhtaṣar* summarised a *madhhab* they felt able to access from other sources. Yes, some of his insights, or *ikhtiyārāt*, were useful, and quoted, but besides that, his work was very much a part of the classical school to which they belonged. Al-Karkhī and al-Ṭaḥāwī, however, belonged to a distinctly earlier period in the formation of the school, so their transmissions, particularly al-Ṭaḥāwī's, and their identifying the opinions of school-founders, were important and authoritative.

The preceding study confirms Ya'akov Meron in placing al-Qudūrī at the beginning of a new period of authorship in the Ḥanafī *madhhab*-tradition. This does not contradict Melchert's identifying al-Karkhī as the figure around whom the classical school developed. This is because formation and development are processes, not moments. Periodisations of complex traditions such the *madhhab* are observations of developments in these traditions. In periodisations, these developments are tied to individuals or events that might mark the beginning, middle or end of a particular development. If al-Karkhī marks the beginning of a socially mature legal guild, then it is perfectly understandable for three generations of jurists to pass for this guild to fully mature. Al-Qudūrī's text was the *mukhtaṣar* authored for the guild. There was no mature guild for whom al-Karkhī and al-Ṭaḥāwī could have authored their texts.

### 2.2.3 Al-Qudūrī and His Sources

We turn now to investigating the legal cases in al-Qudūrī's *Mukhtaṣar* and what these reveal of the understanding of authority in this newly formed *madhhab*. This will be tackled by a careful analysis of his sources: Which sources was he drawing on and what weight did he give to each of these? His *K. al-Ṭahārah* is carefully investigated in this section to shed light on these questions.

It is commonly held that the main written works of al-Shaybānī have formed the central part of Ḥanafī doctrine, and thus have been the sources for the well-known *mukhtaṣar*s of the school. These works of al-Shaybānī are *al-Aṣl*, *al-Jāmi' al-kabīr*, *al-Jāmi' al-ṣaghīr* and *al-Ziyādāt*. The late school records them, along with *al-Siyar al-kabīr* and *al-Siyar al-ṣaghīr*, to be the strongest transmitted texts of the school, giving them the title *ẓāhir al-riwāyah*, 'manifest in transmission'.[291] However, we struggle to find a clear explanation of this term before the thirteenth century. Talal al-Azem has rightly criticised writers, such as Wael Hallaq, who take this late statement as historical fact. Al-Azem shows that the term *ẓāhir al-riwāyah* gained wide circulation in Transoxianan Ḥanafī scholarship in the late fifth century but with no clear statement of what the term actually meant. He suggests that texts such as the *Mukhtaṣar* of al-Qudūrī be compared to these books to assess the centrality awarded these texts.[292] The assumption that these texts of al-Shaybānī were the basis of Ḥanafī *mukhtaṣar*s is also echoed by Norman Calder who notes, "all of the material originally contained in Qudūrī, can be traced back to the foundational texts of the Ḥanafī school, those attributed to Shaybānī."[293] I am not aware of anyone who has tested this understanding or provided a more nuanced discussion of the sources of Ḥanafī *mukhtaṣar*s. This current section is a foray into this area.

The *K. al-Ṭahārah* contains 104 legal cases. I found 78 of these to directly match cases in the aforementioned sources, primarily the *Aṣl*. At first glance, this confirms the centrality of these texts to forming the core of Ḥanafī doctrine; but what of the other 26 cases, and what do they show of how al-Qudūrī perceived the hierarchy of authority in the newly matured *madhhab*?

[291] Hallaq, *Authority, Continuity, and Change in Islamic Law*, 48; Calder, "The ''Uqūd Rasm Al-Muftī' of Ibn 'Ābidīn", 220, 223.
[292] Al-Azem, *Rule-Formulation*, 151-5.
[293] Calder, *Islamic Jurisprudence*, 28.

To answer this question, I consulted key commentary works, including al-Qudūrī's own *Sharḥ Mukhtaṣar al-Karkhī*, the *Sharḥ Mukhtaṣar al-Ṭaḥāwī* of al-Jaṣṣāṣ, the *Mabsūṭ* of al-Sarakhsī, the *Badā'i' al-ṣanā'i'* of al-Kāsānī and *al-Muḥīṭ al-burhānī* of Māḥmūd ibn Māzah (d. 616/1219-20). My goal was to identify the sources for the narrations al-Qudūrī was following when departing from opinions stated in al-Shaybānī's main works. The most useful source is al-Qudūrī's own commentary, as it shows what he perceived as the source of each opinion. Al-Jaṣṣāṣ also represents a reliable source as he was two generations before al-Qudūrī and in his own direct line of teachers. The later commentaries are less reliable in stating what al-Qudūrī himself perceived as the source of these transmissions; rather, they present what the school remembered as the source. This is meaningful in showing how the *madhhab* understood the hierarchy of authority from which the *Mukhtaṣar*'s rules were derived, and very likely reflects a memory that al-Qudūrī himself inherited. However, we cannot state this latter point for sure. The bulk of my observations below are from al-Qudūrī's commentary.

The most striking result of this investigation is the vast array of sources to which these rulings return. The rulings in the *K. al-Ṭahārah* of al-Qudūrī's *Mukhtaṣar* cannot be arrived at without narrations of al-Ḥasan ibn Ziyād al-Lu'lu'ī from Abū Ḥanīfah; narrations from Abū Yūsuf by narrators including Muḥammad ibn Samā'ah (d. 233/847-8), Mu'allā ibn Manṣūr, Bishr ibn al-Walīd (d. 238/853) and 'Alī ibn al-Ja'd (d. 230/845); narrations from Muḥammad al-Shaybānī by narrators including Ibrāhīm ibn Rustum (d. 211/826); and books from Abū Ḥanīfah's companions including *al-Imlā'* and *al-Jawāmi'* of Abū Yūsuf, and *Kitāb al-āthār* of al-Shaybānī. Furthermore, a careful inspection of al-Qudūrī's use of these sources shows him not to have held them to be of a lesser rank than al-Shaybānī's well-known books. Rather,

al-Qudūrī interacted with them as one body of knowledge of roughly equal importance. In this regard, the aforementioned numbers – that 78 of 104 cases are found in the well-known books of al-Shaybānī – might be misleading, as these 78 might be found in these other sources when pooled together, and it might be the concurrence of these that led to the acceptance of these cases.

Four cases illustrate al-Qudūrī's leaving the clear statements of al-Shaybānī's books. The first is the case of purifying a well in which a chicken or a cat died. Al-Qudūrī in the *Mukhtaṣar* states that forty-to-sixty buckets of water should be removed, whereas the *Aṣl* and *al-Jāmi' al-ṣaghīr* state forty-to-fifty buckets.[294] The opinion expressed by al-Qudūrī is not ascribed to any prior authority. Al-Qudūrī in his *Sharḥ Mukhtaṣar al-Karkhī*, after acknowledging that the *Aṣl* instructs that forty-to-fifty buckets be removed, states that removing fifty-to-sixty buckets is the opinion of al-Ḥasan ibn Ziyād and the opinion of Abū Yūsuf as transmitted by 'Alī ibn al-Ja'd.[295] In his *Mukhtaṣar*, he clearly took the lower limit – forty buckets – from the transmission of the *Aṣl* and *al-Jāmi' al-ṣaghīr* and the upper limit – sixty buckets – from these other narrations. Why would he do this? We can speculate that this might be because forty-to-sixty is exactly double the twenty-to-thirty buckets removed for the death of a mouse, which is held to be half the size of a chicken and thus deserves half the number of buckets.[296] Whatever the reason, this clearly illustrates an opinion not transmitted from the school's founders but arrived at by combining transmissions.

A second and third case of modifying the transmission of the *Aṣl* is the case of a person who fears missing a funeral or Eid prayer were he to busy himself with looking for water to perform ritual ablutions. The *Aṣl* states that in such a case a person may perform the *tayammum* (dry ablutions), without mentioning any

[294] Al-Shaybānī, *al-Aṣl*, 1:27; al-Shaybānī, *al-Jāmi' al-ṣaghīr*, 65.
[295] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 107.
[296] Ibid., 107.

exceptions to this rule. Furthermore, in the case of the Eid prayer, the *Aṣl* is explicit that the imam may also perform *tayammum* in such a case.[297] In al-Qudūrī's *Mukhtaṣar*, however, these cases are restricted by a transmission from al-Ḥasan ibn al-Ziyād. For the funeral prayer, al-Ḥasan's transmission makes an exception for the guardian of the deceased because he may repeat the prayer if missed, unlike other attendees, so he has no fear of missing the prayer.[298] Likewise, al-Ḥasan transmits that the imam of the Eid prayer may not perform the *tayammum* as he is the imam and will not fear missing the prayer.[299] Al-Qudūrī explicitly states the exception of the guardian from the funeral prayer and words the case of the Eid prayer in a way that appears to accord with al-Ḥasan's transmission.[300]

A fourth case is the least amount of the head that must be wiped with a wet hand in ritual ablutions. The *Aṣl* states that at least the amount of three fingers must be wiped.[301] Al-Qudūrī, however, states the amount of a forelock (*nāṣiyah*), following thereby the *mukhtaṣar*s of al-Ṭaḥāwī and al-Karkhī.[302] This is only narrated by al-Ṭaḥāwī and al-Karkhī.[303] How can the opinion, so explicit in the *Aṣl*, be replaced by one transmitted by fourth-century scholars? Although the answer is not clear, and probably many-faceted, it shows that the opinions around which the *madhhab* formed were arrived at by dealing with a large number of early sources, and were most influenced by the conclusions of the collective scholarly activity of the third and early fourth centuries, not by a particular body of texts.

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[297] Al-Shaybānī, *al-Aṣl*, 96-7.
[298] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*," 318.
[299] Al-Sarakhsī, *al-Mabsūṭ*, 2:40.
[300] Al-Qudūrī, *Mukhtaṣar*, 13.
[301] Al-Shaybānī, *al-Aṣl*, 34, 39.
[302] Al-Ṭaḥāwī, *Mukhtaṣar*, 18; al-Qudūrī, *Mukhtaṣar*, 9; al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 123.
[303] Al-Kāsānī, *Badā'i'*, 1:4.

This point is further exemplified when considering cases, found in al-Qudūrī's *Mukhtaṣar*, that directly match the *Aṣl*, yet al-Qudūrī, in his *Sharḥ Mukhtaṣar al-Karkhī*, quoted other sources to justify them. Two cases illustrate this.

The first is the amount that must be wiped of the *khuff* (footgear) in ritual ablutions. The *Aṣl* is explicit, in more than one place, that the amount of three fingers must be wiped.[304] This is the opinion mentioned by al-Qudūrī in his *Mukhtaṣar*.[305] However, al-Karkhī in his *Mukhtaṣar* states the amount of three toes, or in Arabic three "fingers" (*aṣābi'*) from the feet. When debating this in the commentary, al-Qudūrī makes no reference to the *Aṣl*, which would be expected the strongest refutation of al-Karkhī. Instead, he quotes the transmission of Ibn Rustum from al-Shaybānī: "If he places only three fingers (*aṣābi'*), it is valid." Al-Qudūrī then deduces that as the *aṣābi'* are being 'placed', they are the *aṣābi'* of the hand, not the feet.[306] Why he would ignore the clear statements of the *Aṣl* regarding this, and why al-Karkhī would ignore the *Aṣl* for an opinion of unclear origin in the transmission record is not clear. What is clear, however, is the aforementioned observation of a nuanced terrain that these jurists negotiated, with its wide range of sources and its received wisdom influencing how these sources were used.

A second case to illustrate this reliance on a larger set of sources also concerns wiping the *khuff*. How large of a hole is acceptable in a *khuff*? Al-Qudūrī states in his *Mukhtaṣar* that a hole is too large if it is the size of three toes. In his commentary on al-Karkhī's *Mukhtaṣar*, he quotes Ibn Rustum's narration from al-Shaybānī that a hole is too large when it is the size of three toes. He follows this with a quotation from al-Shaybānī's *al-Ziyādāt*, one of his well-known books, stating that the area in question

[304] Al-Shaybānī, *al-Aṣl*, 71,73.
[305] Al-Qudūrī, *Mukhtaṣar*, 18.
[306] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 357. This discussion is partly based on the confusion caused by the word *aṣābi'*, as it can be used in Arabic for both fingers and toes.

is to be measured by the size of three *small* toes.[307] What is noteworthy here is firstly his establishing the ruling with Ibn Rustum's narration, and then casually mentioning the narration of the *Ziyādāt* to add the idea of small toes, and secondly that, in his *Mukhtaṣar*, he altogether ignores the idea of small toes mentioned in the *Ziyādāt* and mentions only three toes as in the narration of Ibn Rustum. This again shows an equal weighting between these sources and a complex method of preferring between them. This fact is the first observation of the study.

The second observation builds on the first and concerns the assigning of legal categories. Al-Qudūrī presents an orderly layout of rulings grouped under clear categories, a feature absent in the *Mukhtaṣar* of al-Ṭaḥāwī. A case in point is the section on the *sunnah* elements of the ritual ablution. Al-Qudūrī presents seven *sunnah*s followed by three *mustaḥabb* (recommended) elements.[308] When searching for the source texts and transmissions that identify the first group specifically as *sunnah*, a higher rank than the simply recommended (*mustaḥabb*), I could not find a clear basis. This again showed that the insights that led to this categorisation were the product of a tradition that strove over generations to organise these rulings, and not a mechanical process of accessing a few well-accepted texts.

The first of these *sunnah*s is washing the hands. Commentaries explain this ruling, along with two conditions al-Qudūrī adds of this being performed after awaking and before entering hands into a container, from *ḥadīth* evidence alone.[309] I have not found a source for the transmission of this opinion from earlier school authorities. On the other hand, the *Aṣl* is explicit that the hands are always washed in the beginning, without any other considerations.[310] As al-Karkhī also appears to

[307] Ibid., 317; Qāḍīkhān, *Sharḥ al-Ziyādāt*, 1: 162.
[308] Al-Qudūrī, *Mukhtaṣar*, 9-10.
[309] See, for example, al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 144-5.
[310] Al-Shaybānī, *al-Aṣl*, 6.

mention the *sunnah* of washing the hands with the conditions provided by al-Qudūrī,[311] it seems that this topic was understood as such in the Iraqi tradition to which al-Karkhī and al-Qudūrī belonged.

The second *sunnah* is saying *bi-ism Allāh al-Raḥmān al-Raḥīm* at the beginning of ablutions. Maḥmūd ibn Māzah, in *al-Muḥīṭ al-burhānī*, mentions a disagreement on whether this is a *sunnah* or an *adab* (synonymous to *mustaḥabb*). For the former, he quotes *Ṣalāt al-athar*,[312] and for the latter he quotes *ẓāhir al-riwāyah*. He strengthens the former by reference to the *mukhtaṣar*s of al-Ṭaḥāwī and al-Qudūrī. It is clear that for Maḥmūd ibn Māzah, these leading *mukhtaṣar* authors were also leading authorities in the difficult task of assigning clear legal categories to points of school doctrine.[313]

The third *sunnah* is using the *siwāk* (toothstick). Again, I found no narration ascribing this to earlier authorities. The only narration from Abū Ḥanīfah that I found stated the opposite, namely, that using the *siwāk* is a general *sunnah*, and not specific to ritual ablutions.[314] Its being listed here also appears to draw from inherited wisdom. This trend continues with other *sunnah*s.

To conclude this point, al-Qudūrī presents a refined categorisation of actions not easily established from the sources known to transmit opinions of the school's founders, which can only be the result of generational efforts and debates. These generational efforts to negotiate this large body of narrations to produce a unified doctrine can be considered an oral teaching tradition. The overarching authority awarded this oral teaching tradition by a *mukhtaṣar* author in the fifth century is significant. Norman Calder has offered a helpful description of the early oral tradition,

[311] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 144.
[312] A book authored by Hishām ibn 'Ubayd Allāh al-Rāzī (d. 201/816-7), a student of both Abū Yūsuf and al-Shaybānī: Ibn Abī al-Wafā', *al-Jawāhir*, 2:205-6.
[313] Ibn Māzah, *al-Muḥīṭ al-burhānī*, 1:42.
[314] Al-'Aynī, *al-Bināyah sharḥ al-Hidāyah*, 1:205.

with its focus on private notebooks, the fluid relationship between a master and his notebook, and the transition into formal written culture in the mid-third century.[315] However, he does not account for the role played by the non-textual discursive tradition after this point, giving the impression that once fixed *madhhab*-texts emerge in the mid-third century, these become the absolute locus of authority. Al-Qudūrī's *Mukhtaṣar* shows that there was no one text that represented the generational, collective effort of forming the unified doctrine for this *madhhab*. There were a large number of sources that existed in the pre-classical period of the school, and each contributed to the doctrine that masters of this period taught. Al-Qudūrī's *Mukhtaṣar* presents a concise summary of this collective doctrine at the dawn of the classical school. This best explains the impact it had on classical authors.

### 2.2.4 The Impact of al-Qudūrī's *Mukhtaṣar*

The legacy of al-Qudūrī's *Mukhtaṣar* is most clearly observed in its impact on later *mukhtaṣar*s. Calder mentions seven that were regarded as the most authoritative texts of the Ḥanafī school.[316] These were the *Mukhtaṣar* of al-Qudūrī, the *Bidāyat al-mubtadī* of al-Marghīnānī, the *al-Mukhtār lil-fatwā* of ʻAbd Allāh ibn Maḥmūd al-Mawṣilī (d. 683/1284), the *Wiqāyat al-riwāyah* of al-Maḥbūbī,[317] the *Nuqāyah* of Ṣadr al-Sharīʻah ʻUbayd Allāh ibn Masʻūd al-Maḥbūbī (d. 747/1346-7), the *Kanz al-daqā'iq* of Ḥāfiẓ al-Dīn ʻAbd Allāh ibn Aḥmad al-Nasafī (d. 710/1310) and the *Multaqā al-abḥur* of Ibrāhim ibn Muḥammad al-Ḥalabī (d. 956/1549-50). Al-Laknawī (d. 1304/1886-7) mentions that some upheld three *mukhtaṣar*s to be paramount: al-Qudūrī's *Mukhtaṣar*, the *Kanz al-daqā'iq* and the *Wiqāyah*; while others upheld four:

[315] Calder, *Studies*, 161-97.
[316] Calder, *Islamic Jurisprudence*, 32.
[317] There is disagreement regarding which member of the Maḥbūbī family authored the *Wiqāyah*. See al-Laknawī, *al-Fawā'id al-bahīyah*, 110-12.

the *Wiqāyah*, the *Kanz*, the *Mukhtār* and the *Majma‘ al-baḥrayn* of Ibn al-Sā‘ātī (d. 694/1294-5).[318]

A brief examination of each of these quickly reveals the indebtedness of the genre to al-Qudūrī's foundational *Mukhtaṣar*. The *Bidāyat al-mubtadī* of al-Marghīnānī, as we have seen, is based on the *Mukhtaṣar* of al-Qudūrī with cases added from *al-Jāmi‘ al-ṣaghīr* of al-Shaybānī.[319] The *Wiqāyah* and the *Nuqāyah* are based directly on the *Bidāyah* of al-Marghīnānī and its commentary, *al-Hidāyah*.[320] The *Kanz al-daqā'iq* is an abridgement of al-Nasafī's larger *mukhtaṣar*, *al-Wāfī*, which is based on five primary sources, one of which is the *Mukhtaṣar* of al-Qudūrī.[321] The *Multaqā al-abḥur*, the 'Meeting of Seas', is the meeting of four *mukhtaṣar*s: al-Qudūrī, the *Mukhtār*, the *Kanz* and the *Wiqāyah*, the latter three all based on the former. The *Majma‘ al-baḥrayn* is a *mukhtaṣar* based on the *Mukhtaṣar* of al-Qudūrī and the *Manẓūmat al-khilāf* of 'Umar al-Nasafī.[322] The *Mukhtār* is the only *mukhtaṣar* not to offer a formal statement of indebtedness to al-Qudūrī. In the introduction, the author states only that he bases his *mukhtaṣar* solely on Abū Ḥanīfah's opinions. However, as Calder observes, "what he most obviously followed was the selections and summaries, indeed the precise expression of Qudūrī."[323] We can therefore observe that every *mukhtaṣar* that was central in presenting the *madhhab* took al-Qudūrī's *Mukhtaṣar* as the starting point. Indeed, when al-Nasafī mentioned the sources for his *al-Wāfī*, he simply called it 'the *Mukhtaṣar*', without needing to identify which *mukhtaṣar* he was referring to.[324]

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[318] Al-Laknawī, *al-Jāmi‘ al-ṣaghīr ma‘a sharḥihi al-Nāfi‘ al-kabīr*, 23.
[319] Calder, *Islamic Jurisprudence*, 29.
[320] Al-Maḥbūbī, *Sharḥ al-Wiqāyah*, 4; al-Quhustānī, *Jāmi‘ al-rumūz sharḥ mukhtaṣar al-Wiqāyah al-musammā bi-al-Nuqāyah*, 7-11; Calder, *Islamic Jurisprudence*, 32.
[321] Kātib Çelebī, *Kashf*, 2:1997.
[322] Ibn al-Sā‘ātī, *Majma‘ al-baḥrayn wa-multaqā al-nayyirayn*, 57-8.
[323] Calder, *Islamic Jurisprudence*, 24.
[324] Kātib Çelebī, *Kashf*, 2:1997.

Calder, reflecting on the development of the *mukhtasar* genre after al-Quduri, states, "Given the conditions of the genre, it is inconceivable that a rule, once established clearly, could change or that a new rule could be introduced that contradicted a previously acknowledged rule."[325] For an indication of the degree of stability of the rulings established in al-Qudūrī, I traced the reception of ten cases I identified as peculiar in the first chapter of al-Qudūrī's *K. al-Ṭahārah*, peculiar by not being based on a clear school transmission or clearly identifiable logic, or by having a largely ambivalent response in the commentary tradition. I include both notable mentions and omissions.

a. Wiping the amount of the *nāṣiyah* (forelock) from the head in ritual ablutions: No *mukhtaṣar* maintained the word *nāṣiyah* except for the *Bidāyah* which immediately qualified it as being equal to a quarter of the head. All followed al-Qudūrī in abandoning the three fingers mentioned in the *Aṣl*, but chose to express this as a quarter of the head, [326] as transmitted by al-Ḥasan ibn Ziyād from Abū Ḥanīfah, over the *nāṣiyah* mentioned only by al-Ṭaḥāwī and al-Karkhī. [327] The commentary literature equates the two, as the head can be divided into four parts, one of which is the *nāṣiyah*.[328]
b. Washing hands at the beginning of ritual ablutions being *sunnah* only if one has awoken from sleep: Al-Qudūrī stipulates this contrary to the *Aṣl* with no

[325] Calder, *Islamic Jurisprudence*, 35.
[326] Al-Marghīnānī, *al-Hidāyah*, 1:15; al-Zayla'ī, *Tabyīn al-ḥaqā'iq sharḥ Kanz al-daqā'iq*, 1:3; Ibn al-Sā'ātī, *Majma'*, 69; al-Mawṣilī, *al-Ikhtiyār li-ta'līl al-Mukhtār*, 1:7; Dāmād Efendī, *Majma' al-anhur fī sharḥ Multaqā al-abḥur*, 1:11; al-Quhustānī, *Jāmi' al-rumūz*, 13; al-Qudūrī, *Mukhtaṣar*, 9; al-Maḥbūbī, *Sharḥ al-Wiqāyah*, 1:10.
[327] Al-Kāsānī, *Badā'i'*, 1:4.
[328] Al-Sarakhsī, *al-Mabsūṭ*, 1:63.

transmission from school-founders quoted to support it.[329] The *Bidāyah*, *Wiqāyah*, and *Mukhtār* follow al-Qudūrī. The others remove this condition.[330]

c. Listing the *nīyah* (intention), *tartīb* (following the correct order) and *istī'āb* (wiping the entire head) as recommended (*mustaḥabb*) in ritual ablutions and not *sunnah*: The commentary literature struggled greatly with this classification of al-Qudūrī, considering that these are obligatory in other schools.[331] The *Bidāyah* and the *Mukhtār* followed al-Qudūrī. All others made these *sunnah*.[332]

d. Having to perform ritual ablutions if one fell asleep leaning against something: Al-Qudūrī, in *Sharḥ Mukhtaṣar al-Karkhī*, explains that this is the unique opinion of al-Ṭaḥāwī, after which he mentions the narration of Khalaf ibn Ayyūb (d. 205/821) from Abū Yūsuf, who narrates from Abū Ḥanīfah, that such is not the case, and al-Qudūrī indicates that it is stronger.[333] Surprisingly, he still affirms the opinion of al-Ṭaḥāwī in his *Mukhtaṣar*. The *Bidāyah*, *Wiqāyah*, *Nuqāyah, Mukhtār* and *Multaqā* follow al-Qudūrī. The others remove this case and thereby affirm the narration from Abū Ḥanīfah.[334]

e. Having to perform ritual ablutions from a naked embrace (*al-mubāsharah al-fāḥishah*): This is mentioned explicitly in the *Aṣl* as invalidating ritual ablutions according to Abū Ḥanīfah and Abū Yūsuf, and is explained as lustful contact with both parties naked and the man aroused. Al-Qudūrī omits it in the

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[329] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 144-5.
[330] Al-Marghīnānī, *al-Hidāyah*, 1:19; al-Zayla'ī, *Tabyīn*, 1:3; Ibn al-Sā'ātī, *Majma'*, 70; al-Mawṣilī, *al-Ikhtiyār*, 1:8; Dāmād Efendī, *Majma' al-anhur*, 1:12; al-Quhustānī, *Jāmi' al-rumūz*, 14; al-Qudūrī, *Mukhtaṣar*, 9; al-Maḥbūbī, *Sharḥ al-Wiqāyah*, 16.
[331] Ibn al-Humām, *Fatḥ al-Qadīr lil-'ājiz al-faqīr*, 1:32.
[332] Al-Marghīnānī, *al-Hidāyah*, 1:16-17; al-Zayla'ī, *Tabyīn*, 1:5-6; Ibn al-Sā'ātī, *Majma'*, 71; al-Mawṣilī, *al-Ikhtiyār*, 1:9; Dāmād Efendī, *Majma' al-anhur*, 1:15-16; al-Quhustānī, *Jāmi' al-rumūz*, 16-17; al-Qudūrī, *Mukhtaṣar*, 10; al-Maḥbūbī, *Sharḥ al-Wiqāyah*, 19-26.
[333] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 185-6.
[334] Al-Marghīnānī, *al-Hidāyah*, 1:18; al-Zayla'ī, *Tabyīn*, 1:9; Ibn al-Sā'ātī, *Majma'*, 73; al-Mawṣilī, *al-Ikhtiyār*, 1:10; Dāmād Efendī, *Majma' al-anhur*, 1:20; al-Quhustānī, *Jāmi' al-rumūz*, 1:44; al-Qudūrī, *Mukhtaṣar*, 10; al-Maḥbūbī, *Sharḥ al-Wiqāyah*, 32.

*Mukhtaṣar*. In *Sharḥ Mukhtaṣar al-Karkhī*, he explains it in a way that shows he did not consider it a unique invalidator of ablutions.[335] The *Bidāyah* and the *Mukhtār* also omit it, and the *Majma‘* mentions it, but supports al-Shaybānī's opinion that it does not necessitate ritual ablution. All others affirmed it, following Abū Ḥanīfah's opinion in the *Aṣl*.[336]

f. The case of performing ritual ablutions with *nabīdh al-tamr* (an intoxicating drink made from dates): The *Aṣl*, *al-Jāmi‘ al-ṣaghīr*, and *al-Ziyādāt* of al-Shaybānī all state that Abū Ḥanīfah held that one should perform ablutions with this drink in the absence of water, with al-Shaybānī holding that one should perform both ablutions and *tayammum* in such a case and Abū Yūsuf holding that one only performs *tayammum*.[337] Al-Qudūrī omits the case. In *Sharḥ Mukhtaṣar al-Karkhī*, he shows himself disinclined to Abū Ḥanīfah's stated opinion, and supports a narration from Nūḥ al-Marwazī (d. 173/789-90) that Abū Ḥanīfah changed his opinion and agreed with Abū Yūsuf.[338] The *Mukhtār* and the *Nuqāyah* also omit the case; the *Kanz* and the *Bidāyah* affirm Abū Ḥanīfah's opinion; and the *Wiqāyah* states all three opinions, as does the *Multaqā* which pronounces Abū Yūsuf's opinion most correct.[339]

g. Mentioning that tanning purifies hides in the chapter of types of water: The peculiarity of this is the ordering. Al-Qudūrī places the case at the end of the chapter of water used in purification, the connection being that water flasks are made of animal hide. Al-Karkhī, before him, had the more logical placement of mentioning this after the chapter on purifying filth (*najāsah*), as

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[335] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 177-8.
[336] Al-Zayla‘ī, *Tabyīn*, 1:11; Ibn al-Sā‘ātī, *Majma‘*, 74; Dāmād Efendī, *Majma‘ al-anhur*, 1:20; al-Quhustānī, *Jāmi‘ al-rumūz*, 20; al-Maḥbūbī, *Sharḥ al-Wiqāyah*, 34.
[337] Al-Shaybānī, *al-Aṣl*, 58, 107; al-Shaybānī, *al-Jāmi‘ al-ṣaghīr*, 63; Qāḍīkhān, *Sharḥ al-Ziyādāt*, 150.
[338] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 335-6.
[339] Al-Marghīnānī, *al-Hidāyah*, 1:26-7; al-Zayla‘ī, *Tabyīn*, 1:35; Ibn al-Sā‘ātī, *Majma‘*, 87; Dāmād Efendī, *Majma‘ al-anhur*, 1:36-7; al-Maḥbūbī, *Sharḥ al-Wiqāyah*, 55.

tanning is a means for purifying filth.[340] All *mukhtaṣar*s followed al-Qudūrī's placement.[341]

h. The number of buckets removed if a chicken or cat dies in a well: Al-Qudūrī states the number as forty-to-sixty buckets. As discussed above, there is no transmission that indicates this; rather, it appears a combination of conflicting transmissions. The *Kanz* mentions only the lower number of buckets for all its cases. The *Majma'* gives equal footing to both opinions by saying, "forty or fifty or sixty". The *Bidāyah* likewise appears to give equal mention to both opinions. All others followed al-Qudūrī.[342]

i. Al-Shaybānī's opinion that 200-300 buckets of water should be removed to purify a well with constantly flowing water: If all the water of a well needs to be removed for its purification, but there is a constant inflow of new water, people are told to make an estimate of the amount of water in the well and remove that amount. One opinion, that al-Qudūrī ascribes to al-Shaybānī, is that they need only remove 200-300 buckets. This is a seemingly anecdotal statement said to refer to wells in Baghdad.[343] Why al-Qudūrī would mention this as a universal judgement is unclear. This opinion is removed by the *Bidāyah*, *Wiqāyah*, and *Nuqāyah*. All others mention it, with the *Multaqā* even describing it as chosen for *fatwā* (*muftā bihi*).[344]

j. The definition of sexual intercourse that necessitates the ritual bath: Al-Qudūrī mentions that the "meeting of the two circumcised parts" necessitates the

[340] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 279.
[341] Al-Marghīnānī, *al-Hidāyah*, 1:23; al-Zayla'ī, *Tabyīn*, 1:25; Ibn al-Sā'ātī, *Majma'*, 80; al-Mawṣilī, *al-Ikhtiyār*, 1:16; Dāmād Efendī, *Majma' al-anhur*, 1:32; al-Quhustānī, *Jāmi' al-rumūz*, 30; al-Qudūrī, *Mukhtaṣar*, 12; al-Maḥbūbī, *Sharḥ al-Wiqāyah*, 50.
[342] Al-Marghīnānī, *al-Hidāyah*, 1:24-5; al-Zayla'ī, *Tabyīn*, 1:29; Ibn al-Sā'ātī, *Majma'*, 81; al-Mawṣilī, *al-Ikhtiyār*, 1:17; Dāmād Efendī, *Majma' al-anhur*, 1:34; al-Quhustānī, *Jāmi' al-rumūz*, 1:87; al-Qudūrī, *Mukhtaṣar*, 13; al-Maḥbūbī, *Sharḥ al-Wiqāyah*, 53.
[343] Al-Sarakhsī, *al-Mabsūṭ*, 1:59; al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 109-10.
[344] Al-Zayla'ī, *Tabyīn*, 1:30; Ibn al-Sā'ātī, *Majma'*, 81; al-Mawṣilī, *al-Ikhtiyār*, 1:18; Dāmād Efendī, *Majma' al-anhur*, 1:35; al-Qudūrī, *Mukhtaṣar*, 13.

ritual bath, an expression taken from a *ḥadīth*. Both of his predecessors, al-Ṭaḥāwī and al-Karkhī, mention a more precise description: the vanishing of the head of the penis in the front or rear of a human, for both the doer and object.[345] Al-Qudūrī in *Sharḥ Mukhtaṣar al-Karkhī* supports the detailed definition, but defends the phrase "the meeting of circumcised parts" as these would never meet without the entry of the head of the penis.[346] In stating this, he appears to have forgotten the case of anal intercourse, which he himself affirms in the commentary. This seemingly forgetful omission finds its way into the *Mukhtaṣar*. He is followed by the *Bidāyah* and the *Majma'*. Other *mukhtaṣar*s provide the more detailed description.[347]

This short investigation has shown that the genre of the *mukhtaṣar* in the Ḥanafī school was a developing genre, with each author adding his own insights in an attempt to best summarise authoritative school precedent. In this regard, previously established rules could be replaced by new rules if the previous rules did not have a strong basis in transmission. This shows Calder to have overstated the static nature of the rulings in these *mukhtaṣar*s. Nevertheless, his general observation is confirmed; and we have seen that even the most peculiar of al-Qudūrī's rulings had a *mukhtaṣar* that adopted it.

A final way to appreciate the impact of this text on the Ḥanafī school is to look at the commentary literature of the school. The following list is based on al-Baghdādī's *Hadīyat al-'ārifīn* and mentions books well known in Ḥanafī literature for the commentaries they generated, each with the number of commentaries recorded for

[345] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 194; al-Ṭaḥāwī, *Mukhtaṣar*, 19; al-Ṭaḥāwī mentions the same detail but with a less specific expression.
[346] Al-Mushayqiḥ, "*Sharḥ Mukhtaṣar al-Karkhī*", 196-7.
[347] Al-Marghīnānī, *al-Hidāyah*, 1:19; al-Zayla'ī, *Tabyīn*, 1:16; Ibn al-Sā'ātī, *Majma'*, 75; al-Mawṣilī, *al-Ikhtiyār*, 1:12; Dāmād Efendī, *Majma' al-anhur*, 1:24; al-Quhustānī, *Jāmi' al-rumūz*, 1:58; al-Qudūrī, *Mukhtaṣar*, 10; al-Maḥbūbī, *Sharḥ al-Wiqāyah*, 41.

it by al-Baghdādī in each century. (References are provided for commentaries not covered in Appendix B.)[348] No doubt, other books can be mentioned alongside these, and further sources would provide further commentaries; however, the list still serves as a useful overview of the interest in these texts.

4th cent

*al-Jāmi‘ al-kabīr*: 8;[349] *al-Jāmi‘ al-ṣaghīr*: 9;[350] *Mukhtaṣar al-Ṭaḥāwī*: 1; *Mukhtaṣar al-Karkhī*: 2

5th cent

*al-Jāmi‘ al-kabīr*: 8;[351] *al-Jāmi‘ al-ṣaghīr*: 3;[352] *Ziyādāt/Ziyādāt al-Ziyādāt*: 2;[353] *Mukhtaṣar al-Ṭaḥāwī*: 4; *Mukhtaṣar al-Karkhī*: 1; *Mukhtaṣar al-Qudūrī*: 2;

6th cent

*al-Jāmi‘ al-kabīr*: 8;[354] *al-Jāmi‘ al-ṣaghīr*: 12;[355] *al-Ziyādāt/Ziyādāt al-Ziyādāt*: 2;[356] *Mukhtaṣar al-Ṭaḥāwī*: 2; *Mukhtaṣar al-Qudūrī*: 9

7th cent

*al-Jāmi‘ al-kabīr*: 12;[357] *al-Jāmi‘ al-ṣaghīr*: 8;[358] *al-Ziyādāt/Ziyādāt al-Ziyādāt*: 1;[359] *Mukhtaṣar al-Ṭaḥāwī*: 1; *Mukhtaṣar al-Qudūrī*: 11; *al-Hidāyah*: 7;[360] *al-Mukhtār*: 2;[361] *Majma‘ al-baḥrayn*: 1[362]

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[348] The following were not dated and, so, are not represented in the list: Two commentaries on the *Wiqāyah* (al-Baghdādī, *Hadīyah*, 1:258, 1:631), one on the *Multaqā* (Ibid., 1:361) and one on the *Hidāyah* (Ibid., 1:562).
[349] Ibid., 1:58, 62, 67, 646, 675; 2:37, 43, 464.
[350] Ibid., 1:58, 62, 67, 342, 514, 646; 2:37, 43, 490.
[351] Ibid., 1:180, 307, 578, 648, 691, 693; 2:76.
[352] Ibid., 1:80, 693; 2:76.
[353] Ibid., 1:693; 2:76.
[354] Ibid., 1:87, 280, 519, 587, 702, 783; 2:92, 487.
[355] Ibid., 1:81, 85, 87, 280, 313, 587, 783, 783, 785; 2:91, 428, 462.
[356] Ibid., 1:87, 587.
[357] Ibid., 1:15, 462, 622, 709, 710, 711, 808; 2:125, 404, 405, 555.
[358] Ibid., 1:89, 96, 649, 709; 2:139, 404, 429.
[359] Ibid., 2:404.
[360] Ibid., 1:13, 570, 596, 711, 787(2); 2:404.
[361] Ibid., 1:13, 462.

8th cent

*al-Jāmi‘ al-kabīr*: 8;[363] *al-Jāmi‘ al-ṣaghīr*: 2;[364] *al-Ziyādāt/Ziyādāt al-Ziyādāt*: 1;[365] *Mukhtaṣar al-Qudūrī*: 3; *al-Hidāyah*: 30;[366] *al-Wiqāyah*: 1;[367] *al-Mukhtār*: 5;[368] *Majma‘ al-baḥrayn*: 2;[369] *Kanz al-daqā’iq*: 4[370]

9th cent

*al-Jāmi‘ al-kabīr*: 3;[371] *Mukhtaṣar al-Ṭaḥāwī*: 1; *Mukhtaṣar al-Qudūrī*: 5; *al-Hidāyah*: 15;[372] *al-Wiqāyah*: 6;[373] *al-Mukhtār*: 7;[374] *Majma‘ al-baḥrayn*: 4;[375] *Kanz al-daqā’iq*: 7;[376] *al-Nuqāyah*: 5;[377] *Sharḥ al-Wiqāyah*: 5[378]

10th cent

*Mukhtaṣar al-Qudūrī*: 3; *al-Hidāyah*: 21;[379] *al-Wiqāyah*: 7;[380] *al-Mukhtār*: 2;[381] *Majma‘ al-baḥrayn*: 3;[382] *Kanz al-daqā’iq*: 6;[383] *al-Nuqāyah*: 3;[384] *Sharḥ al-Wiqāyah*: 17;[385] *Multaqā al-abḥur*: 3[386]

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[362] Ibid., 1:100.
[363] Ibid., 1:108, 109, 655; 2:147, 162, 171.
[364] Ibid., 1:465; 2:147.
[365] Ibid., 1:790.
[366] Ibid., 1:15, 16, 104, 108, 109(2), 110, 201, 314, 368, 464, 596, 716, 720(3), 723, 726, 790, 839; 2:142, 147, 155(2), 163, 167, 171, 409(2), 557.
[367] Ibid., 1:650.
[368] Ibid., 1:114, 347, 468, 655, 790.
[369] Ibid., 1:112; 2:172.
[370] Ibid., 1:111, 137, 655; 2:429.
[371] Ibid., 2:185, 188.
[372] Ibid., 1:236, 385, 729, 735, 792; 2:182, 201(2), 213, 420, 421, 433, 546, 562, 563.
[373] Ibid., 1:315, 617, 639(2), 726, 735.
[374] Ibid., 1:129, 533, 831(2); 2:195, 208, 217.
[375] Ibid., 1:617, 831; 2:194, 197.
[376] Ibid., 1:563, 729, 835; 2:200, 203, 211; 2:420.
[377] Ibid., 1:133, 533, 534, 632, 831.
[378] Ibid., 1:132, 288, 728; 2:546, 560.
[379] Ibid., 1:138, 141, 144, 335, 378, 508, 547, 598, 748(2), 749, 804; 2: 243, 247, 252(2), 256, 258, 435, 436, 565.
[380] Ibid., 1:141, 145, 148, 345, 498; 2:238, 433.
[381] Ibid., 2:230, 242.
[382] Ibid., 1:25, 142, 402.
[383] Ibid., 1:147, 378, 498(2); 2:223, 242.
[384] Ibid., 1:586; 2:244, 411.
[385] Ibid., 1:28, 138, 143, 147, 148, 217, 402, 423; 2:218, 230, 235, 236, 243, 248, 252, 530, 563.
[386] Ibid., 1:402, 746; 2:255.

11th cent

*Mukhtaṣar al-Qudūrī*: 1; *al-Hidāyah*: 10;[387] *al-Wiqāyah*: 4;[388] *Majma' al-baḥrayn*: 1;[389] *Kanz al-daqā'iq*: 11;[390] *al-Nuqāyah*: 2;[391] *Sharḥ al-Wiqāyah*: 1;[392] *Multaqā al-abḥur*: 17[393]

12th cent

*Mukhtaṣar al-Qudūrī*: 2; *al-Hidāyah*: 1;[394] *Kanz al-daqā'iq*: 2;[395] *Sharḥ al-Wiqāyah*: 1;[396] *Multaqā al-abḥur*: 14[397]

13th cent

*Mukhtaṣar al-Qudūrī*: 2; *Multaqā al-abḥur*: 1[398]

14th cent

*al-Jāmi' al-ṣaghīr*: 2;[399] *al-Hidāyah*: 2;[400] *Sharḥ al-Wiqāyah*: 1[401]

The list demonstrates the lasting effect of al-Qudūrī's fifth-century *Mukhtaṣar*. There is almost no book before it or after it that can be said to have had such an impact. It was subject to commentaries in every century, and inspired many more through the *mukhtaṣar*s that it directly affected, along with commentaries on those *mukhtaṣar*s, most notably the *Hidāyah* and the *Sharḥ al-Wiqāyah*. It is truly at the centre of the literature that defined the doctrine of the Ḥanafī *madhhab*.

I say, "there is *almost* no book before it" to exclude *al-Jāmi' al-ṣaghīr* and *al-Jāmi' al-kabīr*; these are undoubtedly al-Qudūrī's only competitors for impact. *Al-*

[387] Ibid., 1:321, 375, 474, 504, 507, 752; 2:270, 271, 286, 440.
[388] Ibid., 1:423, 752, 832; 2:299.
[389] Ibid., 2:268.
[390] Ibid., 1:165, 358, 423, 496, 548, 600, 750, 796; 2:262, 414, 441.
[391] Ibid., 2:299, 414.
[392] Ibid., 1:262.
[393] Ibid., 1:218, 354, 428, 549, 550, 563(2), 751, 755, 762; 2:267, 281, 282, 287, 296, 414, 441.
[394] Ibid., 1:219.
[395] Ibid., 2:326, 453.
[396] Ibid., 1:173.
[397] Ibid., 1:168, 172, 260, 299, 552, 658, 764; 2:304, 313, 331, 425, 442, 451, 568.
[398] Ibid., 1:824
[399] Ibid., 2:385; 420.
[400] Ibid., 2:385, 420.
[401] Ibid., 2:385.

*Jāmi‘ al-ṣaghīr* was the second source of al-Marghīnānī's *Bidāyat al-mubtadī*, after al-Qudūrī's *Mukhtaṣar*; the large amount of commentaries on the *Hidāyah* are equally commentaries on *al-Jāmi‘ al-ṣaghīr*, as are commentaries on the *Kanz al-daqā'iq*, as the *Wāfī* from which it was summarised is based on both *al-Jāmi‘ al-ṣaghīr* and *al-Jāmi‘ al-kabīr* as well as the *Mukhtaṣar* of al-Qudūrī. This lasting interest, in the commentary tradition, in two books of a school-founder is unexpected. One would expect that once the school had matured with texts such as al-Qudūrī's that drew on a number of early sources and drew on the scholarly tradition that matured between the time of the school-founders and the formation of the *madhhab*, there would be no interest in texts that did not draw on this vast resource. This leads to several important observations regarding authority construction in the *madhab* tradition with which we conclude this investigation.

## 2.3 Conclusion: The Place of Precedent in Ḥanafī Epistemology

An epistemology seeks to identify sources of knowledge. A legal epistemology must therefore account for the sources of legal doctrine. The need for this is even more pressing in the case of the Ḥanafī school given the centrality awarded the legal cases of Abū Ḥanīfah's circle, whereby the entire edifice of legal theory is constructed around understanding and serving these cases, as we have seen. The term Ḥanafī precedent is vast, as, properly speaking, it includes all previous legal cases cited in Ḥanafī works, whether in *mukhtaṣar*s, commentaries or *fatāwā* compilations. However, there is a core of this precedent that serves a more specific purpose, namely, providing a core of authoritative school doctrine to be the basis for commentary activity. This core of Ḥanafī precedent is presented in *mukhtaṣar*s, in which it serves as a kernel around which the entire Ḥanafī legal project can be

explored through commentary. This kernel needs to represent the most authoritative doctrine of this legal tradition, as scriptural and rational arguments will be made subordinate to this doctrine, and an underlying understanding of the rationale of the law will be arrived at through this doctrine. This kernel will also serve as the basis for education: Students will memorise it, and it will be exposited in a variety of educational settings. It must, therefore, be the surest expression of legal doctrine in this tradition.

We have seen this quest for surety and authority in the three texts we have studied here: the *Jāmi' al-ṣaghīr*, the *Mukhtaṣar* of al-Qudūrī, and the *Bidāyat al-mubtadī*. The *Jāmi' al-ṣaghīr* was authored by Muḥammad al-Shaybānī, one of the founders of the Ḥanafī school. The recurring chains of transmission in the text document, in the clearest terms, how it is a faithful transmission of the law of Abū Ḥanīfah, the ultimate authority figure of this legal tradition. The text was widely studied, memorised and exposited in the earliest teaching circles of this legal tradition. It represents authoritative school doctrine.

The *Mukhtaṣar* of al-Qudūrī is the most authoritative short collection of legal rules authored after al-Shaybānī. We have seen this through its impact on later *mukhtaṣar*s, whose authors felt able only to amend particular phrases or cases, while faithfully following the remainder of the text. The basis for this authority, we have seen, lies in two main factors. Firstly, it was the first *mukhtaṣar* of the classical school. It incorporated insights from earlier *mukhtaṣar*s, but its thorough presentation and neat organisation caused it to entirely replace previous works. Secondly, it drew on the entire experience of the school's pre-classical formative period in assimilating and assessing the vast transmissions of doctrine from school-founders. This pre-classical project did not award ultimate authority to any single text; rather, it worked

with the entire corpus of legal narrations from Abū Ḥanīfah's circle as one body of knowledge to be negotiated. Al-Qudūrī provides a kernel of authoritative doctrine from this pre-classical project. Later writers in the school were unable to ignore al-Qudūrī's text for the reason that he was summarising the insights of a tradition that they themselves were unable to access directly. His text served as a door to the tradition that gave birth to the classical school. I have called this the oral teaching tradition. It was not actually oral, as legal activity was still centred on textual transmission and commentary. However, authority was not held by any single text. Authority lay in the juristic community, whose extra-textual discourse appears to have been the final arbiter of authoritative school doctrine.

The last work, the *Bidāyat al-mubtadī*, combined the previous two texts. On the level of the legal cases, this combination was generally seamless: Al-Qudūrī typically presents only foundational cases in each topic, whilst *al-Jāmi' al-ṣaghīr* presents only subsidiary cases; one clearly seems to complement the other. However, on the level of epistemology of legal sources, something deeper is being displayed by this combination. For al-Qudūrī, the written works of al-Shaybānī could not independently contribute to the kernel of legal doctrine preserved in the *mukhtaṣar*; there needed to be the corroboration of the teaching tradition. For al-Marghīnānī, these works of al-Shaybānī were completely authoritative, presumably because his teaching tradition treated them as such; the locus of authority had shifted to these texts.

What I am suggesting is that, paradoxically, the later text of al-Qudūrī conveys an earlier notion of authority, where authority rests with the juristic community, whilst al-Marghīnānī's utilisation of the *Jāmi' al-ṣaghīr* reflects a later notion of authority, where authority rests with a body of authoritative texts. When we speak of a

classical tradition, we invariably speak of a text-centred tradition, where particular texts represent a canon to which the discourse of this tradition is subordinate, and in the exposition of which the tradition finds continuity. The main written works of al-Shaybānī were canonised in the classical school in a way that they were not in the pre-classical school. Thus, we find that from the fourth to the sixth centuries, al-Baghdādī's *Hadīyat al-ʿārifīn* records fifty-two commentaries on al-Shaybānī's two *Jāmiʿ*s and the *Ziyādāt*, compared with twenty-one on the *mukhtaṣar*s of al-Ṭaḥāwī, al-Karkhī and al-Qudūrī combined. Al-Shaybānī's main texts also formed basic curricular texts in al-Marghīnānī's Transoxiana. Al-Marghīnānī's *Bidāyah* is a landmark text because of its attempt to bring together these two forms of authority in a single presentation of core authoritative school doctrine, seeking to align doctrine from the earlier oral teaching tradition with these canonised written texts, a trend that continued in noteworthy *mukhtaṣar*s authored after him. This explains the above-mentioned tension where *mukhtaṣar* authors after al-Marghīnānī were typically divided over following al-Qudūrī when he departed from the doctrine of al-Shaybānī's main works. Just as al-Qudūrī's *Mukhtaṣar* represented a concise summation of the oral teaching tradition, the two *Jāmiʿ*s of Muḥammad were the strongest concise expressions from the textual tradition. The early-classical school did its best to honour both its oral and textual heritage. The *Bidāyah* is a window onto this aspect of their project.

An important observation from our study of the legal cases in the *Bidāyah* is that these cases are all ascribed to Abū Ḥanīfah and his two students. Al-Marghīnānī's two source texts provide no insight into later produced doctrine. Even in cases where al-Qudūrī was following the *mukhtaṣar*s of al-Ṭaḥāwī and al-Karkhī in matters that had no clear basis in the textual record – for example, in stating that the amount of the

*nāṣiyah* (forelock) must be wiped in ablutions – the school treated these as narrations (*riwāyah*s) from the school's founders: When it came to presenting authoritative school doctrine for the purpose of these *mukhtaṣar*s, these earlier figures were seen as narrators or selectors between conflicting narrations. The cases of the *Bidāyah* do not reflect legal production from the four-hundred years that separated al-Marghīnānī from these founders of the Ḥanafī school. The law contained in the *Bidāyah* can therefore be seen as a repository of 'ancient law' – pristine, authoritative legal cases from the ancient founder of the school, who himself was but a conduit for the insights of the illustrious *salaf*, through whom sacred law reaches us.

While this study has focused only on the *K. al-Ṭahārāh*, it has provided us an overview of the written sources consulted by al-Qudūrī in producing his *Mukhtaṣar*; these can be assumed to serve as his main sources for other chapters in the *Mukhtaṣar*. Al-Marghīnānī's combination of this *Mukhtaṣar* with al-Shaybānī's *al-Jāmi' al-ṣaghīr* suggests strongly that the entire *Bidāyat al-mubtadī* can be regarded as a repository of legal cases of ancient law from Abū Ḥanīfah's circle. The application of the findings of the current chapter to other chapters of the *Hidāyah* is further strengthened by the cases explored in Chapter Four of the present study, where cases from across the chapters of the *Bidāyat al-mubtadī* are presented in the commentary as issuing directly from Abū Ḥanīfah's circle, even where common practice in later periods is described as being to the contrary.

In regarding the legal cases of the *Bidāyah* as repositories of ancient law, we are reminded of the studies of Calder and Wheeler, both of whom award Ḥanafī precedent a status of an 'ideal' law that is studied but is not meant to reflect actual law. The ancient status of these cases seems to support these conclusions. We should, however, be cautious and note that the conclusions of the current study, like most of

the conclusions of Calder and Wheeler, pertain to law contained in *mukhtaṣar*s, which is not all of Ḥanafī precedent, only a kernel of this precedent which was preserved to serve a particular purpose in the spheres of education and commentary. We are unable to comment on the status of Ḥanafī precedent in its wider sense without a study of all genres of *madhhab* legal writing. As for the ancient law of the *Bidāyah*, did al-Marghīnānī consider it law, meaning rules to be applied directly to his time and place? At this stage in our study, we can only answer ambivalently.

Yes, the status of these cases as ancient law implies that they could not all have been considered law for his time; there must have been important developments in points of doctrine over the passage of four-hundred years.[402] However, there is a statement in the introduction of the *Bidāyah* that shows al-Marghīnānī intended this collection of legal rules to have immediate practical benefit: He states after naming his two sources, "I resolved to combine the two, without stepping beyond them, except where dictated by necessity, and I felt the plentiful occurrence of a matter [deserved its mention from a further source]." He here acknowledges the addition of doctrine from further sources, but only where forced by necessity to address something whose occurrence is plentiful. As the editor of the *Bidāyah* points out, these additional points of doctrine are rare in the text, and are typically from other repositories of ancient law such as the *Aṣl*, the *Nawādir* and *Amālī* of Abū Yūsuf, and the *Mukhtaṣar*s of al-Ṭaḥāwī and al-Karkhī.[403] What we can note from his introduction is that he wished the text to address frequently occurring practical scenarios, while making it a repository of the ancient law of the *Jāmi' al-ṣaghīr* and

[402] Even in the sections of ritual purity, *fatāwā* works record many developments and debates in later periods. See, for example, a survey of debates regarding water used in ritual purity in Sohail Hanif, "Sixth-Century Ḥanafī *Fatāwā* Literature and the Consolidation of School Identity".
[403] Al-Marghīnānī, *Bidāyah*, 25.

al-Qudūrī's *Mukhtaṣar*. The combination of these two seemingly contradictory objectives is puzzling.

We might find an answer to this puzzle in the pre-classical interest in the *Jāmi'*s of al-Shaybānī, which were widely taught and commented on. We saw that the main purpose of this engagement was to ponder on the rationale behind their legal cases and therefore invite the juristic community into a wider world of legal reasoning and argument. We saw an anecdotal incident whereby scholars of other juristic persuasions were intimidated by the level of juristic discourse facilitated by a study of the *Jāmi' al-ṣaghīr*. Yet despite this interest in these texts, we have seen that the *Jāmi'*s were not the ultimate statement of law, neither ideal nor actual, as the core legal doctrine of the school was pulled together from a wide range of sources. Therefore, we can note that the commentary interest in these texts was important in informing the shared rationality of this juristic community, whose members were then entrusted with determining the core doctrine of this community. This explanation is very much in line with Wheeler's understanding of legal commentaries, where the cases of the *mukhtaṣar* serve only to convey a system of reasoning to enable jurists to confirm existing law or produce new law to replace it. This answer, along with al-Marghīnānī's stated aim of adding cases to address common scenarios, suggests that he sought for his *mukhtaṣar* to have practical benefit by enabling juristic thought pertaining to topics that frequently occur, for jurists to then apply the law of the *mukhtaṣar* directly or to replace with new law informed by the reasoning inspired by the *mukhtaṣar*. This is the most we can suggest from our study of the cases themselves. We will revisit this question of the law after a study of the commentary.

It is interesting to note the echoes of Ḥanafī *uṣūl* theory in the processes through which core authoritative school doctrine was determined. The *uṣūl* theory

awarded ultimate authority to the *salaf* in determining the *sunnah*; the school awarded ultimate authority to Abū Ḥanīfah's circle in determining school doctrine. *Uṣūl* theory allowed Prophetic reports on which jurists of the *salaf* were silent to be followed without making this binding; early classical Ḥanafī jurists added to the conclusions of the pre-classical juristic tradition with the written works of al-Shaybānī, which can be seen as analogous to strongly transmitted Prophetic reports on which the early juristic tradition was silent. *Uṣūl* theory states that if a Companion states something that he could not have independently derived, this must be assumed to be based on a report he heard from the Prophet, and that breaks in the chain of a report do not weaken the report if early jurists accepted it; the school treated statements of pre-classical jurists, such as al-Ṭaḥāwī and al-Karkhī, which do not appear to have been independently derived, as narrations that had reached them from Abū Ḥanīfah's circle, even if they were removed from this circle by several generations. The method of assimilating transmitted Prophetic knowledge into a coherent legal system provided in Ḥanafī *uṣūl* works appears to reflect the very experience of this juristic community in its own quest to assimilate transmitted knowledge from Abū Ḥanīfah's circle into the coherent legal system that bears his name.

# Chapter Three

## Legal Theory in the Commentary (1): An Analysis Through the Theory Lens

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This chapter presents a detailed study of the structure of argument in the commentary, focusing on the *Kitāb al-Ṭahārāt* (Book of Purification), a large chapter consisting of 161 legal cases. The large number of cases studied here allows us to survey the entire spectrum of activities undertaken by the commentator. The purposes of the current study are best served by focusing on a complete chapter of the law and not randomly selected cases, since the most central feature of the commentary is demonstrating congruence and sensibleness in the law. A contained chapter with its range of sub-topics provides an excellent opportunity to study how the commentator achieves this. Ritual worship might appear an odd topic to select for such a study. However, the analysis presented below demonstrates that a complete range of commentary activity takes place in the *K. al-Ṭahārāt*, from rationalising principles to adjusting law for social context, showing that ritual law is not subject to a separate epistemological engagement from other chapters of the law.[404]

Section 3.2 presents a study of the commentary through main points of the theory lens developed in Chapter One, assessing how Abū al-Yusr's explanation of *fiqh* and the three formerly identified pillars of Ḥanafī legal theory shed light on the range of arguments and the underlying epistemology of law found in the commentary. In section 3.3, we will see recurring methods employed in the commentary for

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[404] Hallaq has also cautioned against seeing ritual law as an altogether separate engagement from the rest of the law, though Hallaq's interest is ethics not epistemology: Wael Hallaq, "Qur'ānic Constitutionalism and Moral Governmentality: Further Notes on the Founding Principles of Islamic Society and Polity", 34-5.

exploring the law, including *jadal*, *khilāf* and exploring similarities with and differences from related legal cases. These methods provide insight into the pedagogic role of the text in jurisprudential training.

The *K. al-Ṭahārāt* offers a commentary on 161 legal cases organised into the following chapters: ritual ablutions (*wuḍū*'), matters that negate ritual ablutions, ritual bath (*ghusl*), types of water, purification of wells, leftover drinking water (*su'r*) of animals, *tayammum* (ablutions without water), wiping *khuff*s (a form of footgear), menstruation and post-natal bleeding, and types of physical filth. The word *ṭahārah* is rendered here as 'ritual purity'. A person is only permitted to offer the ritual prayer (*ṣalāh*) if in a state of ritual purity; thus this entire topic is seen as a 'key to the prayer'.[405] When a person is not in a state of ritual purity, he is said to be in a state of *ḥadath* or 'ritual impurity'. There are two forms of impurity that this chapter is interested in: ritual impurity (a form of impurity believed to be present on the limbs of a person that must be washed away in ritual ablutions) and physical impurity or *najāsah*. This latter refers to a range of substances, including urine, faeces and blood, that must be washed away from the body and clothing of a person wishing to pray. In this chapter, I refer to these substances as 'physical filth', or sometimes simply 'filth'. This chapter will cite extensively from the discussions of the *Hidāyah*, and some discusions will be treated multiple times, in different sections, to address different aspects of these passages.

Before undertaking a breakdown of the commentary by bringing together conceptual features from across the *K. al-Ṭahārāt*, it is helpful to first study a complete topic within this chapter. This will show how the author constructs a single topic around a small set of rational principles that demonstrate the sensibleness of

[405] Al-Sarakhsī, *al-Mabsūṭ*, 1:5.

school doctrine, and how features such as *jadal* and *khilāf* come together to serve this presentation. The complete topic we look at is wiping over a form of footgear called a *khuff*. This is the subject of section 3.1.

## 3.1 The Chapter of Wiping over *Khuff*s

As an example to demonstrate the holistic approach to topics of the law, we will analyse al-Marghīnānī's commentary of the chapter of wiping over *khuff*s (*bāb al-masḥ 'alā al-khuffayn*).[406] A *khuff* is a form of leather sock which a person may wipe over in ritual ablutions in lieu of washing feet. The entire topic is considered a case of *istiḥsān*, that is, a departure from the law's prevalent logic. This is because there is no rational way to deduce that one may wipe over *khuff*s from the established rule of washing feet.[407] We only know that it may be done from Prophetic reports permitting it. We can recall from Chapter One that an exception from the expected rule must be treated as an exception: It may not be taken as a rule to extend to other cases.[408] Thus, the topic would be assumed to be highly textual in nature and not grounded in legal meanings and rational explorations. This is why it serves as an excellent case study to demonstrate that the primary concern of *fiqh* in this legal tradition is exploring legal meanings, as we see the commentator strive to tie this non-rational topic to clear rational meanings to explain the cases in the chapter.

I first present a translation of the *mukhtaṣar*, the *Bidāyat al-mubtadī*, followed by a study of al-Marghīnānī's commentary. The cases are numbered for ease of reference.

[1.] Wiping over *khuff*s is permissible, [as established] by the *sunnah*,

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[406] Al-Marghīnānī, *al-Hidāyah sharḥ Bidāyat al-mubtadī*, 43-7 (henceforth '*Hidāyah*'), and al-Marghīnānī, *al-Hidāyah: The Guidance, Volume One*, translated by Imran Ahsan Khan Nyazee, 53-8 (henceforth '*Guidance I*').
[407] Qur'an, 5:6.
[408] See pages 69-70, above.

[2.] from every ritual impurity (*ḥadath*) that necessitates ritual ablutions, if he puts them on in a complete state of purity and then loses the state of purity (*aḥdatha*).
[3.] It is permissible for the one resident [to wipe] for a day and night, and for a traveller [to wipe] for three days and nights.
[4.] [The time period] starts immediately after the occurrence of ritual impurity (*ḥadath*).
[5.] Wiping takes place on the upper part of [the *khuff*] with the fingers, starting from the toes, up to the shin.
[6.] The obligatory amount [of wiping] is three fingers.
[7.] It is not permissible to wipe over a *khuff* with a large hole from which the amount of three toes is visible. If [the hole] is smaller than that, it is permissible.
[8.] Wiping is not permissible for the one who must perform the ritual bath.
[9.] Wiping is negated by everything that negates ritual ablutions.
[10.] It is also negated by removing the *khuff*,
[11.] and, likewise, the passage of the time limit.
[12.] If the time limit is completed, he removes his *khuff*s, washes his feet and prays. He does not have to repeat the rest of the ritual ablutions.
[13.] Whoever starts wiping while resident and then travels before the passage of a day and night may wipe for three days and nights.
[14.] If he becomes resident while travelling, then if he has completed the time period for someone resident, he removes [the *khuff*], and if he has not completed it, he completes it.
[15.] Whoever wears a *jurmūq* [a protective over-sock] over the *khuff* may wipe over it.
[16.] It is not permissible to wipe over socks (*jawrabayn*) according to Abū Ḥanīfah unless they have a leather upper and sole (*mujalladayn*) or have a leather sole (*muna''alayn*).[409] [Abū Yūsuf and Muḥammad al-Shaybānī] both said it is permissible if they are thick (*thakhīnān*) and not transparent (*lā yashiffān*).
[17.] It is not permissible to wipe over a turban, hat, face-covering or gloves.
[18.] It is permissible to wipe over splints (*jabā'ir*), even if he ties them when not in a state of ritual purity.
[19.] If the splint falls off without the wound being cured, the [previous] wiping is not negated.
[20.] If it falls off with the wound being cured, it is negated.

With the opening case, al-Marghīnānī, in the commentary, informs that wiping over *khuff*s is established by overflowing (*mustafīḍ*) reports, such that the one who denies them is said to be an innovator (*mubtadi'*).[410] With this statement, he has grounded the topic on a strong textual basis. When explaining the second case, he introduces us to the legal meaning that governs this chapter, namely, that the *khuff*

[409] The terms *mujallad* and *muna''al* are explained thus in al-Bābartī, *al-'Ināyah sharḥ al-Hidāyah*, 1:157.
[410] The *mustafīḍ* is similar to the *mashhūr*: al-Sarakhsī, *Uṣūl*, 1:378.

prevents ritual impurity from reaching the foot (*māni' sirāyat al-ḥadath ilā al-qadam*). At first blush, this appears only a description of what the *khuff* is doing, but it is more than that. It is a rationalisation of this seemingly non-rational topic. It treats ritual impurity as an actual substance that adheres to the limbs washed in ritual ablutions. The *khuff* 'works' by stopping this ritual impurity from reaching the foot, forcing it to settle on the surface of the *khuff*, from where it is conveniently wiped away. This creative description is used throughout the chapter as the overarching legal meaning through which the other cases are to be understood. Al-Marghīnānī uses it to explain *why* the *khuff* only works if a person is in a complete state of ritual purity, with the *khuff* on, before losing the state of purity (case 2). He uses it to explain *why* the time-period for wiping starts after the occurrence of ritual impurity (case 4), and not after first putting on the *khuff* or after first wiping on the *khuff*, as it is only after this that the ritual impurity will settle on the surface of the *khuff*; the *khuff* is not actually 'doing' anything before then. He uses it to explain *why* removing the *khuff* necessitates washing the feet (case 10), as ritual impurity is now able to reach the foot after the removal of the barrier. He uses it to explain *why* a person need only wash his feet upon the completion of the time limit and not repeat ritual ablutions (case 12), because upon the completion of the time limit, the ritual impurity settled on the *khuff* reaches the foot from where it must be washed; it does not reach anywhere else. He uses it to explain *why* if a person completes the day and night time period available to the person resident before travelling, that the time doesn't extend (case 13), because, again, upon the passage of the time period, the ritual impurity will reach the foot, and the *khuff* cannot lift ritual impurity that has already reached the foot. He uses it in a sub-discussion on the use of the *jurmūq* (case 15): He tells us that if the *jurmūq* is worn over the *khuff* after a person already loses ritual purity, he may not wipe on the

*jurmūq*, because in this case ritual impurity will have settled on the *khuff*, so it can only be removed by wiping the *khuff*. In short, this 'reason' is adduced several times to justify key cases in the chapter, revealing that it is the underlying legal meaning through which the topic is to be understood. To use Abū al-Yusr's phrase, it is the meaning that 'underpins' the cases pertaining to the *khuff*. This is a constant feature in the chapters of the *Hidāyah*, where primary meanings underlying chapters are discovered and explored through the legal cases of the *mukhtaṣar*.

As mentioned, this particular legal meaning is not, in itself, rational. It cannot be arrived at by rational inference from other chapters of the law. Al-Marghīnānī does not use the term *istiḥsān* in the current chapter, but refers to it as *ma'dūl bihi 'an al-qiyās* ("divergent from the general rule"), a phrase synonymous with *istiḥsān* in Ḥanafī *uṣūl* works.[411] Al-Marghīnānī reminds us that, because it is an exception from the general rule, the topic cannot itself be a basis for analogy; rather, it must be followed strictly in line with the textual sources that established it. Thus, when discussing wiping over the top of the *khuff* as opposed to the bottom (case 5), al-Marghīnānī states, "It is not valid to wipe the bottom of the *khuff*, the heal or the shin. This is because it is *divergent from the general rule* so all factors mentioned in sacred texts (*shar'*) are observed." In other words, since the texts only affirm wiping over the top of the *khuff*, we may not extend the ruling to wiping other parts of the *khuff*. Such attempts to delineate the rational and the non-rational to restrict the application of non-rational topics is a recurring concern in the work. A seemingly contradictory concern that we also find throughout the book is the attempt to rationalise many non-rational topics to understand the scope of their application.

[411] See, for example, al-Sarakhsī, *Uṣūl*, 2:150-55, 206-7.

We find this seemingly contradictory concern in the topic of wiping over socks (*jawrabayn*) (case 16). In this case, both Abū Ḥanīfah and his two companions permit wiping over something not considered a *khuff*, and thereby extend the topic to a case not mentioned in sacred texts. We saw in Chapter One that a ruling established by *istiḥsān* may only be applied to another case if it resembles the former in every respect.[412] We can consider this a highly restricted form of analogy, although *uṣūl* works refuse to call it *qiyās*, since *istiḥsān* is the opposite of *qiyās*; rather, they sometimes call it *ilḥāq* or attaching a case to the *istiḥsān*-based case. The challenge for this process of *ilḥāq* is that it requires a 'theory' for what makes the original case work the way it does – what 'underpins' it – so that we can then consider if the subsidiary case resembles it in this respect. Thus, the non-rational case must be given a rational explanation. And this is what we find in the discussion of wiping socks, to which the dialectical sequence of case 16 – one of three in the chapter – is devoted.

The dialectical sequence presents the disagreement between Abū Ḥanīfah, on the one hand, who stipulates a leather sole to permit wiping over socks, and his two companions, on the other, who stipulate only that the sock be thick and non-transparent. The dialectical sequence commences with the companions' evidence. They cite a report stating that the Prophet wiped over his socks (*jawrabayh*). They then cite a rational argument: "It is *possible to walk in it* if it is thick ... so it resembles the *khuff*." This argument shows the underlying quality of the *khuff*, due to which it functions as it does, to be the possibility of walking in it. Abū Ḥanīfah responds with a counter rational argument: "It [the thick sock] does not suit the *meaning* of the *khuff*, because it is not possible to *continuously* walk in it unless it has a leather sole, and the *ḥadīth* [cited by the companions] is to be understood [as referring to] such [a sock]."

[412] See page 69, above.

Abū Ḥanīfah's proposed legal meaning, presented in the commentary as superior, is that the *khuff* replaces the foot in ritual ablutions because it enables continuous walking, as opposed to simply the act of walking. After having arrived at the underlying reason for why this non-rational topic functions as it does, an analogy has now been made possible, to thick socks for the companions or leather soled socks for Abū Ḥanīfah.

A further feature in the section is the exploration of similarities and differences with other established legal cases. These are explorations of the overall logic of the law, showing the congruence of all of its parts. Similarities are often used to justify related cases, whilst differences are explained lest they be held as proofs for an unjustified incongruence of a particular ruling. Both similarities and differences are summoned when discussing holes in the *khuff* (case 7). The *mukhtaṣar* states that a hole the size of three small toes will prevent the validity of wiping on a *khuff*. Al-Marghīnānī adds in the commentary that holes in a single *khuff* are added together to assess if they reach this size, but that holes in one *khuff* are not added to holes in the other for this purpose. He explains this by saying, "because a hole in one of them does not prevent traversing a journey (*qaṭ' al-safar*) with the other," referring to the underpinning trait of the *khuff* – the ability to 'walk'/'continuously walk' in it – as the basis for this ruling. Here, a difference arises with another chapter of the law that one might have expected to be treated in a similar fashion. Thus, al-Marghīnānī hastens to add, "[This is] unlike scattered physical filth (*najāsah*)" – which is all added up (including from both *khuff*s) – "because he is bearing it all (*li-annahu ḥāmil lil-kull*)." Both cases are similar in that both are matters that prevent prayer upon the existence of a particular amount of the matter in question. With physical filth, one is permitted to have up to the amount of a *dirham* (silver coin) or a quarter of an item of clothing,

depending on the form of filth;[413] and with holes, one is permitted up to the size of three small toes. With both, scattered amounts are added up to see if they reach this limit. Yet each, as al-Marghīnānī points out, is underpinned by a different legal meaning and serves a different purpose. With physical filth, the meaning is simply 'bearing'. One may not bear a particular amount of filth while praying; all filth that one bears is thus added up. With the *khuff* the meaning is more specific: The *khuff*'s purpose is to enable traversing distances on foot, to which end a hole in one *khuff* does not affect the other. Immediately after this, al-Marghīnānī reminds us of yet another related case: "The revealing of nakedness (*al-'awrah*) [in the prayer] is similar to filth." The topic of revealing nakedness in prayer is another instance of a matter that prevents prayer upon the existence of a particular amount. In that topic, we are told that if a quarter of a limb is revealed, the prayer is invalidated, and if parts of limbs are revealed, these are all to be added up to see if they reach a quarter of the smallest exposed limb.[414] Adding up all revealed areas resembles filth in that all affected areas across a person's body are added together. In this instance, al-Marghīnānī does not justify the case or point to the underlying reason why it resembles filth and not holes in the *khuff*. He simply points out the similarity. This entire exploration of similarities and differences, like much of the commentary, is exceedingly brief: *bi-khilāf al-najāsah al-mutafarriqah li-annahu ḥāmil lil-kull wa-inkishāf al-'awrah naẓīr al-najāsah*.

Similar to exploring similarities and differences by comparing cases from different chapters is the process he calls *i'tibār* (consideration). Through *i'tibār* established cases are used to answer questions pertaining to the case under

[413] There are two forms of filth: heavy (*ghalīẓah*) and light (*khafīfah*). The difference between the two is how much a person may have on his body and clothing without invalidating the prayer. With heavy filth, a person may bear up to the amount of a *dirham* (silver coin), and with light filth, he may bear up to the quarter of an item of clothing. See *Hidāyah*, 1:57; *Guidance I*, 72-3.
[414] *Hidāyah*, 1:74; *Guidance I*, 102.

investigation. Again, this is based on an understanding of general congruence in the law. One such *i'tibār* is used to justify the recommended way of wiping (case 5). Al-Marghīnānī states, "Starting from the toes is recommended out of consideration (*i'tibar*) for the original [case] (*al-aṣl*), namely, washing." In other words, as it is recommended when washing feet to start from the toes, and wiping over *khuff*s has replaced washing, the original case can help answer details pertaining to the new ruling, in this instance, from where to start wiping. Interestingly, al-Marghīnānī bases wiping from the toes on this 'consideration' *after* mentioning a Prophetic report that directly justifies this practice. This reminds us of our study of Prophetic reports in Chapter One. What strengthens a Prophetic report that is not *mutawātir* or *mashhūr*? The prevalent logic of the system. The prevalent logic is thus adduced here through an *i'tibār*-consideration to support the Prophetic report.

We can see, then, that the author strives to provide a rationally acceptable meaning to explain legal rulings, even those that are non-rational in their origin. Only in the areas where he is unable to do this, as in the question of why the top of *khuff*s are wiped instead of the bottom, does he concede and remind that the topic is non-rational so these details cannot be explained.

A further commentary feature that occurs several times in this section is the invoking of a secondary layer of global legal principles. I call these 'secondary' as they are secondary to the main legal meaning that governs the key cases of the chapter (i.e. that the *khuff* prevents ritual impurity from reaching the foot). I call them 'global' because they are not specific to this topic and may be applied across several chapters. These are 'legal' in that they are principles that govern, explain and justify legal cases.

One such principle is that 'the most of a thing takes the ruling of all of that thing'. This principle is invoked across chapters to justify particular measurements or determinations. It is invoked here to explain why a hole the size of three toes prevents a *khuff* from stopping ritual impurity reaching the foot. We are told in this discussion that small holes are excused because *khuff*s ordinarily (*'ādatan*) have such holes so there is hardship (*ḥaraj*) in avoiding them – *'ādah* and *ḥaraj* themselves being important recurring global principles. But where did the three-toe measurement come from? Al-Marghīnānī tells us that the basis of the foot (*al-aṣl fī al-qadam*) – meaning the most significant part of the foot – is the toes. Three toes are most of the toes. The principle 'most of a thing is as all of it' means that if three toes are exposed, all the toes are exposed, which is as if the whole foot is exposed, since toes are the main part of the foot; but if less than three toes are exposed, then most of the toes are covered, and this is as if all the toes are covered, which is as if all the foot is covered. We are further told in this discussion that the school's position is that the hole is considered large if it is the size of the three *smallest* toes. Why the smallest and not the largest? We are told that this is out of precaution (*iḥtiyāṭ*). This short discussion, thus, introduces a number of global principles: the aforementioned principle of measurement and the interplay of ordinary phenomena (*'ādah*), hardship (*ḥaraj*) and precaution (*iḥtiyāṭ*) in framing a legal ruling. Each is a global principle whose application is explored through the exposition of cases in which it is present. This legally rich exploration of the question of holes in the *khuff* is presented in the form of a dialectical exchange in response to al-Shāfi'ī and Zufar, who argue that a hole of any size should prevent wiping, as is inferable from the main legal meaning of the chapter – that the *khuff* prevents ritual impurity from reaching the foot – which implies that once there is a hole, ritual impurity is able to reach the foot. Thus Zufar

and al-Shāfi'ī argue, "When it became necessary to wash the exposed part [of the foot], it became necessary to wash the rest." This argument itself implies another global principle which he explicitly states later when commenting on why removing one *khuff* necessitates washing both feet (case 10), namely, "the impossibility of combining washing and wiping in a single act".

An important global principle pertaining to time is explored in the case of a resident travelling before the completion of a day and night (case 13). Al-Marghīnānī says, "Because it is a ruling connected to time, it is the end of [the time] that is considered." He provides this as a principle for all such time-related cases, without supporting it with related cases. This principle brings together several cases in the chapters of ritual worship such as making up prayers for which one travelled before the end of prayer time, or prayers for which a lady commences her menstrual cycle before the end of the prayer time.[415]

Another global principle mentioned is that "a substitute (*badal*) cannot itself have a substitute". Interestingly, this principle is introduced in a dialectical exchange where al-Shāfi'ī uses it to defend his opinion that a *jurmūq* may not be wiped (case 15). When presenting the argument for the Ḥanafīs, al-Marghīnānī does not reject the principle, showing it to be a valid principle observed by Ḥanafīs. Instead, the response argues that the *jurmūq* complements the *khuff* in its purpose and use, so it resembles a further layer of the *khuff* and is thus properly a substitute (*badal*) for the foot, not the *khuff*. Global principles are thus sometimes introduced on the tongues of opponents. Their degree of acceptance in the Ḥanafī school is displayed by the nature of the response to the opponent in these dialectical exchanges. In this case, the principle is not only accepted, but the response shows nuance in how the principle is applied –

[415] Al-Bābartī, *al-'Ināyah*,1:155.

that something completing the purpose and use of another is treated as this other and not as a detached entity.

Another form of legal meaning that al-Marghīnānī explores in this section is an exploration of what can be termed the underlying wisdom of the special ruling of the *khuff*. What I mean by 'wisdom' – a translation of the Arabic *ḥikmah* – is an attempt to answer why this special ruling was legislated by the Lawgiver: What objective is this ruling to achieve? As always, he addresses it only briefly and in the middle of exploring a legal case for which this wisdom proves a helpful explanation. What I categorise as the wisdom behind the ruling is his statement that "the dispensation [of wiping over *khuff*s] is to remove hardship (*al-rukhṣah li-daf' al-ḥaraj*)," presumably the hardship of having to remove *khuff*s and wash the feet. This explanation seems simple enough. What is interesting is how this higher wisdom is itself used almost as an underlying *'illah*, whose absence and presence affects related cases. He tells us that one may not wipe over the *khuff* when performing a ritual bath (case 8) because major ritual impurity (*janābah*) is not a state that frequently occurs, so there is no 'hardship' in removing the *khuff*. He tells us that it is not permissible to wipe over turbans, hats, veils and gloves (case 17) because there is no 'hardship' in removing these; the underlying wisdom does not apply. He tells us that splints may be wiped over (case 18) because "the hardship in it is greater than the hardship in removing the *khuff*, so it is even more suited to the prescription of wiping." But he does not carry across the other rulings of the *khuff*. The underlying wisdom that both the *khuff* and splint share allows wiping to be applied to the splint. But what of the time limit? He tells us that there is no time limit for wiping over splints because there is no text that provides a time for this. This implies a further global principle, that time limits are only applied where a sacred text provides them. In the absence of one,

the extent of wiping is limited by its need, in this case the hardship of removing the splint: So long as the splint is needed, the person may wipe, and as soon as it is not needed, the person must wash. Here the wisdom itself defines the limit. But what if the splint falls off during the prayer revealing that the wound has been healed (case 20)? We are told that the prayer must be repeated, "because he is able to perform the original ruling (*al-aṣl*) before fully availing himself of the substitute (*badal*)," providing an important principle governing substitutes.

With this final case, the chapter of the *khuff* is completed. Here is a summary of its main features. It contains six Prophetic reports: one giving the time limit for wiping, one showing how the wiping is done, one to show that the *khuff* is removed for the ritual bath, one to support wiping over the *jurmūq*, one to support wiping over socks (*jawrabayn*) and one to support wiping over splints. There is no reference to *ḥadīth* compilations to document these reports and no attempt to show them in any way stronger in transmission than competing reports. There are three dialectical sequences. The first is the aforementioned exchange with Zufar and al-Shāfiʿī, who argue that small holes should prevent the permissibility of wiping. This exchange contrasts the logical application of the topic-governing rule – i.e. that the *khuff* prevents ritual impurity from reaching the foot – (the position of Zufar and al-Shāfiʿī) with an exception made out of necessity – small holes are common and there is hardship in avoiding them (the position of the school). The second dialectical sequence is the aforementioned exchange with al-Shāfiʿī, who does not permit wiping over the *jurmūq*. This exchange highlights a principle of substitutes – that they cannot themselves have substitutes – and the response shows how this principle is applied to items that are externally distinct but serve the same purpose. The third sequence is the aforementioned exchange between Abū Ḥanīfah and his two companions concerning

wiping over socks. The focus of this exchange is the underlying quality of the *khuff* that allows it to be subject to wiping. All three dialectical sequences tease out the implications and applications of legal meanings. There are twelve legal cases introduced in the commentary to add to the cases of the *mukhtaṣar*: nine of these were introduced to show how a particular legal meaning carried across to a related ruling to the one being discussed,[416] four were mentioned to show a limit for a particular meaning to where it could not carry across to a related case,[417] and only one case was added purely for practical reasons and not to extend or limit a legal meaning.[418] The predominant interest in exploring the interplay of legal meanings and seeking rules that promote congruence in the law is very clear in the selection of legal cases the commentator adds to the text. The chapter illustrates the quality of legal reasoning the reader is exposed to in the *Hidāyah*'s chapters. It also illustrates the difficulty of categorising the layers of legal meaning explored. Yet as it is these meanings that the commentary seeks to explore, we will attempt a further categorisation below.

[416] These are that 1) a lady with continuous dysfunctional bleeding (*mustaḥāḍah*) may not wipe over *khuff*s if she puts them on while bleeding; 2) a person who had performed *tayammum* and then saw water may not wipe over the *khuff*; 3) a person who washes his feet, puts on the *khuff* and then completes ritual ablutions may wipe over his *khuff*s; 4) holes are considered in each foot separately, and are not combined; 5) and 6) wiping is negated by removing the foot into the shin of the *khuff* and, likewise, by removing most of the foot; 7) if a resident completes the day and night and then travels, his time for wiping is not extended; 8) a *jurmūq* worn after having lost ablutions may not be wiped; 9) a person praying when the splint falls off revealing the wound has been healed must start the prayer again.

[417] These are that 1) the sides, heel and bottom of the *khuff* may not be wiped; 2) a hole exposing the tips of toes is not considered if they are not exposed while walking; 3) a *jurmūq* of cotton (*kirbās*) may not be wiped; 4) a person who washes his feet, while believing in the dispensation of wiping, is rewarded [by God].

[418] This is that a person need only wipe most of a splint, not all of it. (This can be said to illustrate the global principle 'most of a thing is as all of it', but he makes no reference to the principle.)

## 3.2 The Pillars of Ḥanafī Legal Theory in the *K. al-Ṭahārāt*

The key features of the *bāb al-masḥ ʻalā al-khuffayn* are found throughout the chapters of the *K. al-Ṭahārāt*, along with further features not found in this particular chapter. The current section attempts to categorise these features, drawing on the epistemological study in Chapter One.

### 3.2.1 Language

Chapter One showed the centrality of language theory to Ḥanafī *uṣūl*. In this Ḥanafī language theory, we saw a confident view of language that placed the Ḥanafīs among the more literalist trends in Islamic legal thought. We also saw that language added several dimensions to revelatory texts: (1) Meanings for the sake of which revelatory passages were conveyed – the 'expression of the text' (*ʻibārat al-naṣṣ*), (2) meanings that may be understood upon reflection on the words of a passage – the 'allusion of the text' (*ishārat al-naṣṣ*), and (3) meanings intended by the divine speaker behind the words used – the 'indication of the text' (*dalālat al-naṣṣ*).[419] In short, this theory of language gives confidence in what is understood from sacred texts, along with a wide scope of meanings that may be understood . The presence of linguistic investigations in al-Marghīnānī's engagement with revelatory texts, therefore, comes as no surprise.

In keeping with the brevity of the commentary, these are not lengthy investigations. He rarely employs specialist terms from *uṣūl al-fiqh*, and most of his linguistic investigations are merely to identify the precise meaning of a word. These brief linguistic comments are nonetheless of interest, as these precise meanings are often taken as representing the underlying legal meaning through which key cases in a topic are explained.

[419] There is a fourth member to this list of interpretive vistas: the *iqtiḍā' al-naṣṣ* ('the requirement of the text'). I omit it here as it was not presented in Chapter One and as the scope it adds to textual interpretation is limited. For information on this, see al-Sarakhsī, *Uṣūl*, 1:248-54.

There are a total of fourteen linguistic investigations in the *K. al-Ṭahārāt*.[420] Ten of these are explorations of the literal meaning of a word, while one emphasises the unrestrictedness (*iṭlāq*) of a word, one its generality (*'umūm*), one its ambiguity (*ijmāl*), and one reminds of the apparent (*ẓāhir*) meaning. All of these categories reflect a single insight: an attachment to the literal meanings of words and phrases employed in sacred texts. If an opponent takes an opinion that violates this literal reading, he is immediately refuted through language, and typically this is a sufficient argument. Rational arguments rarely accompany these linguistic investigations. Now, texts whose literal meanings are decisive must themselves be of high epistemic standing – i.e. we must feel sure these faithfully convery the words of the Lawgiver – otherwise, its literal meanings cannot be authoritative. Thus, in the majority of these cases, we are dealing with Qur'anic verses. Only two are Prophetic reports. I will provide a few examples.

In the chapter of ritual ablutions, the *mukhtaṣar* states that the face must be washed. The commentary defines the limits of the face as being from the hairline to the chin in length and from earlobe to earlobe in width. Al-Marghīnānī justifies this by saying, "This is because 'facing' (*muwājahah*) occurs with all of this, and [the face (*wajh*)] is linguistically derived from [facing]."[421] He repeats this argument in a debate that occurs later in the chapter of the ritual bath. Ḥanafīs hold that rinsing the mouth and nose is recommended (*sunnah*) in ritual ablutions, but obligatory in the ritual bath. Shāfi'īs hold it recommended in both and charge the Ḥanafīs with contradicting themselves. In a short dialectical sequence, after quoting al-Shāfi'ī's argument, al-Marghīnānī responds:

[420] *Hidāyah*, 1:15, 18, 22, 23, 26, 31, 39, 40, 50, 52, 53; *Guidance I*, 8, 14, 20, 21, 26-7, 32, 44, 45-6, 62, 64, 66.
[421] *Hidāyah*, 1:15; *Guidance I*, 8.

> For us [against al-Shāfi‘ī] is His saying, Most High, ‘If you are in major impurity (*junub*) then thoroughly purify yourselves (*fa-iṭṭaharū*).’ (Qur’an, 5:6) This is a command to purify the entire body; however, that which is difficult to reach with water is excluded from the text. This is different from ritual ablutions because what is compulsory there is washing the face (*wajh*); there is no ‘facing’ (*muwājahah*) with [the inside of the mouth and nose].[422]

In other words, the command pertaining to the ritual bath, *iṭṭaharū*, is a command to thoroughly cleanse the body. It gives no limits, so it must be understood to mean washing everything possible, including the mouth and nose, while in ritual ablutions the washing was restricted to the *wajh*, the linguistic derivation of which excludes the insides of the mouth and nose, since ‘facing’ does not occur with these. Any argument against this logic is preferring evidence at a lower epistemic level over the explicit wording of the relevant Qur’anic passages and is rejected.

Another example of this is a debate regarding materials that may be used to perform the *tayammum* (dry ablutions). The Qur’anic instruction regarding this is *tayammamū ṣa‘īdan ṭayyiban* (“seek out pure *ṣa‘īd*” [Qur’an, 5:6]). But what exactly does *ṣa‘īd* refer to? Al-Shāfi‘ī and Abū Yūsuf, we are told in a dialectical sequence, say it refers to dirt (*turāb*) and that the adjective ‘pure’ means ‘suitable for growth of vegetation’ (*munbit*). The proof presented for this interpretation is a statement of Ibn ‘Abbās. The decisive response to this on the part of Abū Ḥanīfah and al-Shaybānī is that “*ṣa‘īd* is a name for the surface of the earth [to include rocks and all natural occurring surfaces]. It is thus named because of its elevation (*ṣu‘ūd*). *Ṭayyib* can mean pure (*ṭāhir*), and thus should it be interpreted as it is most fitting for the topic of purity.”[423] In this exchange, the etymological argument is given weight over a transmission from the early community, reflecting the epistemological weight awarded linguistic investigations. It is also in the topic of *tayammum* that we are told

[422] *Hidāyah*, 1:22; *Guidance I*, 20.
[423] *Hidāyah*, 1:40; *Guidance I*, 45-6.

the intention (*nīyah*) is obligatory, unlike in the ritual ablutions, because the word *tayammum* literally means *qaṣd* or intent.[424]

The one example that emphasises the unrestrictedness of a word is notable. The Qur'an states the God sent down from the sky a "purifying water" (Qur'an, 25:48). Water is the purifying agent for ritual purification by virtue of this text. There is no qualifying description added to this water. Therefore, anything that may be called 'water' may be used in ritual purity. This seems a simple insight. Yet he repeats it several times in the section on types of water used in ritual purity, making this simple insight into unrestrictedness the major legal meaning governing the cases in that section. Among the cases justified with this principle is the validity of purification from water mixed with saffron. Al-Shāfi'ī, we are told, does not permit it, as it is now called 'saffron-water' and not simply 'water'. The response given to this is that "the name 'water' can still be unrestrictedly applied. Do you not see that it has not acquired a new name altogether? The ascription to 'saffron' [i.e 'saffron-water'] is like the ascription to 'well' and 'spring' [as in 'well-water' and 'spring-water'].'"[425]

We can see that the linguistic approach to sacred texts in the commentary appears fully informed by the epistemology we saw in Chapter One. However, the specialist terms in *uṣūl* works are rarely used. The concern is not to consciously demonstrate how the *uṣūl* applies to the *furū'*. Rather, the concern is to show how the *furū'* reflect a faithful reading of the relevant sacred texts grounded in a particular language theory. Specialist terms are used sparingly, only where they are needed to show a faithful reading.

[424] *Hidāyah*, 1:40; *Guidance I*, 46.
[425] *Hidāyah*, 1:26-7; *Guidance I*, 26-7.

### 3.2.2 Reports

Prophetic reports are frequently encountered in the commentary. It certainly cannot be said that Prophetic reports are unimportant to this commentary tradition. A total of fifty-nine reports are mentioned in the *K. al-Ṭahārāt*. At times, these reports are quoted to defend the opinion of an opponent in a dialectical sequence, although usually it is to defend the position of the *mukhtaṣar*. At times reports are defended with an additional rational argument, and at times the report is an argument by itself. A question to ask is whether the use of reports reflects the approach to reports we saw al-Sarakhsī's *Uṣūl*. The answer is yes.

The most fascinating feature in the way reports are presented is that they are mentioned without reference to *ḥadīth* works or *ḥadīth* sciences. The commentator frequently defends the cases of the *mukhtaṣar* with only a Prophetic report, yet he makes no effort to show it as being strong in transmission. At times he will present a report to support the opinion of an opponent in a dialectical sequence and then respond with another report, making no effort to show that the counter-report is more reliable. The reader of the commentary can only conclude that *ḥadīth*-transmission as a category is not important to the commentator. This is hard to accept at face value given the very cautious approach to epistemology in Ḥanafī legal theory and in the arguments of the commentary. What can explain this approach to reports? The answer appears to be the second pillar of Ḥanafī legal theory, the *salaf*-based approach to inherited tradition.

Al-Sarakhsī, as we saw, grounds the topic of Prophetic reports not in chains of transmission but in the acceptance of early jurists. The juristic community are presented as the trustworthy bearers of the *sunnah*. A report that is conveyed by the jurists is reliable precisely because the jurists conveyed it. Abū Ḥanīfah took directly

from these early jurists. His legal cases therefore reflect the *sunan*. Reports that agree with his cases are, therefore, from the authentic *sunnah*. Of course, this logic makes the argument from the *sunnah* entirely circular: A case in the *mukhtaṣar* is correct because of a report, and this report is correct because of the case in the *mukhtaṣar*. However, the implied circularity can be broken by understanding that, although we discovered the correctness of the report after knowing the legal case, the correct report necessarily preceded the legal case. Thus, the report is a proof from the *sunnah* that the legal case is based on, even though we discovered its correctness after the legal case.[426]

There is a further insight that results from considering all reports in the commentary as representing juristic transmission.We saw in Chapter One that only a jurist from the *salaf* can be relied to faithfully convey the *meaning* of the Prophet's words. Others can fall short in this, not because they are unreliable, but because their deficiency in *fiqh* means they might use words that fall short of conveying the intended meaning. Thus, confidence in the *wording* of a Prophetic report is only possible if it is transmitted by jurists. Although the *uṣūl al-fiqh* discussions presented above only deal with jurists of the early community, it seems that the understanding applies throughout the juristic community. As the reports that al-Marghīnānī is quoting are grounded in the Ḥanafi juristic community, all held to be master jurists who took their knowledge of the *sunnah* from Abū Ḥanīfah, a master jurist, who took from the master jurists of the *salaf*, one can be confident in the wording of these reports. This seems to best explain the occasional linguistic argument from the wording of a Prophetic report to defend a legal case. The single clear example of this

[426] This is reminiscent of the principle in al-Karkhī's *Uṣūl*: "The principle is that every report that conveys something contrary to the position of our associates (*aṣḥābunā*) [i.e. Abū Ḥanīfah's circle] is understood to be abrogated or contradicted by an opposing report": Al-Karkhī, "*Risālat al-imām Abī al-Ḥasan al-Karkhī fī al-uṣūl*", 169-70.

in the *K. al-Ṭahārāt* is the case of substances that exit from the private parts. We are told that everything that might exit from the private parts will invalidate ritual ablutions. This is explained firstly with a Qur'anic verse that refers to relieving oneself in the latrine. This is followed by a report in which the Prophet is asked about what invalidates ablutions, to which he replies, "That (*mā*) which exits from the private parts", after which al-Marghīnānī comments, "The word *mā* is general (*'āmm*), so it includes what ordinarily [exits] and what does not."[427] This form of linguistic argument entails confidence in the wording of the report. As no reference is provided for this report and no attempt is made to strengthen it with any of the categories of Ḥanafī report-theory, we can only assume that its strength comes from its being transmitted by a group that can be relied upon to transmit words faithfully, namely, the jurists.

There is only one instance in which reference is made to the transmission of a report relying on the wider *ḥadīth* tradition. This is done, not to support a Ḥanafī position, but to discredit a report relied upon by al-Shāfi'ī, who holds that water is not rendered physically filthy by filth mixing with it if water reaches a volume of two large jars (*qullatayn*). Al-Marghīnānī responds to al-Shāfi'ī's report by stating that Abū Dāwūd (d. 275/889) – the renowned *ḥadīth* authority – declared the *ḥadīth* weak.[428] This is the only mention of a *ḥadīth* authority in the *K. al-Ṭahārāt* and is only mentioned to refute an opponent based on his own epistemology. It does not represent a frame of reference for the Ḥanafīs, themselves, as there are no such references to support their reports.

This approach to Prophetic reports – great reliance on them coupled with utter disregard for recognised *ḥadīth* authorities, *ḥadīth* books and *ḥadīth* terms – appears

[427] *Hidāyah*, 1:18; *Guidance I*, 14.
[428] *Hidāyah*, 1:28; *Guidance I*, 28.

unique to Ḥanafī commentaries. One will be hard-pressed to find a text of another legal school in the sixth century approaching the *ḥadīth* tradition in such a way. The best explanation for this phenomenon is the *salaf*-based theory of reports presented in our theory lens.

From this Ḥanafī theory in which the commentary appears clearly embedded, we again see little use of specialist terminology. The word *mutawātir* is not used. The word *mashhūr* occurs once to defend a report followed by Abū Ḥanīfah, contrary to his two companions, in which the Prophet performed ritual ablutions with *nabīdh* (an alcoholic date-beverage) in the absence of water. The term *mustafīḍ*, synonymous to *mashhūr*, occurs once to describe the reports permitting wiping over *khuff*s. No other terms are encountered. Not '*khabar al-wāḥid*', '*āḥād*', '*gharīb*', '*ṣāḥīḥ*', '*ḍa'īf*'. This illustrates, as in the topic of language, that the commentator is not making a conscious attempt to build the commentary on the details of the *uṣūl* tradition. What we do note is that he is committed to its underlying epistemology, but will only use specialist terms where useful to a discussion.

### 3.2.3 Consensus and the Salaf

We saw, in Chapter One, a clear *salaf*ism on which Ḥanafī legal theory is based and how this reflects in the topics of consensus and following the opinions of jurist-Companions. We will reflect here on the appearance of these topics in the *K. al-Ṭahārāt*.

#### *Consensus*

The topic of consensus is rarely encountered in the *K. al-Ṭahārāt*: *Ijmā'* is adduced six times[429] and in a number of ways. I summarise these below.

[429] It also occurs once for a non-legal issue, where we are told that the particle *wāw* means conjunction without temporal succession (*muṭlaq al-jam'*) by "consensus of lexicographers" (*bi-ijmā' ahl al-lughah*): *Hidāyah*, 1:18; *Guidance I*, 14.

In one instance – the allowing of pigeons and doves into mosques – we are told it is by "consensus of the Muslims" (*bi-ijmā' al-muslimīn*).[430] Here, consensus is a reference to widespread practice and not to statements from a group of scholars.

When discussing the cases pertaining to purifying wells, we are told that a well whose water has become physically filthy is purified by removing all of its water and that this is established by "consensus of the early Muslims" (*bi-ijmā' al-salaf*).[431] Here, the reference is not to widespread practice, but to the verdicts of scholars from the early community, as is clear from the Companion statements that are mentioned to support this topic.

Twice the term appears to refer to the agreement of a limited group of scholars. The first is in a debate regarding a woman's bleeding after giving birth to the first of two twins. Zufar holds that this is not considered post-natal bleeding until she gives birth to the second child and cites to support his position the case of a woman who, in a post-divorce waiting period (*'iddah*), gives birth to the first of two twins. We are told that there is *ijmā'* that, in such a case, the *'iddah* is only completed by the birth of the second child. [432] It is possible that this refers to an actual *ijmā'*. But equally possible from the nature of the presentation is that it simply means agreement amongst Abū Ḥanīfah's circle. Another example is a debate with al-Shāfi'ī, who holds that a person wiping himself clean after using the latrine must use an odd number of rocks. This is refuted by a "consensus" that a person may use a single rock with three edges.[433] Given the nature of this case and that Ḥanafīs do not consider any fixed amount of wiping to be necessary, it does not appear to be a case requiring citation of

[430] *Hidāyah*, 1:33; *Guidance I*, 33-4.
[431] *Hidāyah*, 1:32; *Guidance I*, 33.
[432] *Hidāyah*, 1:54; *Guidance I*, 68.
[433] *Hidāyah*, 1:59; *Guidance I*, 76.

an authoritative consensus and, thus, appears simply a point of agreement with al-Shāfiʿī, although the possibility remains that this is an actual case of *ijmāʿ*.

The remaining cases of *ijmāʿ* are devoid of further nuance. We are told that a woman must perform a ritual bath after the cessation of post-natal bleeding due to *ijmāʿ*. Interestingly, immediately before this he justifies the obligation of performing the ritual bath upon the cessation of menstrual bleeding by a Qur'anic verse (Qur'an, 2:222).[434] It could have been argued that, by the indication of that text (*dalālat al-naṣṣ*), post-natal bleeding is also intended as both are forms of bleeding from the womb. The fact that *ijmāʿ* was quoted and not a deeper engagement with the Qur'anic text implies that *ijmāʿ* is a surer argument in such cases.

A seemingly opposing use of *ijmāʿ* occurs in interpreting the meaning of *ṭayyib* (pure) in the verse of *tayammum*: "If you do not find water, then seek out (*tayammumū*) *ṣaʿīd ṭayyib*." (Qur'an, 5:7) We are told that *ṭayyib* in this context means pure – i.e. unsoiled by physical filth – as that is more fitting (*alyaq*) for a discussion on ritual purity, "or this is the meaning [due to] *ijmā*.""[435] Here the interpretation of the word through its context in the verse appears the preferred argument, which is backed up by an alternative argument from consensus.

Taking the last two examples together, it appears that interpreting a word through its context (*ʿibārat al-naṣṣ*) is epistemologically stronger than *ijmāʿ*, which in turn is epistemologically stronger than the indication of a text (*dalālat al-naṣṣ*). The weighting of *ijmāʿ* against the *dalālat al-naṣṣ* and the *ʿibārat al-naṣṣ* in such a way is sensible. It accords well with the theory of language presented earlier and implies a cautious and consistent application of epistemology in this commentary tradition.

[434] *Hidāyah*, 1:24; *Guidance I*, 22.
[435] *Hidāyah*, 1:40; *Guidance I*, 46.

There is no doubt further nuance concerning the doctrine of *ijmā'* that can be discovered by observing its use throughout the commentary.

## *The* Salaf

The authority of the *salaf*, meaning primarily the first two generations of Muslims – the Companions and Successors – can be detected in the *K. al-Ṭahārāt*, but, as in the case of *ijmā'*, the examples are too few to provide a deep engagement with al-Marghīnānī's method. Research into the naming of these authorities throughout the text will reveal more about the manner in which this generation of jurists are used in the text.

In the *K. al-Ṭahārāt*, authorities from the early community are quoted in two distinct ways: as narrators of reports and as legal authorities. The former examples have no direct bearing on the place of the *salaf* in Ḥanafī epistemology as they are not mentioned as authorities in their own right. Four Companions are mentioned in this capacity: Umm Salamah (d. 61/681), two reports, al-Mughīrah ibn Shu'bah (d. 50/670-1), two reports, and Ṣafwān ibn 'Assāl (d. ?) and Maymūnah (d. 63/682-3?), both with one report. We saw in Chapter One an elaborate theory on the juristic standing of narrators and the consequences of this on how reports are received. A study of a larger sample of reports throughout the book can reveal how the Ḥanafī theory of *ḥadīth* narrators has been employed in the text. The sample in the *K. al-Ṭahārāt* is too small for such a study.

Of more direct relevance to our study are eleven instances where Companions are quoted as legal authorities. At times, the Companions are presented as a sufficient basis for establishing a ruling. This is the case in various scenarios for purifying wells. We are told in beginning of that section that the entire topic rests on *āthār*, meaning specifically Companion reports, and not *qiyās*, as according to analogy a well can

never be purified.[436] After this grounding of the topic in Companion reports, these Companions are quoted to justify various legal cases with no further corroborating evidence. Companions quoted thus are Anas ibn Mālik, Abū Sa'īd al-Khudrī (d. 64/683-4), 'Abd Allāh ibn 'Abbās and 'Abd Allāh ibn al-Zubayr.[437]

At times, Companion reports are combined with Prophetic reports in interesting ways. In a dialectical sequence regarding whether a small amount of vomit negates ritual purity, a Prophetic report is presented to support Zufar's opinion that all vomiting negates ritual purity, regardless of whether it is in small or large amounts. This is opposed by a statement from 'Alī ibn Abī Ṭālib, where he explicitly states that it is a mouthful of vomit that negates ritual purity.[438] In this particular exchange, 'Alī's statement can be seen as qualifying the former report, placing a Companion statement on equal footing with a Prophetic report. This is entirely consistent with the presentation of Companion statements in Ḥanafī *uṣūl* works.

A similar instance, also involving 'Alī, is the case of wiping over splints in ritual ablutions in place of washing. The validity of this practice is upheld through three arguments: first, that the Prophet did it; second, that 'Alī ordered its performance; and third, that there is more hardship in removing a splint than in removing a *khuff*, so *a fortiori* it is suitable for wiping.[439] It appears that any one of these three pieces of evidence would have been sufficient to support this case. The example places 'Alī's statement on an equal footing with Prophetic practice, both explaining the act through transmitted knowledge, before the latter argument explains it through the legal meaning it shares with the *khuff*.

[436] *Hidāyah*, 1:32; *Guidance I*, 33.
[437] *Hidāyah*, 1:34; *Guidance I*, 35.
[438] *Hidāyah*, 1:19-20; *Guidance I*, 16.
[439] *Hidāyah*, 1:47; *Guidance I*, 58.

There is an example of ʻĀ'ishah being quoted to provide the exact meanings of the terms *manī* (sperm), *madhī* (pre-ejaculate) and *wadī* (a cloudy liquid that can exit after urination).[440] In this case, she is quoted not as an authority on language, but in the meanings intended by these terms with regards to the various legal rulings attached to them, i.e. as a legal authority.

There are also two examples, one of ʻĀ'ishah and one of Anas, where Companions are quoted to determine the *sunnah*. I mention this here because they are not named simply as narrators of a Prophetic report but as authorities of Prophetic practice. In the case of Anas, he is reported to have performed the ritual ablutions by wiping his head once and then stated that the ablutions of the Prophet were performed thus.[441] Here the Prophetic report is strengthened by the practice of Anas, a Companion not counted by al-Sarakhsī as a jurist-Companion, but one whose positions, al-Sarakhsī notes, were often adopted by Abū Ḥanīfah's circle, even when not supported by a clear *qiyās*.[442] He is quoted twice as a legal authority in the *K. al-Ṭahārāt*: once here and once in a *fatwā* pertaining to purifying wells. In the case of ʻĀ'ishah – who is regarded by al-Sarakhsī as a jurist-Companion – she is quoted describing the practice of menstruating women at the time of the Prophet, namely, that they would make up fasts and not prayers.[443] Again, she is presented as an authority on early practice, not simply as a narrator of an event.

There is only one example of a Successor's being quoted as a legal authority – and indeed being mentioned at all. The example is revealing. The Successor in question is Ibrāhīm al-Nakhaʻī, who is mentioned as explaining that the least length of a period of purity between menstrual bleedings is fifteen days. In other words,

[440] *Al-Hidāyah*, 1:25; *Guidance I*, 23.
[441] *Hidāyah*, 1:18; *Guidance I*, 13.
[442] Al-Sarakhsī, *Uṣūl*, 1:342.
[443] *Hidāyah*, 1:48; *Guidance I*, 60.

menstrual periods are separated from each other by at least fifteen days, and any blood seen within these fifteen days cannot be considered menstrual blood. We are told that this measurement is "transmitted from Ibrāhīm al-Nakha'ī, and such is not known except by revelation (*tawqīfan*)."[444] In other words, as the like of this cannot be known by rational inference, it must be based on a Prophetic report. The example is interesting because the works of *uṣūl al-fiqh* mention this rule only for Companions, that if a Companion states something not inferrable by rational deliberation then it is treated as a Prophetic report, as that must have been the origin of this statement.[445] That fact that this rule for Companions is applied to the statement of Ibrāhīm al-Nakha'ī supports the aforementioned statement in al-Sarakhsī's *Uṣūl* that al-Nakha'ī had the same status as a Companion since he was a recognised jurist in the era of the Companions.[446]

We can conclude from the few examples of consensus and early jurists in the *K. al-Ṭahārāt* that the commentary is completely consistent with the Ḥanafī *uṣūl al-fiqh* tradition in the epistemological weighting given to these sources and in the way they are employed, down to the details of how statements of specific figures such as 'Ā'ishah, Anas and al-Nakha'ī are utilised. However, as the number of mentions of these is limited in the *K. al-Ṭahārāt*, a larger sample from the commentary is needed to study nuances in the commentator's interaction with this topic.

### 3.2.4 Legal Meanings

It is undeniable that the main purpose of the commentary is exploring the legal meanings underpinning the cases of the *mukhtaṣar*. These explorations occur in an abundance unmatched by any other commentary activity. We saw in Abū al-Yusr's

[444] *Hidāyah*, 1:51; *Guidance I*, 63.
[445] See, for example, al-Sarakhsī, *Uṣūl*, 2:110.
[446] Ibid., 2:114.

definition of *fiqh* that a legal meaning is what underpins a sacred ruling: It explains why the ruling is the way it is; it governs it; the ruling is but an expression of it; if the meaning were to be detached from the ruling in a particular circumstance, the ruling itself would no longer apply. We saw him give a number of names to these legal meanings, such as *'illah*, *sabab*, *qiyās* and *dalīl*. I suggested that these be seen not as synonyms, but as various forms of relation between a legal meaning and a sacred ruling, in other words, different forms of legal meaning. A single ruling can thus be governed by a number of legal meanings: These multiple legal meanings might relate to a particular ruling in distinct ways – e.g. as cause, occasion or wisdom – and they might relate in the same way but represent different degrees of closeness to the judgement. What I mean by this latter point is what we saw in the chapter of wiping over *khuff*s. The underlying legal meaning that governed most of the cases of the chapter was that the *khuff* 'prevents ritual impurity from reaching the foot'. This helped explain the main cases of the chapter. But then there were cases that were best explained by a higher, more abstract understanding of *why* the *khuff* was able to do this, namely, the notion of hardship (*ḥaraj*). This legal meaning was used to extend the ruling to the issue of wiping over splints and to explain why particular scenarios were excluded from the special ruling of wiping. Thus a jurist in studying a text such as the *Hidāyah* is acquainted with *layers* of legal meanings. Unfortunately, they are not presented in an organised fashion, but rather appear randomly through the various debates, cases and exchanges which demonstrate to a jurist how these different layers interact. I will attempt here to present an initial categorisation of the layers of legal meaning explored in the *K. al-Ṭahārāt*. I present every example of legal meanings that I found under these categories to allow the reader to see how each chapter is constructed through distinct layers of meanings. I wish for the reader to also observe

how seemingly mundane many of these are, causing them not to be noticed for the underpinning legal meanings they are, as well as how difficult it is to categorise them in some cases.

*1. Legal meanings that govern topics*

As much as possible, the commentator aims to make a particular meaning the rule that explains the key cases of a section. Some sections are self-contained and deal with a single topic, such as the wiping of *khuff*s. Others have a number of sub-topics, and, as much as possible, each sub-topic will be governed by an overarching rule. Key cases in a particular topic/sub-topic are explored to show how they are an expression of that single rule, or, if they depart from that rule, why they depart. This departure is shown as being due to a conflict between the topic-governing rule and a more general legal rule.

Many such rules can be seen as *'illah*s, that is, meanings that 'cause' a particular prescription to apply. Unfortunately, the term *'illah* cannot be technically applied to many of these due to particular stipulations in Ḥanafī *uṣūl* texts regarding the use of the term. For example, the rule governing the wiping over the *khuff* cannot be called an *'illah* because it governs a topic of *istiḥsān*. As *istiḥsān*-based topics cannot be extended to other cases, we are told that we cannot seek *'illah*s in them.[447] At times, the topic-governing rule is merely the implementation of a clear text. We saw that the rule that governed liquids which may be used for ritual ablutions was simply that the liquid be classified as 'water', as indicated by the expression of the text (*'ibārat al-naṣṣ*). These also cannot be called *'illah*s in the technical sense. I thus only refer to these as topic-governing rules.

[447] Al-Sarakhsī, *Uṣūl*, 2:150.

I have found seventeen clear examples of topic-governing rules that occur in the commentary on the *K. al-Ṭahārāt*. More can certainly be extracted. The difficulty in identifying these rules is that they often read as simple descriptions of a topic, as we saw in the rule governing *khuff*-wiping. It is by observing how a statement is employed in the commentary that one realises whether it is a topic-governing rule. I mention only rules introduced in the commentary, not the *mukhtaṣar*, and those that are explicitly stated and have an effect on more than one case. There is no doubt that further rules can be extracted from the commentary which are not worded as rules. Here are the seventeen rules:

a. What makes an act '*sunnah*' in ritual ablutions: The *sunnah* is that which completes an obligatory act in its site.[448]
b. What negates ritual purity: The exiting of physical filth from the body.[449]
c. What must be washed in the ritual bath: That which can be washed of the body without hardship.[450]
d. What may be used for ritual purification: That to which the unrestricted term 'water' may be applied.[451]
e. What is the status of leftover water drank by animals, in terms of filth and purity: Saliva takes the ruling of meat [i.e. the saliva of animals which may not be eaten is filthy, so will be the water they have drunk].[452]

[448] *Hidāyah*, 1:17; *Guidance I*, 12. In other words, a *sunnah* act must be complementing an obligatory act. Furthermore, it must complement it in its very site, not in a related site. This is used, for example, to support an argument that passing wet fingers through the part of a beard that hangs below the chin cannot be a *sunnah*, since this is not part of the face, and it is the face that is the 'site' of the obligation.
[449] *Hidāyah*, 18-21; *Guidance I*, 14-19.
[450] *Hidāyah*, 22-3; *Guidance I*, 20-1.
[451] *Hidāyah*, 26-7; *Guidance I*, 25-7.
[452] *Hidāyah*, 35-7; *Guidance I*, 37-41.

f. The bodies of which animals become physical filth upon death: The body of an animal with flowing blood [to exclude insects and sea creatures] is rendered filthy upon death.[453]

g. What substances may be used for *tayammum*: Whatever is considered *ṣa'īd ṭayyib*, namely, a pure substance naturally occurring on the surface of the earth.[454];

h. What enables one to perform *tayammum*: The inability to use water.[455]

i. What must be intended for a valid *tayammum*: An act sought for devotion (*qurbah maqṣūdah*) which is not valid without ritual purity.[456]

j. How a *khuff* works: The *khuff* prevents ritual impurity from reaching the foot.[457]

k. Why splints are wiped: To ward off the hardship of removing and washing.[458]

l. When is intercourse permitted after menstruation: When there is preponderance of the likelihood that bleeding has finished.[459]

m. The rule governing excuses that permit one to pray despite the exiting of filth from the body: These are excuses so long as the need for them remains.[460]

n. When post-natal bleeding (*nifās*) commences: Upon the exiting of most of the child.[461]

o. How items are purified from ritual filth: Removing filth from the item.[462]

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[453] *Hidāyah*, 28-9; *Guidance I*, 29.
[454] *Hidāyah*, 1:40; *Guidance I*, 45-6.
[455] *Hidāyah*, 1:38-9, 42-3; *Guidance I*, 43-4, 47, 50.
[456] *Hidāyah*, 1:41; *Guidance I*, 46-7.
[457] *Hidāyah*, 1:43-6; *Guidance I*, 53-7.
[458] *Hidāyah*, 1:47; *Guidance I*, 58. This appears a 'wisdom', but it is used to explain more than one case pertaining to this topic.
[459] *Hidāyah*, 1:50; *Guidance I*, 62.
[460] *Hidāyah*, 1:52-3; *Guidance I*, 64-6. The excuse (*'udhr*) is a reference to a state of constant bleeding or the like whereby a person is unable to perform ritual purification and pray without filth exiting the body. In such cases, the person is 'excused' for the duration of a prayer time, as the negation of ritual purity is unavoidable.
[461] *Hidāyah*, 1:53-4; *Guidance I*, 66-7.

p. The demarcation between 'heavy' and 'light' filth (*najāsah ghalīẓah* and *khafīfah*): Heavy filth is where sacred texts agree on its being filth – according to Abū Ḥanīfah – or where jurists agree – according to Abū Yūsuf and al-Shaybānī.[463]

q. Utilisation of filth: Pure filth (*najas al-'ayn*) may not be utilised for any purpose.[464]

*2. Legal meanings that support topic-governing rules*

In addition to providing a main legal meaning that governs a topic, the commentary provides a second layer of legal meanings which show how an individual case relates to these topic-governing rules. This second layer of legal meaning is generally specific to a particular legal case and ties it to the topic governing rule. A number of these can function as criteria or *ḍawābiṭ* for the application of the topic-governing rule. Many of them are forms of rationale to explain *why* a case falls under the topic-governing rule. These rationales come close to the 'wisdoms' mentioned below. The difference between rationales and wisdoms, for the purpose of the current categorisation, is that rationales explain how a criterion or legal meaning is subsumed under a topic-governing rule, while wisdoms explain the advantage served by a particular judgement without returning it back to a topic-governing rule. The difficulty in identifying the current group of legal meanings is that, at times, they might seem like a legal case of their own. It is by observing how these are used to tie particular legal cases to a topic-governing rule that they can be identified. Here are the twenty legal meanings I found under this category in the *K. al-Ṭahārāt*, presented in order of occurrence. All rationales mentioned below are from the commentary.

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[462] *Hidāyah*, 1:54-9; *Guidance I*, 70-2, 75.
[463] *Hidāyah*, 1:57-8; *Guidance I*, 72-4.
[464] *Hidāyah*, 1:31-2, 35-6; *Guidance I*, 32-3, 38.

a. There is no need for an intention (*nīyah*) for the validity of ritual ablutions, "because purification (*ṭahārah*) [automatically] occurs by use of a purifying agent (*muṭahhir*)." [Legal meaning that shows this case a consequence of the topic-governing rule: Purification is by use of water.][465]

b. When the exit of filth negates ritual ablutions: When it moves to a part of the body that is washed in the ritual bath. [Criterion (*ḍābiṭ*) for the application of topic-governing rule: Ritual purity is negated by filth exiting the body.][466]

c. Why mere appearance of filth at the surface of the two passages [of urine and faeces] (*al-sabīlayn*) negates ritual purity, while if it exits from another part of the body, it is stipulated that it flow out from the point of exit? "When the skin is peeled back, filth [i.e. blood] appears in its site, so it is exposed but has not exited, as opposed to the two passages, because they are not sites for filth [as urine and faeces are stored further inside the body], so we infer from visibility that there has been exiting." [Legal rationale for application of topic-governing rule: Ritual purity is negated by filth exiting the body.][467]

d. Must filth flow by itself out of the body? Ritual ablutions are negated if filth flows naturally from its site, not if made to flow by being squeezed out. [Criterion for application of topic-governing rule: Ritual purity is negated by filth exiting the body.][468]

e. Amount of vomit that negates ritual ablutions: A mouthful of vomit negates ritual ablutions, because vomit is only considered to have exited the body once

[465] *Hidāyah*, 1:17; *Guidance I*, 13.
[466] *Hidāyah*, 1:18-9; *Guidance I*, 14-16.
[467] *Hidāyah*, 1:19; *Guidance I*, 16.
[468] *Hidāyah*, 1:22; *Guidance I*, 19.

it fills the mouth. [Criterion accompanied by legal rationale that connects to the topic-governing rule: Ritual purity is negated by filth exiting the body.][469]

f. When small amounts of vomit are added up to see if they reach a mouthful: If they occur in the same place (*ittiḥād al-maḥall*) according to Abū Yūsuf, or if they occur by the same cause (*ittiḥād al-sabab*), namely, the same convulsions (*ghathayān*), according to al-Shaybānī. [Criteria to manage a case under the previous criterion in e. that served the topic-governing rule: Ritual purity is negated by filth exiting the body.][470]

g. Forms of sleep that invalidate ritual ablutions: Sleep invalidates ablutions if the physical posture is one that allows the complete relaxation of the joints, because in such sleep filth ordinarily (*ʿādatan*) exits the body. [Criterion accompanied by legal rationale to connect to topic-governing rule: Ritual purity is negated by filth exiting the body.][471]

h. Ritual ablutions from water that falls from grape vines is permissible, "because it is water that has exited without human agency (*ʿilāj*)." [Criterion for application of topic-governing rule: Purification is by use of water.][472]

i. Ritual ablutions from water cooked with something is impermissible, "because it is no longer in the meaning of that which falls from the sky, unless it is cooked with something for the purpose of cleaning." [Legal rationale accompanied by criterion for topic-governing rule: Purification is by use of water.][473]

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[469] *Hidāyah*, 1:19; *Guidance I*, 16.
[470] *Hidāyah*, 1:20; *Guidance I*, 16.
[471] *Hidāyah*, 1:21; *Guidance I*, 18.
[472] *Hidāyah*, 1:26; *Guidance I*, 26. I call this a criterion and not merely a rationale because it introduces a new condition to consider when applying the topic-governing rule, namely, that liquid extracted from plants by human agency can never be considered water.
[473] *Hidāyah*, 1:27; *Guidance I*, 27.

j. Animals that die in their source of origin: An animal that dies in its source of origin (*ma'din*) is not treated as filth. [Criterion for application of topic-governing rule: The body of an animal with flowing blood is rendered filthy upon death.][474]

k. Animal hair and bones are pure, "because there is no life in them, so there can be no death." [Legal rationale to connect to topic-governing rule: The body of an animal with flowing blood is rendered filthy upon death.][475]

l. Leftover drinking water of a free-range chicken is disliked to use, "because it mixes with filth" i.e. by pecking filthy items. [Legal meaning to add to topic-governing rule: Saliva takes the ruling of meat.][476]

m. Performing *tayammum* out of fear for missing one of the five daily prayers is impermissible,[477] "because the shortcoming (*taqṣīr*) is from the individual." [Legal rationale to exclude from topic-governing rule: *Tayammum* is permitted by the inability to use water.][478]

n. Intention for *tayammum* is required, "because dirt is only purifying in a particular circumstance, unlike water." [Legal meaning to support legal rationale a. in serving topic-governing rule: Purification is by use of water.][479]

o. *Tayammum* may be performed for the Eid and funeral prayers if a person fears missing them, "because they cannot be repeated, so inability is realised."

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[474] *Hidāyah*, 1:29; *Guidance I*, 29.
[475] *Hidāyah*, 1:32; *Guidance I*, 32-3.
[476] *Hidāyah*, 1:36; *Guidance I*, 39. In this case, the meaning doesn't cause the case in question to be subsumed by the topic-governing rule, as chicken saliva is pure according to this rule. It offers an alternative reason for this case to enter into the general sphere of that rule, by advising caution regarding its leftover drinking water.
[477] In other words, if a person fears that the time taken to perform ritual ablutions will cause him to offer the prayer outside of the prayer time, he must still perform ritual ablutions and may not perform *tayammum*.
[478] *Hidāyah*, 1:39; *Guidance I*, 49.
[479] *Hidāyah*, 1:40; *Guidance I*, 46.

[Legal rationale to connect to topic-governing rule: *Tayammum* is permitted by the inability to use water.][480]

p. *Tayammum* when water is not *known* to be present is permissible, even where water actually is present, because "knowledge is what is meant by ability." [Criterion for application of topic-governing rule: *Tayammum* is permitted by the inability to use water.][481]

q. Socks may be wiped if a person is able to walk (continuously) in them. [Legal meaning to subsume this case under topic-governing rule: The *khuff* prevents ritual impurity from reaching the foot.][482]

r. Intercourse after a menstrual period in which bleeding stops in less than ten days is only permissible if the woman takes a ritual bath, "because blood continues sometimes, and cuts off in others, so the bath is needed to give preponderance to cessation [of menstruation]." [Legal rationale to connect to topic-governing rule: There must be a preponderance of the likelihood that bleeding has finished.][483]

s. It is permissible to have intercourse with a woman who does not perform the ritual bath after menstruation if she misses a prayer in its time, "because the prayer has become a debt that she owes, so by implication she is purified." [Legal rationale to connect to topic-governing rule: There must be a preponderance of the likelihood that bleeding has finished.][484]

[480] *Hidāyah*, 1:42; *Guidance I*, 48-9.
[481] *Hidāyah*, 1:42-3; *Guidance I*, 50.
[482] *Hidāyah*, 1:46-7; *Guidance I*, 57.
[483] *Hidāyah*, 1:50; *Guidance I*, 62.
[484] *Hidāyah*, 1:50; *Guidance I*, 62.

t. Items of physical filth that are hard to avoid are considered light filth, "because of the difficulty of avoidance." [Criterion for applicaton of topic-governing rule: Light filth is excused up to a quarter of an item of clothing.][485]

*3. Legal meanings that serve as 'wisdoms' (*ḥikam*)*

Some of the legal meanings invoked in the commentary serve as 'wisdoms'. What I mean by 'wisdom' is a rational meaning that explains *why* a particular ruling is observed from the point of view of the sensible objectives it serves. Here are the ten wisdoms I found in the *K. al-Ṭahārāt*. I frame these as questions to show that each is telling is objective behind the act.

a. Why are hands washed at the beginning of the ritual ablutions? "Because the hand is the tool used for purification so it is recommended to commence by purifying it."[486]

b. Why are feet washed at the end of the ritual bath and not with the ritual ablutions performed at the beginning of the ritual bath? "Because the feet are in a pool of 'used' water, so there is no benefit in washing [them until the end]."[487]

c. Why should physical filth on the body be washed away at the beginning of the ritual bath? "So that [the filth] does not spread by the pouring of water."[488]

d. Why is it recommended to perform a ritual bath for the Friday and Eid prayers? "Because [people] gather for them, so it is recommended to bathe so as not to harm [others] with one's odour."[489]

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[485] *Hidāyah*, 1:57-8; *Guidance I*, 74. The topic-governing rule referred to here is clearly stated in the *mukhtaṣar*, so it is not in the list of topic-governing rules presented above.
[486] *Hidāyah*, 1:16; *Guidance I*, 10. In other words, the hand will be cleaning the other limbs, so we should start by ensuring it itself is clean.
[487] *Hidāyah*, 1:23; *Guidance I*, 20. Water that has been used on the limbs to lift ritual impurity is termed 'used' (*musta'mal*). Ḥanafī imams agree that used water may not be re-used to lift ritual impurity. Furthermore, Abū Ḥanīfah and Abū Yūsuf considered this water to be physically filthy. This is why it makes sense to only wash the feet once one steps out of the pool of used water.
[488] *Hidāyah*, 1:23; *Guidance I*, 20.

e. Why is it assumed that filth which falls in one side of a large pool of water will not render the far side filthy if the pool is of such a size that the far side is not disturbed by stirring the near side? "Because the effect of stirring is greater in moving water [from one side to the other] than the effect of filth."[490]

f. Why are the hands dusted after touching soil and before wiping the face in *tayammum*? "So that it does not constitute disfiguration (*muthlah*) [by wiping dirt on the face]."[491]

g. Why may *khuff*s not be wiped in the ritual bath? "Because major ritual impurity (*janābah*) is not ordinarily frequent, so there is no hardship in removing [the *khuff*], unlike ritual impurity (*ḥadath*), which is frequent."[492]

h. Why, after menstruation, does a woman make up missed fasts but not missed prayers? "Because there is hardship in making up prayers due to their multiplication (*li-taḍā'ufihā*), and there is no [such] hardship in making up fasts."[493]

i. Why does ritual impurity (*ḥadath*) prevent only touching the *muṣḥaf*, while major ritual impurity (*janābah*) prevents both touching the *muṣḥaf* and recitation of the Qur'an? "*Ḥadath* and *janābah* dwell in the hand so they both share the case of touching, while *janābah*, not *ḥadath*, dwells in the mouth, so they differ in the case of reciting."[494]

j. Why is there no minimum time of bleeding to establish post-natal bleeding (*nifās*), while there is a minimum time of three days of bleeding to establish menstruation (*ḥayḍ*)? "Because the prior exit of the child is the sign that this

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[489] *Hidāyah*, 1:25; *Guidance I*, 23.
[490] *Hidāyah*, 1:28; *Guidance I*, 28.
[491] *Hidāyah*, 1:39; *Guidance I*, 44.
[492] *Hidāyah*, 1:45; *Guidance I*, 56.
[493] *Hidāyah*, 1:48; *Guidance I*, 60.
[494] *Hidāyah*, 1:50; *Guidance I*, 61.

blood has come from the womb, so there is no need for a prolonged time to serve as a sign for that as in the case of menstration."[495]

4. *Legal meanings that serve as maxims (*qawā'id*)*

Some of the legal meanings we find in the *Hidāyah* are best thought of as maxims. These are legal meanings that explain related cases across different chapters and are not specific to a particular chapter. These were referred to in Section 3.1 as global legal meanings, as that is precisely the role maxims play. Some are wide in application and abstract in formulation. These are very much like the legal maxims found in the later developed science of *al-qawā'id al-fiqhīyah*.[496] Others are more restricted in application. Some of these are explicitly stated as formulaic maxims, while others are implied as such in the course of an exchange. The following are the sixteen maxims I found in the *K. al-Ṭahārāt*:

a. What is normal is treated as certain (*al-thābit 'ādatan ka-al-mutayaqqan bihi*).[497]
b. Certainty is not removed by doubt.[498]
c. Something rare is not awarded consideration.[499]
d. Something deemed predominant is treated as realised (*ghālib al-ra'y ka-al-mutaḥaqqiq*).[500]
e. Something which ordinarily causes preponderance of a matter may be treated as the very occurrence of that matter to facilitate ease.[501]
f. Most of something is like all of it.[502]

[495] *Hidāyah*, 1:53; *Guidance I*, 67.
[496] For an overview of the concerns of this genre that flourished after al-Marghīnānī's period, see Wolfhart Heinrichs, "*Qawā'id* as a Genre of Legal Literature".
[497] *Hidāyah*, 1:21; *Guidance I*, 17.
[498] *Hidāyah*, 1:35; *Guidance I*, 36.
[499] *Hidāyah*, 1:39; *Guidance I*, 44. This is not phrased as a maxim but is easily inferrable from a dialectical exchange.
[500] *Hidāyah*, 1:41; *Guidance I*, 48.
[501] *Hidāyah*, 1:59; *Guidance I*, 75. Also inferrable from *Hidāyah*, 1:24; *Guidance I*, 22.

g. The cause of a thing takes its place when the thing itself is hard to establish.[503]

h. A substitute is subject to whatever the original case is subject to.[504]

i. One site cannot be subject to both washing and wiping.[505]

j. A ruling connected to time is governed by the end of that time.[506]

k. A substitute cannot have a substitute.[507]

l. Something that complements another is treated as part of it.[508]

m. The ability to perform the original act before completing the substitute annuls the substitute.[509]

n. A measurement provided by the Lawgiver is followed literally.[510]

o. A quarter is treated like the whole.[511]

p. An intention is required for an act to be considered devotional (*qurbah*).[512]

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Here ends this categorisation of legal meanings. This section has presented a total of sixty-three legal meanings. No doubt, more can be extracted from arguments presented in the text. Of course, this listed presentation of legal meanings does not allow us to appreciate the sophistication with how they are brought together to direct legal discussions, as we were able to note in the chapter of *khuff*-wiping. What I have sought with this large list of examples is to show that this four-part division of legal meanings is helpful in representing four distinct forms of abstract meanings presented by the author. At the same time, the differences between topic-governing rules,

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[502] *Hidāyah*, 1:15, 45, 48; *Guidance I*, 10, 55, 58.
[503] *Hidāyah*, 1:24; *Guidance I*, 22.
[504] *Hidāyah*, 1:41-2; *Guidance I*, 47-8.
[505] *Hidāyah*, 1:45; *Guidance I*, 56.
[506] *Hidāyah*, 1:46; *Guidance I*, 56.
[507] *Hidāyah*, 1:46; *Guidance I*, 57.
[508] This is implied: *Hidāyah*, 1:46, 50; *Guidance I*, 57, 61-2.
[509] *Hidayah*, 1:47; *Guidance I*, 58.
[510] *Hidāyah*, 1:48; *Guidance I*, 59.
[511] *Hidāyah*, 1:57; *Guidance I*, 73.
[512] *Hidāyah*, 1:17; *Guidance I*, 13.

secondary legal meanings that serve these rules and wisdoms is not always clear, and observers might disagree over the classification of particular meanings. The list allows us to appreciate the legal-case-based rationality of Ḥanafī jurisprudential reasoning: Other than meanings listed as maxims, none of these legal meanings can be fully appreciated without the cases they govern, and, in fact, differentiating them from their cases also requires a degree of reflection at times.

The four-part division of meanings is only meant to serve as a framework to guide further exploration into this world of legal meanings that lies at the heart of the Ḥanafī legal commentary. Many questions remain regarding how such meanings are discovered, how they compare with each other on an epistemological scale and whether some are more established than others. This current study does not satisfactorily address these questions, but lays the groundwork and provides a framework for further investigation. We will return to these legal meanings in Section 3.3, below, to see several ways these legal meanings are put into conversation with each other and with the cases of the law to train readers in juristic reasoning. We will in that section have more to say about these legal meanings and their role in these texts. Before that, we must look at the final topic from Chapter One's theory lens: *istiḥsān*.

### 3.2.6 *Qiyās* versus *Istiḥsān*

Most of the preceding layers of legal meanings can be described as expressions of the prevalent logic of this legal system pertaining to the topics under discussion. These layers interact in various ways to influence cases governed by these meanings. A ruling that accords with the prevalent logic of the system is called the *qiyās*-position. At times, rulings are influenced by exceptions to this prevalent logic; such a ruling is termed the *istiḥsān*-position. We saw in Chapter One that there are two forms of

*istiḥsān*: The first is an exception established by either a sacred text or necessity, and the second is a subtle form of analogy termed 'hidden *qiyās*'. The latter is not really an exception; it only appears an exception at first blush. The former, however, really is an exception to the rule as it does not reflect the prevalent logic of the system, except in as much as breaking rules for the sake of necessity is a recognised principle in this system. Ḥanafī *uṣūl* works tell us that with this category of *istiḥsān*, as it is a real exception, the ruling is followed literally and is not extended to related cases unless they resemble the exceptional case in every respect.[513] There are nine direct explorations of this form of *istiḥsān*, three in dialectical sequences. In addition to these direct explorations, there are several instances of necessity (*ḍarūrah*), each of which is an indirect exploration of *istiḥsān*. These cases of necessity will be studied in the following chapter. In the current section, we look only at the direct references to the departure from *qiyās*.

The first example does not contain a reference to *istiḥsān* and *qiyās per se*. Rather, it discusses the interplay of intelligible (*ma'qūl*) and non-intelligible (*ghayr ma'qūl*) statements of law, representing prevalent logic and exceptions from prevalent logic. The example in question consists of a dialectical exchange with al-Shāfi'ī, who does not accept the validity of Prophetic reports that imply ritual ablutions are negated by filth exiting from other than the two passages (of urine and faeces). Furthermore, al-Shāfi'ī denies the validity of using analogy to oblige ritual ablutions for filth exiting from other than the two passages, since "[the obligation] to wash other than the area affected [i.e. washing the four limbs in ritual ablutions instead of the area from which the filth exited] is purely ritual (*ta'abbudī*),[514] therefore [this obligation]

[513] Al-Sarakhsī, *Uṣūl*, 1:334.
[514] For a study of the notion of *ta'abbud* as the incomprehensible in discussions of ritual in Islamic law, see Kevin Reinhart, "Ritual Action and Practical Action: The Incomprehensibility of Muslim Devotional Action".

only connects to [filth exiting from] the area mentioned in sacred texts, namely, the ordinary point of exit [of the two passages]."[515] In other words, as there is no intelligible reason why filth exiting from the two passages necessitates washing four particular limbs of the body, the topic may not be rationalised, and therefore the ruling that filth exiting the passages negates ritual ablutions may not be extended to filth exiting from other parts of the body. The Ḥanafī response is that "the exiting of filth is effective (*mu'aththir*) in the removal of ritual purity. This part of the primary case (*aṣl*) is intelligible (*ma'qūl*), while washing only the four limbs is not intelligible, but it extends [to filth exiting from other body parts] due to the extension of the former [(intelligible) meaning]." In other words, even though ritual ablutions are not intelligible, they are obliged upon the exiting of filth, and this is an intelligible meaning, i.e. it makes sense why the exiting of filth from the body would necessitate an act of self-purification. Since the non-intelligible ablutions are dependent on the intelligible notion of filth exiting the body, this non-intelligible ruling applies wherever this intelligible meaning is found to occur, in this case, by the exiting of filth from any part of the body. In this example, the word *mu'aththir* (effective) is used to describe the appropriateness of 'filth exiting' as a meaning to necessitate ritual purity. This appears a technical usage of the concept of *ta'thīr*.

Another instance of identifying limits for non-intelligible topics is the importance of using only water for ritual purity. We are told that water squeezed from trees or fruits may not be used for ritual purity because "these are not [forms of] unrestricted water (*mā' muṭlaq*), in the absence of which the judgement turns to

[515] *Hidāyah*, 1:19; *Guidance I*, 15-16.

*tayammum*. The act in these limbs is purely ritual (*ta'abbudī*) so it does not move beyond that which was explicitly stipulated [i.e. water]."[516]

A feature that is repeated when dealing with exceptions from prevalent logic by means of a sacred text is the insistence that the text be followed in as literal a way as possible. This is a part of treating an exception as an exception and not as a rule. There are three clear examples of this in the *K. al-Ṭahārāt*. The first is the case of boisterous laughter (*qahqahah*) in prayer. This, we are told, negates ritual purity as well as the prayer. This is completely against the prevalent rule that ritual purity is only negated by the exiting of physical filth from the body. We are told that the basis for this exceptional rule is the Prophetic report, "Whoever laughed amongst you boisterously, then let him repeat both his ablutions and prayer." We are told that as the incident for which these words were uttered was one of a 'complete' prayer – meaning a regular prayer with bowing and prostration – then this prescription is restricted to that. This is to exclude funeral prayers and prostrations for Qur'anic recital which are not complete prayers: As these are not exactly like the prayer concerning which this exception was made, the exception will not apply to them.[517]

A second example is the case of performing ritual ablutions with *nabīdh al-tamr*, an intoxicating beverage made from dates. We are told that this is permitted due to *mashhūr* reports that the Prophet performed ablutions with this beverage. We are then told that no other form of *nabīdh*, i.e. those not made from dates, may be used in ritual purity "in keeping with the issue of *qiyās*" (*jaryan 'alā qaḍīyat al-qiyās*),[518] i.e. because the exception-making text mentioned only *nabīdh al-tamr*.

A third example is the manner *khuff*s are wiped. We are told that only the top of the *khuff* can be wiped, not the bottom or sides. This is because the topic of *khuff*

[516] *Hidāyah*, 1:26; *Guidance I*, 26.
[517] *Hidāyah*, 1:21; *Guidance I*, 18.
[518] *Hidāyah*, 1:38; *Guidance I*, 42.

wiping is "divergent away from the prevalent rule, so everything mentioned in sacred texts [concerning it] must be observed."[519]

A central part of dealing with these *istiḥsān*-based cases is identifying whether similar cases are similar enough to these exceptional cases to share their exceptional rule. An interesting example of this is the contrast between sleep and unconsciousness. Prophetic reports suggest that sleep in particular postures, particularly postures held in the prayer, do not negate ritual ablutions. This is explained as a sensible exception, since in these postures a person is not in deep sleep and his muscles are engaged, so it is not the total muscular relaxation that would accompany the release of wind, which negates ritual purity. But we are reminded that this is still an exception to prevalent logic, so the ruling may not be extended to unconsciousness as it is a more severe state than sleep so cannot share its exception.[520] In a similar vein, we saw above the debate over which kinds of socks share the trait of the *khuff* and may thus be wiped over.[521]

These examples show the importance given to separating the rational from the non-rational in this legal project and carefully delineating the sphere of exceptions. This clears the way for the prevalent legal meanings of this legal system to take full effect and guide jurists in their formulation of rules. The discussions of *istiḥsān* in the *K. al-Ṭahārāt* are completely consistent with the theory presented in the *uṣūl al-fiqh*.

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With this ends our initial investigation of the effect of the pillars of Ḥanafī *uṣūl al-fiqh*, as identified in Chapter One, on the commentary. What we have observed throughout is a deep and principled engagement of the law through this epistemology. There can be no doubt that al-Marghīnānī viewed the underlying foundations of the

[519] *Hidāyah*, 1:44; *Guidance I*, 54-5.
[520] *Hidāyah*, 1:21; *Guidance I*, 18.
[521] *Hidāyah*, 1:46-7; *Guidance I*, 57.

legal project exactly as presented in the *uṣūl al-fiqh* of his Ḥanafi Transoxianan milieu and was completely committed to its epistemological nuances. At the same time, we have noted that he makes no effort to incorporate the specialist terms of *uṣūl al-fiqh* except where necessary. We can learn from his commitment to the underlying epistemology of *uṣūl al-fiqh* and not to its detailed nomenclature that, when discussing the relation between *uṣūl al-fiqh* and *furū' al-fiqh*, we must separate *uṣūl al-fiqh* into two layers: a layer that presents the underlying epistemology of the legal project and a layer that presents detailed theoretical investigations built on that layer. It is the first layer that informs the legal justifications of the *Hidāyah*. The latter is of no major consequence here.

## 3.3 Methods for Exploring the Law

In Chapter One, we saw a short summary of the genres of *jadal* and *khilāfīyāt*. Both are prominent features in the *Hidāyah*. The main role they play in the commentary is as methods for reasoning with the cases of the law within the epistemology of this legal system. The employment of these methods underscore the pedagogic use of texts such as the *Hidāyah*, as they take the reader through a series of discussions and alternative ways to view legal cases and manipulate established legal meanings. The current section studies the role of *jadal* and *khilāf* in the *K. al-Ṭahārāt*. It also studies the explorations of similarities and differences with other cases of the law as a further avenue for exploring the larger logic of the law.

### 3.3.1 *Jadal*

There are fifty-three complete dialectical sequences in the *K. al-Ṭahārāt*. By 'complete', I mean only that an argument is presented for both parties. Otherwise, none of these can be seen as truly complete, in that they do not represent actual dialectical exchanges, which would typically involve many steps of questions directed

against the respondent. On the contrary, the sequences in the *Hidāyah* take place in only two steps, starting with the opponent's argument and ending with the response to the opponent. The argument presented second wins the debate.

Of the fifty-three dialectical sequences, nine involve only textual evidence, ten combine textual evidence with legal meanings, and the remaining thirty-five deal only with legal meanings. We can see from this the centrality of exploring legal meanings to the employment of dialectical exchanges. I will present one of the longer exchanges to illustrate the general features of these sequences. It is an internal *khilāf* between Abū Ḥanīfah and his two companions, Abū Yūsuf and Muḥammad al-Shaybānī, with the text of the *Mukhtaṣar* emboldened.

§1 The legal case

**If they find a [dead] mouse or other creature in a well - with it not being known when it fell and with it not having bloated or disintegrated – then they repeat the prayers of a day and a night if they performed ritual ablutions from it, and they wash everything its water touched. If it has bloated or disintegrated, they repeat the prayers of three days and nights. This is according to Abū Ḥanīfah, God have mercy on him.**

§2 The debate: Abū Ḥanīfah vs an opponent

**They [Abū Yūsuf and Muḥammad al-Shaybānī] both said that they need not repeat any [prayers] unless they are sure when it fell.**

§3.1 Opponent's argument: a legal maxim

Because certitude is not lifted by doubt.

§3.2 Opponent's argument: An agreed-upon case

It becomes like [the case of] the one who saw filth (*najāsah*) on his clothing but he does not know when it affected him.

§4.1 Abū Ḥanīfah's response to maxim

[The argument] for Abū Ḥanīfah – God have mercy on him – is that death [in this instance] has a clear cause (*sabab ẓāhir*), namely, falling into water, so [death] is ascribed to it (*fa-yuḥālu ʻalayh*).

§4.2 Justification for Abū Ḥanīfah's measurements

However, bloating and disintegrating are proofs of the passage of time (*dalīl al-taqādum*), so it is determined as three [days]. The absence of bloating and disintegrating is proof of a short passage of time (*dalīl qurb al-ʻahd*), so we determined it as a day and night, because what is less than that is moments that cannot be precisely determined (*sāʻāt lā yumkinu ḍabṭuhā*).

> As for the case of filth [on clothing], Mu'allā narrates that the same disagreement applies, so it is determined as three [days] for the worn out (*al-bālī*) and a day and night for the fresh.
>
> §4.3.1 Abū Ḥanīfah's first response to agreed-upon case
>
> If it is conceded [that there is no disagreement regarding that case], then clothing is something he sees before his eyes, whereas a well is absent from his vision, so they are not the same.[522]
>
> §4.3.2 Abū Ḥanīfah's second response to agreed-upon case

There is a lot the reader is exposed to in this sequence. It starts with two possible answers to the question of a dead animal being found in a well from whose water people have performed ritual ablutions. All contributing parties agree that water in the well is rendered physically filthy due to the presence of the dead animal, but what of the prayers they have prayed with ritual ablutions performed from the well's water: Must they be repeated? The opponents, in this case Abū Ḥanīfah's companions, hold that prayers offered prior to finding the dead animal in the well need not be repeated. Two arguments are presented to support their position, both of which aim to show the greater congruence of their opinion with other established points of law. The first is a common maxim. Appealing to this maxim is a strong argument for the congruence of the suggested answer with a large number of cases across chapters. This is followed by a more specific argument for congruence from a similar case that also deals with ritual filth and repeating prayers. The response from Abū Ḥanīfah does not present a clear argument for the greater congruence of his position, but rather denies the application of the cited principle and agreed-upon case. In both cases, the reader is being exposed to important principles of argument and of legal reasoning. Regarding the legal maxim, Abū Ḥanīfah's response instructs the reader in the limits of the maxim, by pointing out that probable causes cannot be ignored, and the case in question does have a probable cause, namely, death by falling in water, which can only have occurred before the moment the animal was discovered. The dialectical

[522] *Hidāyah*, 1:35; *Guidance I*, 36-7.

sequence has thus taught the reader both a legal maxim and the limits of its application. The response to the agreed-upon case is in two steps. The first is a rejection of it by a narration from Muʿallā ibn Manṣūr (a student of both Abū Yūsuf and al-Shaybānī) that shows the case in question to be subject to the same disagreement. Based on Muʿallā's narration, Abū Ḥanīfah's response here is congruent with his response there. The second response addresses the case on the assumption that Abū Ḥanīfah's answer to the agreed-upon case does indeed align with his companions. The response aims to establish a difference between the agreed-upon case and the case under question to justify Abū Ḥanīfah's addressing it in a different way. The difference is that one's clothing is on one's person, unlike the well, which is absent: It is quite possible for a person not to notice when an animal dies in a well, and much less likely for him not to know when filth falls on his clothing.

The sequence teaches the reader a great deal. The reader has been shown an important legal maxim – "Certainty is not lifted by doubt" – and an important consideration when using this maxim in practice – probable causes must be taken into account. The reader has also been shown how cases are used to resolve related cases, and the subtle differences between seemingly related cases that must be investigated. Furthermore, the sequence also mentions reasoning behind Abū Ḥanīfah's measurements of one day and night for the non-bloated case and three days and nights for the bloated or disintegrated. The justification of the three days and nights is incomplete, but when taken together with other cases where measurements have to be justified, the reader is acquainted with the general approach to defining amounts and quantities through purely rational considerations.

This is only one dialectical sequence. There are fifty-two more in the *K. al-Ṭahārāt*, and hundreds more in the rest of the work. These dialectical sequences

underscore the role of commentaries such as the *Hidāyah* as textbooks of legal reasoning. This particular sequence also brings to the fore our previously raised question, "What is the law", in other words, what should a people practice if they find themselves in such a situation? Is it to follow strictly the one day and night for the unbloated animal and three days and nights for the bloated, as stated in the *mukhtaṣar*, or are they to follow the probable cause, suggested by Abū Ḥanīfah's argument in the dialectical sequence, if it suggests an alternative measurement? For example, what if the animal has bloated, but witness accounts, or other measures, show that it cannot have been in the water for more than two days and nights? In such a case, do they make up for two days as the argument has suggested, or still stick to the three as in the *mukhtaṣar*? The law, meaning the actual legal ruling that a person is meant to walk away with for addressing such cases, does not appear to simply be the dogmatic statement of the *mukhtaṣar*, but rather to exist between the dogmatic statements of the *mukhtaṣar* and the rational justifications offered for it. We will return to this point later. My interest for now is to attempt a categorisation of the dialectical sequences in the *K. al-Ṭahārāt*.

*1. Purely scriptural exchanges*

Nine sequences are devoted to purely scriptural exchanges. One debates the meanings of the particles *fā'* and *wāw* in the Qur'anic verse prescribing the ritual ablutions.[523] Three prefer the linguistic meanings of Qur'anic words over the implication of reports presented by the opponent.[524] Four set Prophetic statements against each other.[525] As mentioned above, there is no attempt made to show that reports supporting the Ḥanafī position are stronger in transmission. Rather, the general model is that the Ḥanafī report is presented and the opponent's report is interpreted in the light of the Ḥanafī

[523] *Hidāyah*, 1:18; *Guidance I*, 14.
[524] *Hidāyah*, 1:22, 23, 40; *Guidance I*, 19-20, 21, 45-6.
[525] *Hidāyah*, 1:24-5, 27-8, 31, 59; *Guidance I*, 22, 27-8, 31-2, 76.

report. This is with the exception of one instance, mentioned above, where the report upholding al-Shāfiʿī's opinion is declared weak in transmission.[526] Finally, there is one sequence that supports a Prophetic report against the obvious meaning of the Qur'anic text.[527] How it does this leads us to our second category of dialectical sequences. This second category includes some cases from the current category.

*2. Investigations in Legal Epistemology*

There are seven investigations – including four from the above category – that appear aimed to present key epistemological underpinnings of Ḥanafī thought. Of course, in one sense, the entire book with all of its dialectical sequences can be said to serve this purpose. However, most dialectical sequences do this only indirectly. The seven cases I mention here are also subtle and make no explicit overture to epistemology; however, as they present how a conflict between two different forms of evidence are resolved, it can be said that the role of these sequences is to guide the reader in weighing between epistemologically different forms of evidence.

The first group of these demonstrate Ḥanafī languge theory, whereby language is presented as a secure means to understanding sacred texts. Thus, we find in these exchanges linguistic understandings from Qur'anic passages being given preference over Prophetic reports. This includes the aforementioned sequence where al-Shāfʿī argues against the Ḥanafī obligation of washing inside the mouth and nose in the ritual bath, while Ḥanafīs hold it only *sunnah* to do this in ritual ablutions, with al-Shāfiʿī mentioning a Prophet report to support his position that washing the mouth and nose is *sunnah* in both purificatory rituals. The response is purely linguistic, explaining the literal difference between the word 'face' (*wajh*) which the Qur'an instructs must be washed in the ritual ablutions, and the command "thoroughly purify

[526] *Hidāyah*, 27-8; *Guidance I*, 28.
[527] *Hidāyah*, 1:37-8; *Guidance I*, 41-2.

yourselves" (*fa-iṭṭaharū*) to justify the Ḥanafī distinction between the ritual ablutions and bath regarding this practice.[528] In another revealing sequence, there is the aforementioned debate regarding the meaning of *ṣa'īd ṭayyib* in the Qur'anic verse on *tayammum*. Al-Shāfi'ī argues that it means dirt (*turāb*), citing as an authority the figure of Ibn 'Abbās. The Ḥanafī response is purely linguistic, on the derivation of *ṣa'īd* and the best rendering for the word *ṭayyib*.[529] Despite the great importance given to early jurists, including Ibn 'Abbās, in Ḥanafī legal theory, in this exchange, language was shown as the most reliable method to access the sacred text. A further sequence dealing with menstruation contrasts language with legal principles. In this sequence, Abū Ḥanīfah's position is supported with a Prophetic report that presents the least amount for menstruation as three days and nights, while Abū Yūsuf is said to hold that the least menstruation is two days and most of the third, based on the aforementioned maxim: Most of something is as all of it. The response on Abū Ḥanīfah's part is that Abū Yūsuf's position "takes away from the measurement provided by the sacred law."[530] In other words, the explicit wording provided by the report, a report transmitted through the juristic tradition, is more reliable than the application of this maxim.

Two sequences give preference to other evidence over the linguistic meanings of Qur'anic passages. In both of these, the integrity of the Qur'anic passage is maintained, but the meaning is restricted by external evidence. The first of these is a case concerning how much physical filth is allowed on a person's body before the prayer is rendered invalid. Al-Shāfi'ī and Zufar argue that no filth is allowed at all, as the text in question – "and purify your raiment" (Qur'an 77:4) – does not specify an exception. The response is that it is impossible to avoid a little bit of filth, so it must

[528] *Hidāyah*, 1:22; *Guidance I*, 20.
[529] *Hidāyah*, 1:40; *Guidance I*, 45.
[530] *Hidāyah*, 48; *Guidance I*, 59.

be excused. A measurement is then provided for this acceptable amount of filth.[531] This example shows a restriction applied to a Qur'anic text in view of the unbearable hardship of the unrestricted meaning. The principle of hardship is of course found in other Qur'anic verses, but it is taken here, and throughout the *Hidāyah*, as a doubtless principle of Islamic law which can restrict all forms of texts and principles. We will return to the topic of hardship later.

The second restricts the meaning of a Qur'anic passage by a Prophetic report, with the argument that the report in question is *mashhūr*. The sequence concerns ritual ablutions with *nabīdh al-tamr* (an alcoholic date-beverage) in the absence of water, with each of the three Ḥanafī imams adopting a different position. Abū Ḥanīfah holds that in such a case one performs ablutions with *nabīdh* and does not perform *tayammum*, citing as evidence the Prophetic report of the *laylat al-jinn* – a night in which the Prophet conversed with the *jinn* – in which the Prophet performed ablutions with *nabīdh* in the absence of water. Abū Yūsuf and al-Shāfi'ī argue that one performs *tayammum* and does not perform ablutions with *nabīdh*, based on the Qur'anic verse of *tayammum* – which orders the performance of *tayammum* upon the absence of water – as the verse is stronger, or, at least, the verse abrogates the report as the report is Meccan and the verse Medinan. Al-Shaybānī argues that one must perform both *tayammum* and ablutions with *nabīdh*; the report is not completely relied upon due to inconsistencies in its transmission and abrogation cannot be claimed as the date is not clearly known; thus both are combined out of precaution. After presenting the three arguments, al-Marghīnānī returns to defend Abū Ḥanīfah's position: "We reply that *laylat al-jinn* occurred more than once, so it is not possible to claim abrogation, and the report is *mashhūr* – it was practised by the Companions –

[531] *Hidāyah*, 1:57; *Guidance I*, 72.

the like of this can qualify the statements of the Book (*wa-bi-mithlihi yuzādu ʻalā al-kitāb*)."[532] Here, he is explicit that Companion practice can restrict what is understood from Qur'anic passages. This is completely consistent with the presentation of the *mashhūr* report in Ḥanafī *uṣūl* works.

There is one sequence not connected to language at all. It contrasts *ijmāʻ* with *qiyās*. In this sequence, al-Shāfiʻī argues that the excrement of pigeons and doves (*ḥamām*) is considered physical filth, as it transforms to something rotten and putrid, so it resembles the agreed-upon case of chicken excrement. In response, we are told that we know the purity of dove and pigeon excrement by the consensus (*ijmāʻ*) of the Muslims, who have tolerated the entry of pigeons and doves into mosques despite the instruction to purify mosques.[533] What al-Marghīnānī refers to as *ijmāʻ* is simply a reference to widespread practice. Widespread practice, in this exchange, is given preference over *qiyās*. This argument is then bolstered by the observation that the excrement in question actually does not have a foul smell, so even the *qiyās* does not properly apply.

What I wish to highlight with these examples is, again, the consistency between the epistemological underpinnings of argumentation in the *Hidāyah* and the epistemology of the Ḥanafī *uṣūl al-fiqh* tradition, and that dialectical sequences that contrast conflicting forms of evidence are excellent opportunities to study the influence of *uṣūl* epistemology.

*3. The interplay of legal meanings*

The vast majority of dialectical sequences in the *K. al-Ṭahārāt* focus on the interplay of legal meanings. At times these exchanges are accompanied by Prophetic reports, though usually they are not. At times these exchanges are accompanied by citations of

[532] *Hidāyah*, 37-8; *Guidance I*, 41-2.
[533] *Hidāyah*, 1:33; *Guidance I*, 33-4.

related cases to either disprove the stance of an opposing party or to prove the stance of the one presenting the case. For the purpose of understanding the role of dialectical sequences in exposing the reader to legal reasoning, the sequences may be further divided into three categories.

*i. Cases where the opponent's legal meaning is rejected as invalid*

The role of these sequences is to show a proposed meaning as being unacceptable, or, at least, insufficient. This rejected legal meaning is countered with an alternative legal meaning. There are fourteen such cases in the *K. al-Ṭahārāt*. At times, the legal meaning is partially acceptable but incomplete and thus invalid. An example is an exchange with Zufar, who holds that the elbows and ankles need not be washed in ritual ablutions. His argument is that since these are presented as the limits of washing – in the Qur'anic verse, "wash ... your arms *until* your elbows ... and your feet *until* your ankles" (Qur'an, 5:6) – then they need not be washed, since "the limit does not enter into that of which it is a limit," and he cites as a basis for this principle the agreed-upon case of fasting until the night. This is a reference to the (unstated) Qur'anic injunction: "Complete the fast *until* the night." (Qur'an, 2:187) Zufar's argument is that since both parties agree that this instruction does not include the night, but rather that the fast is broken as soon as day ends, then likewise the limit should be excluded in the current case. The response is brief: "In our favour is that the limit [in this case] is to exclude what is after it, since were it not for [the limit] the act [of washing] would have encompassed the whole [limb]. However, in the chapter of fasting, [it is to] extend the ruling to [the limit], since the term [fasting] applies to restraint (*imsāk*) [only] for a moment." Through this response, the reader is

acquainted with two distinct approaches to limits in sacred texts; Zufar's simple rule of limits is thus rejected as incomplete and, therefore, insufficient.[534]

Here are are four more examples:

a. Intention in ritual ablutions. Al-Shāfi'ī: Intention is obligatory because this is ritual worship (*'ibādah*), so it is invalid without intention, as in the agreed-upon case of *tayammum*. Ḥanafīs: Intention is required for it to be considered an act of devotion (*qurbah*), but without it ablutions remain a means to offer prayer since one utilises a naturally purifying substance [i.e. water], unlike *tayammum* which utilises dirt, which is only purifying in the case of needing it for prayer.[535] [The reader is introduced to a larger philosophy of purifying substances and that ritual worship has a devotional aspect but can also have a functional aspect, and each is considered independently. Al-Shāfi'ī's simple view of ritual worhip is rejected.]

b. The death of creatures without flowing blood, such as flies, mosquitoes, hornets and scorpions, in water. Al-Shāfi'ī: The water is rendered physically filthy because "prohibition [to eat] not for the sake of honour (*karāmah*)[536] is a sign of physical filth." Ḥanafīs: "It is not filthy because what makes a dead body filthy is the mixing of flowing blood within its body parts [that occurs] upon death, [and these insects do not have flowing blood]. A slaughtered animal is permissible [to eat] as there is no blood in it. Prohibition [to eat] does not necessarily imply physical filth, as in the agreed-upon case of clay."[537] [This example is an argument for 'effectiveness'. It provides a general rule about animal bodies upon death that relates to what we know

[534] *Hidāyah*, 1:15; *Guidance I*, 8-9.
[535] *Hidāyah*, 17-8; *Guidance I*, 13.
[536] "Not for the sake of honour" is to exclude humans. It is forbidden to eat humans, but this is out of honouring humans, not because they are physical filth.
[537] *Hidāyah*, 1:28; *Guidance I*, 29.

about reasons for things to be filthy and that explains the related topic of slaughtered animals. Al-Shāfi'ī's simple rule is rejected.]

c. The death of amphibious creatures in water, such as fish, frogs and crabs. Al-Shāfi'ī: The water is rendered filthy (except upon the death of fish) due to the reason cited by al-Shāfi'ī in b., above. Ḥanafīs: The water is pure because these have died in their source of origin (*ma'din*) so it is not given the qualification of 'filth', as in the case of an egg with blood inside; furthermore, there is properly speaking no blood in these, as creatures with blood do not live in water, and it is blood that makes bodies filthy.[538] [The latter argument (negating the presence of blood in these creatures) shows that the legal meaning provided in b., above, is sufficient for governing and explaining this case. However, this case was used to provide a further legal meaning pertaining to filth found in its source of origin. Again, al-Shāfi'ī's rule is rejected.]

d. A Christian performs *tayammum* to convert to Islam; is his *tayammum* valid for prayer? Abū Yūsuf: Yes, because he intended a purposeful, devotional act. Abū Ḥanīfah and al-Shaybānī: No, because dirt is only purifying when performed for a purposeful, devotional act *which is not valid without a state of purity*.[539] [The exchange highlights a subtlety brought out by this case, enabling a precise understanding of acts which may be intended with *tayammum*. Abū Yūsuf's principle is rejected as incomplete.]

The remaining examples explore the relation between unbelief and acts that require a legally valid intention,[540] whether *tayammum* is a complete form of purity or only one

[538] *Hidāyah*, 1:29; *Guidance I*, 29.
[539] *Hidāyah*, 1:41; *Guidance I*, 46-7.
[540] *Hidāyah*, 1:41; *Guidance I*, 47.

of necessity,[541] the exact quality of *khuff*s that enables them to be wiped on,[542] the nature of the dispensation awarded to someone continuously bleeding who performs ablutions to pray,[543] the connection between post-natal bleeding and the post-marital waiting period (*'iddah*) upon the birth of twins,[544] and whether the removal of filth with water is something rational or non-rational.[545] In most of these, cases from other chapters of the law are presented to support proposed legal meanings. In each, the legal meaning of the opponent is presented as either erroneous or incomplete, and is thus rejected.

*ii. Cases where both parties disagree over the appropriate application of the same legal meaning*

In this set of dialectical exchanges, both parties agree that a particular legal meaning is the relevant one to govern a particular case, but they disagree on whether it is actually present in the case in question. There are fourteen instances of this in the *K. al-Ṭahārāt*. Here are five examples.

a. The amount of bleeding and vomiting required to negate ritual purity. Zufar: Any amount of these will negate, as is the case with the two passages [of urine and faeces]. Other Ḥanafī imams: Blood must flow out from the wound and vomit must fill the mouth because, otherwise, filth has *appeared* but not *exited*; as the exit point of the two passages is not the natural place of urine and faeces, any appearance will mean filth has exited, as opposed to blood in a wound.[546] [Both parties hold that the exit of filth negates ritual purity, but disagree on what it means for filth to exit.]

[541] *Hidāyah*, 1:42; *Guidance I*, 48.
[542] *Hidāyah*, 1:46-7; *Guidance I*, 57.
[543] *Hidāyah*, 1:52; *Guidance I*, 64.
[544] *Hidāyah*, 1:54; *Guidance I*, 67-8.
[545] *Hidāyah*, 1:54-5; *Guidance I*, 70.
[546] *Hidāyah*, 1:19-20; *Guidance I*, 16.

b. Does vomiting a mouthful of phlegm negate ritual ablutions? Abū Yūsuf: Yes, because phlegm will mix with filth in the stomach, so with the vomit of a mouthful of phlegm comes a mouthful of filth. Abū Ḥanīfah and al-Shaybānī: No, because phlegm is a sticky substance that filth will not penetrate; the amount of filth attached to it will be little, and vomiting a little amount of filth will not negate ritual purity.[547] [Both parties hold that phlegm is not filthy, that it mixes with filth in the stomach and that only vomiting a mouthful of filth will invalidate ritual purity. The application of these points of agreement to the question is where they disagree.]

c. Ritual ablutions with saffron-water. Al-Shāfi'ī: This is invalid as it is not called 'water', and, furthermore, particles of dirt in natural water are only permitted out of necessity. Ḥanafīs: It is valid as it has not acquired a new name, and the ascription 'saffron-water' is like the ascription 'well-water'; furthermore, small amounts of all substances are hard to avoid, so all small amounts are permitted by necessity.[548] [Both parties hold that only something called 'water' may be used for ritual ablutions and that small amounts of other substances are excluded by necessity. The debate is on the application of these rules.]

d. Someone in a city who needs to perform a ritual bath but has only access to cold water and fears that he will become sick or even be killed from the cold. Abū Yūsuf and al-Shaybānī: He may not perform *tayammum*; it is rare for this situation to occur in a city so it is not considered. Abū Ḥanīfah: He may perform *tayammum*; such a person is truly unable to use water so his

[547] *Hidāyah*, 1:20; *Guidance I*, 17.
[548] *Hidāyah*, 1:26-7; *Guidance I*, 26-7.

circumstance must be considered.[549] [Both parties hold that inability to use water permits *tayammum* and that fear of sickness or death from water use is an accepted form of inability. The debate is whether such a situation is likely enough in a city to be awarded consideration.]

e. The imam or the follower in the Eid prayer loses ritual purity during the prayer. Abū Yūsuf and al-Shaybānī: As he is able to perform ritual ablutions and continue the prayer, he has no excuse to perform *tayammum* to continue the prayer. Abū Ḥanīfah: He may perform *tayammum* and continue the prayer as there will be a great rush of people, and it will be hard for him to continue the prayer afterwards.[550] [Both parties hold that *tayammum* can be performed for a prayer that has no substitute, that the Eid prayer constitutes such a prayer, that one who loses ritual ablutions during prayer may simply perform the ablutions and continue the prayer from where he left off as long as he does not speak or delay unnecessarily.[551] The debate is on how this applies to the case of the Eid prayer.]

The examples in these sequences are training the reader in nuances pertaining to the application of a single rule. This includes thinking about the natures of substances, the needs of people, and nuances within the rule itself. The sophistication of the *fiqh* project lies not only in identifying legal meanings, but in applying them to a case. The sequences in the current category train the reader in this aspect of *fiqh* training.

[549] *Hidāyah*, 1:39; *Guidance I*, 44.
[550] *Hidāyah*, 1:42; *Guidance I*, 49.
[551] This is a topic referred to as *binā'*: *Hidāyah*, 1:100-1; *Guidance I*, 141-2. The negation of ritual purity within the prayer does not invalidate the prayer; rather, the prayer is suspended. If the individual is able to immediately proceed to perform ritual purification without talking, exposing his nakedness and unnecessary delay, then he may return to the prayer and continue from where he left.

*iii. Cases where two valid legal meanings compete for implication*

There are a total of seven instances of this category in the *K. al-Ṭahārāt.* This category is unlike the previous two: The two disputing parties apply an opposing legal meaning, so it is unlike category 2, and the legal meaning of the opponent is upheld as valid, so it is unlike category 1. Instead, the argument here is that the meaning applied by the party defended by the author is more appropriate. Usually, one legal meaning is 'closer' to the case at hand, whilst the other is 'higher', pertaining to this topic as well as other topics. As the higher meaning is only invoked where necessary, it is often the higher meaning that is supported, but not always. Here are all seven instances of this category of sequences:

a. Ritual bath due to the exit of semen. The Ḥanafī imams agree, *contra* al-Shāfi'ī, that there must be a feeling of lust accompanying the release of semen for the ritual bath to be obliged. But they distinguish between the release of semen from its place of rest (i.e. the testes) and its actually exiting the penis. Abū Yūsuf argues that since lust must accompany release from the place of rest, it must also accompany exiting the penis. Thus, if semen exits the penis after the contractions have died and the organ is limp, the ritual bath is not obligatory. The response is simply, "It is semen [for which the ritual bath is] obliged from one point of view (*wajh*), so precaution (*iḥtiyāṭ*) is in obligation."[552] Here the 'closer' principle of 'exiting with lust' is overcome by the 'higher' principle of 'precaution'.

b. The aforementioned discussion on *khuff*s with small holes. Al-Shāfi'ī and Zufar hold that small holes render wiping invalid: "As it is obligatory to wash what is visible, it is obligatory to wash the rest." The response of the Ḥanafī

[552] *Hidāyah*, 1:23-4; *Guidance I*, 21.

imams is that "*khuff*s are rarely free of small holes, so there is hardship (*ḥaraj*) for [people] in removing them."[553] Here the 'closer' principle pertaining to the *khuff* was overcome by the 'higher' principle of hardship.

c. The aforementioned discussion on an animal found dead in a well. Abū Yūsuf and al-Shaybānī applied the higher principle, "Certainty is not removed by doubt". Abū Ḥanīfah accepted the principle but responded with the importance of considering probable causes.[554] It can be said that they applied the higher rule, while he applied a more specific consideration that was more appropriate given the nuances of the case.

d. Intention for *tayammum*. Zufar: Intention is not obligatory because *tayammum* "is a replacement (*khalaf*) for ritual ablutions, so it does not oppose it in its characteristics." The other Ḥanafī imams: *Tayammum*, lingustically, "implies intention, so it is not realised without it, or it is only purifying in a particular circumstance, while water purifies through itself, as mentioned previously."[555] Zufar's rule is valid, but it draws on a general notion of replacements and ignores the nuances of this particular topic. This nuance can be defended either by the literal meaning of the word or by the general philosophy of purifying substances presented earlier. In this example, the higher meaning is weaker.

In some cases, the two competing legal meanings enjoy the same level of closeness or height with respect to the case at hand. There are three cases of this.

e. Vomiting less than a mouthful of flowing blood. Al-Shaybānī: This does not negate ritual purity in keeping with all the rules of vomiting, which require a mouthful of vomit to negate purity. Abū Ḥanīfah and Abū Yūsuf: It negates

[553] *Hidāyah*, 1:44-5; *Guidance I*, 55.
[554] *Hidāyah*, 1:35; *Guidance I*, 36-7.
[555] *Hidāyah*, 1:40; *Guidance I*, 46.

ritual purity if it flows by its own force, as the stomach is not a place for blood, so this must be from a wound.[556] In this case the rule for vomit clashes with the rule for blood. Vomit negates purity if it is a mouthful, while blood negates as long as it flows by itself out of the wound. Al-Shaybānī applies the rule of vomiting without exception, while the other two imams apply more nuance in attempting to distinguish between these two legal meanings where the meaning for blood is more appropriate; hence, their position is defended.

f. When is water utilised for ritual purity considered 'used' (*musta'mal*) and therefore unfit to be used again? Al-Shaybānī: Water is only considered used if the person intended his ablutions as a devotional act, because used water is made unfit for subsequent purification due to sins transferring to the water, and this only happens if the person intended an act of devotion. Abū Yūsuf: Yes, this is correct, water is considered used if the person intended a devotional act; but it is also used if it removes ritual impurity from a person's limbs, even if he did not make an intention.[557] In this case, there are two possible meanings that can govern what renders water 'used'. The answer presented as preferred combines both meanings together. Thus someone in a state of ritual impurity might wash his hands, for example, with no particular intention, but thereby ritual impurity is washed away from his hands, so the water is considered used, as per Abū Yūsuf's rule. And likewise, someone already in a state of ritual purity might perform ablutions again, intending it as an act of devotion, and thereby the water is also considered used.

g. Must a person hoping to find water near the end of the prayer time wait until the end of the time, or may he perform *tayammum*? Abū Ḥanīfah and Abū

[556] *Hidāyah*, 1:20; *Guidance I*, 17.
[557] *Hidāyah*, 1:30; *Guidance I*, 30-1.

> Yūsuf in a weaker narration: The person must wait and may not perform ablutions due to the well-known maxim: That which is predominant is treated as realised (*ghālib al-ra'y ka-al-mutaḥaqqaq*). Abū Ḥanīfah and Abū Yūsuf in the stronger narration: The person is recommended to wait, but does not have to, based on the well-known maxim: That which is definitely established is not removed except by a certainty like it.[558] In this example, two maxims – or 'higher' legal meanings – clash for implication, and preference has been given to the latter maxim, probably for the very good reason that one can never really be sure to find water by a particular time in such a circumstance.

The dialectical sequences in this category also offer a very specific form of training in jurisprudential reasoning. They show the interplay of valid legal meanings, often functioning at different levels – what I have referred to loosely as 'higher' and 'closer' meanings. In these exchanges, the conclusions are sensible, meaning that the reader is generally able to appreciate why a particular legal meaning was given preponderance, even where an opposing meaning could have expressed itself.

With this ends our exploration of dialectical sequences and their use in investigating the interplay of legal meanings. It is clear that dialectical sequences present a rich arena for training in juristic reasoning. If one considers the hundreds of such sequences found in the *Hidāyah* and the many legal principles, maxims, practical considerations, philosophies of topics and related cases they present, one can begin to discern the power of such texts in their pedagogic role of training jurists.

### 3.3.2 *Khilāf*

Presenting areas of juristic disagreement, *khilāfīyāt*, is another primary interest of the commentary. Many of these cases of *khilāf* are explored through dialectical

[558] *Hidāyah*, 1:41; *Guidance I*, 48.

sequences. These have been studied above. In the current section, we look at presentations of *khilāf* that are not accompanied by complete dialectical sequences. These presentations of *khilāf* at times have arguments to support only one party, at times there are arguments for each party without any attempt to give preference to a particular argument, and at times the *khilāf* is stated without accompanying argument. For our purposes, we can divide these explorations of *khilāf* into two categories: inter-school *khilāf* and intra-school *khilāf*.

1. *Inter-School* Khilāf

There are thirteen such cases of inter-school *khilāf* in the *K. al-Ṭahārāt*. In eight of these cases, the position of the school is defended with a Prophetic report against the position of an opponent, for whose position no evidence is presented. Here is the first example of this, with the text of the *mukhtaṣar* in bold:

> **The obligatory amount [is to wipe] the amount of a forelock** due to what has been narrated from al-Mughīrah ibn Shu'bah that the Prophet came to the waste area of a people and urinated, then performed the ritual ablutions, wiping his forelock and *khuff*s. ... This is a decisive case against al-Shāfi'ī in determining the [minimum] amount [to be wiped] with three hairs and against Mālik in stipulating encompassing [the entire head with wiping].[559]

The role served by such exchanges seems simply to make the reader aware of key areas of disagreement with opposing legal schools. They provide an opportunity for teachers and commentators to present opposing arguments and convert these into dialectical sequences. Beyond this general awareness, they do not seem to serve a further purpose.

At times the inter-school *khilāf* is an opportunity to emphasise a particular legal meaning. Here is one example: "**The saliva of predatory land animals is physically filthy**, as opposed to al-Shāfi'ī – in other than the dog and pig – because their meat is filthy, and from [meat] saliva is born. This is the meaning considered in

[559] *Hidāyah*, 1:15; *Guidance I*, 9-10.

this topic (*al-mu'tabar fī al-bāb*)."[560] Here, again, the reader is acquainted with a key area of disagreement with the Shāfi'ī school. Although no argument is presented for al-Shāfi'ī, the argument has made a strong case for the sensibleness and consistency of the Ḥanafī approach to the topic. This is probably seen as a sufficient argument against whatever argument al-Shāfi'ī might present. As above, it presents an opportunity for commentators and teachers to convert this into a dialectical sequence. A similar, but lengthier, example pertains to the purity of the dog's hide:

> [The Prophetic saying, 'Any hide that is tanned is purified,'] is a decisive case against al-Shāfi'ī concerning dog-hide. Dogs are not filthy in essence (*najas al-'ayn*). Do you not consider that it is used in guarding and hunting, as opposed to the pig, which is filthy in essence due to the [pronoun] 'it' in His saying – Most High – 'Surely *it* is absolute filth (*rijs*).'[561]

As above, the author probably deemed this a sufficient argument against whatever argument al-Shāfi'ī might have presented. It has also afforded an opportunity to explore the difference between pigs and dogs: The fact that the latter may be utilised for human purposes shows that it is not filthy in its essence and thus its hide can be purified.

In one instance, there is no argument presented for either party, and the passage merely implies why the *khilāf* exists: "**If [a Christian] performs ritual ablutions, not for the purpose of becoming Muslim, but then subsequently becomes Muslim, he is ritually pure**, as opposed to al-Shāfi'ī, based on [his] stipulation of intention [for ritual purity]."[562] Both parties hold that an unbeliever cannot have a valid intention, but have disagreed whether an intention is necessary for ritual purity. We are told, with the briefest expression, that the disagreement here stems from the previous disagreement.

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[560] *Hidāyah*, 1:36; *Guidance I*, 38.
[561] *Hidāyah*, 1:31-2; *Guidance I*, 32.
[562] *Hidāyah*, 1:41; *Guidance I*, 47.

The thirteen cases of inter-school *khilāf* present the awareness of main points of *khilāf* as an important part of a jurist's training, even where these cases are not used for explorations of legal meanings and reasoning. In some of these, we are only given a Prophetic report to support the Ḥanafī position, and, in others, the *khilāf* is dismissed with the legal meanings that support the appropriateness and consistency of the Ḥanafī position.

### 2. *Intra-School* Khilāf

There are thirty-one cases of internal *khilāf.* At times, the *khilāf* is presented with no further exploration or argument, while at other times, there is further argument, but not for the sake of opposition. There is a very different flavour between the intra-school *khilāf* and the inter-school *khilāf* presented above. Whereas the position of the opponent in the inter-school *khilāf* is dismissed, the positions in intra-school *khilāf* are presented as plausible conclusions in a shared enterprise. The key objective behind arguments in intra-school *khilāf* is showing how a particular position can be comprehended in the light of the legal meanings associated with the particular topic. The commentator often refers to this as the *wajh* ('manner', 'avenue') of the position. At times, the intra-school *khilāf* is between different figures from Abū Ḥanīfah's circle; at times, it is between two narrations from a single figure; and at times, it is between the positions of unknown figures from the school tradition, presented only with "It is said". We will see examples and nuances of each of these.

#### *i. Intra-School* Khilāf *Without Argument*

There are five instances of internal *khilāf* without an argument. In each of these instances, the author is merely acquainting the reader with the existence of a disagreement. We can see from this the importance of being aware of different internal positions as part of juristic training, and that these are not always mentioned

for the sake of argument. Again, these might be converted into dialectical sequences on the part of teachers and commentators. Some of these disagreements appear to present opportunities for legal reasoning, while others appear to be mentioned only for practical possibilities they provide. I provide my thoughts on the purposes served by the presentation of *khilāf* in the following examples.

a. Multiple bouts of vomiting. Abū Yūsuf and al-Shaybānī agree that a mouthful of vomit negates ritual ablutions, but disagree when to add together multiple bouts of vomiting to see if they amount to a mouthful: "According to Abū Yūsuf, the unity of the setting is considered [i.e. they are added if they occur in the same place] and according to Muḥammad, the unity of the cause, namely, convulsions (ghathayān) [i.e. they are added if issuing from the same convulsions]."[563]

   No reasons are provided for either position, although someone trained in this jurisprudential system should not struggle providing plausible reasons for each. Which to practise? He gives no sign of preference. The jurist appears left to follow either or the one that seems most reasonable.

b. The Friday ritual bath. The commentator states it is highly recommended (*sunnah*) to perform a ritual bath on Friday *for the prayer* according to Abū Yūsuf, meaning that a person should not lose ritual purity after the bath until offering the prayer. We are then told, in few words, "And regarding this there is the disagreement of al-Ḥasan" (*wa-fīhi ikhtilāf al-Ḥasan*),[564] implying that according to al-Ḥasan ibn Ziyād, Abū Ḥanīfah's student, the ritual bath on Friday is not for the prayer; it is just for Friday.

[563] *Hidāyah*, 1:20; *Guidance I*, 16.
[564] *Hidāyah*, 1:25; *Guidance I*, 23.

It appears this disagreement is mentioned for its practicality. If one is unable to perform the bath expressly for the prayer as stipulated by Abū Yūsuf, there is the easier, more relaxed position of al-Ḥasan, should a person need it.

c. Filth in a large pool of water. The statement of al-Qudūrī's *Mukhtaṣar*, incorporated into *Bidāyat al-mubtadī*, is that if filth falls in one side of a large pool, water from the other side of the pool may be used for ritual purity. Al-Marghīnānī remarks that al-Qudūrī's wording contains "an allusion to the fact that the site in which [the filth] fell has become filthy. And [it is narrated] from Abū Yūsuf that it is not rendered filthy except by the appearance of the trace of filth, as [is the case] with flowing water."[565]

No arguments are presented. Al-Qudūrī's position is easily inferrable from the other cases regarding water and filth. The latter position is not directly inferrable; instead, a similarity is presented with the case of flowing water. It appears the latter is mentioned to offer an avenue for an easier approach to the topic, should it be needed.

d. Buckets used in purifying wells. Various amounts of buckets are to be removed from a well to purify it upon the death of an animal in the well, amounts differing depending on the size of the animal. We are then told about these buckets that are to be used: "What is considered in every well is its own bucket which is used to draw water out of it. And it has been said [that it is] a bucket that encompasses a *ṣā'* (a measure of volume)."[566]

These appear to be later attempts to provide detail to cases from Abū Ḥanīfah's circle that speak of buckets with no further descriptions. Al-

[565] *Hidāyah*, 1:28; *Guidance I*, 28-9. Flowing water (*mā' jārin*) does not become filthy by coming into contact with filth unless traces of this filth – smell, colour or taste – show.
[566] *Hidāyah*, 1:34; *Guidance I*, 35.

Marghīnānī appears to prefer the former opinion, as it is stated definitively and does not impose an external measurement on the statements of Abū Ḥanīfah's circle, while the latter is preceded by "it is said". Why mention the latter position? It appears that, again, it offers possibilities for practice, because the preferred opinion is vague. Perhaps a *muftī* would require an actual measurement.

e. Liquids other than water for washing physical filth. Abū Ḥanīfah and Abū Yūsuf hold that filth can be washed away with any liquid, and that water is not a condition. We are then told that the *mukhtaṣar* "does not differentiate between clothing and the body, this being the position of Abū Ḥanīfah and one of two narrations from Abū Yūsuf. And [it is narrated] from [Abū Yūsuf] that he differentiated between the two and did not permit other than water on the body."[567]

No reason is given for Abū Yūsuf's other narration, and it is much harder for the reader to provide a reason for this seemingly arbitrary differentiation between body and clothing. Furthermore, the position is harder to practise as it restricts the substances that can be used on a person's body. So why add it? We can only speculate: Either it is a strong transmission from Abū Yūsuf, so he wishes it to be known, or he mentions it to advise caution in practising this topic.

*ii. Intra-School* Khilāf *With a Single Argument*

There are nine cases of intra-school *khilāf* where an argument is presented for one of several opinions presented. These forms of *khilāf* are mentioned to present an alternative solution to a problem. Again, it can be challenging to identify whether the

[567] *Hidāyah*, 1:55; *Guidance I*, 70.

commentator prefers one of these positions over the other, or whether both are to be taken as equals. I present my speculation on the commentator's preference in the following examples.

a. How much to wipe of the head in ritual ablutions. The *mukhtaṣar* mentions the amount of the forelock, that this equals a quarter of the head and that this is supported by a Prophetic report. After explaining this, al-Marghīnānī adds, "And in some narrations, some of our associates (*ba'ḍ aṣḥābinā*) have determined it [to equal the size of] three fingers from the fingers of the hand, because this is the most of what is the basic tool for wiping [i.e. the hand],"[568] a reference to the maxim, 'the most of a thing is as all of it'.

   He appears to only add this position to show it has also been transmitted and has a sensible basis, not to prefer it: It appears weaker due to his two uses of 'some': "In *some* narrations ... *some* of our associates".[569]

b. The passing of wet fingers through the beard (*takhlīl al-liḥyah*) in ritual ablutions. The *mukhtaṣar* states it is *sunnah*. The commentary supports this with a Prophetic narration, but then adds, "It is said that it is a *sunnah* according to Abū Yūsuf, and [merely] permissible according to Abū Ḥanīfah and Muḥammad because the *sunnah* is what completes the obligation in its site, and the inside [of the beard] is not a site for the obligation."[570]

   It appears that he might prefer this latter opinion, namely, that passing fingers through the beard is not a *sunnah* but, rather, is simply an act that may

[568] *Hidāyah*, 1:15; *Guidance I*, 10.
[569] I have added this case in the category of *khilāf* with argument presented for only one opinion, when there is, in actual fact, an argument offered for each. The reason for this is that he offers no rational argument for the former to contrast with the latter. And it is these rational arguments that are employed to show the *wajh* of a particular position. Interestingly, this weaker opinion along with its argument is the position found in the *Aṣl*: al-Shaybānī, *al-Aṣl*, 1:34.
[570] *Hidāyah*, 1:17; *Guidance I*, 12.

be done, because the reason he gives is identified above as a topic-governing rule.

c. Ritual baths deemed *sunnah* to perform. The *mukhtaṣar* lists the following ritual baths as *sunnah*: the bath for the Friday and Eid prayers, at ʻArafah (on *ḥajj*) and for entering the state of pilgrim sanctity or *iḥrām*. The commentator then adds, "It is said that these four are recommended (*mustaḥabb*). Muḥammad calls the ritual bath for Friday 'good' (*ḥasan*) in the *Aṣl*."[571]

He appears to support the opposing narration, which he defends through the wording of al-Shaybānī's text, as he presents no argument to support the position of the *mukhtaṣar*, and as it is more congruent with his relegating several *sunnah* acts of the ritual ablutions in the *mukhtaṣar* to the level of *mustaḥabb*.

d. Sheep faeces found in a container of milk; is it excused if little, as is the case with pieces of sheep faeces in wells, or not? The commentary states, "A small amount is not excused in a container, based on what has been said, due to the absence of necessity. And it has been narrated from Abū Ḥanīfah that it is like a well with respect to one or two pieces of faeces."

From the presentation, one would assume the former to be the stronger position, and that he presented the latter to acquaint the reader with it for its practical advantage.

e. The obligatory amount to wipe of the *khuff*. The *mukhtaṣar* states the obligatory amount to be three fingers (*aṣābiʻ*) from the hand. The commentator tells us that al-Karkhī held it to be three toes (*aṣābiʻ*) from the

[571] *Hidāyah*, 1:24; *Guidance I*, 22.

foot, and then notes, "The former is soundest (*aṣaḥḥ*) for its consideration of the tool of wiping [i.e. the hand] (*i'tibāran li-ālat al-masḥ*)."

The last is the only example where he clearly states a preferred position. Otherwise, the reader is challenged to identify where the author intends one to be a preferred position and where both may be taken as equals for implementation. I believe a careful engagement with the arguments throughout the book will train the reader in distinguishing between these two different purposes by regarding the manner in which he presents the *khilāf* and the nature of argument employed.

*iii. Intra-School* Khilāf *With Multiple Arguments*

In the *K. al-Ṭahārāt*, there are seventeen instances of internal *khilāf* with arguments presented for multiple positions. At first glance, one might think of these as dialectical exchanges, but they are not. There is no conflict in these exchanges. Each is presented as a possible application of valid legal meanings to addressing a particular case. Here are some examples with observations on nuance with each example.

a. Scratching off the remains of semen. The *mukhtaṣar* states clothing may be purified by scratching off dried semen. Concerning scratching semen off of the body, the commentator states, "Our teachers (*mashāyikhunā*) have said that it is purified by scratching because the [frequency of] affliction is more. It is narrated from Abū Ḥanīfah that it is not purified except by washing, because the heat of the body pulls it in so it does not form a body [of its own], and because the [human] body cannot be [deeply] scratched."[572]

The position of the *mashāyikh* seems the one that is taught and accepted. It appears that the narration from Abū Ḥanīfah has been added to advise caution.

[572] *Hidāyah*, 1:56; *Guidance I*, 71.

b. Purifying a well whose water cannot be emptied. In this case, the various opinions are presented simply as valid ways to solve a problem and do not reflect conflicting legal insights. It is the case of a well, all of whose water must be removed to purify it, but it cannot be emptied due to a constant source of water running into it.

> **If the well has a constant source of inflowing water such that it can never be emptied, they remove the amount of water contained in it.** The way to know this is by a hole being dug resembling the amount taken up by water in the well, then withdrawing water from the well and pouring it in [the hole] until it is filled. Or a cane is placed into it, and the part reached by the water is marked; then ten buckets, for example, are removed and the cane is replaced to see how much the level has diminished; then for every such amount, ten buckets are removed. These both are from Abū Yūsuf. And [it is narrated] from Muḥammad that two to three hundred buckets are removed. Perhaps he built this opinion based on what he observed in his city. And [it is narrated] from Abū Ḥanīfah in *al-Jāmi' al-ṣaghīr* regarding such a case that they keep withdrawing until the water overcomes them, but he didn't determine a measurement for 'overcoming', as is his habit. And it is said that they take the opinion of two men with insight into matters of water, and this is most in accord with deep understanding (*wa-hādhā ashbah bi-al-fiqh*).[573]

None of the narrations from the school's imams is presented as being weaker or stronger than the others. The role of the *khilāf* is to present possible methods for achieving a shared aim. In this instance, the author provides an opinion from an unnamed source that he finds most penetrating in understanding. Such forms of resolution are not frequent.

c. The status of water used in ritual purity. Abū Ḥanīfah considered such water to be physically filthy, with two narrations from him concerning whether it is heavy or light filth: "In the narration of al-Ḥasan from Abū Ḥanīfah, it is heavy filth, in consideration of water used to remove actual filth. In the

[573] *Hidāyah*, 34-5; *Guidance I*, 36.

narration of Abū Yūsuf – which is Abū Yūsuf's [own] position – it is light filth due to the presence of disagreement."[574]

The role of the *khilāf* is similar to b., above, in that it shows the reasonableness of multiple solutions, except that here they represent multiple narrations from a single jurist.

d. The death of creatures that live in water, such as fish, frogs and crabs. The *mukhtaṣar* states that water is not rendered filthy by the death of such creatures. The commentary provides two legal meanings to explain this: first, that they died in their source of origin, so they cannot be considered filthy, second, that they don't have blood in them, and it is blood that makes the bodies of dead animals filthy. A *khilāf* case is then presented: "In other than water, it is said that other than fish ruins it [by rendering it filthy], as it is not the source of origin; and it is said that it does not ruin it as there is no blood, and this is soundest (*al-aṣaḥḥ*)."[575]

The role of the *khilāf* in this instance is to allow two legal meanings presented previously to be placed head-to-head in a scenario where they lead to different conclusions. In this instance, he gives definitive support to one opinion.

e. Peforming the ritual bath with *nabīdh al-tamr*. The *mukhtaṣar* states that Abū Ḥanīfah permitted ritual ablutions with *nabīdh al-tamr*, the alcoholic date beverage. The commentary introduces a *khilāf* in which possible solutions from later scholars seek to address what Abū Ḥanīfah's position would have been regarding the permissibility of performing the ritual bath with this beverage: "As for bathing with it, it has been said that it is allowed according

[574] *Hidāyah*, 1:30; *Guidance I*, 30.
[575] *Hidāyah*, 1:29; *Guidance I*, 29.

to him in consideration of [the permissibility of performing] ritual ablutions [with it]. And it is said that it is not allowed, as it is above it (*li-annahu fawqahu*)."[576]

The role of this *khilāf* is to present two possible extrapolations of Abū Ḥanīfah's ruling on ablutions with *nabīdh*, both with a *wajh*, an avenue through which it can be seen as reasonable. The first permits it, as both ablutions and ritual bath are forms of purity that require water. The second prevents it, as the bath is *above* ritual ablutions, this being a reference to *istiḥsān*: As the use of *nabīdh* is an exception to the general rule of using water, it may only be applied to the ritual bath if the latter resembles the former in every particular; but the ritual bath is a more intense form of purification for a rarer cause, so it cannot be subsumed under an exception made for a lower form of purity.

f. The status of horse meat and urine. Al-Shaybānī considers horse urine pure, while Abū Yūsuf and Abū Ḥanīfah consider it light filth. Al-Shaybānī and Abū Yūsuf consider its meat lawful to eat, while Abū Ḥanīfah does not permit it. Al-Shaybānī finds horse urine pure "because the urine of [creatures] whose meat may be eaten is pure according to him, while it is light filth according to Abū Yūsuf, with its meat being permissible to eat according to both. As for Abū Ḥanīfah, the lightening [of its filth] is due to the conflict of reports (*ta'āruḍ al-āthār*)."[577]

The role of the *khilāf* in this example is different from previous examples. Its purpose is not to simply suggest that these are all reasonable solutions, but that each imam has a principle unique to himself that he has

[576] *Hidāyah*, 1:38; *Guidance I*, 42.
[577] *Hidāyah*, 1:58; *Guidance I*, 74.

applied consistently in this case. The *khilāf* exists to elucidate each imam's unique principle: In such exchanges, Ḥanafī imams are presented as independent jurists, each constructing his own legal edifice on independent insights. If there is a choice the reader must make, it does not pertain simply to one case – such as the status of horse urine in this example – but to the whole body of cases that are based on this singular independent insight. Al-Shaybānī's consistently applied independent principle is that the urine of all animals that may be eaten is pure, and thus has he judged here, as horse meat may be eaten. Abū Yūsuf holds that the urine of animals that may be eaten is light filth, and thus has he judged here. Abū Ḥanīfah's ongoing principle is that cases where sacred texts – referred to here as *āthār* – conflict as to whether they constitute filth or not are treated as light filth, and cases where texts agree are treated as heavy filth. Each has stayed consistent to his own principle for the case at hand.

g. Drinking the urine of animals whose meat may be eaten. The Ḥanafī imams disagreed over the permissibility of drinking such urine, due to an incident where the Prophet instructed some people to drink the urine of a particular group of camels to cure them of an ailment.

> According to Abū Ḥanīfah, it is impermissible to drink it as a cure or otherwise, as there is no certainty that it contains a cure [for a particular case], so the unlawfulness established [for ingesting filth] is not overstepped. According to Abū Yūsuf, it is permissible as a cure, due to the story [of the Prophet's permitting it]. According to Muḥammad, it is permissible as a cure and otherwise, as it is pure according to him.[578]

The role of the *khilāf* in this example is similar to f., above, except that the disagreement between Abū Ḥanīfah and Abū Yūsuf is not due to

[578] *Hidāyah*, 1:33; *Guidance I*, 34.

conflicting principles, but rather whether to make an exception for the sake of this Prophetic report to their agreed-upon prohibition of drinking such urine: It is a disagreement over establishing *istiḥsān*. As for Muḥammad, his disagreement is due to his own principle, as in f., above.

We have seen, here, several aims and uses of intra-school *khilāf* in the commentary tradition. Many of these aims are clear to us. These include assessing the reasonableness of multiple solutions to a proposed question, understanding the individual insights of different jurists from Abū Ḥanīfah's circle, and presenting possible solutions to questions based on principles derived from the legal cases of Abū Ḥanīfah's circle. There are also aims that are not immediately clear: When does the author wish to give the reader a choice regarding which position to adopt, and when does he prefer a particular position? It appears that a deeper grasp of the world of legal meanings presented throughout the commentary is the key for understanding how to negotiate these various presentations of juristic disagreements.

### 3.3.3 Similarities and Differences

An important part of exploring legal meanings is comparison with other established cases of the law. Sometimes a similarity with another case is used to support the appropriateness of a particular legal case. Sometimes a difference from a related case is used to illustrate the opposing effects of a single legal meaning. At times similarities are not used to support a case, but to answer a question pertaining to it.

These similarities are often invoked in dialectical exchanges, where opposing parties will strengthen their own proposed position through a similarity or weaken the opponent's position through a difference. The entire topic is grounded on a key assumption of the law, namely, that it is fully consistent and coherent. Similarities are

to be expected across its chapters and differences must be explained. The topic is a further illustration of observing the habit of the law to answer questions of the law.

This topic is tied to particular linguistic markers, each serving a different purpose. There are four main linguistic markers that introduce similarities and differences: *ka*, *bi-khilāf*, *i'tibāran* and *ashbaha*. We will inspect each linguistic marker in turn and, through this, observe a further feature of the commentary, the precision with which the author applies seemingly non-technical terms. These linguistic devices are markers of the fully developed commentary tradition of which the *Hidāyah* is a part.

*1.* '*Like*' *(*ka*)*

The genitive particle, *ka*, occurs twenty times to introduce a similar legal case to the one under investigation. The *ka* is used in two distinct ways:

i. *As a primary case to support a legal meaning*

In these cases, the similarity is presented as a form of analogical reasoning. The case after *ka* is agreed upon amongst debating parties. This case is governed by a particular legal meaning. That legal meaning is also present in the case under consideration. Therefore the prescription applied to the case after *ka* should also be applied to the case under consideration. There are eight instances of this. Only in two of these does the case after *ka* also pertain to ritual purity, while two pertain to the ritual prayer, and three to other chapters. We commence with examples containing cases from other chapters, as these indicate the far reaching search for consistency in this legal tradition.

a. Zufar holds that elbows are not washed in ritual ablutions as the Qur'anic passage states, "Wash...arms *until* the elbows", arguing that "the limit does not

enter into the thing for which it is a limit, *like* the night in the topic of fasting."[579] This argument was discussed above.

b. Al-Shaybānī holds that if someone already in a state of ritual purity were to perform ritual ablutions, intending it as an act of devotion, the water touching his limbs is considered 'used' (*musta'mal*) and may not be used for subsequent ritual ablutions: "An act of devotion has been performed with it so its trait changes, *like* the wealth of *ṣadaqah*."[580] This is a reference to the money paid in *zakāh*. It is considered filthy money with respect to the Prophet's family, as they are not permitted to receive it.

c. All Ḥanafī imams agree that a non-Muslim may not make a valid intention for ritual acts, and, so, is unable to perform *tayammum*, as intention is a condition for *tayammum*. Zufar holds that, similarly, if a Muslim makes *tayammum* and then leaves Islam, his *tayammum* is invalidated, "because unbelief negates it, so initiating and continuing are the same, *like* unmarriageable-ness (*maḥramīyah*) in marriage,"[581] i.e. just as one may not initiate a marriage with someone unmarriageable (*maḥram*), if one's spouse becomes unmarriageable during the course of the marriage, then the marriage is annulled.

The following examples invoke cases of ritual purity.

d. It is not possible to avoid small amounts of substances like saffron mixing with water, so they are excused and such water may be used for ritual purity, *like* bits of the earth mixing into natural forms of water.[582]

e. If a frog dies in water, it does not make that water impure as it is the source of its origin (*ma'din*), *like* blood in an egg.[583]

[579] *Hidāyah*, 1:15; *Guidance I*, 8-9.
[580] *Hidāyah*, 1:30; *Guidance I*, 30.
[581] *Hidāyah*, 1:41; *Guidance I*, 47.
[582] *Hidāyah*, 1:27; *Guidance I*, 26-7.

f. Abū Ḥanīfah and Abū Yūsuf: The urine of animals that may be eaten is filthy because it results in something rotten and putrid, *like* the urine of animals that may not be eaten.[584]

g. Abū Yūsuf and al-Shaybānī: If filth is found in a well, we assume it fell in when it was found, because certainty is not lifted by doubt, *like* filth found on one's clothing.[585]

h. Al-Shāfi'ī: Intention is a condition for ritual ablutions, because ritual worship is not valid without an intention, *like tayammum*.[586]

ii. *To compare two cases without mention of a shared legal meaning*

In ten instances, the particle *ka* is used only to confirm that the case under consideration is similar to another case that supports it by virtue of its existence, not a specific legal meaning that is alluded to. In these cases, the case after *ka* is usually from the chapter of purity, but not always. Here are examples.

a. The head is not wiped thrice; it is *sunnah* to wipe it once, *like* wiping the *khuff*.[587]

b. Abū Yūsuf: A large amount of water does not become filthy when it comes into contact with filth unless traces of the filth appear, *like* flowing water.[588]

c. Abū Ḥanīfah: A container of milk is not rendered filthy if a piece or two of the faeces of livestock is found in it, *like* a well.[589]

d. In menstruation, we need only consider the presence of blood at the beginning and end of the menstrual period, "*like* the poverty line (*niṣāb*) in the chapter of

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[583] *Hidāyah*, 1:29; *Guidance I*, 29.
[584] *Hidāyah*, 1:33; *Guidance I*, 34.
[585] *Hidāyah*, 1:35; *Guidance I*, 36.
[586] *Hidāyah*, 1:17; *Guidance I*, 13.
[587] *Hidāyah*, 1:18; *Guidance I*, 13.
[588] *Hidāyah*, 1:28; *Guidance I*, 28-9.
[589] *Hidāyah*, 1:33; *Guidance I*, 33.

*zakāh*."[590] In the topic of *zakāh*, when assessing if someone needs to pay *zakāh*, we check that he is above the poverty line (*niṣāb*) at the beginning and end of the lunar year, and pay no attention to fluctuations in between.

e. It is recommended for the one hoping to find water to delay the *tayammum* until the end of the prayer time, *like* the one hoping to catch a group prayer.[591]

f. Abū Yūsuf: The prayer is not valid if someone performs *tayammum* forgetting he had water in his saddle bag, *like* the one who prays naked forgetting he has clothes.[592]

g. A protective covering (*jurmūq*) over *khuff*s serves the objectives of the *khuff*, so it is treated as a part of it, *like* a *khuff* with two layers.[593]

h. Zufar and al-Shaybānī: A woman does not enter post-natal bleeding after the birth of the first of two twins, *like* the fact that she is not considered to be menstruating in such a case.[594]

i. Clothes affected by physical filth are washed until one has reasonable certainty (*ghālib al-ẓann*) that the filth is removed, *like* determining the direction of prayer.[595]

These are all instances of directly comparing a case to a case, without the intermediary of a particular legal meaning upheld by the compared case. Most of these can be presented in the form of the cases mentioned in the first group with the addition of a legal meaning. The fact that they are not mentioned in such a way is an illustration of the meaning-laden view of legal cases in this legal tradition: Since cases

[590] *Hidāyah*, 1:50; *Guidance I*, 63.
[591] *Hidāyah*, 1:41; *Guidance I*, 48.
[592] *Hidāyah*, 1:42; *Guidance I*, 50.
[593] *Hidāyah*, 1:46; *Guidance I*, 57.
[594] *Hidāyah*, 1:54; *Guidance I*, 67-8.
[595] *Hidāyah*, 1:58; *Guidance I*, 75.

are meaning-laden, mere similarity to a case represents a legal argument, because the similarity will be on the level of an abstract meaning that they share.

2. *'Unlike' (*bi-khilāf*)*

The phrase *bi-khilāf* is used a total of sixteen times to introduce a case that is presented as being different from the case under investigation. This happens for two different reasons:

*i. To illustrate the efficacy of a stated legal meaning*

This is the more common use of the *bi-khilāf* construction, with eleven of the sixteen cases being for this reason. In these cases, the argument is that the *bi-khilāf* case is different from the original case precisely because the legal meaning governing the original case is absent, thus illustrating its efficacy. Here are seven examples.

a. There is no need to intend purification when performing ritual ablutions with water because one is using a naturally purifying substance, *unlike tayammum*, as dirt is not naturally purifying.[596]
b. There is no repetition for wiping the head because that would resemble washing, *unlike* washed limbs, as repetition does not affect them.[597]
c. Deep sleep whilst leaning upright against something negates ritual ablutions, because in such a situation the muscles are completely relaxed (so the person might pass wind), *unlike* sleep while standing, sitting, bowing or prostrating, as there is still some control left in the body.[598]
d. A worm exiting the private area negates ritual ablutions as there is a small amount of physical filth on it, *unlike* wind passing through the vagina or penis, as this does not originate in a place of physical filth.[599]

[596] *Hidāyah*, 1:17-8; *Guidance I*, 13.
[597] *Hidāyah*, 1:18; *Guidance I*, 13.
[598] *Hidāyah*, 1:21; *Guidance I*, 17-18.
[599] *Hidāyah*, 1:22; *Guidance I*, 19.

e. A woman need not wash inside her braids in the ritual bath, *unlike* the beard of a man, as there is no hardship in making the water reach inside it.[600]

f. Inserting the penis into a human's anus is a perfect cause for ejaculation so a ritual bath is obliged, *unlike* doing so into an animal or another place besides the vagina, as these are not perfect causes.[601]

g. A dog is not essential filth (*najas al-'ayn*) as it can be used in guarding and hunting, *unlike* the pig, which cannot be used such because it is essential filth.[602]

ii. *To show that a seemingly similar case is governed by an opposing legal meaning*

This occurs five times. The two opposing legal meanings in each case are in italics below.

a. Al-Shāfi'ī: Water with saffron may not be used for ritual purity as it is now *qualified*, *unlike* parts of the earth, because water is *not ordinarily free* of them.[603]

b. One may wipe over the protective covering (*jurmūq*) on a *khuff*, because it *completes the objectives* of the *khuff* so is treated as part of it, *unlike* if he wears the *jurmūq* after losing ritual purity, because ritual impurity is on the surface of the *khuff*, so *it will not move* to other than it.[604]

c. Holes are not added between one *khuff* and another (to see if they are too large), because holes in one *khuff* do not affect the *ability to walk* with the other, *unlike*

[600] *Hidāyah*, 1:23; *Guidance I*, 21.
[601] *Hidāyah*, 1:24; *Guidance I*, 22.
[602] *Hidāyah*, 1:31; *Guidance I*, 32.
[603] *Hidāyah*, 1:26-7; *Guidance I*, 26-7.
[604] *Hidāyah*, 1:46; *Guidance I*, 57.

scattered physical filth (which is added up wherever it is), because the person is *bearing* all of it.[605]

d. Somebody resident who travels before the completion of 24 hours in wiping his *khuffs* extends the time to 72 hours because it is *an act governed by time so we consider the end of it*, *unlike* if he completes the 24 hours before travelling, as in this case *ritual impurity will reach the foot*, and the *khuff* cannot lift this.[606]

e. It is disliked for someone in ritual impurity to touch the bound Qur'an (*muṣḥaf*) with his sleeves, *as they are considered adjoined to his person*, *unlike* books of sacred law (*kutub al-sharī'ah*) for those who study these, *due to necessity*.[607]

We can see that *bi-khilāf* is used very similarly to *ka*, but in the negative direction. As it is negating an expected similarity, the cases invoked are generally close to the original topic, unlike the particle *ka*, which can involve cases from more distant chapters of the law.

*3. 'Consideration' (*i'tibār*)*

*I'tibāran*, in the indefinite form, is a commonly used linguistic identifier for investigating similar cases. This is different from *ka*. The case after *ka* is mentioned only to *support* a case, either by the intermediary of a shared legal meaning or without. As for the *i'tibār*, the case after it is presented as *directly influencing* the case under discussion. The implicit argument is that the case under discussion bears a direct resemblance to the case after the *i'tibār*, justifying it to be treated similarly. The term is used nine times for such a comparison. Here are the examples.

a. Al-Shāfi'ī: The head is wiped thrice in ritual ablutions, *in consideration of* what is washed in ritual ablutions.[608]

[605] *Hidāyah*, 1:45; *Guidance I*, 55.
[606] *Hidāyah*, 1:46; *Guidance I*, 56.
[607] *Hidāyah*, 1:50; *Guidance I*, 61-2.
[608] *Hidāyah*, 1:18; *Guidance I*, 13.

b. Zufar: The exiting of blood from the body negates ablutions even if it does not flow, *in consideration of* the normal point of exit [i.e. the two passages].[609]

c. Al-Shaybānī: Blood that is vomited only negates ritual purity if it is the amount that fills the mouth, *in consideration of* all forms of vomit.[610]

d. It is said that Abū Ḥanīfah permits ritual bath with *nabīdh al-tamr*, *in consideration of* ritual ablutions with *nabīdh*.[611]

e. It is recommended to start wiping *khuff*s from the toes, *in consideration of* the original ruling of washing the feet.[612]

f. Al-Shāfi'ī: Vaginal bleeding of a pregnant woman is menstruation, *in consideration of* post-natal bleeding.[613] [In other words, post-natal bleeding shows that bleeding associated with pregnancy comes from the womb, so bleeding during pregnancy should be treated as from the womb.]

g. Al-Shaybānī: A person may bear up to the size of a *dirham* of heavy filth on his person, including filth on the anus, *in consideration of* all other parts of the body.[614] [A response to Abū Ḥanīfah and Abū Yūsuf who do not consider filth around the anus as part of this excused amount.]

h. Abū Yūsuf: Semen must exit from the penis accompanied by lust for the ritual bath to be incumbent, *by consideration of* exiting (*khurūj*) as initial release (*muzāyalah*).[615] [ A response to Abū Ḥanīfah and al-Shaybānī who hold that once semen is initially released from the testes by lust, then the ritual bath is obliged, even if it only exits the penis once the lust has died down.]

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[609] *Hidāyah*, 1:19; *Guidance I*, 16.
[610] *Hidāyah*, 1:20; *Guidance I*, 17.
[611] *Hidāyah*, 1:38; *Guidance I*, 42.
[612] *Hidāyah*, 1:44; *Guidance I*, 54-5.
[613] *Hidāyah*, 1:53; *Guidance I*, 66.
[614] *Hidāyah*, 1:59; *Guidance I*, 76.
[615] *Hidāyah*, 1:23-4; *Guidance I*, 21.

i. The status of water used in ritual purity: "The limb is pure in reality, so *in consideration of* that, the water will be pure; but it is physically filthy in implication (*najas ḥukman*), so *in consideration of* that, the water will be filthy; so we negated its purifying nature while affirming its purity, out of applying both resemblances. ... In a narration from Abū Ḥanīfah, it is heavy filth *in consideration of* water by which actual filth is removed.[616]

We can see that with *i'tibār*, a case is introduced as being nearly identical, allowing for the prescription pertaining to that case to be applied to the case under investigation. As this assumes the near identical nature of the considered case, we find that cases introduced with the term *i'tibār* are closely tied to the case being discussed. Not only are they all from the discussions of ritual purity, but also every case shares the same sub-topic in purity with the case being assessed.

*4. 'It resembles' (*ashbaha*)*

The phrase *ashbaha* is the final linguistic marker for introducing related cases, Again, it has a very particular nuance through which it stands apart from the previous terms. It identifies close similarities between two cases and, more specifically, between two 'entities', whether physical or mental. It is very similar to the *i'tibār*, except for its focus on substances and the direction in which the comparison moves: The *i'tibār brings* a consideration to the case being discussed, while *ashbaha takes* the case under consideration to another case it strongly resembles. It occurs five times. Here are the examples.

a. The exiting of a worm from the anus negates ritual ablutions, but not a worm that exits from a wound on the body, "because the physical filth is what is covering it, which is only a little; [the exiting of only a little filth] causes ritual

[616] *Hidāyah*, 1:29-30; *Guidance I*, 30.

impurity if from the two passages, not from other than them. [Thus, the two cases] *resemble* burping and passing wind."[617] [Both burps and wind pass through the digestive track which contains impurities; the one that passes through the mouth does not negate purity, but the one that passes through the anus does.]

b. The debate between al-Shāfiʿī and the Ḥanafīs on dove excrement. Al-Shāfiʿī holds that it "results in a putrid, foul substance, so *it resembles* chicken excrement." The response to this is the consensus of Muslims to allow doves into mosques, and that it "does not result in a foul-smelling [substance], so *it resembles* mud (*ḥam'ah*)."[618]

c. Abū Yūsuf and al-Shaybānī: "Thick, non-transparent socks may [be wiped] ... because it is possible to walk in them if they are thick, meaning that they hold to the shin without needing to be tied with anything, so *they resemble* the *khuff*."[619]

d. The leftover drinking water of birds of prey is disliked to use in ritual purity, "because they eat carcasses, so *they resemble* the free-ranging [chicken]."[620]

e. Zufar: If only the leftover drinking water of a donkey or mule is present, it should be used first for ritual ablutions, before performing *tayammum*, "because it is water that must be used, so *it resembles* unrestricted water (*mā' muṭlaq*)."[621]

As the phrase compares entities, we find that it too is used for comparing cases in the same topic – in this case purity – and usually in the same sub-topic.

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[617] *Hidāyah*, 1:22; *Guidance I*, 19.
[618] *Hidāyah*, 1:33; *Guidance I*, 33-4.
[619] *Hidāyah*, 1:46-7; *Guidance I*, 57.
[620] *Hidāyah*, 1:37; *Guidance I*, 39.
[621] *Hidāyah*, 1:37; *Guidance I*, 40.

We have seen through our exploration of four distinct linguistic devices that there are four main ways in which the cases of the law support each other. The first, signalled with the genitive particle *ka*, is through the direct intermediary of legal meanings. Cases from other chapters of the law reveal the legal meanings which underpin them. These legal meanings can be shared with other cases, often in very different topics and chapters. The shared legal meaning supports a case being treated in a similar way. The second, signalled with the phrase *bi-khilāf*, uses opposing cases to support each other. This too is usually on the level of the legal meaning. If the legal meaning is absent in one and present in the other, this explains the difference between the two and thus upholds the validity of that legal meaning. At times, seemingly similar cases behave quite differently; the *bi-khilāf* investigations explain this due to opposing legal meanings underpinning each. The third, signalled with the phrase *i'tibāran*, applies details from a near-identical case to the case being explored. This is not quite justification, but rather the direct application of a particular detail in this near identical case. Due to the nature of this form of consideration, the cases explored with the *i'tibār* tend to be from the same sub-topic of the law. The fourth, signalled with the phrase *ashbaha*, is closely related to the *i'tibār*, except that its purpose is to signal the close resemblance of entities: While the *i'tibār* takes it as a given that the two cases are nearly identical, *ashbaha* establishes the similarity between two entities on the assumption that the similarity is not a given. This is why, in each of the cases of *ashbaha* above, an argument was provided to prove this similarity, unlike the *i'tibār* cases. The latter two phrases are limited to dealing with very similar cases from the same sub-topic of the law, whilst the first two phrases, particularly *ka*, are free to draw parallels with distant legal chapters thought to have a bearing on a question of the law due to a shared legal meaning. Throughout, this form of exploring the law

emphasises, again, the importance of the habit of the law as one of the most fundamental pillars upholding the epistemology of law for our author, and shows that 'doing *fiqh*' necessary involves bringing the entire law into a conversation to assess the plausibility of a proposed legal case.

### 3.3.4 Additional Legal Cases and Explanatory Notes

The commentary contains further legal cases as well as explanatory notes. What I mean by explanatory notes are details that give a better understanding of the statements of the *mukhtaṣar* and do not constitute justification, legal meanings or further legal cases. There are 44 instances of such explanatory notes in a commentary on 161 cases. Some cases have two or three such notes, and most are devoid of any. We can see from this that mere elucidation of the *mukhtaṣar* is by no means the primary purpose of the commentary, although he offers useful notes where needed. Such explanatory notes include what is meant by terms such as 'washing', 'wiping', 'face', '*nabīdh*'. They also include details that give insights into the application of cases, such as when to say the *basmalah* in ritual ablutions, how deep a large pool of water needs to be, what is meant by an animal that 'lives in water', at what point water is considered 'used', and that the dead animal must be removed from a well before the removing of buckets of water to which the *mukhtaṣar* refers. Finally, they include criteria that govern the application of these cases, such as what constitutes each of a mouthful of vomit, boisterous laughter in prayer, flowing water, traces of filth in a large body of water, and thick socks.

There are twenty-two further legal cases introduced in the commentary, meaning legal cases beyond those presented with *jadal*, *khilāf* and special linguistic markers. Most of these, although devoid of a linguistic marker, still serve the purpose of validating a proposed legal meaning. They function very similarly to the

explorations of similarities and differences, above, in terms of their showing the application of a proposed legal meaning, but are devoid of consistent linguistic markers, and are, therefore, not explicitly presented as comparisons. As an example, we are told that wind passing through the anus negates ritual purity because it originates in a place of filth, whereas wind passing through the vagina does not negate ritual purity because it does not originate in such a place. After having established the legal meaning that governs this topic, the commentary gives us the following case: "If a woman has a merged anal and vaginal passage (*in kānat al-mar'ah mufḍāh*), then it is recommended for her to perform ritual ablutions due to the possiblity of its exiting from the anus."[622] This legal case shows the implication of this legal meaning where the wind might have come from either. Or, for example, when we are told that a person delays washing feet until the end of a ritual bath only because his feet are in a pool of used water so there is no point to washing them earlier, we are then given the short case, "If he is standing on a flat board (*lawḥ*), he does not delay [washing the feet]."[623] This legal case was presented only to show that the proposed legal meaning really is the meaning around which this topic revolves. We see with the remaining cases a direct or indirect connection to the proposed legal meaning that explains the case of the *mukhtaṣar*. Thus, legal cases introduced in the commentary, even when devoid of the express intention of comparing cases in the law, appear primarily to illustrate the effectiveness of proposed legal meanings.

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With this we conclude Section 3.4, our study of the main methods in the commentary for exploring the law. As mentioned, these underscore the pedagogic role of such commentaries, which train the reader in a very specific form of legal reasoning. The

[622] *Hidāyah*, 1:22; *Guidance I*, 19.
[623] *Hidāyah*, 1:23; *Guidance I*, 20.

reader is trained to consider the legal meanings of cases and to use the various cases of the law already known to him to support or weaken a proposed legal case. Even when studying the most mundane topics of ritual purity, the commentator is expecting the reader to operate at the highest levels of juristic reasoning. Whichever chapter we look at in the text, we will find the same range of activities for these same objectives.

## 3.4 Conclusion: *Fiqh* in the Commentary

This chapter has presented a detailed analysis of argument in the *K. al-Ṭahārāt* of the *Hidāyah*. Although it has dealt only with the topics of ritual purity, it has shown a rich tapestry of commentary activity in addressing these ritual topics. The detailed analysis presented here has vindicated the theory lens proposed in Chapter One. It has shown the usefulness of the three proposed pillars of Ḥanafī *uṣūl al-fiqh*, along with Abū al-Yusr al-Bazdawī's definition of *fiqh*, for understanding the various layers of argument presented in the *Hidāyah* with a clarity previous studies have not been able to provide due to the absence of such a Ḥanafī-specific theory of legal epistemology.

Chapter One suggested that Ḥanafī legal theory is upheld by three fundamental pillars: a literalist theory of language, a deference to insights of the early juristic community and a deference to the habit of the law. The activity of *fiqh* occurs within the sphere of these three pillars to identify the legal meanings underpinning established legal rulings. This is a summary of our theory lens, and it has explained the main features of the *K. al-Ṭahārāt*.

Language was the least employed of these pillars of Ḥanafī thought in the *K. al-Ṭahārāt*, as it only pertained to particular texts, generally Qur'anic verses. The commentatory displayed great insight on the part of the author into the relative weight given to these linguistic investigations *vis-à-vis* other sources of law such as reports,

Companion opinions, legal maxims and consensus, in a manner perfectly consistent with Ḥanafī *uṣūl al-fiqh* epistemology.

The epistemological stature of the early juristic community was demonstrated by references to Companions and Followers as authority figures. Again, the manner in which the commentator approached statements from these early figures, from his presenting their reports as equal in stature to Prophetic reports, to the individual Companions and followers named as authority figures – such as ʻĀ'ishah, Anas and Ibrāhīm al-Nakhaʻī – throughout, he showed, again, a deep awareness of the epistemological stature of such figures and such reports and how they weighed with other sources as presented in Ḥanafī *uṣūl al-fiqh*. Furthermore, the epistemological stature of early jurists explained the unique authority awarded the legal cases of the *mukhtaṣar*. This in turn explained the manner in which Prophetic reports were employed in the commentary: They were deemed strong simply from their agreement with Ḥanafī precedent. Throughout, arguments tied to this pillar of Ḥanafī thought were constructed with care and consistency.

The final pillar, the habit of the law, was found to be the predominant interest of the commentator. While he only rarely engaged with language, and while our main insights into the *salaf*-based epistemology was only through the indirect medium of the ancient law of the *mukhtaṣar*, it was the legal meaning, the fundamental unit of investigating the habit of the law, that was his explicit preoccupation. The category of the 'legal meaning', coined in Chapter One to reflect the main insight of Abū al-Yusr's definition of *fiqh*, allowed the current study to bypass the technicalities of concepts such as *ʻillah*, *sabab* and syllogistic notions of *qiyās* to a broader appreciation of the various forms of rational scaffolding provided to uphold the legal cases of ancient law. These legal meanings took the form of topic-governing rules,

rationales and criteria to connect individual cases to the rules governing their topics, maxims that varied in the breadth of their possible application and wisdoms that provided higher objectives. The commentary did not just provide legal meanings; it demonstrated how these are derived, how these compete for implication over legal cases, how at times the implications of some legal meanings decisively overcome others, and how at other times they provide multiple acceptable positions. This training in the manipulation and exploration of legal meanings was primarily acheived through dialectical sequences (*jadal*), presentations of juristic disagreement (*khilāf*) and explorations of similarities and differences with other cases of the law.

In as much as *qiyās* in Ḥanafī legal theory is a grasp of an underlying philosophy of the law to address new topics, as presented clearly in the topic of *ta'thīr* (effectiveness) in Ḥanafī *uṣūl al-fiqh* works, the manifold explorations of legal meanings in the *Hidāyah* justify its being considered a textbook in *qiyās*: A careful study of the various chapters of this book enables the perceptive student to suggest laws in areas where the Ḥanafī precedent is silent in the light of the interplay of legal meanings, which is precisely what is meant by *qiyās* in Ḥanafī thought.

Where does this leave us regarding the debate in current scholarship on the relation between *uṣūl* and *furū'*? We can start by noting that the debate is framed through the lens of the non-Ḥanafī *uṣūl* tradition,[624] addressing whether the discipline of *uṣūl al-fiqh* actually generated laws directly from the sources of revelation or not.[625] This discussion is predicated on the supposed claim of *uṣūl al-fiqh* works to

[624] For example, one of Sherman Jackson's arguments in this debate is that since all schools used the same *uṣūl al-fiqh* literature to support different laws, this discipline cannot objectively generate laws: Sherman Jackson, "Fiction and Formalism",179-80. This argument presupposes that all schools have the same *uṣūl al-fiqh* literature, which we have demonstrated does not apply to the Ḥanafī school, and that *uṣūl al-fiqh* claims to generate laws independently of juristic tradition, which Ḥanafī *uṣūl* works do not claim.

[625] This is how Robert Gleave frames the current debate, with Hallaq, on the one hand, arguing that *uṣūl al-fiqh* does generate law, and Ahmed, Lowry, Jackson, Weiss and Calder, on the other, arguing that it does not, rather that it serves other functions, such as justifying existing *fiqh* (Jackson),

show how law is derived directly from revelatory sources. The *uṣūl al-fiqh* texts of the early classical Ḥanafī school make no such claim.[626] How could they make such a claim, considering that direct derivation of law from primary scriptural sources undermines the main pillar of this system, the need to access tradition through the early juristic community? The Ḥanafī *uṣūl al-fiqh* literature is subordinate to the rules of Ḥanafī precedent because the underlying epistemology of Ḥanafī legal theory is constructed to provide this precedent highest epistemic stature. Thus, the supposed paradox between the claims of *uṣūl al-fiqh* literature and the practice of *fiqh* in *furū'* literature dissipates with regards to the early classical Ḥanafī tradition.

As for the relation between *uṣūl al-fiqh* and *furū' al-fiqh* in this early classical Ḥanafī tradition, this study has shown that the commentator is fully embedded in what I have called the underlying epistemology of Ḥanafī *uṣūl*: He displays a firm grasp of the relative weighting of different forms of argument in complete harmony with the *uṣūl* literature prevalent in his milieu. At the same time, we also saw no particular interest on the part of the author to impose specialist terms, definitions and theories from the *uṣūl al-fiqh* literature. It is clear that he sees his task as upholding ancient law by presenting measured arguments grounded in a Ḥanafī legal epistemology and to show a careful engagement with the habit of the law through exploring legal meanings; for this, the wider theories of *uṣūl al-fiqh* are generally irrelevant to him and belong properly to another discipline.

Now comes a tricky question. This underlying epistemology that I have termed the epistemology of Ḥanafī *uṣūl*, is it borrowed from *uṣūl* works into *furū'*

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theologising *fiqh* (Weiss), or offering a beautiful, coherent system of law (Calder). See Gleave's foreword to Aron Zysow, *The Economy of Certainty*, xii-xiii.

[626] Al-Sarakhsī's claim in the introduction to his *Uṣūl* is exceedingly humble. His great *uṣūl* work is simply to help the reader understand his arguments in his legal commentary, the *Mabsūṭ*, so they can appreciate the "reality underlying the *furū'*"; he makes no other grand claims pertaining to the purpose of Ḥanafī *uṣūl*: al-Sarakhsī, *Uṣūl al-Sarakhsī*, 1:10.

works or is it borrowed from *furū'* commentaries and then developed in *uṣūl* works? We can only speculate from what we know of the development of Ḥanafī thought, of its being grounded since its beginnings in the legal cases of Abū Ḥanīfah's circle in texts authored to draw readers into a particular pattern of legal reasoning, especially argument grounded in legal meanings. This depiction suggests that the underlying epistemology, so present in al-Marghīnānī's commentary activity, has been an organic development within the sphere of engagement with Abū Ḥanīfah's legal cases. Based on this insight, *uṣūl al-fiqh* can be seen as a theoretical discipline that was developed by Ḥanafī scholars on top of this already developed epistemology of the law. If this understanding is correct, then what I have been terming 'the epistemology of Ḥanafī *uṣūl al-fiqh*' is actually the epistemology of Ḥanafī legal thought in general. Based on this, we can suggest that Ḥanafī *uṣūl al-fiqh*, due to its theoretical structure, facilitates a study of the epistemological foundations of Ḥanafī thought, but it is not the origin of this epistemology; rather, the origin of this epistemology is a living commentary tradition stretching back to the earliest Ḥanafī circles. This I believe is the best answer that can be given on the relation between these disciplines based on the theory lens of Chapter One, the understanding of ancient law in Chapter Two, and the employment of argument in Chapter Three.

In the final chapter of this study we turn first to the *K. al-Ṭahārāt* and then to the rest of the *Hidāyah* to address recurring points of legal theory in the commentary that do not seem to come under the theory lens of Chapter One. This includes a theory to change laws to suit social circumstances, central to our second main question in this study, "What is the law?"

# Chapter Four

## Legal Theory in the Commentary (2): An Analysis Outside of The Theory Lens

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In this chapter we assess forms of legal theory found in the commentary that are not directly addressed by our theory lens, yet reveal important insights into legal epistemology. The points of theory that we explore here can broadly fit under two categories: theory addressing the interface between *fiqh* and the external world and theory addressing the interface between *fiqh* and the guild of jurists producing it. We start in Section 4.1 with a study of all such points of theory in the *K. al-Ṭahārāt*. In Section 4.2 we study key parts of this theory in the remainder of the *Hidāyah*, with a focus on points of theory that reveal how this legal tradition saw to adjust the law for social context. Finally, in Section 4.3 we bring this theory together with the theory lens to suggest a general theory of Ḥanafī *fiqh* and how this *fiqh* produces law.

## 4.1 Further Theory in the *Kitāb al-Ṭahārāt*

This section explores recurring features in the *K. al-Ṭahārāt* that are not directly subsumed by the discussions of Chapter One. Due to the absence of a theory lens through which to comprehend these features, our conclusions regarding these points of theory are speculative.

### 4.1.1 Natural and Social Science

There is a marked interest in the commentary in what can be termed ‘natural and social science’, reflecting the understanding that the legal opinion which most accords with an accurate description of the physical properties of substances and the norms of

people is most worthy of adoption. In dialectical sequences, such arguments are often presented as decisive. In the chapter of purity, the greater focus is on physical properties. No doubt, in later chapters the greater focus will be on social norms. Here are the examples in the order of their appearance:

a. The nature of phlegm. Abū Yūsuf held that vomiting a mouthful of phlegm negates ritual purity, "because it is filthy, due to its mixing [with filth]", to which Abū Ḥanīfah and al-Shaybānī reply, "It is sticky (*lazij*); filth does not penetrate it, so what is connected to it of filth is little, and little filth in vomiting does not negate ritual purity."[627]

b. Vomiting blood. Al-Shaybānī holds that vomiting blood only negates ritual purity if it is a mouthful, in line with the rules of vomiting. Abū Ḥanīfah and Abū Yūsuf hold that any amount of vomited blood negates ritual ablutions if it flows by its own force, "because the stomach is not a site for blood, so it must be from a wound in the space connecting to it (*al-jawf*)."[628]

c. Water-like liquid from boils. 'Water' that flows from a peeled scab negates ritual purity, "because blood develops (*yanḍuju*) and becomes pre-pus (*qayḥ*), then it further develops and becomes pus (*ṣadīd*), then it becomes water."[629]

d. Blood in fish, frogs and crabs. In arguing against al-Shāfi'ī to affirm that water is not rendered filthy by the death of such water creatures, we are told, "and because there is no blood in them, since blood-based creatures do not live in water."[630]

e. Dove excrement. Al-Shāfi'ī's argument for it being filthy is that "it forms a rotten, putrid substance, so resembles chicken excrement," which is countered

[627] *Hidāyah*, 1:20; *Guidance I*, 17.
[628] *Hidāyah*, 1:20; *Guidance I*, 17.
[629] *Hidāyah*, 1:22; *Guidance I*, 19.
[630] *Hidāyah*, 1:29; *Guidance I*, 29.

by noting that "it does not form something with a rotten smell, so it resembles mud."[631]

f. Urine of animals permissible to eat. The argument against al-Shaybānī to affirm that this urine is filthy involves the observation that "it forms a rotten, putrid substance, so it becomes like the urine of animals that may not be eaten."[632]

g. Water in saddle-bags. In the course of arguing that someone who forgot water in his saddlebag and subsequently prays with *tayammum* must repeat his prayer, Abū Yūsuf notes, "The saddle-bag of a traveller is the ordinary place for water, so he is obliged to seek it [there]." The response to this from Abū Ḥanīfah and al-Shaybānī is that "water in saddle-bags is stored for drinking, not use [for other purposes]."[633]

h. Asking for water. Abū Yūsuf and al-Shaybānī, contrary to Abū Ḥanīfah, argue that a person must ask his travel-companions for water before performing *tayammum*, "because water is ordinarily shared."[634]

i. Murky discharge as menstruation. Abū Yūsuf held that murky discharge (*kudrah*) is only considered menstruation if it exits after blood, "because if it truly is from the womb, then the murky [discharge] will exit after the pure [blood]." The response to this from Abū Ḥanīfah and al-Shaybānī is that, "the mouth of the womb is inverted, so the murky exits first, like a jar if it has a hole in the bottom."[635]

j. Vaginal bleeding in pregnancy. Al-Shāfiʿī considered it menstruation through a comparison to post-natal bleeding. The response to this is that "pregnancy

[631] *Hidāyah*, 1:33; *Guidance I*, 33-4.
[632] *Hidāyah*, 1:33; *Guidance I*, 34.
[633] *Hidāyah*, 1:42-3; *Guidance I*, 50.
[634] *Hidāyah*, 1:43; *Guidance I*, 51.
[635] *Hidāyah*, 1:48; *Guidance I*, 60.

closes the mouth of the womb. This is the ordinarily observed phenomenon (*kadhā al-ʿādah*). And post-natal bleeding occurs [only] after it opens with the exiting of the child. This is why post-natal bleeding is after the exit of a part of the child."[636]

k. Wiping filth off leather. Contrary to al-Shaybānī, Abū Ḥanīfah and Abū Yūsuf consider it purification to wipe filth off of shoes, "because the parts of filth do not penetrate leather due to its solidity (*ṣalābah*), except for a little amount; then the body [of remaining filth] pulls it back as it dries, so if [the body] is removed, then the [moisture] that subsists in it is also removed."[637]

l. Filth on clothing is only removed by washing, "because many parts of filth penetrate cloth, due to holes between threads (*li-takhalkhulihi*); nothing can remove it except water."[638]

m. Filth may be wiped off swords and mirrors, "because filth does not penetrate them."[639]

These examples show a wide range of explorations from human biology to the properties of inert objects. In these examples, there is interest in identifying what is ordinarily observed (*ʿādah*). Cases g. and h. are examples of what I loosely refer to as 'social science' because they attempt to predicate rulings based on what is ordinarily observed human practice. There is no doubt that such forms of 'social science' will be a greater proportion of such investigations once we leave the chapters of worship.

### 4.1.2 Recurring Principles

There are several terms that are repeated in the chapter and serve as important principles on which rulings of the law are based. I have singled them out due to the

[636] *Hidāyah*, 1:53; *Guidance I*, 66.
[637] *Hidāyah*, 1:55; *Guidance I*, 70-1.
[638] *Hidāyah*, 1:55; *Guidance I*, 71.
[639] *Hidāyah*, 1:56; *Guidance I*, 72.

paucity of theoretical discussions pertaining to them in the main *uṣūl al-fiqh* works of al-Marghīnānī's milieu, yet their recurrence shows them to be important tools for a Ḥanafī jurist. I will present briefly what we can learn of these terms as they appear in the *K. al-Ṭahārāt*.

*1.* Iḥtiyāṭ *(Precaution)*

This particular principle is adduced five times in the *K. al-Ṭahārāt*.

a. Abū Ḥanīfah and al-Shaybānī hold that if semen is released with lust, then there is no need for lust to also be present when it actually exits the penis: "Since the ritual bath is incumbent from one point of view, *precaution* entails that it be obligated."[640]

b. Intercourse in the anus makes the ritual bath obligatory for both the doer and done-to: "It is incumbent on the done-to out of *precaution*."[641]

c. Al-Shaybānī holds that if a person has access to only *nabīdh al-tamr* (alcoholic date beverage), instead of water, then he combines ritual ablutions using *nabīdh* with *tayammum*, "because in the Prophetic report there is uncertainty, and the date is unknown [so we cannot assume it abrogated by the verse of *tayammum*], so both [rituals] must be combined out of *precaution*."[642]

d. A hole the size of three smallest toes prevents wiping over *khuff*s: "Consideration of the *smallest* is out of *precaution*."[643]

e. If a woman's menstrual cycle stops short of its usual length (*'ādah*), her husband may not have intercourse with her until the usual length of her period

[640] *Hidāyah*, 1:24; *Guidance I*, 21.
[641] *Hidāyah*, 1:24; *Guidance I*, 22.
[642] *Hidāyah*, 1:38; *Guidance I*, 42.
[643] *Hidāyah*, 1:45; *Guidance I*, 55.

passes, "because the return [of bleeding] within this usual time is expected, so *precaution* is in abstaining."[644]

These are only five examples, but they reveal the importance of this principle. In the first example, it was a sufficient response to Abū Yūsuf's logical argument based on an *i'tibār* that, since lust is a condition for release of semen from the testes, exiting from the penis should be treated the same way. Precaution overcame *i'tibār* in the dialectical exchange. The second case is equally interesting. The obligation of the ritual bath on the doer is understandable as it is an act that ordinarily leads to ejaculation, but the obligation on the done-to is not so clear. The relevant sacred texts obliging the ritual bath only refer to sex in the vagina. Applying these to the anus by a linguistic move such as the *dalālat al-naṣṣ* would be speculative. He has managed to bypass such an argument by simply invoking the principle of precaution. How it is a case of precaution, he does not say. We have seen the anus can be equated to the vagina by the *dalālat al-naṣṣ* in some arguments – for example, for establishing the punishment of adultery according to Abū Yūsuf and al-Shaybānī[645] – so precaution gives weight to this possibility. The third example is the only case where the opinion based on precaution was not the one supported as strongest in a dialectical exchange. This is because the commentator does not accept that the date of the event in question is unknown, so precaution is irrelevant. In the fourth example, a measurement not directly stated in sacred texts was determined by precaution. In the final example, precaution rendered intercourse unlawful.

In each example, precaution is shown to be a sufficient argument, one on which obligations and prohibitions may be based. We see, in these examples, that

[644] *Hidāyah*, 1:50; *Guidance I*, 62.
[645] See page 45, above.

arguments based on precaution are upheld as being stronger than those not upheld by precaution if the doubt on which the precaution is based is clearly established.

2. Ḍarūrah *(Necessity)*

Necessity is presented as a legal principle in eleven cases. The cases reveal a broad understanding of the word. We are not talking about loss of life or limb. We are not talking about fear of perishing. What are we talking about? These eleven cases provide some insight into the term. Unlike the term *iḥṭiyāṭ*, the examples here do not present *ḍarūrah* as a sufficient argument to win dialectical exchanges. Discussions of *ḍarūrah* typically involve an investigation into whether necessity is truly present in a particular case and to what degree such a necessity should be taken into account. The topic is connected to the above-mentioned discussion on natural and social science in that *ḍarūrah* is a study of the reality of a situation. The analysis that reflects the most accurate reflection of this reality will be deemed strongest. Finally, we can note that *ḍarūrah*, unlike the other terms here, does have an important discussion in our *uṣūl al-fiqh* works. It is mentioned in the topic of *istiḥsān* as a reason to leave the prevalent logic.[646] However, our *uṣūl* works do not discuss what constitutes a valid case of *ḍarūrah*. To better understand the term, we must comb the instances of its appearance in legal commentaries to piece together the rules of this important point of Ḥanafī legal doctrine. Here are the examples from the *K. al-Ṭahārāt*, in the order of their appearance, with brief analyses.

a. Al-Shāfi'ī: The death of insects and crabs ruins water because the prohibition of eating them indicates that they are considered filth, "as opposed to the vinegar eel (*dūd al-khall*) and fruit worms, because of *necessity*."[647] Here, al-Shāfi'ī uses necessity to allow for a case that is contrary to his general rule.

[646] Al-Sarakhsī, *Uṣūl*, 2:203.
[647] *Hidāyah*, 1:28; *Guidance I*, 29.

The Ḥanafī school does not accept the general rule, so his use of necessity is ineffective in the exchange.

b. When water used in ritual purity is deemed 'used'. "Water becomes 'used' as soon as it separates from the limb. The disregard for the consequence of being 'used' before separation is due to *necessity*, and there is no *necessity* after it."[648]

This case refers to Abū Ḥanīfah and Abū Yūsuf's position that water used in ritual purity is physically filthy. The consequences of this are awkward: As you wash your limbs to purify them, you generate filthy water. How can you be purified? It is to answer this apparent contradiction that *ḍarūrah* is invoked. In this example, we see the usefulness of *ḍarūrah* in settling inconsistencies between theory and practice.

c. A small amount of sheep faeces does not ruin well water,

> because wells in desert-lands (*falawāt*) do not have barriers around the top, and as land animals defecate around them, the wind casts them into the well. A small amount is, therefore, excused for *necessity*. There is no *necessity* in a large amount. ... There is no difference between moist and dry [faeces]; whole and broken; camel, sheep and cow faeces, as *necessity* encompasses each. ... Concerning a sheep that defecates one or two pieces into a milking bucket, they said that the faeces is cast aside and the milk is drunk, due to the presence of *necessity*. And a little bit is not excused in a container, based on what has been said, due to the absence of *necessity*. [649]

This topic addresses genuine necessity. If forms of faeces that can easily fall into wells were to render well-water impure, then entire villages would be without water for drinking, cooking, cleaning and rituals. The consequences would be dire. Necessity resolves this problem. The sub-cases presented here show attempts to define the extent of this necessity.

[648] *Hidāyah*, 1:30; *Guidance I*, 30.
[649] *Hidāyah*, 1:32-3; *Guidance I*, 33.

d. The leftover drinking water of a cat whose mouth is known to be filthy: "If [a cat] eats a mouse then drinks immediately thereafter, the water becomes filthy unless it waits for a moment (*sā'ah*) because of its washing its mouth with its saliva. The exception is based on the position of Abū Ḥanīfah and Abū Yūsuf. The condition of pouring [water] is abandoned for *necessity*."[650]

This case presents what can be considered a mild need. There does not seem to be a pressing necessity in declaring that a cat's mouth is purified by the movement of saliva in its mouth, although great inconveniences can be caused. Here, necessity is synonymous with avoiding inconvenience.

e. Al-Shāfi'ī: A person performs a *tayammum* for each obligatory prayer, "because it is a purification of *necessity*. We [respond] that it is purifying in the absence of water, so it does its work as long as its condition [i.e. the inability to use water] remains."[651]

This debate concerns divine intent: When God permitted *tayammum*, was it to be a form of purity by necessity, valid only for the specific prayer for which it is performed, or a complete form of purity in the absence of water, valid so long as a person is unable to use water? This example shows *ḍarūrah* as an interpretive device to understand God's legislation.

f. Unlike the Qur'an, books of sacred learning may be touched by scholars with their sleeves while in a state of ritual impurity "because there is *necessity*".[652] This is another case showing that at times necessity can simply mean avoiding inconvenience, in this case the inconvenience of performing ritual ablutions whenever a person of sacred learning touches his books.

[650] *Hidāyah*, 1:36; *Guidance I*, 39.
[651] *Hidāyah*, 1:42; *Guidance I*, 48.
[652] *Hidāyah*, 1:50; *Guidance I*, 61-2.

g. Dysfunctional bleeding (*istiḥāḍah*). Scholars concur that a woman with continuous dysfunctional bleeding may perform ablutions and pray despite the constant flow of blood. Ḥanafī scholars considered her to retain a state of ritual purity for the whole prayer time, while al-Shāfiʿī held that she only retains ritual purity for the performance of the obligatory prayer, "because the consideration of her purity is for the *necessity* of performing the obligatory prayer, so it does not remain after completing it."[653] Scholars also concur that anyone with a condition resulting in the constant release of filth from the body is treated as a woman with dysfunctional bleeding, because "*necessity* is realised in such an instance."[654]

In these two cases, the necessity is real, though theoretical in nature. If someone is constantly bleeding, then maintaining ritual purity is impossible by definition, since they will lose ritual purity as they seek to gain it. I call this theoretical, in that a person's actual life is not affected. Rather, it is the law that is ineffective given this situation, so it is the law that must accommodate this person for them to practise the law. This resembles the form of necessity in b., above.

h. Al-Shaybānī, Zufar and al-Shāfiʿī: Only water may be used to wash physical filth, because the *qiyās*-position is that as soon as liquid touches filth, it becomes filthy, so it cannot remove filth, "but with regard to water, this *qiyās* was left out of *necessity*."[655]

This case represents an attempt to understand whether washing filth with water is an exception to the prevalent logic – i.e. a case of *istiḥsān* – or whether it comes under the prevalent logic, in which case other liquids can act

[653] *Hidāyah*, 1:52; *Guidance I*, 64.
[654] *Hidāyah*, 1:52-3; *Guidance I*, 66.
[655] *Hidāyah*, 1:54; *Guidance I*, 70.

similarlty. Here, ‘necessity’ is equivalent to ‘exceptional’. The supported opinion in this exchange – that of Abū Ḥanīfah and Abū Yūsuf – is that washing with water is not exceptional; it is not a case of *ḍarūrah*.

i. Abū Yūsuf and al-Shaybānī: The faeces of animals that may be eaten is light filth, “because of *necessity*, since streets are filled with it. ... We respond, [defending Abū Ḥanīfah’s considering it heavy filth], that [consideration of] *necessity* has already led to lightening [the prescription] with regard to shoes through the permissibility of rubbing [shoes to purify them]; this satisfies the needs of that [necessity].”[656]

In this case, ‘necessity’ is again to be interchanged with ‘inconvenience’. The ensuing debate is how this inconvenience is to be mitigated. Abū Yūsuf and al-Shaybānī mitigate it by treating the faeces of such animals as light filth, meaning that a much greater amount may be excused on one’s person. The position that wins this dialectical exchange, that of Abū Ḥanīfah, is that there is no need for this mitigation, as it is shoes that will be stepping on this filth, and shoes have an exceptional method of purity whereby traces need only be removed by rubbing. There is no need for further exceptions to address the inconvenience.

j. Al-Shaybānī: The faeces of predatory birds is heavy, not light, filth, “because light-ness is for *necessity*, and there is no *necessity* due to the absence of intermingling [with people]. ... [In Abū Ḥanīfah’s and Abū Yūsuf’s favour] is that they defecate from the air, which is difficult to protect against, so *necessity* is realised.”[657]

[656] *Hidāyah*, 1:57; *Guidance I*, 73.
[657] *Hidāyah*, 1:58; *Guidance I*, 74.

> This is also a case of inconvenience, and the degree of inconvenience seems mild, as one would imagine that predatory birds do not regularly pass faeces over peoples bodies, clothing or places of prayer. However, as there is no other way to mitigate this inconvenience, the filth is deemed light.

These examples show a range of application awarded to the term *ḍarūrah* and thus lays the groundwork for a deeper understanding of the term in Ḥanafī law. There are three distinct points of view for which the doctrine is invoked: explaining the rulings of the Lawgiver, creating a practical way to implement theory as developed by jurists and to respond to difficulties faced by people in implementing the law. This latter point of view is itself of three levels: physical cases of necessity – whereby real difficulty would be felt by people were the law not to consider their need – theoretical cases of necessity – whereby the law would not be implementable were the law not to take this impossibility into account – and cases of inconvenience – whereby people would be inconvenienced by being adversely affected by the law in their daily lives, thus the law moves to minimise this inconvenience. This simple summary is what can be drawn from the eleven cases in the *K. al-Ṭahārāt*.

*3.* Ḥaraj *(Hardship)*

There are nine cases of *ḥaraj*. Four of these pertain to the topic of wiping *khuff*s, which is framed as a topic entirely built on this principle. The topic is a recurring one in our *fiqh* works, and, like *ḍarūrah*, is in need of a larger study. I attempt here to document what can be understood from the examples in the *K. al-Ṭahārāt*. Here are the examples:

a. A woman need not wet the insides of her braids in the ritual bath, unlike the beard of a man, "because there is no *hardship* in making water reach the insides of [the beard]."[658]

b. A person outside the city by a particular distance may perform the *tayammum*: "A mile is the preferred distance because there is *hardship* for him in entering the city."[659]

c. *Khuff*s with small holes may still be used, because "*khuff*s are not ordinarily free from small holes, so there is *hardship* for people in [having] to remove [them]; and they are [ordinarily] free of large [holes], so [there is] no *hardship*."[660]

d. *Khuff*s are only wiped in ritual ablutions, not in the ritual bath, "because major ritual impurity (*janābah*) does not ordinarily occur frequently, so there is no *hardship* in removing [them], as opposed to [minor] ritual impurity (*ḥadath*) for it is frequent."[661]

e. Turbans, hats, face-coverings and gloves may not be wiped in ritual ablutions, "because there is no *hardship* in removing these things, and the dispensation [of wiping over *khuff*s] is to ward off *hardship*."[662]

f. Splints may be wiped in ritual ablutions, even if tied when not in a state of ritual purity, "because the *hardship* in this is greater than the *hardship* in removing the *khuff*, so it is more worthy of wiping."[663]

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[658] *Hidāyah*, 1:23; *Guidance I*, 21.
[659] *Hidāyah*, 1:39; *Guidance I*, 43-4.
[660] *Hidāyah*, 1:45; *Guidance I*, 55.
[661] *Hidāyah*, 1:45; *Guidance I*, 55-6.
[662] *Hidāyah*, 1:47; *Guidance I*, 57.
[663] *Hidāyah*, 1:47; *Guidance I*, 58.

g. Menstruating women make up missed fasts and not missed prayers, "because there is *hardship* in making up prayers as they multiply, but there is no *hardship* in making up fasts."[664]

h. Children may be given the bound Qur'an (*muṣḥaf*), even if not in a state of ritual purity, "because preventing them deters from the memorisation of the Qur'an, and in ordering them to purify themselves is *hardship* for them."[665]

i. Filth is purified from a site by the removal of its traces, except for traces hard to remove, "because *hardship* must be avoided."[666]

The topic is similar to the previous topic of *ḍarūrah*, and it appears that *ḥaraj* is best seen as a subset of *ḍarūrah*. Whereas *ḍarūrah* covered a range of cases, from those that actually led to unbearable difficulty to those that merely led to inconvenience, *ḥaraj* appears mostly for cases of inconvenience. And as in *ḍarūrah*, above, this regard for inconvenience is sometimes considered by the Lawgiver, as in the dispensation of wiping over *khuff*s, and sometimes by the jurists, who seek to mitigate inconveniences affecting people. Another difference between *ḍarūrah* and *ḥaraj* is that *darūrah* is also used as a juristic device to facilitate the practical implementation of theoretically based positions, as in examples b. and g. of *ḍarūrah*.

*4. Difficulties*

There are two more terms that are similar to the 'necessity' and 'hardship' explored above. The first is the term *balwā*, which, literally, means 'tribulation'. It occurs three times in the *K. al-Ṭahārāt*, all in the final section on physical filth:

a. Rubbing filth off shoes to purify them. Abū Ḥanīfah and al-Shaybānī only allow dried, solid filth to be cleansed in this way, while Abū Yūsuf also allows

[664] *Hidāyah*, 1:48; *Guidance I*, 60.
[665] *Hidāyah*, 1:50; *Guidance I*, 62.
[666] *Hidāyah*, 1:58; *Guidance I*, 75.

moist filth to be wiped away, "due to *widespread tribulation* (*li-'umūm al-balwā*)."[667]

b. Scratching (*fark*) dried semen as a means of purification. Ḥanafī imams agree that clothing with dried semen can be purified by scratching it off. There is a debate if this can also be done to the body: "Our *shaykh*s have said that [the body] is [also] purified by scratching, because the *tribulation* in it is more severe (*al-balwā fīhi ashadd*)."[668]

c. Faeces of land animals that are permissible to eat. Abū Ḥanīfah treats it as heavy filth, while his two companions treat it as light filth. However, in one narration from al-Shaybānī, we are told that, "when Muḥammad entered Rayy and saw the *tribulation*, he gave the *fatwā* that even large amounts [of faeces on one's person] do not prevent [the validity of prayer]."[669]

*Balwā* appears interchangeable with *ḥaraj*. It refers to a difficulty in implementing the law that jurists take into account as they frame the law to lessen or remove this difficulty. The main difference between the two appears a form of temporality in examples of *balwā*. The most clear example of this is c. It shows that tribulation can be found in particular times and places and not in others. A. can also be seen as a temporal ruling open to change. B. appears closer to the examples of *ḥaraj*, because the likelihood of semen affecting the human body seems equal in all times and places. As above, a larger sample needs to be studied to learn more about *balwā*.

A related term is *ḍarar*, literally 'harm'. It comes in two cases in the *K. al-Ṭahārāt*, both in the chapter of *tayammum*. Both instances take avoiding *ḍarar* as a fundamental consideration of *tayammum*, for the sake of which an increase in

[667] *Hidāyah*, 1:55; *Guidance I*, 71.
[668] *Hidāyah*, 1:56; *Guidance I*, 71.
[669] *Hidāyah*, 1:58; *Guidance I*, 74.

sickness permits *tayammum*,[670] as does being forced to buy water at extortionate prices.[671] The very restricted use of the terms suggests it not to be as important a principle as the other terms studied here.

*5. Ease*

There are several references to a principle of 'ease' that guides jurists in framing the law. This is referred to as *taysīr* ('making easy') in two instances, as *tawsi'ah* ('expansion') in one, and, in one, a position was preferred because it was *aysar* ('easier'). Here are the examples:

a. A lady with continuous dysfunctional bleeding can perform ritual ablutions for each prayer time. Within this prayer time she is deemed ritually pure and may offer as many prayers as she likes without the bleeding invalidating her ritual purity, "because the [prayer] time took the place of actual performance *out of facilitating ease* (*taysīran*)";[672] in other words, she is considered pure for the whole prayer time, not just for the performance of the prayer.

b. When washing clothing from filth whose traces are not visible, a person washes until reasonably sure that the filth has been removed. Later scholars determined that one need only wash such items three times: "They only determined [that this condition is satisfied] with three [washings] because reasonable certainty is attained thereby, so the apparent cause [of reasonable certainty] was treated as [reasonable certainty] *out of facilitating ease* (*taysīran*)."[673]

[670] *Hidāyah*, 1:39; *Guidance I*, 43-4.
[671] *Hidāyah*, 1:43; *Guidance I*, 51.
[672] *Hidāyah*, 1:52; *Guidance I*, 64, although it appears that Nyazee omitted the word *taysīr*.
[673] *Hidāyah*, 1:59; *Guidance I*, 75.

c. According to Abū Yūsuf, if a woman experiences a break in vaginal bleeding for less than fifteen days, it will be treated as if she bled continuously throughout that period: "And taking this opinion is *easier* (*aysar*)."[674]

d. A large pool of water does not become filthy by coming into contact with filth, unless the traces of filth show. It was originally defined as a pool of such a length that if filth falls in one end, it will not reach the other; however, later scholars determined it as a pool of ten cotton-cubits by ten cotton-cubits,[675] "*to make the matter vast* (*tawsi'atan*) for people."[676]

The first of these examples explains the rationale behind a prescription from the Lawgiver, who tied the ritual purity of a woman with dysfunctional bleeding to the entire prayer time to make worship easy for her. The last three pertain to prescriptions from jurists. The cases in both b. and d. are originally tied to vague criteria that an individual is expected to apply; out of a fear that laymen would struggle with implementing these vague criteria, later jurists have defined both cases with clear measurements to facilitate implementation. The case in c. is similar, except that the measurements are provided by Abū Ḥanīfah's circle, not later jurists; Abū Ḥanīfah's circle provided a number of alternative ways to calculate matters pertaining to menstruation; of the various options, an opinion transmitted from Abū Yūsuf has been preferred for its ease

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Here concludes our brief exploration of certain recurring principles of law in the commentary which do not directly reflect the categories of *uṣūl al-fiqh*. These can be seen as a form of legal meaning, but they have a particular role in governing the

[674] *Hidāyah*, 1:50; *Guidance I*, 63.
[675] The cotton-cubit (*dhirā' al-kirbās*) is measured with six fists placed above each other with thumbs tucked in. A larger measure is the measuring-cubit (*dhirā' al-misāḥah*), consisting of six fists with thumbs protruding. See al-Bābartī, *al-'Ināyah*, 1:81.
[676] *Hidāyah*, 1:28; *Guidance I*, 28.

relationship between the jurists' law and the external world. We might be able call these 'principles of *fatwā*', where *fatwā* implies the tailoring of *madhhab* doctrine to best fit a given situation. We can also call them 'legal mechanisms' that ensure *madhhab* doctrine reflects the needs and circumstances of people. Other than the slight mention of *ḍarūrah* in the topic of *istiḥsān*, these topics have no formal treatment amongst the categories of *uṣūl al-fiqh*, and if they occur in those works, it is only as a part of commentary on legal cases.[677] The absence of these legal mechanisms in formal *uṣūl al-fiqh* theory reveals that the 'theory' in *uṣūl al-fiqh* is bounded by particular unstated boundaries. *Uṣūl al-fiqh* is not all of legal theory; only a particular area of this theory is represented there. Which part of legal theory is contained in the *uṣūl*? In our commentary, it is the theory used to understand and justify *madhhab* law. The current section reveals a further layer of theory that pertains to the application of this law to particular contexts, which is equally important for a jurist to master. But where is this theory 'theorised'? It appears that up to al-Marghīnānī's time, it was not theorised in a particular set of texts. The terms that make up this theory are scattered in the works of legal commentary. This theory appears the special domain of the living, teaching tradition in which jurists were trained. The frequent mention of the terms that make up this theory in legal commentaries suggests that this theory was well developed and formed a shared language understood by jurists in the tradition. We will study these points of theory further in Section 4.2.

[677] This is with the exception of Abū al-Yusr's short treatment of *ḥaraj* in his *uṣūl* work. However, his discussion is quite general, focusing on *ḥaraj* as a principle to prevent death (*halāk*): Abū al-Yusr al-Bazdawī, *Ma'rifat al-ḥujaj al-shar'īyah*, 171-4.

### 4.1.3 *Taṣḥīḥ*

Al-Marghīnānī often remarks whether particular positions are 'sound' (*ṣaḥīḥ*) or 'soundest' (*aṣaḥḥ*). The term *ṣaḥīḥ* is used twenty-one times in *K. al-Ṭahārāt*, while *aṣaḥḥ* is used five times. This is another set of terms that we find no explanation for in the sections of *uṣūl al-fiqh*. Differentiating between various opinions in such a way is clearly an important role played by the commentary. Unfortunately, the author gives no clear explanation of what makes a particular position *ṣaḥīḥ* or *aṣaḥḥ*. The terms themselves lead us to assume that in cases where a particular position is 'sound', competing positions must be 'unsound', whereas if a particular position is 'soundest', then other positions might also be 'sound'.

In eleven cases, there is a legal meaning presented to support the *ṣaḥīḥ* position. However, there must also be legal meanings to support opposing positions, so the question still remains, what renders a particular position *ṣaḥīḥ*, and not merely one position amongst several? It is clear that these terms represent the accumulated insights of the *madhhab* teaching tradition. One example clearly shows the process of *taṣḥīḥ* to be dependent upon previous juristic tradition. This one example is exceptional, as it is a rare case in which jurists after Abū Ḥanīfah's circle are named. The reason for this anomaly might be his application of the stronger term, *ṣaḥīḥ*, for a position contrary to the *mukhtaṣar*, requiring him to defend this strong departure from the *mukhtaṣar*. The issue pertains to water mixed with safflower (*mā' al-zardaj*): "In the *mukhtaṣar*, he treats safflower-water as broth (*maraq*), but that which is narrated from Abū Yūsuf is that it is like saffron-water, and this is the sound position (*ṣaḥīḥ*), *thus it was chosen by al-Nāṭifī and al-Imām al-Sarakhsī*."[678]

[678] *Hidāyah*, 1:26; *Guidance I*, 26.

As for the use of *aṣaḥḥ*, he uses it twice in supporting a position opposed to the position of the *mukhtaṣar*.[679] That this happens twice and is not backed up with a reason – neither a legal meaning nor names of scholars who supported it – supports the previous suggestion that *aṣaḥḥ* is the weaker of the two terms, as it still allows for the correctness of the opposing position. Twice, *aṣaḥḥ* is used to prefer one of two positions introduced with "It is said (*qīla*)", with legal meanings presented for each,[680] and it occurs once between two *qīla* positions not supported with legal reasoning.[681] In order to better understand the processes behind the application of *ṣaḥīḥ* and *aṣaḥḥ*, we will need to compare al-Marghīnānī's use of these terms to their use in other commentaries, both before him and contemporary to him, to see how positions come to be seen as sound in the wider *madhhab* tradition.

### 4.1.4 *Fatwā*

A reference to the term *fatwā* comes three times in the *K. al-Ṭahārāt*. It comes twice in the formula *wa-'alayhi al-fatwā*. This phrase implies that *fatwā*s – that is legal rulings issued by jurists outside of court settings – should be issued in accordance with this particular opinion. In both cases, the term is used for a position contrary to that of the *mukhtaṣar*. In one, a reason is given to support why a particular case has been adopted as the *fatwā*-position, while in the other no reason is given.

The first deals with the issue of defining a large pool of water. We are told that a large pool will not become filthy if it comes into contact with filth, unless the traces of filth are detectable. The *mukhtaṣar* defines a large pool as one whose furthest end is not disturbed by stirring its nearest end, as, in such a case, it is assumed that filth will not reach that end. This is a very vague measurement. We are then told: "Some of

[679] *Hidāyah*, 1:16; *Guidance I*, 11.
[680] *Hidāyah*, 1:29, 37; *Guidance I*, 29, 40.
[681] *Hidāyah*, 1:58; *Guidance I*, 74.

them determined it [as a pool with] an area of ten-by-ten cotton-cubits (*dhirā' al-kirbās*) to make the matter easier for people, *and this is the* fatwā-*position* (*wa-'alayhi al-fatwā*)."[682] Here, after justifying this position as one that facilitates implementation, he informs us it is the *fatwā*-position.

In the second case, there is no such justification provided. It is the debate between Abū Ḥanīfah and his two companions regarding wiping over socks. In the dialectical sequence, presented in Section 3.1 above, the two companions hold that the *meaning* of the *khuff* is satisfied by any sock that a person may walk in. In Abū Ḥanīfah's response – presented as the winning position in the debate – we are told that a person must be able to walk *continuously* for socks to satisfy the *meaning* of the *khuff* and that this is only if socks have a leather sole. Then, after this defence of Abū Ḥanīfah's position, we are simply told, "And [it has been narrated] from him, that he reverted to their position (*raja'a ilā qawlihimā*), *and this is the* fatwā-*position*."[683] This example is fascinating because it defends one position, and then immediately states that the *fatwā* is given according to the opposing position, without any justification offered for why this might be the case. This second example underscores the two distinct legal worlds the commentary is engaging: The first being a theoretical exploration of transmitted, authoritative *madhhab*-law, and the second a presentation of received 'wisdom' from the teaching tradition pertaining to the implementation of this law, argument being essential to the former, not the latter.

There is only one other mention of *fatwā*. It is in an anecdotal reference to al-Shaybānī's more relaxed position on the faeces of land animals: "And [it is narrated] from Muḥammad that when he entered Rayy and saw the *balwā*, he gave the *fatwā*

[682] *Hidāyah*, 1:28; *Guidance I*, 28.
[683] *Hidāyah*, 1:47; *Guidance I*, 57.

(*aftā*) that large amounts also do not prevent [the validity of prayer]."[684] This is another instance of a change of the school position in response to practical difficulties experienced by people. Although this is only an anecdotal reference, it suggests that the social assessment behind the principles of *fatwā* originate directly from the insights of Abū Ḥanīfah's circle.

### 4.1.5 *Madhhab* Authorities

There is little explicit reference in the commentary to the tradition of jurists that connect the author to the founding imams of the school, excepting the above-mentioned passage where al-Marghīnānī names al-Sarakhsī and al-Nāṭifī as having preferred a transmission of school doctrine over that in the *mukhtaṣar*. Beyond this, we do not find the names of Ḥanafī jurists in the *K. al-Ṭahārāt* except twice: one mention for each of al-Karkhī and al-Ṭaḥāwī. In both instances, we are provided with a rebuttal of positions adopted by them in their respective *mukhtaṣar*s, so in both cases they are not cited as authority figures. Furthermore, there is no reference given to al-Qudūrī, the author of the original *mukhtaṣar*, neither by name nor by indirect reference. In avoiding mention of *madhhab* authority figures, the book presents itself as a direct engagement with the doctrine transmitted from the founding imams: Abū Hanīfah and his circle of students, without intermediary. This maintains the sense of 'ancient' tradition conveyed by the rules of the *mukhtaṣar*. But as we have seen, the commentary functions at different levels. There is the level at which 'ancient law' is explored and explained. This level contains no direct or indirect reference to the teaching tradition between al-Marghīnānī and the founding imams. Then there is another level that expresses the further insights of the living, teaching tradition of the school. This includes an interest in practical considerations, attempts to apply the

[684] *Hidāyah*, 1:58; *Guidance I*, 74.

insights of school-founders to new situations, and dealing with various transmissions from school-founders. In this second layer, we do find reference to this teaching tradition, but largely indirect reference.

The most obvious reference is with the phrase *mashāyikhunā*, 'our teachers', which occurs three times. The phrase 'our teachers' appears parochial: It distinguishes between 'our teachers' and 'their teachers' or 'your teachers'. We can only assume it to be a reference to the Transoxianan tradition, and perhaps a Transoxianan sub-tradition.[685] In each instance, 'our teachers' are invoked where they gave preference to a position opposed to the 'ancient law' of the *mukhtaṣar* in view of its greater practicality.

a. "And likewise **leftover drinking water of predatory birds** [is disliked] because they eat carcasses, so they resemble free-ranging [chickens]. And [in a narration] from Abū Yūsuf, if it is restrained, and its owner knows there is no filth on its beak, then it is not disliked. *Our teachers* have shown approval of this narration (*istaḥsana mashāyikhunā hādhihi al-riwāyah*)."[686]
b. Abū Yūsuf permits wiping moist excrement off shoes, contrary to Abū Ḥanīfah and al-Shaybānī, "due to widespread tribulation and the unrestricted words of [the Prophetic report] we narrated; and *our teachers* adopt this (*wa-'alayhi mashāyikhunā*)."[687]
c. Semen can be scratched off of clothing by agreement of Ḥanafī imams. But what of the body? "*Our teachers* have said that it is purified by scratching, because the tribulation in it is more severe; and [it is narrated] from Abū Ḥanīfah that it is not purified except by washing, because the heat of the body

[685] For a study of the term *mashāyikh* for leading figures in the pre-Classical Ḥanafī school, see Eyyup Kaya, "Continuity and Change in Islamic Law: The Concept of Madhhab and the Dimensions of Legal Disagreement in Ḥanafī Scholarship of the Tenth Century".
[686] *Hidāyah*, 1:37; *Guidance I*, 39-40.
[687] *Hidāyah*, 1:55; *Guidance I*, 71.

pulls inwards, so it does not return to the body of the substance, and the body cannot be [deeply] scratched."[688]

The use of *istiḥsān* in a. might be merely literal, in that the teachers have shown an approval of that narration. It might also be technical, referring to the hidden *qiyās* presented by al-Sarakhsī, based on the insight that predatory birds drink with their beaks so their saliva does not touch water.[689] C. is insightful as it pits 'our teachers' against a narration from Abū Ḥanīfah for which al-Marghīnānī presents a detailed justification. Why would he contrast this with the position of 'our teachers' in such a way? It seems to suggest that he does not feel bound by the position of these teachers, or perhaps that in this instance it is only some of these teachers that are implied, giving him room to disagree.

Another form of reference al-Marghīnānī makes to the teaching tradition is with the third-person plural pronoun. This occurs five times. The first instance is where we are told that "some of *them* determined (*qaddarū*) the area of a large pool as ten-by-ten cotton-cubits."[690] In the second instance, *they* said that if a sheep defecates into the milking bucket, the faeces is thrown aside and the milk drunk.[691] In the third instance, after explaining that it is a condition in *tayammum* to wipe the entire limb, he notes, "And this is why *they* said that he interlaces his fingers and removes [his] ring."[692] In the fourth instance, he tells us about the aforementioned *fatwā* issued by al-Shaybānī after entering Rayy, in which he allowed all amounts of the faeces of land animals that may be eaten to be on a person without it affecting the validity of his prayer. We are then told, "*They* treated as analogous to it (*wa-qāsū 'alayhi*) the mud

[688] *Hidāyah*, 1:56; *Guidance I*, 71.
[689] See pages 69-70, above.
[690] *Hidāyah*, 1:28; *Guidance I*, 28.
[691] *Hidāyah*, 1:33; *Guidance I*, 33.
[692] *Hidāyah*, 1:39; *Guidance I*, 45.

of Bukhara."[693] In the final example, he discusses the washing of clothes from physical filth of no visible trace. The *mukhtaṣar* states that a person washes until reasonably certain it is purified. After explaining why reasonable certainty is required, he states, "*They* only determined [it] with three [washings], because reasonable certainty occurs upon it, so the apparent cause [of reasonable certainty] takes the place of [reasonable certainty] for facilitating ease."[694]

A final reference to the teaching tradition, though not as clear, is the phrase "It was said (*qīla*)". It appears in twenty-three instances, sometimes by itself, and sometimes paired with an accompanying *qīla*. It comes paired six times: in three of these, he tells us that the latter of the two is *aṣaḥḥ*, while in three he does not explicitly support either. In most of these, it is clear that we are seeing attempts of later scholars to deduce Abū Ḥanīfah's position on a question based on his principles. For example, "And as for performing the ritual bath with [*nabīdh al-tamr*], then it is said that it is permitted according to him in consideration of [his permitting it for] ritual ablutions, and it is said that it is not permissible because it is above it [so it does not come under the exception made for the ritual ablutions]."[695] There are four other examples of what appear to be two opposing attempts to deduce what the appropriate position ought to be based on the *madhhab*'s principles.[696] In one of these, it appears we are dealing with a disagreement on the precise understanding of transmitted doctrine: When we are told in the *mukhtaṣar* of a debate between al-Shaybānī, on the one hand, who does not permit prayer with more than a *dirham*-amount of predatory-bird excrement, and Abū Ḥanīfah and Abū Yūsuf, on the other, who do permit it, al-Marghīnānī comments, "It is said that the disagreement concerns [whether it

[693] *Hidāyah*, 1:58; *Guidance I*, 74.
[694] *Hidāyah*, 1:58-9; *Guidance I*, 75.
[695] *Hidāyah*, 1:38; *Guidance I*, 42.
[696] *Hidāyah*, 1:29, 36, 37, 58; *Guidance I*, 29, 39, 40, 74.

constitutes] filth, and it is said that it concerns the amount that is excused, and this [latter] is soundest."[697] Here, we are shown an internal debate on understanding what this disagreement is conveying.

When *qīla* does not come in a paired presentation, it is usually to present an alternative position to one mentioned in the text. At times, this alternative position is accompanied by justification, and at times it is not. It is very hard in these cases to determine whether the position after *qīla* is weaker than the position before it, or whether the reader is given the choice to consider each, as we saw in the presentation of *khilāf* in the previous chapter.

We can note from this brief survey that al-Marghīnānī is fully embedded in this teaching tradition. This, of course, goes without saying, as it is only through the teaching tradition that he is able to contribute to this discipline. Through the manner in which he engages this teaching tradition we can comprehend something of its rules. The most important of these rules appears to stem from what I called the clear *salaf*ism of Ḥanafī legal theory. Law is only accessed through the jurists of the *salaf*, the early community, who were the safeguards of the correct understanding of revelation. Authoritative legal reasoning, that is, the ability to reason correctly to understand the law and contribute new prescriptions in its light, is the reasoning of the jurists of the *salaf*. Abū Ḥanīfah's circle, in the Ḥanafi *madhhab* tradition, was held to be directly connected to the jurists of the *salaf*, and, thus, this circle was accorded the respect and deference accorded the *salaf*. It seems to be due to these insights that we do not find names and authorities in the commentary beyond the names of prominent members of Abū Ḥanīfah's circle. Only in rare instances of transmission would we find the names of Ḥanafī scholars, and, in the *K. al-Ṭahārāt*, this occurs only once. In

[697] *Hidāyah*, 1:58; *Guidance I*, 74.

the exposition of the 'ancient law' transmitted from Abū Ḥanīfah's circle, the authorities from the *madhhab* tradition are transparent, giving the exposition itself an ancient character to match the exposited doctrine.

Where the teaching tradition disagreed in understanding important transmitted doctrine, or in applying this doctrine to new questions, we are shown this with the passive past tense *qīla*. Where the teaching tradition presents an addition to Ḥanafī doctrine by providing criteria for application based on an assessment of human needs, we find the active third-person plural reference. And where this addition is parochial in nature, he points out his own sub-group within this teaching tradition with the phrase *mashāyikhunā*. Throughout, the anonymity of reference is a fitting feature for a *salaf*-based commentary tradition.

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This section has provided an initial exploration of points of theory in the *K. al-Ṭahārāt* that pertain to the relation of this commentary to the *madhhab* teaching tradition and, of direct relevance to this study, the accommodation of this *fiqh*-tradition to external reality. Our conclusions have been revealing, but speculative, due to the small sample. These speculative observations lay the foundation for further engagement in the rest of the commentary to better understand the relation of this *fiqh* tradition to external reality and the formulation of law.

## 4.2 Further Theory in Further Chapters

In this section we will focus on key aspects of the further theory presented in Section 4.1 as it appears in other chapters of the *Hidāyah*, focusing on the points of this theory that reflect external reality. In the absence of a detailed theory lens, our comments here will continue to be speculative. A larger study in the early classical commentary tradition will be needed for more definitive conclusions. Our goal in this section is to

better understand the second of our two initial questions: What is the law? To recall, this question asked how this *fiqh* training was meant to guide a jurist in offering a specific legal ruling for a specific social context.

We start with the declaration of *fatwā*-positions (4.2.1), as these seem the most explicit statement of a legal ruling for a particular context. We then look at further mention of the *mashāyikh* (4.2.2) to see if their mention guides to further legal application on their part. We then look at a series of terms, termed legal mechanisms above, to see how they are used in the rest of the book (4.2.3): terms for ease, hardship and social practice. We end with an observation of the use of 'our time' (*zamānunā*) in the book (4.2.4).

### 4.2.1 *Fatwā*-Positions

There are twenty-five[698] instances, including two from the *K. al-Ṭahārāt*, where we are informed that a particular position is a *fatwā*-position, including two negative statements that a position should not be issued as a *fatwā*. In only a few of these is an altogether new position endorsed, meaning a position not from the ancient law of Abū Ḥanīfah's circle. Six such cases can be identified, four positive *fatwā*s and two negatively stated *fatwā*s, which I still consider a *fatwā*-position as it is a *fatwā* against a position. Here are the four positive *fatwā*s:

a. The case previously mentioned concerning the size of a large pool of water, where we are told, contrary to the vague description of the *mukhtaṣar*, that the *fatwā*-position (*'alayhi al-fatwā*) is that a pool is large when it measures ten-by-ten cotton-cubits.[699]

[698] The numbers of various terms employed in the *Hidāyah* presented in this chapter are arrived at by electronic word-based searches using the programme *al-Maktabah al-Shāmilah*.
[699] *Hidāyah*, 1: 28; *Guidance I*, 28.

b. Paying *zakāh* to rebels (*khawārij*) who have seized control of an area. The *mukhtaṣar* states that if these rebels take the land tax (*kharāj*) and the obligatory alms due on freely grazing animals (*ṣadaqat al-sawā'im*) from people, the people are not asked to pay these a second time (*lā yuthannā 'alayhim*), i.e. it is considered a valid payment of *zakāh*. We are then told, "They have given the *fatwā* (*aftaw*) that they should pay [the alms] again, not the [land tax]." Al-Marghīnānī comments that this is the more precautionary practice that people should observe between themselves and God (*baynahum wa-bayn Allāh*) to ensure the validity of their alms payment.[700]

c. Paying someone to teach the Qur'an. The *mukhtaṣar* holds it impermissible to hire someone to give the call to prayer (*adhān*), lead prayers, or teach *fiqh* or the Qur'an. The reason given is that these are acts of subservience to God (*ṭā'ah*) that a person does for his own sake – i.e. to earn a reward from God – so he may not be paid by someone to do them. The commentary adds, "Some of our teachers have approved of hiring someone to teach the Qur'an today, because laxity in religious matters has become evident, so holding back from this leads to squandering the preservation of the Qur'an; and this is the *fatwā*-position."[701]

d. A man swearing an oath by stating, "Every lawful matter is unlawful for me (*kullu ḥill 'alayya ḥarām*)." The *mukhtaṣar* states that this applies to food and

[700] *Hidāyah*, 1:164-5 (the phrase *fīmā baynahum wa-bayna Allāh* is missing from the Arabic text of this edition); *Guidance I*, 263-4 (the phrase *fī mā baynahum* is interpreted as a reference to the Khawārij, not the people told to pay the *zakāh*; I consider this a mistranslation). Interestingly, the phrase "they gave *fatwā*" is in the main body of the *Bidāyat al-mubtadī* in Bakdāsh's edition: *Bidāyah*, 139. Unfortunately, as Bakdāsh rarely notes differences between manuscripts, it is unclear whether this is only in a later manuscript and therefore a possible interpolation from the *Hidāyah*, which I hold most likely, or in most manuscripts and therefore one of the further additions to his two sources that al-Marghīnānī promised in the introduction. The original case is from the *Jāmi' al-ṣaghīr*: *al-Jāmi'*, 83. Calder provides a brief study of this case in Norman Calder, "Exploring God's Law: Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī on *Zakāt*", 67-70.

[701] *Hidāyah*, 2:327. Nyazee's two-volume partial translation of the *Hidāyah* corresponds to volume one of the Arabic edition referenced here. Thus references to volume two have no equivalent translation.

drink – meaning the oath is broken if he eats or drinks anything – and that it only applies to other than food if that was intended when the oath was uttered. The commentary then states, "Our *shaykh*s have said that a divorce occurs through it when [uttered] without a specific intention, due to predominant usage (*li-ghalabat al-isti'māl*); and this is the *fatwā*-position."[702]

Here are the two negative *fatwā*s:

e. The land tax upon a man who plants a less-valuable crop while able to plant a more valuable one. The *mukhtaṣar* states a general rule: "If a [land] owner neglects [his land], he must still pay the land tax." The commentary provides a further ruling from later scholars, where 'they' said that if a man plants a less-valuable crop while being able to plant a more valuable one, he will be made to pay the tax of the more valuable crop, as he willingly squandered this increase. However, "*Fatwā*s are not to be issued according to this, lest oppressors be encouraged thereby to seize the wealth of people."[703]

f. Arbitration (*taḥkīm*) for matters other than retaliation (*qiṣāṣ*) and prescribed penalties (*ḥudūd*). The *mukhtaṣar* states that arbitration is impermissible regarding retaliation and prescribed penalties. The commentary states that 'they' said this statement implies that arbitration is valid for all other matters that require careful discernment (*mujtahadāt*), such as divorce and marriage. Interestingly, we are told, "This is sound (*ṣaḥīḥ*), but *fatwās* are not to be issued in accordance with it; [instead] it should be said that someone entrusted with authority must judge [these matters], lest laymen be emboldened."[704]

These six examples represent varying reasons for the change of the official school position. The first case is an example of changing a vague school ruling for a

[702] *Hidāyah*, 1:479; *Guidance II*, 160.
[703] *Hidāyah*, 1:594; *Guidance II*, 332.
[704] *Hidāyah*, 2:152-3.

clearly defined measurement for the sake of facilitating application. The second is the opposite; it makes the ruling harder for the sake of observing precaution in devotional matters. The third seeks to avert a calamity – the loss of the Qur'an – that the official school position would lead to, given that people have become unwilling to teach without payment. The fourth is based on a change in the common use of a particular phrase: Making the lawful unlawful used to commonly refer to food, but now it commonly refers to divorce, so the *fatwā*-position takes this into account. The two non-*fatwā* cases are equally interesting. In these we are to acknowledge the soundness of the school position but to not reveal this knowledge to the public, and, instead, to issue *fatwā*s according to a contrary position because of perceived problems resulting from the otherwise-sound school position. The first of these is to not let oppressors take advantage of the school position by demanding excess payments from land owners on a false claim of their deliberately not planting the most valuable crop. The second of these seeks to prevent laymen from taking the resolution of disputes into their own hands and thereby undermining the official teachings of the *madhhab* concerning the technicalities of such matters as marriage and divorce.

These six examples illustrate that the law issued by *madhhab* jurists is not meant to merely mimic the ancient law of the *mukhtaṣar*, but to reflect an understanding of how this ancient law will be implemented in a social context and to make adjustments for that social context. However, six cases are very few compared to the many cases in the text. Are these exceptions, or do they represent a larger rule? And if they do represent a larger rule, then how is one to know whether to make matters easy (as in a.), or more difficult out of precaution (as in b.); how is one to weigh these different insights? We will not be able to provide a definitive answer to these queries, but can hope to shed more light on the matter through a further study of

some of the main legal mechanisms below. But, first, what of the remaining *fatwā*-positions?

In the remaining instances of mentioning a *fatwā*-position, preference is awarded to one school position over another. In five of these, a practical consideration is given as the reason for this preference. These are presented below:

a. A man swears not to buy heads. The *Bidāyah* states, "In the *Jāmi' al-ṣaghīr*: If he swears that he will not buy heads, then this applies to both the heads of cows and sheep according to Abū Ḥanīfah; Abū Yūsuf and Muḥammad said it applies only to sheep." The commentary explains, "This is a disagreement based on age and time (*ikhtilāf 'aṣr wa-zamān*). The custom (*'urf*) in his time applied to both, while in their time [it applied] only to sheep. In our time, the *fatwā* is issued based on ordinary usage (*'alā ḥasab al-'ādah*), as stated in the *Mukhtaṣar* [of al-Qudūrī in the similar case of the man who swears not to *eat* heads]."[705]

b. A man swears not to wear jewellery. The *mukhtaṣar* states that if a man swears not to wear jewellery, but then wears a pearl necklace without a rock (*'iqd lu'lu' ghayr muraṣṣa'*), his oath is not broken according to Abū Ḥanīfah, while it is according to the two companions. Abū Ḥanīfah's argument is that this is not used as jewellery according to common custom (*'urf*), which is what oaths are meant to consider. The commentary then states, "It is said that this is a disagreement based on age and time; the *fatwā*-position accords with the two [companions] because it is ordinarily used as jewellery."[706]

c. Verifying the uprightness of witnesses. The *mukhtaṣar* states that according to Abū Ḥanīfah it is enough for witnesses to be externally upright (*ẓāhir al-*

[705] *Hidāyah*, 1:487; *Guidance II*, 174.
[706] *Hidāyah*, 1:500; *Guidance II*, 197-8.

*ʿadālah*), so a judge need not investigate whether they are upright in their private lives, while we are told that according to the two companions, the judge must investigate and establish whether they are truly upright. The commentary tells us, "It is said that this is a disagreement based on age and time; the *fatwā*-position is that of the two [companions] in the current time."[707]

d. Representatives in court. The *mukhtaṣar* states that a person appointed to represent someone in a dispute (*wakīl bi-al-khuṣūmah*) is also assumed to possess the agency to seize the disputed item (*wakīl bi-al-qabḍ*) on behalf of the appointing party if the dispute is successful. The commentary tells us that this is "according to us" and is in opposition to the position of Zufar, who holds that the appointing party have shown approval of the representative to dispute on their behalf, but have not shown approval for this representative to seize the disputed item. After a short dialectical sequence to defend the position of the *mukhtaṣar*, we are told, "The *fatwā* today is [given] according to the position of Zufar due to the appearance of treachery amongst [such] representatives; a person who may not be entrusted with wealth might be entrusted to dispute."[708]

e. Sharecropping. The *mukhtaṣar* states that sharecropping is invalid according to Abū Ḥanīfah, valid according to the two companions. The commentary provides a long dialectical sequence in which Abū Ḥanīfah's position is championed, but then states, "[However], the *fatwā*-position is that of the two [companions] because of people's need (*ḥājat al-nās*) for [sharecropping] and

[707] *Hidāyah*, 2:166.
[708] *Hidāyah*, 2:206.

the evident widespread practice of the community (*ta'āmul al-ummah*); the *qiyās*-position is abandoned for the sake of widespread practice."[709]

A number of important legal mechanisms are adduced in these examples. The first two speak of custom (*'urf*) and ordinary usage (*'ādah*/*mu'tād*). We are told in the second example that oaths are an instance of a chapter in which *'urf* is awarded primary consideration, raising the possibility that several such chapters might exist. The first and third speak of a 'disagreement based on age and time', implying that the debate between Abū Ḥanīfah and his companions is not legal, but contextual. This again suggests that in all such cases, the most appropriate position to a particular context must prevail. The fourth is not presented as a disagreement based on context: It is assumed that Zufar had a particular legal argument for denying the one appointed to represent a party in dispute from being able to seize the disputed item. However, this alternative position is chosen as advantageous in a time in which the official position of the school no longer represents the intents of those appointing representatives for disputation. The last one introduces a new mechanism, that of widespread practice (*ta'āmul*). People engage in particular economic practices because of needs they have (*ḥājat al-nās*) that are met by these. A most interesting principle is stated here regarding this: Widespread practice is given preference over *qiyās*. In other words, if the habit of the law suggests that a particular economic practice is impermissible, but people practice it widely as it meets their needs, this practice will permit what the habit of the law prohibits.[710] The terms introduced here: *'urf*, *'ādah*, *ta'āmul* and *zamān* will be further investigated below.

These examples illustrate practical considerations, meaning considerations of the application of the law in a particular social context, to have direct relevance to

[709] *Hidāyah*, 2:465.
[710] Of course, this cannot be assumed to apply to matters prohibited explicitly by the Lawgiver, such as usury (*ribā*).

determining the law produced by this *fiqh* tradition. In these examples, these practical considerations have led to a movement between the opinions held in Abū Ḥanīfah's circle, not to new positions as in the first six examples presented above. This appears to be one reason for the frequent mention of intra-school *khilāf* in texts such as the *Hidāyah*: Awareness of various positions in Abū Ḥanīfah's circle allows movement between these positions when preferred by practical considerations.

There are eight remaining examples of al-Marghīnānī's identifying a *fatwā* position. He generally mentions a legal meaning for these positions as well as for opposing positions, and then identifies one of them as a *fatwā*-position. We are left to guess whether this strong preference for a particular position is because the legal meaning is deemed much stronger than for an opposing position, or because there is a practical consideration that he has omitted.[711]

Most of these eight examples prefer a position of one or both of the two companions, implying that the notion of a *fatwā*-position is tied to a departure from established school doctrine based on Abū Ḥanīfah's position. However, two of these prefer Abū Ḥanīfah's position, with one of them explicitly stating that Abū Ḥanīfah's position is the evident position of the school (*ẓāhir al-madhhab*).[712] If this is already Abū Ḥanīfah's position, and already the evident position of the school, then why identify it as a *fatwā*-position? Clearly, almost every case in the *mukhtaṣar* can be similarly identified. We are left to speculate what purpose such an identification serves, and what sets it aside from the far more common phrases 'sound' (*ṣaḥīḥ*) and 'soundest' (*āṣaḥḥ*), of which there are twenty-six instances in the *K. al-Ṭahārāt* alone.

[711] This is with the exception of one case, where he prefers a position of al-Khaṣṣāf over that of al-Karkhī, stating that the former represents deep understanding (*fiqh*): *Hidāyah*, 1:429; *Guidance I*, 2:85-6.
[712] *Hidāyah*, 2:430, 561.

We may speculate that the phrases *yuftā bihi* and *'alayhi al-fatwā* represent an attempt to regulate public legal statements made by school jurists. Regulating the juristic enterprise is the role of the school in its capacity as a social guild, and it appears that the identification of a *fatwā*-position is a manifestation of the school operating as a guild. A *fatwā* issued by a jurist contrary to these established *fatwā*-positions would presumably be rejected by the guild. The school has decided that internal disagreements must be ignored with respect to these specific cases. As these cases are exceedingly few with respect to the cases of the book, we must assume that each of these were subject to some form of socially-inspired interest for the sake of which guild masters sought to restrict the position offered in the name of the school. As for positions deemed 'sound' and 'soundest', it would appear that a *fatwā* issued contrary to this identification would not be immediately rejected, and that these merely represent an attempt to organise differing internal school positions. The distinction offered here between these terms is speculative and is in need of further corroboration.[713]

### 4.2.2 The *Mashāyikh*

The term *mashāyikh* is employed in the commentary more than fifty times. They are typically mentioned for a transmission from Abū Ḥanīfah's circle that they prefer or a an altogether new position that they adopt. The reference is usually vague; the most we might be told is that a certain position is adopted by 'some *mashayikh*' (*ba'ḍ al-mashāyikh*), 'most *mashāyikh*' (*akthar al-mashāyikh*), or 'the generality of

[713] Talal al-Azem presents a detailed study of *taṣḥīḥ* in the Ḥanafī tradition, which he renders 'rule review': al-Azem, *Rule-Formulation*. However, al-Azem focuses on a later era, Ibn Quṭlūbughā's ninth-century, and he incorporates the identification of a *fatwā*-position into *taṣḥīḥ* (which it is), without suggesting nuances between these terms. The above suggested distinction between *fatwā*-positions and sound/soundest positions, with the former a point of group corroboration and the latter a point of ongoing exchange, mirrors Jackson's explanation of *mashhūr* and *rājiḥ* in the Mālikī writing of al-Qarāfī (d. 684/1285), except that *fatwā*-positions seem less frequently encountered in Ḥanafī works than *mashhūr*-positions in Mālikī works. See Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī*, 84-9.

*mashāyikh*' (*'āmmat al-mashāyikh*). In terms of geographic localities, the *mashāyikh* of Balkh are mentioned several times;[714] in one instance, they are contrasted with 'our *mashāyikh*' (*mashāyikhunā*),[715] meaning presumably the *mashāyikh* of Transoxiana. In one instance, he specifies the *mashāyikh* of Samarqand, implying a distinct Samarqandi position not held in other centres in Transoxiana.[716] Only three scholars are mentioned by name as being from the *mashāyikh*: al-Qudūrī,[717] Fakhr al-Islām al-Bazdawī,[718] and al-Imam Abū Manṣūr,[719] presumably Abū Manṣūr al-Māturīdī.

There are two roles played by the *mashāyikh* that are of interest to us in the current investigation: their upholding a position contrary to that of school-founders and their choosing a particular position transmitted from school-founders. We will look at each in turn.

We start with examples of their upholding a position contrary to that of school-founders. We have seen one example above, the case where a man makes the lawful unlawful for himself: Official school doctrine treated this as applying to food, whilst the *mashāyikh* treated it as applying to divorce; the difference, they explained, was due to predominant usage, which had shifted to this new meaning.[720] Here are four more examples.

a. The least and maximum amounts of discretionary punishment (*ta'zīr*). The *mukhtaṣar* states that the most that a person can be beaten through *ta'zīr* is thirty-nine lashes, and the least is three; it then states that according to Abū

[714] *Hidāyah*, 1:97; 2:64, 468, 471; *Guidance I*, 136.
[715] *Hidāyah*, 1:97; *Guidance I*, 136.
[716] *Hidāyah*, 2:375.
[717] *Hidāyah*, 2:506.
[718] *Hidāyah*, 2:135.
[719] *Hidāyah*, 2:161.
[720] *Hidāyah*, 1:479; *Guidance II*, 160.

Yūsuf *ta'zīr* can reach seventy-five lashes.[721] The commentary provides the reason for the maximum limits through a Prophetic report that declared it transgression to beat someone the amount of a prescribed punishment (*ḥadd*) when no prescribed punishment is due. In following this report, Abū Ḥanīfah and Muḥammad considered the least prescribed punishment given to a slave, which is forty lashes, and took one away, leaving thirty-nine, while Abū Yūsuf considered the least prescribed punishment given to someone free, which is eighty lashes, and removed one according to one narration, and five according to the narration in the *mukhtaṣar*, since seventy-five has been transmitted from the Companion 'Alī. As for the least amount of lashes that may be given as *ta'zīr*, the *mukhtaṣar* states it to be three lashes; the commentary explains that this is because a person is not deterred by less than that. We are then told, "Our *mashāyikh* have mentioned that the least amount of [*ta'zīr*] is determined by the ruler (imam); it is determined by the amount that he knows will function as a deterrent, because that is different for different people."[722]

The *mashāyikh* are showing that, unlike the discussion of the maximum amount of *ta'zīr* punishment, this discussion of the least amount is not based on any larger consideration tying this to the topic of prescribed punishments (*ḥudūd*); it can only be based on a consideration of what suits the purposes of *ta'zīr*, namely, its function as a deterrent. As this is something that can change with place and time, this part of transmitted school doctrine can only be seen as an example, and not a fixed point of doctrine to be adhered to.

[721] This is in the text of the *Bidayah*, 357, and is taken from the *Mukhtaṣar* of al-Qudūrī: al-Qudūrī, *Mukhtaṣar*, 305. Surprisingly it is not marked as part of the *mukhtaṣar* in either *Hidāyah* or *Guidance I*, reminding us of the general unreliability of identifications of the *mukhtaṣar* in editions of the *Hidāyah*.
[722] *Hidāyah*, 1:535; *Guidance I*, 242.

b. Exchanging impure silver coins in unequal amounts. The *mukhtaṣar* states that impure coins may be exchanged in unequal amounts. This is unlike pure silver coins – meanings coins consisting of more than 50% silver – as these must be exchanged in exactly the same amounts, otherwise the exchanging parties are guilty of usury. In impure coins, if the quantities are unequal, the extra silver on one side is assumed to be paying for the extra copper on the other side, so this is considered regular trade, and not a usurious contract. We are then told, "Our *mashāyikh* do not issue *fatwā*s for the permissibility of this concerning *ʻadlī*s and *ghaṭrīfī*s, as they are the most precious forms of wealth in our lands; if it were permissible to trade with them in unequal quantities, the door to usury would be opened."[723] *ʻAdlī*s (pl. *ʻadālā*/*ʻadlīyāt*) and *ghaṭrīfī*s (pl. *ghaṭārifah*) are two forms of impure silver coin that appear to have been a main form of currency in Transoxiana.[724]

This insight from the *mashāyikh* reveals that the original school doctrine, which stands on a strong theoretical basis, is only suitable in settings where impure silver coins are not a main form of currency, as such forms of currency exchange would be uncommon. In a setting where such forms of currency are normally used, then permitting such forms of exchange would have the same social consequence as exchanging pure silver coins in the times of the founding imams. It is to block this underlying consequence that this position was not permitted by Transoxianan *mashāyikh*. Note how al-Marghīnānī still included the original ruling of ancient law in the *mukhtaṣar*, after which he defended its underlying rationale in the commentary, before finally telling his Transoxianan readers that they may not follow it.

[723] *Hidāyah*, 2:120.
[724] See al-Bābartī, *al-ʻInāyah*, 6:263, 7:153.

c. Touching another man's slave-woman. The *mukhtaṣar* states that a man may look at another man's slave-woman to the same extent that he may look at his own unmarriageable relative (*maḥram*). It then states that, in the case of considering purchasing her, he may touch what he is permitted to look at of this slave-woman even if he fears being aroused. The commentary states that the ruling is conveyed thus in both the *Mukhtaṣar* of al-Qudūri and the *Jāmi' al-ṣaghīr* without any further details, after which it states, "And our *mashāyikh* hold it permissible to *look* in this case, even if aroused, because of necessity (*ḍarūrah*); but he may not *touch* if he is aroused or his predominant assumption is that [he will be aroused], because this is a form of deriving pleasure (*istimtā'*)."[725]

This is another case in which the *mashāyikh* have forbidden something permitted in officially transmitted school doctrine out of a form of precaution to avoid an evil consequence of that doctrine. In this particular case, the argument is not presented as being based on considering the needs of a specific time or place, as in previous examples; but rather it is a general restriction for the sake of an overriding principle, namely, the prohibition of deriving pleasure except where clearly permitted.

d. Staying the first moment of the subsequent month in a monthly rent contract. The *mukhtaṣar* states that if a tenant stays in a rental property for the first moment (*sā'ah*) of the subsequent month, then the contract for that month is enacted, so the landlord may not make him leave until the end of the month. After a short explanation of the rationale underlying this position, the commentary states, "However, this [position] mentioned in the book is [only]

[725] *Hidāyah*, 2:516.

the *qiyās*-position which some of the *mashāyikh* inclined towards; the evident transmission (*ẓāhir al-riwāyah*) [on the other hand] is that each has an option [to annul the contract] during the first night and day of the month, because there is a degree of hardship in [only] considering the first [moment]."[726]

This example is the opposite of the previous examples. In this, some *mashāyikh* preferred the most logical *qiyās*-position, which al-Qudūrī also preferred and added to his *Mukhtaṣar*. However, the stronger textual transmission from school-founders is a form of *istiḥsān*, a departure from the *qiyās*-position in view of the hardship entailed by it. It seems from his presentation that al-Marghīnānī seeks to strengthen this latter position in view of its greater practicality.

Three examples can be presented for the *mashayikh* preferring a particular position of the school-founders – as opposed to an altogether new position – for a perceived practical advantage:

e. The definition of a drunkard (*sakrān*) for the purposes of receiving a prescribed punishment (*ḥadd*). The *mukhtaṣar* states that the drunkard, for the purposes of prescribed punishment, is the one who does not understand speech (*lā ya'qilu manṭiqan*), neither little nor much, nor can he distinguish a man from a woman. The commentary then states, "This is according to Abū Ḥanīfah; [Abū Yūsuf and Muḥammad] held that he is the one who speaks gibberish (*yahdhī*) and his words are confused (*yakhtaliṭu kalāmuhu*),[727]

[726] *Hidāyah*, 2:326.

[727] In Bakdāsh's edition this position of the companions is part of the *Bidāyat al-mubtadī*. This is almost certainly an interpolation from the *Hidāyah* and not part of the original *mukhtaṣar*. This is because this case is from the *Jāmi' al-ṣaghīr*, which states only the former position, implying it is the position of all three imams. Furthermore, the *Hidāyah* introduces this position of the two companions with "the weak servant notes", a reference to himself that is common in the commentary, which is replicated in Bakdāsh's text as "he said, may God have mercy on him", which is a common rephrasing of the former phrase by copyists in the text of the *Hidāyah*. Unfortunately, as Bakdāsh only rarely points out differences in his manuscripts, we cannot ascertain which manuscripts contain this addition.

because this is the drunkard according to customary usage (*'urf*), and to this inclined most of the *mashāyikh*."[728]

Here the *mashāyikh* prefer an opinion ascribed to the two companions which is deemed closer to customary usage. Al-Marghīnānī's presentation of the topic appears to prefer Abū Ḥanīfah's position, as he places this position of most *mashāyikh* within the dialectical exchange to which he responds on Abū Ḥanīfah's part, the closing argument being Abū Ḥanīfah's. This form of presentation contrasts with most cases , where he concludes the dialectical sequence first and then states the preference of the *mashāyikh*. In this particular case, Abū Ḥanīfah's position is based on the overriding maxim that pertains to the topic of prescribed punishments, namely, that they should be avoided as much as possible. The form of presentation suggests that for al-Marghīnānī, this legal maxim bears greater weight than customary usage. This is an important observation for understanding the place of customary usage in Ḥanafī legal epistemology, a point to which we will return.

f. A letter from a judge ordering that someone be punished. The *mukhtaṣar* informs that if a judge instructs, "I have judged that this [person] be stoned, so stone him," or "[his hand] be severed, so sever it," or "be beaten, so beat him," then the recipient may comply with this request. The commentary then states,

> [It has been narrated] from Muḥammad that he reverted from this [position], and said, "Do not follow his word until you see the proof [for the judgement]," because this word of his may possibly be wrong or erroneous, and making up [for this mistake] is not possible [after the punishment]. ... The *mashāyikh* have preferred this narration due to the corrupt state of most judges in our time.[729]

[728] *Hidāyah*, 1:528; *Guidance II*, 231.
[729] *Hidāyah*, 2:161.

Al-Marghīnānī follows this with a detailed breakdown of how the ignorance and corruption of a judge can be taken into account, a breakdown he attributes to al-Imam Abū Manṣūr, presumably meaning al-Māturīdī.

g. Wages of third-parties in a sharecropping agreement. The *mukhtaṣar* states that third-parties, such as those hired to harvest, lift grain, and separate grain from stalks, must be paid by both the landowner and the worker between whom the sharecropping agreement has been made, proportionate to the profit each stands to make; if it is stipulated that the worker must bear all these costs, the agreement is corrupted (*fāsid*). Al-Marghīnānī provides an argument to support this position, after which he states,

> And [it is narrated] from Abū Yūsuf that it is permissible for [it to be stipulated that these costs] be covered by the worker due to common practice (*ta'āmul*), in consideration of (*i'tibāran*) the manufacturing contract (*istiṣnā'*). This is the chosen position (*ikhtiyār*) of the *mashāyikh* of Balkh; Shams al-A'immah al-Sarakhsī said, 'This is the soundest position in our lands (*hādhā huwa al-aṣaḥḥ fī diyārinā*).'[730]

It would appear that the *mashāyikh* of Balkh chose this narration for the sake of common Balkhan practice; al-Sarakhsī's confirmation of this position implies it was also common practice in Transoxiana.

The above eight examples – five where the *mashāyikh* chose an altogether new position and three where they chose a particular school position – further illustrates the interest on the part of this juristic tradition to subject the ancient law of school doctrine to particular filters to assure appropriate application of the law to a particular social context. In the latter three examples, the chosen position was itself a part of ancient law, meaning law formulated in Abū Ḥanīfah's circle, but was chosen amongst competing representations of ancient law due its appropriateness. Case a. from the first four examples, the case of discretionary punishment, was not one of

[730] *Hidāyah*, 2:471.

seeking law to suit a specific context, but rather one of presenting the underlying reasoning of school doctrine, with the transmitted position being simply an example of what might be the least amount of beatings in a particular 'ancient' context. Case b., the case of trading impure silver coins, was also spurred on by a deep reflection of underlying rationale. The rationale behind the prohibition of exchanging pure silver coins would be similarly expressed in the exchanging of impure coins in a setting where impure coins were the common currency. This deeper reflection on the case at hand led to prohibiting a form of exchange permitted in ancient law. Case c., the case of touching a slave-woman one seeks to purchase, was based on imposing a principle widely observed in the habit of the law – the restrictions of deriving pleasure from the opposite sex – on a strongly transmitted piece of school doctrine that did not seem in line with this principle. These three cases do not stem from applying a filter of further theory on school doctrine to make it suit social context. Rather, they stem from a deep training in legal meanings as displayed in our theory lens; these legal meanings led these jurists to formulate legal positions most in line, according to them, with the legal meanings underpinning these legal cases.

The remaining four examples show a filter of further theory being applied to these cases, leading to an alternative position being formed or an alternative transmission to be adopted. In case d., the case of staying a moment from a month in a rental contract, we had a *qiyās*-position contrasted with a position that took into account the hardship of the *qiyās*-position. Interestingly, here, some *mashāyikh* preferred the *qiyās*-position, while al-Marghīnānī's presentation gives strength to the alternative position, which also happens to be strongly transmitted school doctrine. Clearly, in this case, the earlier *mashāyikh* did not feel the hardship on which this school doctrine was formed needed to be taken into account in their contexts, while

al-Marghīnānī is pointing out that where this hardship is enough to take into account, the stronger transmission of school doctrine seems appropriate. In case e., the definition of drunkenness for a prescribed punishment, most *mashāyikh* preferred a definition that accorded best with customary usage (*ʿurf*), one of the filters of our further theory. However, in this case, al-Marghīnānī seems to prefer the original doctrine of Abū Ḥanīfah as it was better grounded in the principle attested to by the habit of the law, namely, that prescribed punishments are warded off as much as possible, which for al-Marghīnānī appears a stronger argument in this case. Case f., not complying with a letter from a judge ordering a prescribed punishment, was based on a change in times that necessitated caution in dealing with judges. Case g., permitting a stipulation that the worker bears the costs of third-parties in a sharecropping agreement, was based on the filter of common practice (*taʿāmul*).

These examples show an ongoing interest on the part of this *fiqh* tradition in producing rulings that are fit for being law, meaning a ruling on behalf of God addressing a particular social context. However, the processes for getting to this law are multi-faceted. There is a sophisticated dialectic between the filters of our further theory and the legal meanings that underpinned our theory lens. In some cases, these legal meanings outweigh all other considerations, and, in others, these filters outweigh legal meanings. We see a great interest, both in our *mashāyikh* examples and our preceding *fatwā* examples, in identifying what the cases of school doctrine are based on. Are these cases based on customary usage, as in oaths? If so, then they should change with customary usage. Are they presented as only examples to achieve a desired aim, as in placing a lower limit in discretionary beatings? If so, then this desired aim should determine the law. Are they presented as exceptions to a rule, where they apply only as long as they are treated as truly exceptional, as in the case of

exchanging impure coins? If so, then when such practices risk being widespread the exception must be negated. Are these to regulate social dealings to avoid injustice, as is the apparent motive behind preventing the worker from bearing third-party costs in a sharecropping agreement? If so, then in a case where such conditions are agreeable to workers based on common practice, then the prohibition must be lifted.

This sophisticated dialectic between the exploration of legal meanings through our theory lens and the mechanisms for legal application that come here under further theory is another expression of epistemology. Each of these parts of theory bear a particular epistemological weight that varies from topic to topic and case to case; jurists must identify the exact epistemological weight of a point of theory where several possible theories might express themselves – e.g. custom versus minimising punishment (case a.), *qiyās* versus *istiḥsān* based on avoiding hardship (case d.) – and give preponderance to the most epistemologically weighty theory regarding a particular case. The apparently topic-based epistemological weighting of these different parts of legal theory makes it challenging to formulate a definitive epistemology of Ḥanafī legal theory, as each topic, in fact each case, will exert its own influence on the epistemological weight given to each part of legal theory. However, our interest in this study is to propose only a general epistemology of how these points of further theory fit into the legal project. To better understand these terms, we turn now to a selective study of the use of these terms in the rest of the book.

### 4.2.3 The Use of Terms from Further Theory

In this section, we undertake a further investigation into al-Marghīnānī's use of terms we have identified above as key legal mechanisms. Our interest is in what these terms reveal of how this *fiqh* tradition envisaged formulating law, and whether we can

extract rules for their employment to better understand where these terms belong in an epistemology of the Ḥanafī legal project.

*1. Terms for Ease*

We have seen that making matters easy is a reason for adopting an alternative transmission of ancient law or an alternative position altogether. We investigate here al-Marghīnānī's use of two related terms: *taysīr* ('making easy') and *aysar* ('easier'). There are nine uses of *aysar* and ten of *taysīr* in the book. None of these are to support a change from the ancient law of the *mukhtaṣar*, except for a minor change in one case. Rather, the facilitating of ease is predominantly used as an explanatory tool, showing the seeking of ease as an important higher principle in the legal thinking of Abū Ḥanīfah's circle. Although these two terms have not been used to justify a change in the law, this recurring principle must be assumed to have consequence in legal training, as jurists are constantly reminded of Abū Ḥanīfah's interest in choosing rulings that are easier for people. It is possible that a deeper reading of the *Hidāyah* will reveal this idea being expressed in changing a rule without the employment of a technical term. To better understand these tools, we will look at examples of each.

*i.* Aysar

There is one instance in which the term *aysar* is used as a principle to choose between transmitted school positions. It is in a previously discussed case of menstruation. The *mukhtaṣar* states that days of non-bleeding (*ṭuhr*) that occur between days of bleeding within a menstrual period are treated as days of bleeding. He then mentions a position that is more expansive in addressing this topic, meaning it accounts for all days of non-bleeding whether in an expected period for menstrual or not:

> And [it is narrated] from Abū Yūsuf – and this is his narration from Abū Ḥanīfah, and it is said that this is the last of Abū Ḥanīfah's positions – that if a period of non-bleeding lasts less than fifteen days, it does not separate [between bleeding days; rather] it is treated as continual bleeding, because it is

an invalid purity (*ṭuhr fāsid*) so it is treated as blood; and adopting this position is easier.[731]

The details of this narration from Abū Yūsuf and how exactly it differs from the original position of the *mukhtaṣar* do not concern us. What does concern us is that this particular topic, providing measurements for identifying menstrual periods, is one that is subject to this higher principle of seeking ease, and Abū Yūsuf's narration is seen as greater in leading to ease than the position of the *mukhtaṣar*.

In seven cases, this principle is used to explain a position from ancient law, whether it is a position of Abū Ḥanīfah or one of his companions. Here are two examples,

a. A person borrows money in the form of a widely accepted fiat currency (*fulūs nāfiqah*), but before he can pay the money back, this fiat currency loses all value (*kasadat*). The commentary tells us that according to Abū Yūsuf, the debtor owes the creditor the value this currency held on the day of their contract, while according to Muḥammad, the debtor owes the value it held just before it lost all value.[732] The commentary does not explicitly endorse one of these positions, but simply notes that Muḥammad's position is more fair to both parties (*anẓar lil-jānibayn*), whilst Abū Yūsuf's is easier (*aysar*). The ease of Abū Yūsuf's position is apparently that no further investigation is required to precisely ascertain its value just before it lost all value; rather, each party can proceed on the value this currency was known to hold on the day they transacted.

b. The executor of a will (*waṣī*) selling the property of an absent adult. The *mukhtaṣar* states that the executor can sell everything owned by an absent adult (*al-kabīr al-ghā'ib*) except for property (*'aqār*). As this executor derives

[731] *Hidāyah*, 1:50; *Guidance I*, 62-3.
[732] *Hidāyah*, 2:121.

his authority from the father who gave him this authority, the commentary explains this rule through comparison to the father: The father may not sell the property of his child, so neither can the executor. Then we are told,

> The *qiyās*-position is that the executor cannot sell non-property either, because the father cannot do this on behalf of his adult child. However, we have established this through *istiḥsān* because this is considered safeguarding (*ḥifẓ*), as ruin can hasten to these things; safeguarding money is easier (*aysar*), and he possesses the right to safeguarding. As for property, it is protected by itself.[733]

This is a case of *istiḥsān* for the sake of making the executor's job easier – a reason for *istiḥsān* not mentioned in *uṣūl al-fiqh* texts. As his job is to protect this adult's property, then he can protect it better in the form of money than in the form of perishables, which here means everything apart from land. Thus we have permitted him to do what even the father who gave him this power may not do.

*ii.* Taysīr

*Taysīr* (lit. 'making easy') is generally applied where an easily observed external marker takes the place of a matter that is difficult to identify. This we are told is to facilitate the implementation of a particular ruling. In most cases, these external markers are well-defined measurements, based on the insight that the law is easier to implement if people are given clear guidelines for measurable acts, rather than leaving these to individual discretion.

a. Washing invisible filth from an item of clothing. We have seen that the *mukhtaṣar* states that to purify an item of clothing from filth without visible trace, it must be washed until the person feels reasonably certain (*ghālib al-ẓann*) that the filth has been removed, while later scholars stipulated that an item be washed three times: "They only determined it with three [i.e. that it is

[733] *Hidāyah*, 2:751.

purified if washed thrice] because that is when reasonable certainty is attained, so the apparent cause [i.e. washing thrice] takes the place [of reasonable certainty] for the sake of facilitating ease (*fa-uqīma al-sabab al-ẓāhir muqāmahu taysīran*)."[734] This is a new ruling to help people follow the original ruling, as the original ruling relied heavily on discretion, and many might struggle knowing when they have washed an item sufficiently.

This is similar to the above-mentioned case where some later scholars determined a large pool to be measured as ten-by-ten cubits instead of the vague description of the *mukhtaṣar*. These are the only two cases of an apparently invented measurement to replace original school doctrine. The following examples merely justify school doctrine through the notion of *taysīr*.

b. Acquiring *zakāt*-able assets within a zakat year. The *mukhtaṣar* states that whoever owns a *niṣāb* (a minimum of wealth above which a person must pay the *zakāh*) of a particular form of *zakāt*-able wealth, then if he acquires more of the same type of wealth, he adds it to what he already owns and gives *zakāh* on all of it when a lunar year passes over his original wealth. The commentary contrasts this with the position of al-Shāfi'ī, whereby such wealth is not combined, but rather is treated as separate, in which case he will calculate a separate lunar year for it. In a dialectical sequence, the argument presented against al-Shāfi'ī is that it is very difficult to distinguish items of the same form of wealth, making it hard to calculate a lunar year for each item of wealth; however, "the lunar year was only stipulated to facilitate ease (*mā shuriṭa al-ḥawl illā lil-taysīr*)."[735] In other words, the lunar year serves as an external marker for the ownership of wealth for a particular period, in the

[734] *Hidāyah*,1:58-9; *Guidance I*, 75.
[735] *Hidāyah*,1:164; *Guidance I*, 262-3.

absence of which it would be very difficult to deal with the topic of *zakāh*. Therefore, any proposed ruling that makes calculating a lunar year burdensome must be incorrect, as it makes the lunar year a burden, while the lunar year only exists to make matters easy.

c. When a person is financially responsible for poor relatives. Both Abū Yūsuf and Muḥammad agree that a person is only financially responsible for poor relatives if he is well-off (*mūsir*). The definition for this according to Abū Yūsuf is possessing a *niṣāb* of wealth – the financial equivalent of 200 *dirham*s or 20 *dīnār*s – while for Muḥammad it is owning wealth in excess of what a person needs to support himself and his immediate dependants for a month. Abū Yūsuf's position is presented as the *fatwā* position. In the course of a dialectical sequence, we are told that the stipulation of the *niṣāb* serves the purpose of facilitating ease. [736] Again, the ease is its providing a clear measurement, not the vague description mentioned by Muḥammad that makes the matter hard to precisely identify.

d. Someone in a state of pilgrim sanctity (*iḥrām*) slaughtering game animals (*ṣayd*). A pilgrim for the greater or lesser pilgrimage (*ḥajj* and *'umrah*) is forbidden to hunt game. The *mukhtaṣar* states that game slaughtered by a pilgrim is considered a dead carcass (*maytah*) and may not be eaten. The commentary adds that according to al-Shāfi'ī it may be eaten. The argument presented for al-Shāfi'ī is that this pilgrim is acting on behalf of a non-pilgrim who will be eating the meat, so his act is treated as an act of this non-pilgrim on whose behalf it is carried out. Al-Marghīnānī then presents an argument for the Ḥanafī position:

[736] *Hidāyah*, 1:440-1; *Guidance I*, 100.

> Ritual slaughter (*dhakāh*) is a divinely sanctioned act (*fi'l mashrū'*), but [the slaughter of a pilgrim] is an unlawful act (*fi'l ḥarām*), so it cannot be considered ritual slaughter, just like the slaughter of a Magian [whose meat is unanimously unlawful to consume]. This is because the divinely sanctioned act is the one that stands in the place of distinguishing between blood and meat for the sake of facilitating ease (*qāma maqām al-mayz bayna al-dam wa-al-laḥm taysīran*).[737]

In this instance, *taysīr* is used as almost an exegetical device, to provide a rationale for why the Lawgiver permits meat from ritual slaughter and not other meat. The answer is that meat that is lawful is that which has been completely separated from blood, as blood is physical filth (*najas*). This is something extremely hard to establish, so in the place of the real way meat is indentified as lawful, the Lawgiver erected an easily observable external act, namely, ritual slaughter. Now, ritual slaughter does not separate all blood, since some blood still remains in the body, so this being erected as a sign for the absence of blood is something established to facilitate the consumption of meat, not because it perfectly separates the two as is ideally required. As this is not an actual separation, but one accepted to facilitate consumption, it cannot be treated as a rule that applies whenever slaughter takes place; rather, it must be established with the conditions set by the Lawgiver. As He has not permitted pilgrims to slaughter, how can the meat be considered pure? This is again a long argument that could have been simplified by adducing the principle of *istiḥsān*: The topic of ritual slaughter is known only textually, otherwise it cannot rationally be considered purifying, thus only the conditions condoned in sacred texts are valid. But here, he wished to explain *why* the Lawgiver erected this as a sign for the separation of blood: It is only to facilitate application, it is not a real cause of purity.

[737] *Hidāyah*,1:270; *Guidance I*, 433.

Sometimes *taysīr* is presented as a juristic device guiding jurists in formulating law, as in the next two examples:

e. Covering the nakedness (*'awrah*) of the deceased when washing the body. The body of the deceased is given a ritual bath before the funeral prayer. During this bath, the nakedness of the deceased is to remain covered out of respect. The normal nakedness that must be covered by a living male is from the navel to the knees. How much must be covered of the deceased during this ritual bath? The commentary states, "It is sufficient to cover the private regions (*al-'awrah al-ghalīẓah*) [i.e. the genitals and anus] for the sake of facilitating ease (*taysīran*); this is the sound position (*huwa al-ṣaḥīḥ*)."[738]

   Unlike previous examples, the *taysīr* here does not concern erecting an external marker. It literally means to make the ritual easy. This is because it is cumbersome for those bathing the deceased to have to wash the whole body while constantly ensuring that almost half the body remains concealed from their eyes. Furthermore, we can reason that the ordinary nakedness is concealed for reasons of modesty and restraining desire; this meaning is absent in someone dead. The legal meaning underpinning nakedness in this case is different – it is out of maintaining the respectability of the deceased – so there is greater allowance for determining nakedness in a way that facilitates ritual washing.

f. Intending the payment of *zakāh*. As *zakāh* is a specific form of alms, a person must have a clear intention of paying *zakāh* for a payment to count as a *zakāh* payment. When must this intention be made? This question is answered in the *mukhtaṣar*: "It is impermissible to pay *zakāh* except with an intention

[738] *Hidāyah*, 1:146; *Guidance I*, 229-30.

cotemporaneous to either the actual payment or the setting aside of the amount due." A problem is raised by the latter option: If you intend *zakāh* when setting the money aside, but then are oblivious when paying it to someone poor, why would this count as *zakāh*? The commentary answers:

> *Zakāh* is an act of ritual worship so the presence of an intention is of its conditions. The basic rule [pertaining to the intention] is that it be cotemporaneous [to the act in question]. However, payments might occur in different times, so it is sufficient for [the intention] to be present at the time of setting it aside, out of facilitating ease (*taysīran*), just like the existence of intention before the fast.[739]

The case of fasting alluded to is similar: A person might be asleep at the time of dawn; does that render the fast invalid as the intention was absent upon the commencement of the fast? Such a stipulation would lead to hardship, so out of ease, a person need only intend at some point during the preceding night. As in the previous example, *taysīr* here refers to the removal of hardship.

We can conclude this discussion by noting that facilitating ease is an important recurring principle in this legal system. It occurs in two distinct forms. The first is the erection of external markers that are easily identifiable to take the place of real causes that are much harder to define and identify. The ease in this case is the ease in implementing the ruling in question as it is tied to an event that a person will not struggle in identifying. The second is the removal of hardship and inconvenience to facilitate the practice of an actual legal ruling. Both of these meanings can be applied in their explanatory capacity to explain the rationale behind established rulings, such as why ritual slaughter purifies meat or why *zakāh* payments are tied to the lunar year. Both can also be used as tools to manipulate and produce law. This manipulation might take the form of choosing between transmissions of school doctrine guided by this principle, as in the case of preferring Abū Yūsuf's position on menstruation

[739] *Hidāyah*, 1:157; *Guidance I*, 252.

calculations. This manipulation, in principle, should also be able to take the form of formulating new rulings outside of transmissions from Abū Ḥanīfah's circle. We do not have any examples of this in the *Hidāyah*. However, *taysīr* as an example to remove hardship, as in examples f. and g. above, appears simply another expression for *ḍarūrah*, a principle that we have seen to impact the formulation of law. Thus the principle and its application in formulating new rules away from Ḥanafī precedent should be the subject of further investigation.

*2. Terms for Hardship*

There were three terms pertaining to hardship that we saw in our study of the *K. al-Ṭahārāt*: *ḍarūrah*, *balwā*, and *ḥaraj*. Of these terms, *balwā* is used the least in the book; it occurs only six times, half of which is in the *K. al-Ṭahārāt*. *Ḥaraj* is used almost forty times. The most common of all is *ḍarūrah*. The term is employed almost 140 times in the *Hidāyah*. Occasionally, it is used only for its linguistic meaning, namely, that of a necessary consequence of something else. Usually, it is used as a legal mechanism around which the law is shown to resolve. A study of the uses of *ḍarūrah* throughout the text does not reveal further significant nuance in the application of the term beyond the nuances discovered in our analysis of the term's use in the *K. al-Ṭahārāt*, above. There are no clear examples of *ḍarūrah* being cited to produce a new legal ruling outside of the ancient law of Abū Ḥanīfah's circle. However, the recurring insistence that many of the rulings of ancient Ḥanafī law are grounded in awareness of necessity and the prevention of hardship and inconvenience serves to relativise these rulings as reflections of a human context. Such relativising can only lead to similar considerations on the part of a later *madhhab* jurist in which he considers the social context in which he finds himself. Here are just five examples

of *ḍarūrah* from the other chapters of law to illustrate the form of relativising achieved by this term.

a. Allowing one's animals to graze on the grass of the sacred precinct (*ḥaram*). The sacred precinct is the sacred land encompassing Mecca and its environs. Special rules apply to this sacred precinct, including the following statement from the *mukhtaṣar*: "He may not graze [his animals] on the grass of the sacred precinct, nor may he cut except lemon grass (*idhkhir*)."[740] The commentary then cites the following debate:

> Abū Yūsuf held that there is no harm in grazing because of necessity (*ḍarūrah*), as it is not possible to prevent animals from grazing. In favour [of the school's position in the *mukhtaṣar* is the Prophetic] report we mentioned, [namely, "Its grass is not to be cut nor its thorns broken,"] and cutting with mouths is as cutting with sickles. Furthermore, carrying grass from outside the sacred precinct is possible, so there is no necessity.[741]

Necessity here is not essential to understanding the statement of the *mukhtaṣar*; but rather al-Marghīnānī has made it a central pivot in the dialectical exchange he introduces. Abū Yūsuf restricts the application of the Prophetic report by adducing necessity, in this case, the extreme difficulty of preventing one's animals from grazing. The response to this is that there is no necessity, because a man may prepare by bringing cut grass with him from outside of the sacred precinct. This exchange can only leave the reader with the understanding that extreme inconvenience can block the application of Prophetic reports, and that in a case where carrying grass is itself not possible, that Abū Yūsuf's position is very plausible. The ancient law of the *mukhtaṣar* has been relativised by this dialectical exchange.

[740] *Idhkhir* is rendered lemon grass in Wilfred Schoff, "Cinnamon, Cassia and Somaliland".
[741] *Hidāyah*, 1:273; *Guidance I*, 437.

b. Paying for servants as part of the basic maintenance (*nafaqah*) due for a wife. The *mukhtaṣar* states that a man is only obliged to pay for one servant (*khādim*) for his wife. The commentary then introduces a dialectical sequence:

> This is according to Abū Ḥanīfah and Muḥammad. Abū Yūsuf held that maintenance is obliged for two servants, because she needs one of them to see to her needs inside the house and for the other to see to her needs outside the house. In the defence of [Abū Ḥanīfah and Muḥammad] is that one [servant] can perform both tasks, so there is no necessity (*ḍarūrah*) for two.[742]

This exchange shows that *ḍarūrah* is the reason why a man must provide a servant to his wife. And it is *ḍarūrah* that determines how many servants and what qualities they must possess. *Ḍarūrah* here is clearly a reference to inconvenience, not a dire necessity, and it is clearly determined based on time and place. Again, the sequence has served to relativise the law of the *mukhtaṣar* by suggesting it is simply an investigation into the sort of support needed by the average woman in the time and place of these imams.

c. Establishing a mosque directly connected to one's own property. A mosque is said to belong to God, a consequence of which is that it cannot belong to anyone else. Thus, the *mukhtaṣar* states that whoever builds a mosque remains its owner (i.e. it is not yet a mosque) until he separates it from his property, by giving it its own public entrance and permitting people to pray in it. The *mukhtaṣar* then states, "Whoever makes a mosque underneath which is an underground chamber (*sirdāb*) or on top of which is a residential room (*bayt*), and makes the door of the mosque open to the public road and separates it from his property, then he may still sell it, and if he dies it is inherited from him." In other words, even if its only entrance is from the main road, as long as it is physically connected to his property by his retaining ownership of a

[742] *Hidāyah*, 1:431; *Guidance II*, 88.

room on top or a chamber underneath, then it is still his property; it is not yet a mosque. After a short explanation, the commentary introduces an internal *khilāf* sequence,

> And it is narrated from al-Ḥasan [ibn Ziyād] from [Abū Ḥanīfah] that [Abū Ḥanīfah] held that if he made the lower level a mosque, on top of which is a residence (*maskan*), then it is a mosque, because a mosque is that which may permanently remain [a mosque], and that is realised in the lower level, not the upper level. The opposite has [been narrated] from Muḥammad, because a mosque is venerated, and if on top of it is a residence or money-earning property (*mustaghall*) then it is not possible to venerate it. It is narrated from Abū Yūsuf that he permitted it in both cases when he came to Baghdad and saw the constrictedness of homes (*ḍīq al-manāzil*); he apparently considered necessity (*fa-ka'annahu i'tabara al-ḍarūrah*). And [it is narrated] from Muḥammad that when he entered Rayy, he permitted all of that for the reason we stated [i.e. *ḍarūrah*].[743]

School doctrine regarding what constitutes a mosque is also subject to necessity. In crowded environments, the author is clearly suggesting that school doctrine should be modified to encourage the establishment of mosques. The temporality in both the closing cases is interesting. Upon entering two different cities, Muḥammad and Abū Yūsuf naturally saw to amend school doctrine for the situation, even though original school doctrine remained in the *mukhtaṣar*. This example, again, presents the ancient law of the *mukhtaṣar* as an ideal law that can be changed, in this case, by living conditions in crowded cities.

d. Pig-hair needles. Regarding pig hairs, the *mukhtaṣar* states, "It is impermissible to sell pig hairs." The commentator explains this briefly: "Because [the pig] is filthy in essence (*najas al-'ayn*), so selling it is not permitted in order to demean it." He then introduces a further legal case in which he explores *ḍarūrah*:

[743] *Hidāyah*, 2:27.

> It is permissible to utilise it for sewing leather out of necessity (*yajūzu al-intifā' bihi lil-kharz lil-ḍarūrah*), because that task cannot be performed with anything else. As it is found free to acquire, there is no necessity to [permit] its sale. If it falls into a small amount of water, it renders it filthy according to Abū Yūsuf; whereas according to Muḥammad it does not render it filthy, because the permission to utilise it is a proof of its purity. In Abū Yūsuf's favour is that this permission is for necessity, which only occurs when it is actually being utilised, which is not the case when it falls [into water].[744]

This passage shows that the very listing of items as filthy is also subject to the absence of necessity: Necessity can make the impure pure. The form of necessity adduced here is an actual social necessity, as it appears that only pig hairs were used to sew leather. The rest of the discussion is to illustrate that necessity is only considered where it is needed, not beyond that. Thus, since pig hairs are available free of charge, necessity does not permit their sale. This of course opens the door for their sale to be permitted in a context where they are not freely available. Similarly, he champions Abū Yūsuf's position that there is no necessity regarding their falling in water. This of course opens the door in other contexts where such forms of excepted filth falls regularly in water. In this passage, al-Marghīnānī both shows the limited way in which *ḍarūrah* is applied – i.e. only to the extent needed to mitigate necessity – whilst simultaneously showing the vast remit given to *ḍarūrah* in the topics of physical filth, sale and drawing utility from impermissible items.

e. Looking and touching women with whom there is no marital or kinship tie (*ajnabīyāt*). The *mukhtaṣar* states, "It is impermissible for a man to look at a woman to whom he has no marital or kinship tie (*ajnabīyah*) except her face and hands." The commentary explains that this is based on the Qur'anic verse: "They should not reveal their adornment except what is visible of it," (Qur'an,

[744] *Hidāyah*, 2:63.

24:31) explaining that what is visible of adornment is the adornment on the face and hands. He explains the rationale for this exception: "Because there is a necessity (*ḍarūrah*) in displaying the face and hands, due to her need for dealing with men by giving, taking and other acts," and then adds further cases to explore the implications of this rationale:

> This [verse] is a clear statement (*tanṣīṣ*) that he may not look at her feet. [It is narrated] from Abū Ḥanīfah that this is permissible because there is a partial necessity in this (*fīhi ba'ḍ al-ḍarūrah*). [It is narrated] from Abū Yūsuf that it is permissible to look at her forearms as well, as these might show in ordinary circumstances (*qad yabdū minhā 'ādatan*).[745]

The Qur'an verse has thus been interpreted to mean that men may only look to parts of a woman's body that display out of necessity, inviting an investigation into what parts of a woman's body ordinarily show out of necessity. Here, we are also introduced to the phrase 'partial necessity' (*ba'ḍ al-ḍarūrah*), which perhaps functions as an acknowledgement that many exceptions made for *ḍarūrah* are really made only to minimise inconvenience and not to address an actual dire necessity as might be understood.

The subsequent case in the *mukhtaṣar* states, "It is not permissible for him to touch her face and hands, even if he has no fear of arousal." The commentary explains this in simple terms: "Due to the presence of a prohibiting [text] (*li-qiyām al-muḥarrim*) and the absence of necessity and tribulation (*wa-in'idām al-ḍarūrah wa-al-balwā*),"[746] and then mentions the prohibiting text in the form of a Prophetic report. What is interesting here is his explicitly stating that in addition to the existence of a prohibiting text, we must also establish the absence of necessity before being able to prohibit touching the opposite gender. This appears to be an underlying assumption in

[745] *Hidāyah*, 2:510.
[746] *Hidāyah*, 2:511.

> many, if not most, chapters of the law: Texts are followed literally where necessity is assumed to be absent, and in a restricted fashion in the presence of necessity. This is a valuable statement for identifying the epistemological status of necessity.

These are only five of approximately one hundred examples of necessity as a legal principle that occur outside of the *K. al-Ṭahārāt*. Even though we do not have explicit examples of an altogether new position being arrived at due to this principle, we do see how contextual and practical the commentary tradition presents many of the cases transmitted from Abū Ḥanīfah's circle. Such an approach to the legal cases of this tradition must be assumed to have a direct effect on how jurists trained in this tradition perceived the law should be applied to a particular context, even if the *Hidāyah* itself does not present many examples of such developments.

*3. Terms for Social Practice*

The discussions above have revealed three terms specially invoked to express common social practice: *'urf*, *ta'āmul*, and *'ādah*. We look at what is revealed by a short survey of the first two of these terms.[747]

*i.* 'Urf

References to custom – *al-'urf*, *'urfan* and *ta'āruf* – occur approximately seventy times in the text. It comes for two distinct purposes: as a method of linguistic interpretation and as a guide to human dealings. In the former capacity, it is presented as a dominant principle for understanding what people intend by the words they use. This is most explored in the long chapter of oaths (*aymān*) in which the interplay between customary (*'urf*) meanings, literal (*ḥaqīqī*) meanings and intended meanings is presented through a large set of cases. The importance of *'urf* as an interpretive

[747] For a broad study of the development of the notion of custom (including both *'urf* and *'ādah*) in Islamic law, see Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of* 'Urf *and* 'Ādah *in the Islamic Legal Tradition*.

principle is not restricted to this topic, however, and is frequently adduced throughout the book.[748] It is usually applied to explain the meanings of human speech, although it is also sometimes applied to divine speech, as the divine speaks to humans based on their linguistic norms. Here are just three examples of *'urf* functioning in such a linguistic capacity.

a. A pilgrim killing predatory animals. Scholars agree that people in a state of pilgrim sanctity (*iḥrām*) are not permitted to kill game animals (*ṣayd*). They disagree whether this includes predatory animals. The *mukhtaṣar* states, "Any [pilgrim] killing game animals whose meat may not be eaten, such as predatory animals (*sibā'*) and the like, must pay the penalty (*fa-'alayhi al-jazā'*)." The commentator adds, "Except for what the sacred law has excepted (*illā mā istathnāhu al-shar'*)," a reference to a Prophetic report: "Five are from the vile creatures (*fawāsiq*); they are killed inside and outside the sacred precinct: vultures, snakes, scorpions, mice and wild dogs (*kalb 'aqūr*)." We are then presented with a dialectical sequence with al-Shāfi'ī, who holds that there is no penalty for the killing of predatory animals because their disposition is to afflict harm, so they are vile creatures, and because the literal meaning of the word *kalb* (translated here as 'dog') includes all predatory animals. The response to this is that, "drawing an analogy to vile creatures is not possible because it negates the number ['five' used in the report], and because the word *kalb* does not customarily (*'urfan*) apply to predatory animals; and custom dominates (*wa-al-'urf amlak*)."[749]

[748] Gleave addresses the role played by customary usage (*'urf*) in arriving at a form of literal meaning, *ḥaqīqah 'urfīyah*: Robert Gleave, *Islam and Literalism: Literal Meaning and Interpretation in Islamic Legal Theory*, 35-55. See also ibid., 112-16, for the importance given by al-Jaṣṣāṣ to popular usage in his legal theory.
[749] *Hidāyah*, 1:268-9; *Guidance I*, 431-2 (Nyazee translates *'urf* as 'technical meaning').

The first argument – that adding more animals is not possible because it opposes the number five mentioned in the report – is an argument grounded in the literalist Ḥanafī language theory presented in our theory lens. The second argument presents the place of *'urf* in the epistemology of Ḥanafī language theory: When dealing with sacred texts, it is assumed that words are used in accordance to customary usage. Of course, the notion of customary usage is a parochial one: It reflects a time and place. The assumption in this passage must be the customary usage of the Arabs in the time and place of revelation.

b. A man saying that his wife is unlawful for him. The *mukhtaṣar* states that if a man says to his wife, "You are unlawful for me," without intending a particular possible meaning of the phrase, then it counts as *īlā'*, an oath not to sexually approach his wife; a person must expiate for such an oath and return to his wife; if he does not do so and four months pass, she is automatically divorced. The commentator adds, "And amongst the *mashāyikh* are those who take the word 'unlawful' to mean divorce, in accordance with the judgement of custom (*bi-ḥukm al-'urf*)."[750]

This is similar to the above-mentioned case where a man declares every lawful thing to be unlawful; the *mukhtaṣar* held that to mean an oath not to eat, while the *mashāyikh* held it to mean he had divorced his wife as that had become the predominant usage (*ghalabat al-isti'māl*). Both cases illustrate that statements of ancient law that address the consequences of human speech are not always to be followed literally: If these are based on customary usage,

[750] *Hidāyah*, 1:394; *Guidance II*, 27.

the jurists must consider the relevance of these cases to customary usage in their own times.

c. The definition of the drunkard for applying the prescribed penalty (*ḥadd*). We have seen above that Abū Ḥanīfah differed from his two students in describing the extent of drunkenness for which a prescribed penalty is to be applied. We saw there that most of the *mashāyikh* inclined to the position of the two companions. The explanation given to ground the position of the two companions was the customary understanding of the word *sakrān* (drunkard).[751] In that particular example, we saw al-Marghīnānī apparently incline to Abū Ḥanīfah's position as it was truer to the topic-governing rule that prescribed penalties are to be avoided to the extent possible.

These are three of many examples conveying an important role played by *'urf* in linguistic discussions, whether in interpreting primary texts (as in a.), interpreting human speech (as in b.), or interpreting terms around which particular sacred prescriptions revolve (as in c.). There is much content in the *Hidāyah* to provide a detailed understanding of the role of *'urf* as an interpretive principle.

The second main usage of *'urf* is as a marker of ordinary human dealings. This is of greater interest to our current discussion as it is here that *'urf* reflects insights into social reality and how it is to be reflected by the law. Here are six examples, in some of which he makes important explicit references to the place of *'urf* in Ḥanafī legal epistemology:

d. Invalid conditions in a sales contract. The *mukhtaṣar* states,

> Whoever sells a slave on the condition that the buyer free him (*yu'tiquhu*), or stipulate his freedom upon the buyer's death (*yudabbiruhu*), or make a contract for the slave to earn his own

[751] *Hidāyah*, 1:528; *Guidance II*, 231.

> freedom (*yukātibuhu*), or sells a slave-woman on the condition that the buyer have a child with her, then the sale is corrupted (*fāsid*).[752]

The commentary explains how these conditions invalidate the sales contract, firstly through a Prophetic report whereby the Prophet forbade the combination of a sale with a condition (*nahā al-Nabī ʻan al-bayʻ wa-al-sharṭ*), and secondly by the provision of a general rule: "Every condition that is not a necessary consequence of the contract (*lā yaqtaḍīhi al-ʻaqd*) and that brings an advantage to one of the two contracting parties or to the object of sale [as in the sale of a slave] ... corrupts [the sale]." He further argues that these conditions bring a stipulated advantage to one party not in exchange for anything, making it a usurious exchange in principle, and that this opens a door to disputes between the two parties. But then he notes, "[This is] unless [such a condition] is customary (*mutaʻāraf*), *because custom decisively overturns analogy* (*li-anna al-ʻurf qāḍin ʻalā al-qiyās*)."[753]

This is an explicit recognition of the high standing of *ʻurf* in Ḥanafī epistemology. *ʻUrf* here is presented in response to both arguments given for prohibiting such conditions: that they resemble usury and lead to disputes. As for the argument that such stipulated conditions resemble usury, we can note that this is not the actual usury explicitly forbidden in scriptural sources, but rather usury through analogy; however, he declares that *ʻurf* is a stronger indicator than analogy. As for the second, that such conditions lead to disputes amongst contracting parties, we can note that a condition that is customarily made is not expected to lead to disputes. Finally, the argument implies that the

[752] A corrupted sale (*bayʻ fāsid*) is one that confers transfer of ownership, but, depending on the case, transacting parties should cancel the exchange, due to the violation of a rule pertaining to sound trading practice: *Hidāyah*, 2:71-2.
[753] *Hidāyah*, 2:66-7.

report of the Prophet's forbidding combining a sale with a condition must be interpreted to exclude conditions that are customary.

e. The costs that may be added to a sale where the seller is selling the item exactly for what it cost him (*tawliyah*). The *mukhtaṣar* states that in *tawliyah* contracts, whereby the seller may contractually only sell an item for what it cost him, the seller may add the costs of bleaching, embroidering, dyeing, spinning and transporting food. The commentary explains these by noting, "Because in customary dealings (*'urf*) these are added to the capital (*ra's al-māl*) in the normally observed practice of traders (*fī 'ādat al-tujjār*)," after which it provides the higher principle governing these examples: "Because everything that adds to the object of sale or to its price is added to it; this is the basic principle (*hādhā huwa al-aṣl*)."[754]

In this example, the commentary is explicit that the points listed in the *mukhtaṣar* only serve as a contextually inspired illustration of a governing principle. It is interesting that in such cases the *mukhtaṣar* does not convey this underlying principle, and simply conveys examples from ancient context. These examples are clearly not intended as law in such cases. Rather, the jurist is expected to note what is customarily added to such contracts in his own context to form his own list of context-specific examples.

f. Exchanging usurious items in different measures. There are six items mentioned explicitly in a Prophetic report which when exchanged for their like must be exchanged for exactly the same quantity, regardless of market cost: If they are exchanged for differing quantities, this is considered a usurious contract. These six items are wheat, barley, dates, salt, gold and silver. How is

[754] *Hidāyah*, 2:79.

equality to be established? Prophetic reports mention that equality in the first four of these items is by volume, whilst it is by weight in the latter two. But what if people start dealing with these items differently? The *mukhtaṣar* addresses this by noting,

> Everything the Messenger of God explicitly forbade unequal exchange of in volume (*kayl*) is always to be measured by volume [to ascertain equality], even if people stop exchanging these in volume, such as wheat, barley, dates and salt; and everything he explicitly forbade unequal exchange of in weight (*wazn*) is always measured by weight [to ascertain equality], even if people stop exchanging these in weight, such as gold and silver. And whatever he did not explicitly state is to be understood through the common practices of people (*ʿādāt al-nās*).

The commentary explains the general rule by noting that "The explicit text is stronger than customary practice (*al-naṣṣ aqwā min al-ʿurf*); something stronger is not left for something weaker." This is an important observation for our purposes as it places custom epistemologically lower than explicit sacred texts. But the exploration doesn't stop here. He presents an important internal *khilāf*:

> [It is narrated] from Abū Yūsuf that he also considered customary usage when it opposed the explicitly stated measurement, because the explicit statement of [those measurements] was due to the presence of common practice (*ʿādah*), so this is what is considered, and it has changed. Based on this, if he exchanges wheat for its like, establishing equality in weight, or gold for its like, establishing equality in volume, this is not permissible according to [Abū Ḥanīfah and Muḥammad] even if this is the customary measure due to the possibility of increase in the considered measurement.[755]

It is important to note that this exchange is presented as a *khilāf*, not a dialectical sequence. In other words, he is not rejecting the transmission from Abū Yūsuf; in fact, he treats it as his established position, as he follows it by acknowledging that the position in the *mukhtaṣar* only belongs to the other two imams. It is not important for our purposes which of these two parties is

[755] *Hidāyah*, 2:87.

right. What is most important is the epistemological underpinnings of the exchange. We learn from this passage that explicit sacred texts are stronger than customary practice, unless those sacred texts are themselves based on customary practice at the time of revelation. In this latter case, customary practice is stronger than the text, because the text is indicating that customary practice should be followed. The only debate after this is whether a particular text is indeed based on prevalent customary practice. Abū Yūsuf holds the particular text discussed here to be such a text. There is no response presented on the part of Abū Ḥanīfah and Muḥammad to show why it is not such a text. Instead, the final sentence suggests that they hold onto their position out of a form of precaution: "due to the possibility of increase in the considered measurement."

g. Representatives in a dispute taking the item of dispute. We have seen above a debate regarding whether someone hired to represent a party in a dispute may also seize the item under question if he wins the dispute. We saw that he could do so according the three Ḥanafī imams, but that he could not according to Zufar, and that the *fatwā*-position was that of Zufar due to the untrustworthiness of such representatives. The commentary then states,

> Similar to this is the agent appointed to settle debts (*wakīl bi-al-taqāḍī*): He possesses the right to seize [debts] according to the original [school] position [*fī aṣl al-riwāyah*], because this is the original meaning of [the term] (*li-annahu bi-ma'nāhu waḍ'an*). However, customary usage (*'urf*) is the opposite of this, and [customary usage] decisively overturns original meanings; the *fatwā* is that he does not possess [the right to seize debts].[756]

In this example, he combines the two usages of *'urf*: as an interpretive tool and a marker for social practice. This is because the customary usage of

[756] *Hidāyah*, 2:206.

what is understood by an 'agent appointed to settle debts' reflects developments in a particular social context reflecting shifting levels of trust awarded such parties. This is why, with regards to this *fatwā*-position, it is the customary usage that counts.

h. Returning stolen or entrusted items to their owners. The *mukhtaṣar* states that a person must return a stolen item (*maghṣūb*) or an item entrusted to his care (*wadī'ah*) directly to its owner; if he returns it only to his home, then he bears financial responsibility for any loss or damages that might occur to it. The commentary explains the case of entrusted items by noting,

> The owner does not accept for it to be returned back to his home or to the hand of any of his dependants, because if he were pleased with [one of these], he would not have entrusted [the item] to [this person]. [This is] opposed to borrowed items, [which may be returned to the home or dependents], because there is customary practice (*'urf*) concerning this. In the case where the borrowed item is a necklace of jewels, a person may not return it except to the person who lent it, because the aforementioned customary practice does not extend to this [case].[757]

This is another example which presents the transmitted cases of school doctrine as attempts to formulate a legal code that reflects the intents and purposes of people. There is no doubt that a jurist trained by such a text will be expected to inspect the customary practices of his context when formulating law pertaining to lent and entrusted items.

i. Rights and duties of each party in the hire of a wet-nurse. The *mukhtaṣar* informs that the hiring party may not forbid the husband of a wet-nurse from having intercourse with her for the duration of the agreement; instead, they have the right to cancel the contract if the wet-nurse becomes pregnant and they fear this will adversely affect their child. The *mukhtaṣar* also informs that

[757] *Hidāyah*, 2:303.

it is the wet-nurse's duty to prepare food for the child in question. The commentary then states the overriding rule:

> The upshot is that customary practice (*'urf*) is considered [for governing] whatever is not explicitly stipulated [in the agreement]. So matters normally considered in customary practice, such as washing the clothes of the child, preparing his food and other such matters are the duty of the wet-nurse. As for the food [of the wet-nurse], this is the duty of the child's father. That mentioned by Muḥammad concerning oil and basil being the duty of the wet-nurse is based on the ordinary practice of the people of Kufa (*'ādat ahl al-Kūfah*).[758]

This passage shows a recurring theme in contracts: Conditions not explicitly stated in the contract are understood through customary practice; whatever is customarily expected is treated as a condition in the contract. In this regard, again, the details of ancient law are presented only as examples of matters that were customary in the original context of ancient law. This is explicitly stated in the last sentence, which explains details provided by Muḥammad as merely reflecting Kufan practice.

We have examined nine examples out of approximately seventy references to *'urf*. These examples show that the use of this concept is part of a well-defined epistemology that the various discussions tied to *'urf* illustrate. Sacred texts and statements of early jurists that are seen to represent customary practices in their times are to be superseded by customary practice in later times. The challenge is identifying which of these early statements were based on customary practice.

*ii.* Ta'āmul

References to common practice (*ta'āmul*) occur fourteen times in the text. As the derivation from *'amal* (lit. 'work') suggests, it is a reference exclusively to economic practices. It is sometimes used as a tool to establish the permissibility of forms of economic activity that were widespread practice at the time of the revelation and were

[758] *Hidāyah*, 2:329.

not interdicted by the Lawgiver. This is the explanation given to prove the permissibility of business partnerships (*sharikah*), partnership where one party offers labour and the other capital (*muḍārabah*), and the hiring of wet-nurses. At times, it is used as a principle that allows prevalent economic practice to take precedence over otherwise established doctrine. The most frequently mentioned example of this is the manufacturing contract (*istiṣnā'*), where a manufacturer is hired to manufacture a product. The *qiyās*-position is that this should not be permitted as a person is paid in exchange for something that is non-existent at the time of the contract. However, because it is common practice, it is permitted contrary to the *qiyās*-position. Here are some examples to illustrate.

a. Details pertaining to the manufacturing contract. An important detail about the manufacturing contract is that it is only permitted in cases of common practice: "It is not permissible for [forms of manufacture] that are not subject to common practice, such as clothing, as there is nothing to permit them [in the absence of common practice]."[759] In this, it is very similar to *ḍarūrah*, which is carefully restricted to the exact point of *ḍarūrah*.
b. Sharecropping and related details. We saw above that Abū Ḥanīfah was opposed to sharecropping, while the two companions permitted it. Al-Marghīnānī defends Abū Ḥanīfah's position in a dialectical sequence, but then states, "The *fatwā* is issued according to [Abū Yūsuf's and Muḥammad's] opinion due to people's need for [sharecropping] and the widespread common practice of the nation in its favour (*ẓuhūr ta'āmul al-ummah bihā*). *Qiyās* is left for common practice, as in the manufacturing contract."[760] Here we find common practice (*ta'āmul*) occupying a similar epistemological standing to

[759] *Hidāyah*, 2:110.
[760] *Hidāyah*, 2: 465.

customary practice (*'urf*), necessity (*ḍarūrah*) and facilitating ease (*taysīr*): Each is explicitly identified as overriding *qiyās*.

In the topic of sharecropping, there is also the previously examined detail of stipulating that the labourer covers the costs of all third parties. The *mukhtaṣar* stated that it was not allowed, but then we were informed that according to Abū Yūsuf it is allowed due to common practice, and that the *mashāyikh* of Balkh and the practice of Transoxiana was in accordance with this.

c. Permanently setting aside moveable items for public utility (*waqf*). The *mukhtaṣar* states that only landed properties can be made into a *waqf*, whereby the individual no longer owns it, and it is permanently dedicated to serve a cause stipulated by the owner. The commentary explains that this exclusion of moveable property is according to Abū Ḥanīfah. Muḥammad holds that any item which is set aside as *waqf* in common practice (*ta'āmul*) may become a *waqf*, such as axes, saws, pots, and *muṣḥaf*s (bound Qur'ans). The explanation for this view is presented in a dialectical sequence with Abū Yūsuf, who allows only those moveable items to be made into a *waqf* which have been mentioned in Prophetic reports:

> According to Abū Yūsuf, this is not allowed because *qiyās* is only abandoned due to a specific text, and a specific text has only occurred concerning weapons and horses, so [the matter] is restricted to these. Muḥammad replies that the *qiyās* can also be abandoned due to common practice (*ta'āmul*) as in the manufacturing contract, and there is common practice in [setting] these things [as *waqf*].[761]

This is an exchange clearly set up to defeat Abū Yūsuf, as his argument is weak: It is widely recognised in this Ḥanafī tradition that *qiyās* can be abandoned without a particular text as well, as in the case of *ḍarūrah*, a

[761] *Hidāyah*, 2:22-3.

standard point of the Ḥanafī doctrine of *istiḥsān*. The exchange was set up in this way to categorically make the argument that *ta'āmul* is a sufficient reason to abandon *qiyās*. Thus, al-Marghīnānī states after this exchange that most jurists from across lands (*akthar fuqahā' al-amṣār*) adopt the position of Muḥammad. Al-Marghīnānī also shows the *ḍarūrah*-like approach to the topic, i.e. that *ta'āmul* only takes away from the *qiyās* to the extent it is actually established, by noting, "Whatever is not subject to common practice may not be made into a *waqf* according to us."

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We have examined here only twelve of many examples in the text where custom and common practice are presented as fundamental points of theory underpinning ancient law. There are many more examples that could have been presented. In addition to seventy mentions of *'urf* and fourteen of *ta'āmul*, there are ninety-seven references to ordinarily observed phenomena (*'ādah*). I have omitted examples of *'ādah* as they do not reveal further epistemological insights outside of those we have seen in our discussions of *'urf* and *ta'āmul*. There are also many examples where social reality is referenced as underpinning the law without employment of a technical term. To say that commentaries such as the *Hidāyah* are insensitive to social reality is an incredible understatement. On the contrary, accommodating common practices, norms and conventions are presented as among the most central points of legal theory. Terms such as *'urf* and *ta'āmul* are explored through a clearly defined epistemology, where these are given a place among the indicators of the law that outweigh *qiyās*. An epistemology of the law must give due attention to these terms, despite the lack of importance given to them among the categories studied in *uṣūl al-fiqh* texts. And to this last point we will return.

### 4.2.4 A Note on Time

Time is a factor that that sets a fascinating backdrop to the discussions of the *Hidāyah*. The references to time in the text represent a 'time warp' in which the reader is placed: In some places, the commentary assumes that it and its readers are observers existing in the glorious age of the *salaf*, while in others it moves between later periods. This shifting notion of time holds the key for us to bring together several features of the commentary in our attempt to form a meta-narrative of the Ḥanafī early classical *fiqh* project.

The current section observes this notion of time through the lens of a single phrase: *zamānunā*, 'our time'. It occurs in the text on fifteen occasions. In four of these fifteen occasions, it is clear that 'our time' is the time of Abū Ḥanīfah's circle. Here are the examples.

a. Washing the private parts after having relieved oneself and wiped with stones. "It is a point of etiquette (*adab*), and it is said that it is highly recommended (*sunnah*) in *our time*."[762] The idea that washing is more emphasised in later generations due to greater amounts of eating and drinking is an idea dating to the early Islamic conquest, to contrast luxurious eating after the conquest to the simple diet at the time of the Prophet. Accordingly, al-Bābartī in his commentary on the *Hidāyah* attributes this statement to the early Follower al-Ḥasan al-Baṣrī (d. 110/728).[763] 'Our time' in this passage is at least Abū Ḥanīfah's time, if not that of the Followers in the generation preceding him.
b. The most worthy of leading the prayer. The *mukhtaṣar* states that the prayer should be led by the "most learned of the *sunnah*" – a phrase that incorporates knowledge of the rules pertaining to the prayer – and if contenders are equal in

[762] *Hidāyah*, 1:59; *Guidance I*, 76.
[763] Al-Bābartī, *al-'Ināyah*, 1:215.

this regard, then the one who is "most read in the Book of God" – a reference to either the one who has most memorised the Qur'an or recites it best. The commentary quotes a Prophetic report which seems to state the opposite: "People should be led by the most read in the Book of God; if they are equal, then the most learned of the *sunnah*." Al-Marghīnānī explains the disparity between the two by noting: "They used to learn [the Qur'an] with its legal rules, so this was preferred in the Prophetic report. [The matter is] not thus in *our time*, so we preferred the most learned."[764] Here, 'our time' is at least the time of Abū Ḥanīfah, whose doctrine is recorded here, if not also his teachers. 'They' in "They used to learn [the Qur'an]" is clearly a reference to the Companions.

c. The manner in which the prayer of fear is offered. The prayer of fear (*ṣalāt al-khawf*) is a form of ritual prayer offered during the confrontation between armies before battle. After explaining the manner in which it is offered, al-Marghīnānī notes in the commentary, "The basis of this is the narration of ['Abd Allāh] ibn Mas'ūd that the Prophet offered the prayer of fear in the manner we have mentioned. And although Abū Yūsuf denies the legality of it in *our time*, the report we have mentioned is a proof against him."[765] This passage is clear that 'our time' is at least the time of Abū Yūsuf, who might well intend, by negating its legality, all times after the Prophet.

d. Marking the *muṣḥaf* (bound Qur'an) with vowels (*naqṭ*)[766] and symbols for the completion of ten verses (*ta'shīr*). The *mukhtaṣar* states that placing such marks in the *muṣḥaf* is disliked. The commentary supports this through a

[764] *Hidāyah*, 1:95-6; *Guidance I*, 133-4.
[765] *Hidāyah*, 1:144; *Guidance I*, 227.
[766] Al-Marghīnānī's explanation explains the problem with *naqṭ* as being that people will rely on it and lose mastery of *i'rāb* (grammatical vowel endings); hence, *naqṭ* has been translated 'vowels'.

> statement of the Companion Ibn Mas'ūd, and explains that such markings interfere with memorisation of the verses and that vowel markings in the *muṣḥaf* prevent people learning grammar as they rely on these markings. We are then told, "They said that in *our time*, non-Arabs need an indication; avoiding this interferes with Qur'anic memorisation and [leads to] the Qur'an being abandoned, so it is a good thing (*ḥasan*)."[767] Such vowellings in the *muṣḥaf* started during the life of the Companions.[768] We are told that al-Kisā'ī (d. 180/796-7), a Kufan contemporary of Abū Ḥanīfah, would sit and recite the Qur'an while listeners would mark their own *muṣḥaf*s according to his recitation.[769] This practice seems to have been widespread in Abū Ḥanīfah's time. Thus, it is unclear if the *mukhtaṣar* is recording a position upheld in Abū Ḥanīfah's circle, or if it is a position of Abū Ḥanīfah's teachers that this circle sought to preserve.

In other examples, 'our time' clearly refers to a time that preceded al-Marghīnānī's by several centuries. In one example, the aforementioned disagreement between Abū Ḥanīfah and his two companions regarding an oath not to eat 'heads', the commentary mentions, "In *our time*, the *fatwā* is issued according to ordinary usage (*'alā-ḥasab al-'ādah*) as is mentioned in the *Mukhtaṣar* [of al-Qudūrī]."[770] Here, 'our time' is at least al-Qudūrī's time (more than 150 years before al-Marghīnānī), and almost certainly that of the teaching tradition that preceded him. In another example, concerning a man guaranteeing to bring another man to justice when needed (*kafīl bi-al-nafs*), we are told that in 'our time' such a person must bring that man to the session of the judge

[767] *Hidāyah*, 2:528.
[768] This practice reportedly started with Abū al-Aswad al-Du'alī (d. 69/688-9) (a close companion of 'Alī ibn Abī Ṭālib), who recited the Qur'an to a student, instructing him to place dots at the ends of words to represent vowel endings: al-Dhahabī, *Siyar a'lām al-nubalā'*, 4:83.
[769] Al-Dhahabī, *Siyar*, 9:132.
[770] *Hidāyah*, 1:487; *Guidance II*, 174.

and cannot just bring him to the market as was stated in original school doctrine. The commentary tradition ascribes this position to al-Sarakhsī who quotes 'later-day scholars' (*muta'akhkhirūn*). 'Our time' is the time of these scholars who preceded al-Sarakhsī.

Many of the remaining instances refer to phenomena that almost certainly preceded al-Marghīnānī by a significant amount of time, likely of the order of centuries, while others belong to some indeterminate time between Abū Ḥanīfah's circle and al-Marghīnānī.[771] Only in one instance can we feel some confidence in asserting that it reflects a time close al-Marghīnānī's. In this instance, he seeks to give an example of the least valuable item that can be measured by a particular volumetric measure termed a *wasaq* by noting that it is "like corn in *our time*."[772] This appears to reflect his own context, but this would require further investigation.

The fifteen examples of *zamānunā* in the *Hidāyah* provide a helpful insight into al-Marghīnānī's *fiqh* project. We have seen that the time intended by the phrase shifts a great deal. In most cases, it is a reference to a time some four-hundred years before the author, the time of Abū Ḥanīfah's students and the early teachers after them, while in some it appears closer to the author's context. Why has such a large spread of time collapsed in this text, allowing any point in a period of more than four-hundred years to equally represent 'our' time? It can only be because 'their' time lies on the other side of this time period. This is best understood as being a direct reflection of the *salaf*-based epistemology of the early classical Ḥanafī school. 'We'

[771] *Hidāyah*, 1:91, *Guidance I*, 124-5; *Hidāyah*, 1:173, *Guidance I*, 281; *Hidāyah*, 1:508 (omitted in *Guidance I*); *Hidāyah*, 1:602. *Guidance II*, 342; *Hidāyah*, 2:161; *Hidāyah*, 2:219; *Hidāyah*, 2:532-3; *Hidāyah*, 2:552.

[772] *Hidāyah*, 1:175; *Guidance I*, 284 (renders *dhurah* as barley). Bakdāsh's edition adds "like corn" to the *mukhtaṣar*. This is almost certainly an interpolation from the *Hidāyah*, as it breaks up "like corn" from "in our time", and it seems unlikely that an example from the *mukhtaṣar* would need to be qualified in this way. We are fortunate that on this occasion Bakdāsh mentions that this is in only one of his manuscripts, a later one from the mid-tenth century: al-Marghīnānī, *Bidāyah*, 148.

only know the law through 'them', the jurists of the earliest community, the *salaf*. 'Their' statements, even those based on temporal contexts, are foundational in understanding the legal tradition, whilst 'our' statements reflecting 'our' temporal context are only reflections of 'their' teaching and wisdom, and are not foundational. We can note that the word 'our' applies at times to Abū Ḥanīfah's students and usually to scholarly figures between them and al-Marghīnānī. It never refers explicitly to Abū Ḥanīfah in the *Hidāyah*, although his generation is clearly implied. This might be a coincidence, or might reflect the dual role played by Abū Ḥanīfah in Ḥanafī legal theory. He is the doorway to the *salaf* and, as such, has a foot in both times; he sees 'our' time and 'their' time. The commentary brings the reader into this unique vision of time, where 'we' stand alongside everyone who has accessed the law through Abū Ḥanīfah, including his own students. This warping of ordinary time can hold the key to understanding several features of the commentary, particularly its attitude to social context.

The underlying puzzle that this chapter has presented is that the commentary ties much of the law to temporal social conditions and provides clear mechanisms to alter school doctrine to respond to shifting social conditions. One can only assume that a training in such a text provides the keys to a fluid and adaptive approach to formulating law in this *fiqh* tradition. Yet, there have been relatively few actual examples given of new positions adopted to replace the ancient law of the *mukhtaṣar* and the transmitted positions of Abū Ḥanīfah's circle. One possible answer to this puzzle draws from the unique vision of time presented here.

Although al-Marghīnānī's text provides clear pointers to how this *fiqh* tradition envisages law to reflect social contexts and provides several examples to show how this is done, the text does not actually exist in al-Marghīnānī's time; it

exists primarily in the time of ancient law and its early reception in the Ḥanafī tradition. The text exists fundamentally as an exposition of ancient law for the purpose of exploring the rationality underpinning this ancient law. No doubt, an ancient rationality will be found to underpin ancient law. Showing where this ancient rationality is built on ancient customs is sufficient to open the door to temporal change, but a focused exposition of temporal contexts cannot be the focus of this ancient exposition. From this point of view, there is no need to include the author's own temporal context; instead, the exploration of ancient temporality is a sufficient guide for forming a temporal law in all subsequent contexts. The commentary, by virtue of its existence in ancient time, has liberated itself from time altogether and become timeless, a source of everlasting authority and relevance to match the everlasting authority and relevance of the *salaf*, whom the *fiqh* tradition may never bypass in the search for revealed knowledge.[773]

This explanation is incomplete, however. If the book's goal is to be timeless as described, then why at all mention the reception of the *mashāyikh* and the occasional new positions adopted as *fatwā*-positions? There appear to be two reasons for these additions. The first reason reflects the role of the *madhhab* as a self-regulating guild. The *Hidāyah* is produced within this guild, for members of the guild, and proceeds to become the leading text through which the guild defines itself. The Ḥanafī guild stands on a *salaf*-based epistemology, so authoring a text centred on ancient time reflects the rules of the guild. But this is only on the level of theory and epistemology.

[773] Baber Johansen reaches a similar conclusion in explaining the unchanging nature of the *mutūn* (authoritative *mukhtaṣar*s) even for questions of the law that had changed, as recorded in commentaries and *fatāwā* works: Baber Johansen, *Contingency in a Sacred Law*, 464. The notion of time presented here corresponds nicely to the notion of circular time that El Shamsy ascribes to a pre-canonisation tradition, as opposed to a linear time that sets in once law is seen as an engagement with a fixed body of texts. The continuation of a pre-canonisation idea of time is a further consequence of the *salaf*-based approach to tradition in this early classical Ḥanafī school. See El Shamsy, *The Canonisation of Islamic Law*, 148.

A self-regulating legal guild must also provide limits; if guild members step past these limits, their statements are not condoned by the guild. Particular new formulations of law become authoritative over the passage of time by widespread acceptance in the guild. These new formulations might be altogether new positions not based on the precedent of Abū Ḥanīfah's circle, or might involve the adoption of a particular position in Abū Ḥanīfah's circle to the exclusion of others. These must be recorded by any text authored within and for the guild, otherwise the text does not reflect the rules of the guild. These newly adopted positions by the guild are relatively few in the text because it takes time for a new formulation to be formally adopted by guild masters, prior to which it is merely part of an ongoing exchange within the guild.

A second reason for the regular reference to *mashāyikh* and later reception of school doctrine in the *Hidāyah* is the role played by *mashāyikh* in the transmission of school doctrine. We have seen how the core doctrine of ancient law in the *mukhtaṣar* was arrived at through a careful negotiation of the living teaching tradition of the pre-classical school and the recorded statements in the canonised textual tradition. The *Hidāyah* shows that the careful negotiation of these two distinct sources of authority continued into the early classical era, with the living doctrine of teachers often presented alongside textual transmission, either to support it or to replace it. At times, they are presented alongside early founding figures, with phrases such as, "Abū Yūsuf and the *mashāyikh* said...",[774] where the position of the *mashāyikh* is presented as equally authoritative with Abū Yūsuf's, because their position shows the acceptance of Abū Yūsuf's position in the living teaching tradition of the school. At times, the *mashāyikh* are authorities in interpreting canonised texts: Where a text presents a point of doctrine as being held by all three school-founders, the *mashāyikh* might

[774] *Hidāyah*, 2:478.

deduce, based on legal reasoning, that it can only be the position of a particular one of the school-founders.[775] At times, positions of the *mashāyikh* are presented alongside evidently transmitted school doctrine (*ẓāhir al-madhhab*/*ẓāhir al-riwāyah*), not because they outweigh it, but because they, through their deep understanding (*fiqh*), can access a subtle form of transmitted school doctrine – the *bāṭin al-madhhab* implied by this contrast with *ẓāhir al-madhhab*.[776] The school is a living continuing tradition that is ancient only in epistemology, not in fact. The commentary presents this perfectly, and the shifting mood of time displays this well.

## 4.3 Conclusion: Towards a General Theory of Ḥanafī Law

In this chapter, we have seen further legal theory that does not directly reflect the categories of Ḥanafī *uṣūl al-fiqh*. Some of this theory reflects features of the *madhhab* as a self-regulating guild, particularly the identification of some positions as *fatwā*-positions and others as sound or soundest positions. Other parts of this theory reflect features of the *madhhab* as a teaching tradition; this is most reflected by references to *mashāyikh*, who are often spoken of simply as 'they'. Most significant, however, for the purposes of the current study were the points of further theory that directly address social context. These points of theory assessed whether notions of difficulty, ease, custom, common practice or undesired outcomes should be reflected by the law. These particular points of theory were termed legal mechanisms as they ensure that law produced by this *fiqh* tradition is appropriate for a particular social context. Although most examples of these mechanisms presented in the text were to contextualise ancient law in ancient context, examples were also found to show that these very mechanisms were to be used to modify authoritative school doctrine to suit

[775] See for example *Hidāyah*, 2:26, where a legal statement about endowments (*awqāf*) found in a text of Hilāl ibn Yaḥyā al-Baṣrī (d. 245/859-60) is understood by the *mashāyikh* to be the position of al-Shaybānī based on al-Shaybānī's position in related cases.
[776] *Hidāyah*, 1:479; 2:142, 161, 326; *Guidance II*, 160.

subsequent temporal contexts, by leading to the adoption of either alternative positions within Abū Ḥanīfah's circle or the formation of new positions altogether. I attempt here to bring these mechanisms together with our theory lens to propose a general theory of the law. I will build up this theory from first principles.

The theory starts with ancient law as the starting point. Ancient law represents the most epistemologically secure understanding of revelation, drawing directly from the pristine *salaf* through the medium of Abū Ḥanīfah. The first process applied to this ancient law is that of *fiqh*, which we have defined as an attempt to determine what it is that underpins this law. Through this *fiqh* engagement with ancient law, we arrive at a set of legal meanings. Some of these will be topic-governing rules as they help explain the rationale of several related legal cases within the same topic. Others of these legal meanings will tie an individual case to the topic-governing rule. Yet others of these legal meanings will be found to be expressed across disparate chapters of the law; these are maxims in this system of legal thought. Through this process of *fiqh*, we discover some cases to follow their topic-governing rules perfectly, while others function as exceptions (*istiḥsān*-positions). Those that function as exceptions must be governed by an alternative rule; we must apply *fiqh* to discovering these rules. Some exceptions are sensible, whilst others are not. Those that are not sensible must be exceptions based on a textual intervention (*istiḥsān* based on a text). Those that are sensible are either alternative reflections of the internal logic of the system (the hidden *qiyās*) or reflections of external, temporal stimuli that restricted the application of the topic rule. The term used for such temporal stimuli in the *uṣūl al-fiqh* literature is simply *ḍarūrah*, necessity, a term for which no detailed explanation is offered. I would like to suggest that our exploration of further theory through the *Hidāyah* has given us an excellent insight into the notion of *ḍarūrah*.

We first saw *ḍarūrah* in eleven instances in the *K. al-Ṭahārāt*. These examples showed *ḍarūrah* to be a broad principle, referring sometimes to actual cases of physical necessity, sometimes to theoretical necessities whereby a point of doctrine is theoretically altered to make it practicable, and sometimes to a mere avoidance of inconvenience caused by school doctrine. We then saw a large set of principles; each reflected a response to external stimuli, and each was explicitly described as being stronger than *qiyās*, meaning each was a means to form an *istiḥsān*-position. The principles studied in this chapter that come under this category were *balwā*, *ḥaraj*, *taysīr*, *'urf* and *ta'āmul*. Other principles that no doubt belong to this set include *'ādah*, *hājah*, *iḥtiyāṭ* and almost certainly others. The commentary showed a very clear understanding of the place of these terms in the hierarchy of Ḥanafī epistemology. Most crucially we can note that they share the same epistemological status as *ḍarūrah* in their ability to modify *qiyās* and their being applied only where needed to the extent needed. Thus, on the level of epistemology, we must conclude that each of these legal mechanisms and filters are but reflections of *ḍarūrah*, each with a different name to show a particular reflection of the term. Through *ḍarūrah* we may enter these mechanisms from further theory into our *uṣūl al-fiqh* theory lens.

It is crucial to note that the development of these mechanisms clearly occurred through the *fiqh*-based analysis of ancient law. Thus the primary role of these mechanisms is in explaining ancient law through their underpinning the cases of ancient law. Once ancient law provides us with these principles of how the law changes to external stimuli, these principles move from being explanatory to being mechanisms for change. With this narrative of legal theory, we have arrived at a functional epistemology of Ḥanafī law that explains the role of *fiqh* in preparing a jurist to know the law.

The schema in Figure 5 summarises this understanding of *fiqh* from our study. The highest point in the diagram is ancient law. *Fiqh* is the discovery of the meanings underpinning ancient law. These underpinning meanings depend on the form of ancient law represented by a particular legal case. In this regard, legal cases are of two types: those that express the internal logic of the remainder of the law and those that do not. I avoid here the terms *qiyās* and *istiḥsān* to include cases such as the use of water in ritual ablutions or the limbs that must be washed, both of which may not be derived from the logic of the legal system, but neither are they departures from internal logic as there is no clear logic pertaining to these points of ritual.

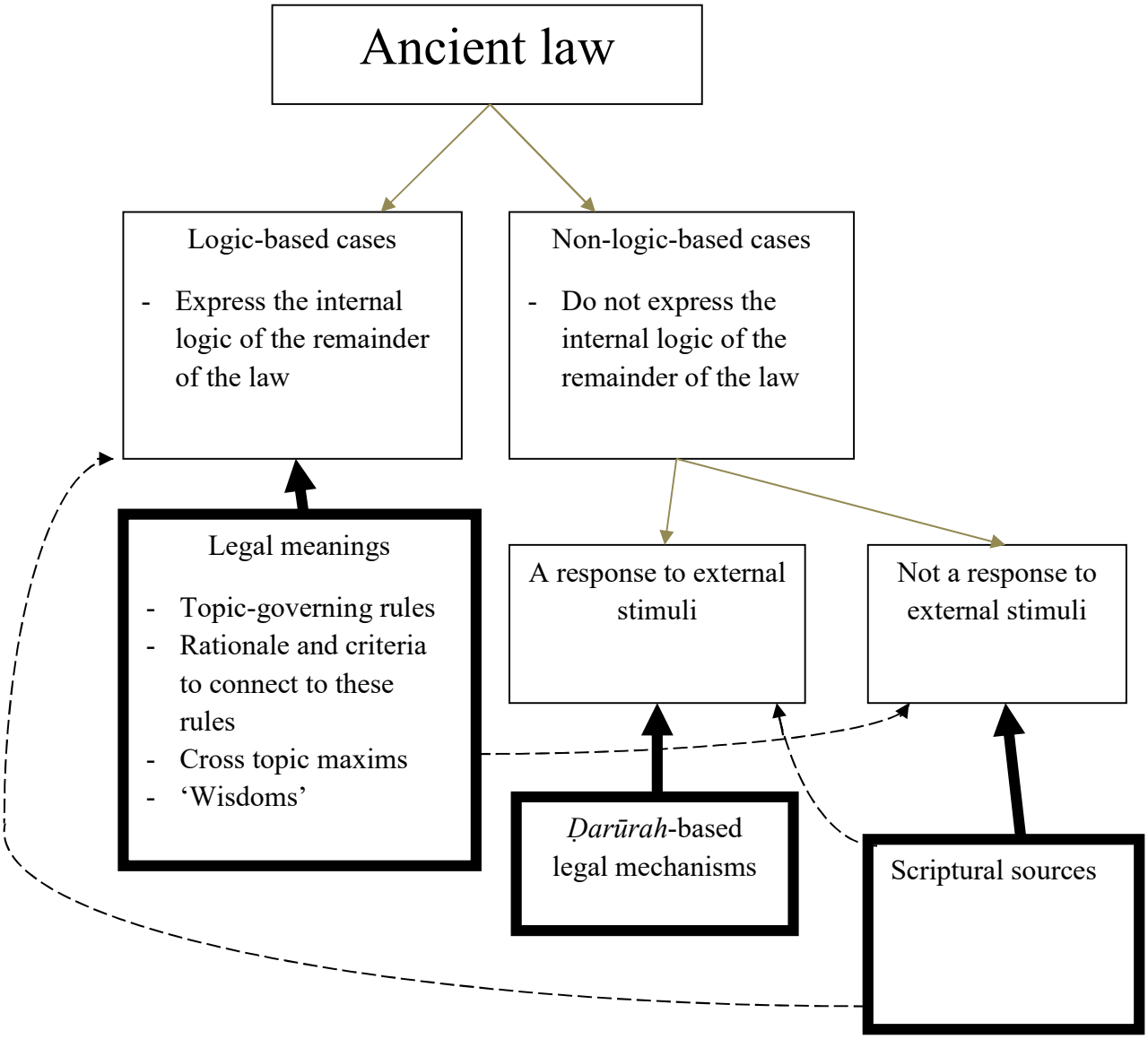



*Figure 5: Fiqh as an engagement with Ancient Law*

The bold boxes are the results of the *fiqh* engagement with ancient law, as these are the factors underpinning the law. This process reveals a detailed set of legal meanings and *ḍarūrah*-based legal mechanisms, which themselves are a subset of legal meanings but are separated here for clarity as they interact with legal cases distinctly. Scriptural sources are essential for presenting what underpins non-logic-based cases that are not a response to external stimuli. They also play a supporting role in presenting arguments for what underpins other cases of law (represented with dashed

lines). Similarly there is a dashed line from the legal meanings to non-logic based cases that are not a response to external stimuli to show that jurists will attempt to provide legal meanings to these exceptional topics to the extent possible (as we saw in the topic of *khuff* wiping), and only if the topic is completely incomprehensible will they rely simply on scriptural sources to explain these cases. Once we have a complete *fiqh* engagement with ancient law, we may now turn to formulating law from this engagement.

Our study of the cases and mechanisms presented in the current chapter has given us an insight into the engagement of this *fiqh* tradition with social context, based on which a model may be proposed. According to this model, the first step in producing law in this tradition is the suggestion of a proposed law. This proposed law is what the law ought to be without regard to a temporal situation. In a text such as the *Hidāyah*, where do we locate proposed law? Through the many examples presented in the last two chapters, we can highlight three distinct places proposed law can be found in the *Hidāyah*. The first is the explicit cases of ancient law. This is predominant with the cases seen in the *K. al-Ṭahārāt*, such as specifying the limbs washed in ritual ablution, the time limit for wiping on *khuff*s, and the items deemed physically filthy. A legal meaning might underpin such cases, but it does not partake in the formulation of proposed law. The second place proposed law might be found is in legal meanings. This is most predominant in cases of ancient law that are seen only as examples to illustrate a legal meaning; the legal meaning here is the proposed law. Examples of such cases are the many cases of oath swearing such as a person's swearing not to eat heads or wear jewellery; the positions of Abū Ḥanīfah and his companions regarding these cases were clearly held as nothing more than examples to illustrate the legal meaning, namely, that oaths such as these are to be interpreted based on customary

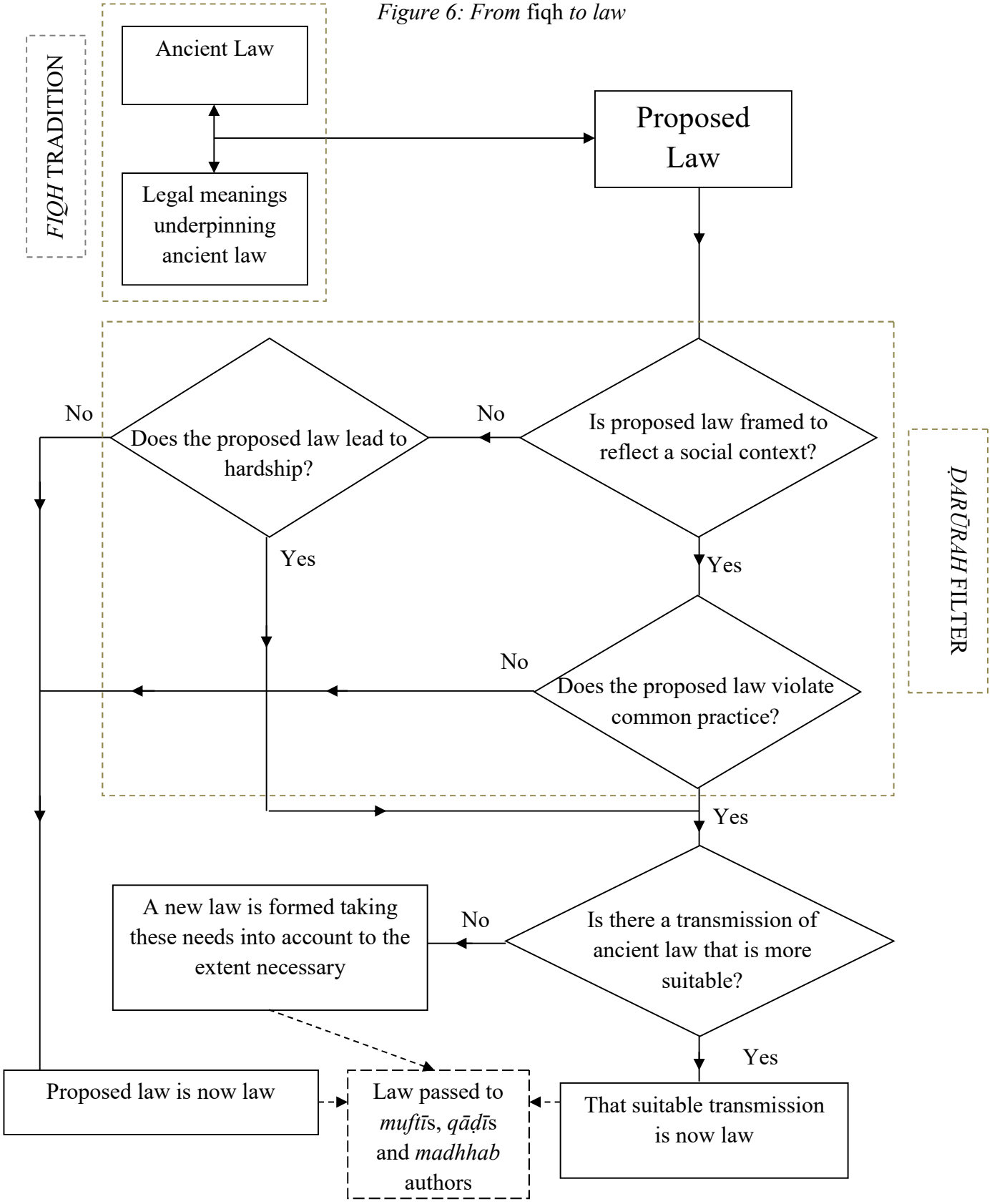
usage. Another example is the least amount of beating for discretionary punishment (*ta'zīr*). The *mukhtaṣar* fixed it at three lashes, but this was seen as only an example to illustrate a legal meaning, namely, that the person in authority can choose a minimum based on what suits a time and place. Here, again, the legal meaning is proposed law, not the number three. Several such examples were seen above. A third place where proposed law is found in the commentary is in the space between a case of ancient law and its legal meaning. This was highlighted in Abū Ḥanīfah's position on finding a bloated animal dead in a well. He determined that people should make up three days of prayers, with the legal meaning stating that this is because bloating suggested it had been in the well for a number of days. This opens the door for adjustment of ancient law in a case where it is definitely known that there was no such animal in the well more than two days prior to its being seen, for example. In such cases, it appears that proposed law will take into account the ancient law of the *mukhtaṣar* along with adjustments from the legal meaning. Here, then are the three distinct places where proposed law can be found in a legal commentary.

The next stage is to pass this proposed law through what we can now simply call a *ḍarūrah*-filter, whose purpose is to ensure that this law does not violate common practice (*'urf*, *'ādah*, *ta'āmul*) or lead to a form of hardship (*ḍarūrah*, *ḥaraj*, *balwā*). Before we do this, we must ascertain if the proposed law is one that is framed to express a particular (ancient) social context. Sometimes even scriptural sources might be interpreted as merely reflecting common practice at the time of revelation. In such cases, we know that the proposed law in question is sensitive to common practice. If proposed law does not lead to hardship or violate common practice, then it becomes law. It is now fit to be issued as a *fatwā* by a *muftī*, or be issued as a judgement in a court by a *qāḍī* or be recorded in a school text. (Of course, for it to be

recorded in a school text it must pass through further filters of the guild to ensure that the guild of jurists approve its addition into school doctrine. Such guild-based filters have not been the subject of the current study so are not represented in the simple model below.)

If, however, proposed law does not successfully pass through the *ḍarūrah* filter, and is instead blocked by these legal mechanisms which flag this proposed law as inappropriate, then a further step is needed. We saw in our cases above, that the most common response to these mechanisms was the adoption of an alternative transmission from Abū Ḥanīfah's circle that was deemed suitable. This enabled social context to be accounted for while keeping the law within the sphere of ancient law, which in this legal tradition is epistemologically desired. (This explains one reason why Ḥanafī commentaries regularly present cases of internal *khilāf*, namely, to facilitate such a movement between transmissions when needed.) If no suitable alternative transmission is discovered, then a new position is created that caters to this social need in question. This model for the production of law is summarised in Figure 6. It should be remembered that what we mean by law in the current study is simply what this *fiqh* tradition identifies as God's law for a particular context, regardless of whether this law is enforced through courts and whether there are any worldly consequences to non-compliance. Finally, this is only a model to summarise the main insight of how *fiqh* leads to law. A more complicated representation would be required to do justice to the range of legal meanings and how they relate to the processes in this summary.

*Figure 6: From* fiqh *to law*



Now that we have a working model to explain what *fiqh* is and what the law is according to this *fiqh* tradition, we may return to the three studies mentioned at the beginning of this thesis as having addressed these questions in Ḥanafī commentaries: the studies of Calder, Sadeghi and Wheeler. Of these, Sadeghi's study presents the most detailed treatment of how the 'received law' of Ḥanafī precedent becomes 'law advocated' for a particular social context. In the course of his explanation, he provides a chart similar to Figure 6.[777] In his chart, the 'received law' of Ḥanafī precedent enters a filter where it interacts with 'precedent-blind, canon-blind law', which is Sadeghi's term for what the law ought to be given "present conditions and values". This filter ensures that received law is tolerable. If received law successfully passes through this filter, then it becomes law advocated for this social context. If, however, it is found to be intolerable based on social conditions and prevalent social values, then it will be changed to a statement of law that suits these conditions. This new statement of law becomes law advocated. This model corresponds well to the chart in Figure 6, except that Figure 6 provides more details of this filter of tolerability and the main questions it seeks to ask, and provides more details of the law advocated in the case of legal change, by pointing out that a switch to an alternative position from Ḥanafī precedent is given preference over the construction of an altogether new position.

Calder, in his study, does not give much attention to the question of how law is produced from an engagement with *fiqh*, as he presents the production of law as only a subsidiary interest of the discipline. He speaks of the need for a "special hermeneutic" for this *fiqh* engagement to produce actual law for a social context; the current study suggests that the *ḍarūrah*-filter, extracted from the legal commentary, is

[777] Behnam Sadeghi, *The Logic of Lawmaking in Islam*, 31.

the basis for the special hermeneutic to which Calder alludes. Wheeler's study corresponds well to the findings of the present study, as both studies present the cases of Ḥanafī precedent as a means to access a particular understanding of how to reason within this tradition. This reasoning that is acquired from the engagement with Ḥanafī precedent guides jurists to formulate suitable laws that are true to this reasoning. The present study adds to Wheeler's by providing further detail on how this pattern of reasoning results on statements of law for a particular context.

The key difference between this study and Wheeler's on the one hand and Calder's and Sadeghi's on the other pertains to the ontology of the legal meaning. For both Calder and Sadeghi, rational justification, which invariably involves legal meanings, possesses no significant weight in this legal system, meaning they have no direct bearing on the question of how *fiqh* leads to law. Legal meanings, in those two studies, are utterly subordinate to the legal cases of Ḥanafī precedent; they serve to justify the law, and serve no clear purpose beyond that. The current study, on the other hand, has emphasised that the primary interest of the commentator to be the construction of such rational arguments, which he applies with a great degree of sophistication. The various dialectical sequences as well as the instances where the teaching tradition was moved, by considering legal meanings, to prefer alternative positions of ancient law or to create an altogether new legal positions all show that the legal meaning, the fundamental unit of this rational exploration, really was seen by these jurists to underpin the law. As these legal meanings cause *madhhab* jurists to move between the various positions of Ḥanafī precedent, the nature of existence they enjoy in this Ḥanafī epistemology can be considered stronger than the legal cases they underpin, since these cases would not exist without them.

Now, this need not be seen as a defence of any individual argument offered in a commentary work. It is quite possible that commentators would differ in providing the best underpinning legal meaning; after all, providing such legal meanings was the main contribution of each commentator. No doubt, particular legal meanings were stable and reproduced in all commentaries – one would imagine the topic-governing rules to be of this sort – while others were less stable and subject to greater variety – maxims, wisdoms and rationales that tie to topic-governing rules might all variably be employed to explain a particular legal case. What was not negotiable was the understanding that there were legal meanings underpinning those cases of law that were deemed sensible – the vast majority of them – and that these legal meanings were the key to arriving at proposed law. This regard for the ontology of the legal meaning as the cornerstone of this early classical Ḥanafī legal project is highlighted by Abū al-Yusr's definition of *fiqh*, and is the main contribution of the current study.

# Conclusions

The *Hidāyah* of Burhān al-Dīn ʻAlī ibn Abī Bakr al-Marghīnānī reveals much about the epistemology of the legal project of the early classical Ḥanafī school. The current thesis has attempted to provide the underlying epistemology of this project with an interest in answering two questions: What is *fiqh*, and what is the law? 'What is *fiqh*' asks what it means to 'do *fiqh*'; what are the methods and objectives of this activity? 'What is the law' asks what legal directives this *fiqh*-tradition produces for a particular social context; is the law identical to the legal cases in *fiqh* texts, or is there a further process for the legal cases in *fiqh* texts to become statements of law? What is meant by 'law' here is simply what a person ought to do or not to do according to the divine law accessed through the *fiqh*-tradition. Under the following eight headings, I will summarise the findings of this study, along with its implications for larger questions pertaining to Islamic law. The implications I draw here are exploratory in nature, suggesting how the current study can relate to standing debates in the field, and each needs to be the subject of further investigation.

1. *From the* Hidāyah *to a General Theory of Ḥanafī Law: The Main Findings of the Thesis*

This study aimed to describe the epistemology of law in the early classical Ḥanafī school, a period corresponding approximately to the fifth and sixth Islamic centuries. Al-Marghīnānī's commentary was taken as the basis for this study due to its being one of the leading classics, meaning one of the most widely and continually referenced works, produced in this period. A study of *uṣūl al-fiqh* works prevalent in al-Marghīnānī's milieu showed Ḥanafī legal theory to stand on three primary pillars that

uphold its epistemology. These pillars can be discerned from the categorisations and discussions found in Ḥanafī *uṣūl al-fiqh* literature, although they are not explicitly mentioned as such in this literature. The first is a highly literal and confident approach to language, particularly language as employed in sacred scripture; the second is a *salaf*-based approach to inherited tradition, whereby *ḥadīth*s and legal insights are awarded highest epistemic stature if known to emanate from recognised jurists of the first two generations of Muslims; the third is a deference to the habit of the law, whereby all probabilistic sources of law and insights not upheld by the previous two pillars are weighed in the light of the patterns and interests evident in established points of law. For the Ḥanafī legal tradition, the historical figure of Abū Ḥanīfah stands as the conduit through whom this knowledge is received. The legal cases transmitted from him represent a distillation of inherited tradition from the *salaf* and contain a careful edifice of legal thought built upon a consideration of the habit of the law. Because of this, the legal cases of Abū Ḥanīfah and his direct circle occupy the highest epistemological level for the Ḥanafī legal tradition. Legal thought in the Ḥanafī tradition arises through a particular form of engagement with these legal cases; this particular engagement can be termed *fiqh*. Through *fiqh*, jurists attempt to discern the legal meanings underpinning these legal cases. Legal meanings, a translation of the *ma'ānī* often quoted in this Ḥanafī literature, represent the whole set of abstract ideas that are perceived to uphold these legal cases: Were it not for these meanings, the cases would simply not exist. Some legal meanings govern a self-contained topic of the law – called here topic-governing rules – others show how a particular case relates to a topic-governing rule; others function as maxims governing disparate topics of law, yet others explain objectives that are to be served by these cases. Cases that do not accord with the prevalent logic found in the habit of the law are explained

as being diverted away from this prevalent logic by either scriptural evidence or practical consideration. Figure 5, above, represents this process of *fiqh*.

In the *Hidāyah*, this process of *fiqh* is applied to a select set of cases held to represent an authoritative transmission of school doctrine. These cases are brought together in the *mukhtaṣar*, or epitome, called *Bidāyat al-mubtadī*, also authored by al-Marghīnānī, in which he combines two texts: the *Mukhtaṣar* of Aḥmad ibn Muḥammad al-Qudūrī and the *Jāmi' al-ṣaghīr* of Muḥammad al-Shaybānī, Abū Ḥanīfah's direct student. Both texts provide legal cases from Abū Ḥanīfah and leading members of his circle, primarily Abū Yūsuf and al-Shaybānī. While the *Jāmi' al-ṣaghīr* presents cases purportedly directly related by al-Shaybānī, al-Qudūrī's *Mukhtaṣar* presents cases from a large variety of sources transmitting doctrine from Abū Ḥanīfah's circle, selected by a living teaching tradition whose conclusions al-Qudūrī summarised. The *Bidāyat al-mubtadī* brings together the conclusions of the pre-classical teaching tradition, represented by al-Qudūrī's text, with a canonised textual tradition, represented by al-Shaybānī's *al-Jāmi' al-ṣaghīr*, showing that it is in the convergence of the living teaching tradition and the canonised textual tradition that core Ḥanafī doctrine is determined. As the cases in *Bidāyat al-mubtadī* represent the cases of Abū Ḥanīfah and his direct circle, cases produced more than four-hundred years before al-Marghīnānī, they were termed in this study as 'ancient law', as they do not represent legal statements addressing his own social context.

The *Hidāyah* is a concise commentary whose primary purpose is presenting the factors that underpin these statements of ancient law. In presenting these factors, the commentary shows a remarkable precision in observing the underlying epistemology of Ḥanafī *uṣūl al-fiqh* literature, showing both the helpfulness of this study's proposed 'pillars' of Ḥanafī thought and also the close relation of *uṣūl al-fiqh*

to *fiqh* at the level of underlying epistemology. These factors presented in the *Hidāyah* as underpinning legal cases include Qur'anic verses and Prophetic reports, the latter being presented without reference to *ḥadīth* texts or indications of strong transmission; it is clear that the reports were considered strong simply by virtue of their upholding these legal cases, an idea grounded in the *salaf*-based epistemology of the school. However, by far the largest concern of the commentary in upholding the legal cases of the *mukhtaṣar* is the exploration of legal meanings. These legal meanings were sometimes merely stated, and sometimes explored through *jadal* (dialectical sequences) – where an opponent presents an argument and then the school responds with a superior argument – and sometimes in exchanges of *khilāf* (juristic disagreement), primarily intra-school *khilāf*, where several alternative positions are presented by figures in Abū Ḥanīfah's circle and a rationale is often presented for each, without one being a response to the others. The *Hidāyah* supports the notion presented by Abū al-Yusr al-Bazdawī that *fiqh* is the knowledge of the factors underpinning legal cases.

However, there is a further layer of theory that the *Hidāyah* is also constructed upon, a layer of theory that finds no detailed treatment in the *uṣūl al-fiqh* literature of al-Marghīnānī's mileu. Part of this theory relates to the role of a *madhhab* as a self-regulating legal guild. As such, the guild regulates itself by declaring particular legal cases of ancient law, or particular extrapolations of later scholars based on those cases, as being sound or soundest, and at times as official *fatwā*-positions, with the understanding that guild members are not to contravene these. Part of this further theory relates to the interface of law with the world; in the *K. al-Ṭahārāt* (Book of Purification) the primary interface was found to be with natural science, showing how the cases of ancient law reflected a strong awareness of natural science where

relevant, while cases from the remainder of the book revealed an interest in social norms. A set of principles were found to function as legal mechanisms to ensure that the law responds to changing social contexts. These principles – terms such as *ḍarūrah* (necessity), *ḥaraj* (hardship), *balwā* (affliction), *taysīr* (facilitation), *'urf* (custom), *ta'āmul* (common practice), *'ādah* (customary norm) – were primarily employed in the commentary to show how the cases of ancient law were suitable to their temporal context, but were also shown to be employed by Ḥanafī jurists to either choose between conflicting positions in Abū Ḥanīfah's circle or to produce altogether new legal positions. A study of a sample of these terms as applied in the commentary showed them to be part of a fully developed epistemology, and not merely randomly applied devices. The rules governing the application of these terms showed them to occupy the same status as *ḍarūrah*, a term that has a brief formal treatment in *uṣūl al-fiqh* as being a reason to leave the prevalent logic of the law. By regarding these terms as forms of *ḍarūrah*, a global theory of Ḥanafī law, meaning a theory of how *fiqh* leads to law, was proposed.

This general theory is summarised in Figure 6, above. The *fiqh* engagement with ancient law produces a proposed law. The proposed law is what the law ought to be on a particular question. It might be identical to the case of ancient law, and might be a modified version taking into account the legal meaning served by ancient law. This proposed law must pass through a filter of legal mechanisms to ensure that it is suitable to social context. In Figure 6, this filter was term a *ḍarūrah* filter, in reference to the main point of theory in *uṣūl al-fiqh* underpinning these legal mechanisms. After passing through this filter, law is produced, meaning a definitive statement on the part of this *fiqh* tradition regarding what ought to be practised regarding a particular question of law. This law might be identical to proposed law if there is no need to

change it, or it might take an altered form in response to practical difficulties raised by proposed law. In the case of an alteration to proposed law, Ḥanafī theory gives preference to an alternative transmission from Abū Ḥanīfah's circle, if one can be found to suit this practical difficulty. If no such alternative transmission exists, then a new position may be arrived at that addresses this practical difficulty to the extent needed.

It should be noted that this general theory is conceptual, not procedural. It explains how this legal project is conceived at the level of legal epistemology, by taking into account the theorising of *uṣūl al-fiqh* and the commentary activity in the *Hidāyah*. What processes actually occurred in practice must be uncovered by a historical study. It should also be noted that our study of the *Hidāyah* was conducted precisely to reveal this underlying epistemology. It does not study al-Marghīnānī's own contributions to this legal tradition or the factors that led to the fame of his book. The success of the current study will be borne by its ability to explain features across legal commentaries in al-Marghīnānī's milieu.

*2. The Relation of* Uṣūl *to* Furū‘ *in the Ḥanafī Tradition*

This study has presented a valuable insight into the question of the relation between the two disciplines of *uṣūl al-fiqh* (legal theory) and *furū‘ al-fiqh* (substantive law), albeit a specifically Ḥanafī one. There are two basic connections between the two disciplines that can be highlighted: an obvious one and a deeper one. The obvious connection is in the central role played by legal cases in works of Ḥanafī *uṣūl*. Almost every point of theory in *uṣūl al-fiqh* is justified through an exploration of Ḥanafī legal cases. This exploration properly belongs to the realm of legal commentary but is ubiquitous in Ḥanafī *uṣūl al-fiqh*. Thus, with respect to legal exposition, *uṣūl* and *furū‘* works share the same activity of legal commentary.

The deeper connection between the two is on the level of underlying epistemology. The detailed discussions, categorisations and hierarchies of evidence found in *uṣūl* works reveal a clear underlying epistemology on which these hierarchies are based. This underlying epistemology was found to fully inform the expolorations of ancient law in the *Hidāyah*. Thus we can say that, in the early classical Ḥanafī case at least, the two genres of *uṣūl al-fiqh* and *fiqh* are united in a shared epistemology on which both genres are based. In *fiqh* works, this epistemology is employed in presenting the factors underpinning the statements of law explored in these works. In *uṣūl* works, this epistemology is taken as the basis for the construction of an impressive scaffolding of theoretical discussions about the law that result from this epistemology. Much of this theoretical scaffolding is precisely that; it is theoretical. We saw a minimal interest, on the part of the legal commentator, in the detailed discussions of *uṣūl al-fiqh*. Beyond the shared epistemology, the actual detailed terms of *uṣūl* are seldom applied and are clearly unimportant in legal commentary. The ends of the two disciplines are different. Thus, the debates between Samarqandi and Bukharan legal theorists about the role of theology in *uṣūl al-fiqh*, for example, and the different *uṣūl* positions adopted by some Samarqandi theorists are likely only of theoretical consequence, meaning they likely had little impact on the activity of jurists in the *fiqh* tradition. Whether they had any impact at all should be the subject of further investigation.

Lastly, we can note that the practical theory pertaining to how *fiqh* interacts with the world of natural phenomena and social practice is absent from the categories of *uṣūl al-fiqh*. The reason for this is not clear. These points of practical theory, particularly those that function as legal mechanisms as presented above, were highly developed points of theory, with it being clearly laid out which topics they affected,

and their exact epistemological status in relation to sacred scripture and the dominant logic of the law. Furthermore, they are upheld by this tradition as being an intrinsic part of the theory conveyed by the legal cases of Abū Ḥanīfah's circle and are important forms of legal meaning underpinning many cases of ancient law. They therefore cannot be said to lag in any way, either temporally or epistemologically, behind the points of theory that are found in *uṣūl al-fiqh*. What this shows is *uṣūl al-fiqh* is not meant to present all of legal theory as recognised and employed by this legal tradition, but only a part of it. What determines which part is in and which is out? This requires further investigation.

*3. The Role of Author-Jurists*

The central role played by juristic authors, such as al-Marghīnānī, in the larger structure of the *madhhab* was expressed by Norman Calder, who showed that it was the scholar-jurist, not the *muftī* (as originally emphasised by Hallaq),[778] who presided over determining which new contributions from *madhhab* jurists were acceptable for incorporation into the *madhhab* tradition.[779] It was through the mediation and oversight of author-jurists (Hallaq's term) that the *madhhab* tradition grew and developed over time, and it was due to their careful monitoring that these developments were slow and gradual.[780]

What has not been previously described, as far as I am aware, is what exactly it is that makes a particular author an outstanding author-jurist whose text plays an authoritative role in determining the boundaries of the *madhhab*, whilst other authors might have little impact and their texts little importance. I would like to suggest that, at least in the early classical Ḥanafī case, the main quality possessed by a leading

[778] Wael Hallaq, "From Fatwās to Furū': The Growth and Change of Islamic Substantive Law".
[779] Norman Calder, *Islamic Jurisprudence in the Classical Era*, 160-1.
[780] Hallaq's later work acknowledged the greater role played by the author-jurist: Wael Hallaq, *Authority Continuity and Change in Islamic Law*, 194-208.

author-jurist is a strong grasp of the school's epistemology: A leading author-jurist is a master of applied legal epistemology. This means that he has the ability to employ the various concepts of legal theory in the right place for a well-crafted and well-considered argument. The author-jurist would be noted for his strong grasp of topic-governing rules and how various cases relate to these, and the ability to explain exceptions using sacred texts where appropriate and *ḍarūrah* filters such as *ḍarūrah*, *ḥaraj*, *'urf*, *ta'āmul*, and *iḥtiyāṭ*, using each in the right place and the right manner. The complete tapestry of arguments when considered together must be balanced and, most importantly, every piece of argument must be consistent with every other piece, this consistency being ensured by the continual observation of the epistemology of this system of legal thought.

However, this does not mean that each of the individual arguments presented by this author are equally strong. When reading a text such as the *Hidāyah*, one might find particular arguments 'creative', 'interesting', 'subjective'; no doubt there will be individual arguments that the subsequent tradition found unhelpful and were supplanted by stronger ones. While individual arguments might well appear quite subjective at times, what is not subjective is the underlying epistemology of the arguments, the entire set of terms and notions that underpin these arguments. The epistemology of the arguments was the objective science in this *fiqh* tradition, and the author who mastered it and manipulated it tastefully was the expert author-jurist.

Now, there are other features in the commentary beyond presenting arguments. Specifically there are guild-facing features, such as identifying positions as being sound, soundest, or *fatwā*-positions, and analysing the contributions of earlier teachers, the *mashāyikh*. Even with these features, the assumption in the tradition

would have been that the master of applied *madhhab* epistemology was best suited to assess each of these and award each its fitting place in this tradition.

*4. The meaning of* ijtihād *in this tradition: Who is* al-muftī al-mujtahid*?*

In his study of rule formation in the Ḥanafī school, Talal al-Azem shows that in Qāsim ibn Quṭlūbughā's schema of Ḥanafī *muftī*s, some were classed as *mujtahid*s, whilst others were classed *muqallid*s, a distinction also present in the *Fatāwā* of al-Marghīnānī's Transoxianan contemporary Qāḍīkhān.[781] The *muftī* who was a *mujtahid* had the ability to answer a new question concerning which there are no clear guidelines in Ḥanafī precedent. The *muftī* who was a *muqallid* had no such ability, and he could do no more than raise his question to the *mujtahid* and follow his answer.

The question that arises is, what does it mean for someone to be a *mujtahid* in the early classical Ḥanafī tradition? The answer cannot lie in what is commonly considered *ijtihād* in non-Ḥanafī sources, namely, a direct, unmediated engagement with the primary texts of revelation with the sophisticated hermeneutic tools of *uṣūl al-fiqh*. Such an engagement would undermine the *salaf*-based epistemology of the Ḥanafī school. We can only assume that *ijtihād*, within the context of the early classical Ḥanafī school, refers to a strong ability in jurisprudential reasoning that is arrived at through an engagement with Ḥanafī precedent, as this precedent *is* the *sunnah* and through it the revelation is to be understood. How would someone arrive at such a strong ability in jurisprudential reasoning to be trusted to arrive at new positions not held in Ḥanafī precedent? A significant step in one's becoming a *mujtahid* within this tradition would no doubt be a strong grasp of the layers of argument presented in a text such as the *Hidāyah*. The *Hidāyah* appears to lay out all

[781] Al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition*, 105-121.

points of theory that such a *mujtahid* would require and employs these to analyse thousands of individual legal cases, teasing out the implications of legal meanings and legal mechanisms through carefully constructed dialectical sequences. I would like to suggest that the *Hidāyah* presents the essence of *ijtihād* in this tradition. Not all who approach it will reach the highest level of being able to manipulate these legal meanings and mechanisms to address new questions, but some will. This smaller group will have trained in the larger Ḥanafī juristic tradition and will no doubt have trained with living masters, but, ultimately, the *Hidāyah* appears to be a book capable of producing such a *mujtahid* if it can be unpacked and if the individual reaches the highest levels of reasoning ability that the book indicates.

The answer I provide here to the question of *ijtihād* within this tradition is, of course, speculative. However, it highlights that the answers to such questions should no longer be made from the point of view of 'generic' Islamic legal theory. The current study has highlighted that the Ḥanafī school has a complete epistemology to which its authors are consciously faithful, whether as commentators or legal theorists, and by which it stands apart from other schools. The answer to questions such as who is *al-muftī al-mujtahid* must reflect the legal epistemology of the school that employs the term. This is the surest way to bypass generalities and arrive at a deeper appreciation of each Islamic legal tradition.[782]

### 5. *The* Madhhab *as Shared Rationality*

There are several models offered to explain the *madhhab*. Ahmed El Shamsy points out that each of these enables us to understand a different aspect of the complex phenomenon that is the *madhhab*: "Schacht focuses on law and legal theory, Makdisi

[782] The answer provided here can clarify references to *ijtihād* in Ḥanafī texts that Jackson holds as distortions of the notion of *ijtihād*: Sherman Jackson, *Islamic Law and the State*, 96.

and Melchert on social structures, and Hallaq on doctrinal change within schools."[783] We can add to this El Shamsy's focus on the textual dimensions of the *madhhab*, a community that forms around interpreting a body of written texts that provide the core doctrine of the *madhhab*.[784] Our study of legal epistemology in the *Hidāyah* provides us with an insight into the *madhhab* that complements the insights of El Shamsy and Hallaq.

For Hallaq, the fully mature *madhhab* was a 'doctrinal' school. Its key feature was the coalescence of a group of jurists around a core of doctrine that defined their common identity. Doctrine, as used by Hallaq, represents authoritative legal rules along with a method of how these rules are to be understood as having derived from revelation, which primarily means the *uṣūl al-fiqh* paradigm.[785] For El Shamsy, the *madhhab* developed as an interpretive exercise around, in the case of al-Shāfi'ī, the texts of the founder. This interpretive exercise drew on the examples of reasoning from the founder to build a complete structure of arguments, converting the written works of al-Shāfi'ī into a paradigm for arguing about the law. Our study has shown a similar understanding of the *madhhab* as expressed by both scholars, but with slight modifications.

On the question of interpretation, the Ḥanafī school is clearly a community of interpretation, but the interpretation is not of a particular set of written texts. Rather, it is of a set of legal cases ascribed to the school's founders. These legal cases are found in a large number of texts, with some of these having a more favourable view in the transmission record than others, yet all of these sources were subject to the interpretive exercise.

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[783]El Shamsy, *The Canonization of Islamic Law*, 169.
[784]Ibid., 169-93.
[785] Wael Hallaq, "From Regional to Personal Schools of Law? A Reevaluation", 19-25; expanded in Wael Hallaq, *Authority, Continuity and Change in Islamic Law*.

On the question of doctrine, the school represented the coalescence of a group of scholars around a set of legal rules and arguments. However, the doctrine in question did not give primary importance to the theoretical details of *uṣūl al-fiqh*, and its interest was not simply in the justification of rules. Rather, the doctrine in question was a particular way of doing *fiqh*, namely, the search for the factors underpinning the law, a search guided by a particular shared epistemology, highlighted by the focus on legal meanings. We can say that the shared doctrine is perhaps better expressed, in the case of the early classical Ḥanafī school, as a shared rationality.

The theoretical doctrine that was the hallmark of the Ḥanafī tradition consisted of two matters: a particular set of legal cases thought to originate from the schools founders and a particular rationality of how to reason with the law, a rationality held to derive directly from the school's legal cases. Someone trained in this tradition was trained to acquire this form of rationality with its underlying epistemology, which he then applied to the schools legal cases both to show his prowess in the legal tradition and to prepare him to answer further questions. Whatever contribution a person made to this legal tradition, it was a contribution representative of the Ḥanafī school as long as it respected both Ḥanafī rationality and the schools authoritative legal cases from which the rationality drew. If the contribution stepped outside of these, it was no longer a Ḥanafī contribution.

We can summarise this insight by suggesting that the Ḥanafī school is both a doctrinal school and a community of interpretation; however, its defining doctrinal method is a particular form of rationality grounded in a particular epistemology, and its interpretation is of a set of legal cases, not a set of texts. When the interpretation is applied to cases and not texts, it allows for a fluidity that texts do not allow. On any one question, there might be several possible answers, with various transmissions

from each of Abū Ḥanīfah and his key students. The Ḥanafī community of interpretation analyses each of these through its shared rationality, and finds within this spread of cases a variety of ways to think about a single question – a spread of possibly relevant legal meanings – and a variety of options to follow if needed.

*6.* Fiqh *as Living Tradition*

A prominent feature in our study of both the *Mukhtaṣar* of al-Qudūrī and the *Hidāyah* of al-Marghīnānī was the existence of a living teaching tradition of master's informing these texts. The role played by these teachers was multifaceted.

The first of these roles was identifying authoritative school doctrine. We found this clearly in the pre-classical-period activity summarised by al-Qudūrī in his *Mukhtaṣar*. It was the masters of the living tradition who were entrusted with sifting through the large amount of transmissions from school-founders to arrive at the most authoritative statements of school doctrine. In the early classical period, the masters of living tradition played a similar role, though presumably to a lesser extent due to the presence of recognised *madhhab* texts summarising core doctrine. Yet disagreements remained regarding which transmissions were stronger, which were most worthy of being followed, and how transmitted doctrine was to be understood. Masters of living tradition were authority figures in the continual need to engage this tradition. Just as early jurists of the *salaf* were the authority in identifying Prophetic *sunnah*, since they were best able to comprehended the meanings and purport of Prophetic utterances, the masters of living tradition were held as best able to comprehend the most reliable transmission of a position from a school-founder based on their insight into the applied epistemology of the school. This role of living masters was revealed in the *Hidāyah* through the invoking of the *mashāyikh*.

These masters were also authorities in operationalising these transmissions. They would provide criteria pertaining to the application of legal positions, and would apply legal mechanisms to ensure appropriate application. Indeed, the legal mechanisms that make up what we called the '*ḍarūrah* filter' were developed points of theory whose details were left out of the *uṣūl al-fiqh* tradition. Where then were these theorised and developed? Their existence was simply a part of the teaching tradition. By being a part of this teaching tradition – composed of both recognised teachers and authoritative texts – a jurist would be acquainted with these legal mechanisms and how they govern the application of law.

The *Hidāyah* was able to make references to such legal mechanisms, to unnamed *mashāyikh* and to an identification of sound and soundest positions, without elaboration of details, methods or how these points were to be used, because the readership of the text were embedded into the same teaching tradition as the author, and in the context of this teaching tradition, these points appear to have been understood. We could say that while much of the intended discourse of the *Hidāyah* can be understood directly from the text, we are left with many mysteries – such as which *khilāf* positions, if any, should be adopted, and which conditions must be considered for applying the many legal mechanisms invoked – which we can expect would have been understood in the author's teaching tradition. As we no longer have access to the teaching tradition that produced the *Hidāyah*, our only window onto it is texts such as the *Hidāyah*.

Thus for our purposes, the *Hidāyah* can play a different role than it once did. While it was originally to be studied as part of a teaching tradition connected to the author's own teaching tradition, it now serves as a means to study this teaching tradition. Where the explanation of when and how mechanisms such as *ḍarūrah*, *'urf*,

and *ta'āmul* were to be applied was left to a master to explain from inherited wisdom, we are left to derive this wisdom through the glimpses of this theory provided in the text.

The most important point for us to note is that the *fiqh* tradition cannot be seen as purely textual, even after the full maturation of the *madhhab* and several centuries of sophisticated authorship. An exacting level of scholarship is required for us to tease out as much as we can about the assumptions of living tradition into which these texts were embedded for a more holistic appreciation of the *fiqh* project.

*7. The Role of the Historical Abū Ḥanīfah in the Formation of the Ḥanafī School*

Wael Hallaq asserts that the historical Abū Ḥanīfah played a minimal role in the formation of the doctrinal school that bears his name. Hallaq holds that the role played by school eponyms such as Abū Hanīfah, protrayed as supreme *mujtahid*s, was essentially a fiction created by the school as a means of venerating the founder after whom these schools were named.[786] Otherwise, the sophisticated legal thought around which the doctrinal school was constructed was formed by later figures. The current study offers an opportunity to consider this question from another angle.

Of course, the current investigation was of a text authored some four-hundred years after Abū Ḥanīfah, so it cannot directly contribute to answering such a question. However, the larger study of epistemology through the text displayed a school tradition whose entire sense of legal theory and shared rationality developed out of an engagement with a set of legal cases. We have seen that legal cases in texts such as the two *Jāmi'*s of al-Shaybānī were presented precisely to elicit a form of legal reasoning to arrive at the meanings underpinning these cases, and that this led to the fame of these texts in early circles after al-Shaybānī, as these texts were apparently

[786] Wael Hallaq, *Authority*, 24-56. Hallaq also claims that Abū Ḥanīfah's indebtedness to earlier masters had to be severed in order to construct the authority of Abū Ḥanīfah (ibid., 26-31), whereas our theory lens places his authority exactly in his close connection to early masters.

the first *mukhtaṣar*s of Islamic law. Now, while Calder has questioned the authorship of early legal texts, we can note that these texts can generally be dated to very early in the formation of the *madhhab* tradition. Furthermore, Calder's own assertion is not that early figures did not write books, but that their texts were open to addition from later figures, so it is hard to identify the kernel produced by the original author. So even with Calder's overly cautious thesis, we should be able to affirm a kernel of the two *Jāmi'*s authored by al-Shaybānī, a kernel that clearly was seen to serve as a window onto a higher system of legal thought that the earliest circles and commentators after al-Shaybānī explored.

What this all implies is that the epistemology and sophisticated layers of legal meanings that form the shared rationality of the doctrinal school is the result of an engagement with legal cases all said to hail from the historical Abū Ḥanīfah, a kernel of which must surely have issued from him. There should therefore be no doubt that Abū Ḥanīfah is responsible for at least a part of the developed legal theory of the school that bears his name. The debate that remains is only about the percentage of school theory, epistemology and rationality that reflects the theory, epistemology and rationality of Abū Ḥanīfah; is there a one-hundred percent correlation, whereby the applied epistemology of the *Hidāyah* represents the legal system *exactly* as Abū Ḥanīfah conceived it, or is it fifty-percent, or twenty? Further work with texts from the formative and early classical periods of the Ḥanafī school can shed more light on the extent of the relationship between the historical Abū Ḥanīfah and the epistemology of the early classical Ḥanafī school.

*8. The* Fiqh *of* Ra'y

Abū Ḥanīfah and his circle were accused by opponents of being *ahl al-ra'y* or *aṣḥāb al-ra'y*. This was used by opponents of Abū Ḥanīfah's circle as a disparaging title,

suggesting that they preferred the conclusions of their intellects to the reports transmitted from the Prophet. The current study does not address legal methods in Abū Ḥanīfah's circle. However, as it has suggested that jurists of the early classical school operated with a uniquely Ḥanafī epistemology of the law, it would be interesting to consider if this uniquely Ḥanafī epistemology reflects in any way the extra rationalism that was generally associated with Abū Ḥanīfah's circle.

We can suggest that the current study has revealed what can be considered a clear rationalist tendency in this tradition. This tendency is found in three basic ideas: a *salaf*-based approach to tradition, and an approach to law through *qiyās* and through *istiḥsān*. The first, a *salaf*-based approach to tradition, cannot be termed rationalism *per se*. However, those who accused Abū Ḥanīfah of *ra'y* primarily intended his not accepting judgements based on reports deemed *ṣaḥīḥ* by the *ahl al-ḥadīth*. This *salaf*-based approach stands in contrast to the *ahl al-ḥadīth* approach, and will lead to the rejection of many *ṣaḥīḥ* Prophetic reports and, with it, the accusation of turning away from Prophetic reports by opponents.

As for *qiyās*, we have seen that, in the early classical Ḥanafī school, this meant a large degree of deference to the habit of the law. This meant preferring the internal logic of the legal cases over Prophetic reports not transmitted by jurist companions. This favouring of legal logic over Prophetic tradition is exactly what Abū Ḥanīfah was accused of, and we find it theorised in Ḥanafī *uṣūl al-fiqh* and implemented in legal commentaries.

As for *istiḥsān*, this we have seen is the departure from legal logic, either due to a Prophetic report or due to practical necessity. A departure due to Prophetic reports should be quite acceptable to opponents of *ra'y*. However, a departure due to practical necessity might not be so. If we consider what we have learnt from the

*Hidāyah* of parts of the theory of *istiḥsān* which are not mentioned in *uṣūl al-fiqh* works, namely, that legal logic can be left for a wide spread of reasons such as *taysīr*, *'urf* and *ta'āmul*, we find that the theory of *istiḥsān* starts to resemble the early *istiḥsān* of which Abū Ḥanīfah was accused and which al-Shafi'ī vehemently opposed. This is because by incorporating this array of subjective devices we have introduced a great deal of subjectivity and indeterminacy into the law. In principle, most statements of law may be modified simply because they are deemed 'inconvenient' – one of the uses of *ḍarūrah* – in need of 'ease' (*taysīr*), or simply opposed to what people are accustomed to. This subjectivity can produce statements of law passed as God's law on the part of the *madhhab* tradition. This is at the heart of the most severe criticisms held against Abū Ḥanīfah by his opponents.

We can see in this a further mark of the continuity of legal method, at least on the level of theory and epistemology, from the circle of the historical Abū Ḥanīfah into the fully mature *madhhab* that bears his name.[787] This underscores the above observation that it is not plausible to deny Abū Ḥanīfah's direct role in formulating the theory and epistemology around which the doctrinal school formed. All that may be reasonably discussed is the extent of this role.

We can note here the possible danger to the integrity of the guild posed by these legal mechanisms that come together to form what we called the *ḍarūrah* filter. This is perhaps one reason why they were not placed into the core legal theory of the school, and assigned instead to the living tradition of masters, to be taught along with the requisite caution in their application. Indeed, it appears that without the condoning of the guild, any attempt to alter the guild's law through these mechanisms would have no consequence. If the guild of masters do not accept a particular new ruling,

[787] I have argued for this continuity of legal method in Sohail Hanif, "A Tale of Two Kufans: Abū Yūsuf's *Ikhtilāf Abī Ḥanīfah wa-Ibn Abī Laylā* and Schacht's Ancient Schools" (forthcoming).

then it is not representative of the guild. This again points out that theory and epistemology only have consequence, meaning they only find acceptable application, within the confines of the masters of living tradition. It might well be that not offering a precise definition to *ḍarūrah* in *uṣūl al-fiqh* works was to ensure it is only discovered by the agreement of the living tradition of masters: What the masters of the tradition in any time agree to be *ḍarūrah* is a case of *ḍarūrah*, and what they do not accept as *ḍarūrah* is not.

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The specificity of the current study – its focus on only one legal school, in only one time and place – has been based on the premise that there is no one legal tradition that can be called 'Islamic law', but rather that this label subsumes within it multiple competing traditions. While this has been a long acknowledged fact, few studies have sought to describe individual legal schools as bearers of complete legal systems peculiar to themselves. For a deeper understanding of the development, the richness and the variety of the Islamic legal tradition, each of these competing Islamic legal traditions should be studied in isolation to examine how each formed a coherent set of ideas and premises through which each offered a unique answer to the two questions: What is *fiqh*, and what is the law?

The current study has underscored the importance of a detailed engagement with the cases of law to arrive at a theory of the law. The study of legal commentaries must be placed at the centre of arriving at a theory of what the Islamic legal tradition was and how it functioned. This will entail the arduous task of working through a large number of mundane legal cases, but, as the current study has hopefully shown, such an effort is not without its rewards. When the rewards are great, then the expenditure of effort is the only reasonable course of action.

# Appendix A

## Works of *Khilāfīyāt* Ordered by Century

The following list provides works described as works of *khilāf* or *ikhtilāf* in Kātib Çelebī's *Kashf al-ẓunūn* and al-Baghdādī's *Hadīyat al-'ārifīn*. References to the *Kashf al-ẓunūn* are given where it contains a book or an important detail absent from the *Hadīyat al-'ārifīn*. Death dates are provided only to the Islamic calendar.

3rd Century

- Muḥammad ibn 'Umar ibn Wāqid (d. 207), *Kitāb al-Ikhtilāf* – disagreement between Medinans and Kufans[788]
- Aḥmad ibn Naṣr al-Marwazī al-Shāfi'ī (d. 279), *Ikhtilāf al-fuqahā'* – a smaller and larger version[789]

4th Century

- Zakarīyā ibn Yaḥyā ibn 'Abd al-Raḥmān al-Sājī (d. 307), *al-Ikhtilāf fī al-fiqh*[790]
- Abū Isḥāq Ibrāhīm ibn Jābir al-Shāfi'ī (d. 310), *al-Ikhtilāf fī al-madhāhib*[791]
- Muḥammad ibn Jarīr ibn Yazīd al-Ṭabarī (d. 310), *Ikhtilāf al-fuqahā'*[792]
- Muḥammad ibn Ibrāhīm ibn al-Mundhir al-Shāfi'ī (d. 318), *al-Iqtiṣād fī al-ijmā' wa-al-khilāf*, *al-Awsaṭ fī al-sunan wa-al-ijmā' wa-al-ikhtilāf*[793]
- Abū Ja'far Aḥmad ibn Muḥammad ibn Salāmah al-Ṭaḥāwī (d. 321), *Ikhtilāf al-'ulamā'*[794]
- Muḥammad ibn al-Ḥārith al-Kh?shanī al-Mālikī (d. 335), *al-Ittifāq wa-al-ikhtilāf li-Mālik ibn Anas wa-aṣḥābihi*[795]
- Abū 'Alī Ḥasan ibn Qāsim al-Ṭabarī (d. 350), *al-Mujarrad fī al-naẓar*[796]
- Muḥammad ibn al-Ḥārith ibn Asad al-Qayrawānī al-Mālikī (d. 361), *al-Ikhtilāf wa-al-iftirāq fī madhhab Mālik*[797]
- Abū al-Layth al-Samarqandī (d. 373), *Mukhtalif al-riwāyah fī masā'il al-khilāf*[798]
- Abū al-Layth al-Samarqandī (d. 375) or al-Qāḍī Abū Ja'far al-S?rmārī,[799] *Ta'sīs al-naẓā'ir* – he mentions that there are eight categories of *khilāf*,

[788] Al-Baghdādī, *Hadīyat al-'ārifīn*, 2:10.
[789] Ibid.,1:51.
[790] Ibid., 1:373.
[791] Ibid., 1:4.
[792] Ibid., 2:27.
[793] Ibid., 2:31.
[794] Ibid., 1:58.
[795] Ibid., 2:38.
[796] Ibid., 1:270.
[797] Ibid., 2:47.
[798] Ibid., 2:490.

starting with the cases of *khilāf* between Abū Ḥanīfah and his two companions.

- ‘Abd al-‘Azīz ibn Aḥmad al-Aṣbahānī al-Ẓāhirī (d. 377), *Kitāb Masā’il al-khilāf*[800]
- ‘Abd Allāh ibn Ibrāhīm ibn Muḥammad al-Mālikī (d. 392), *Ummahāt al-masā’il fī ikhtilāf Mālik wa-Abī Ḥanīfa wa-al-Shāfi‘ī*[801]

5th Century

- Abū al-Ḥasan Muḥammad ibn ‘Abd al-Wāḥid al-Shāfi‘ī al-Aṣbahānī, *al-Dalā’il al-sam‘īyah ‘alā al-masā’il al-shar‘īyah*, completed in the year 411 - presents al-Shāfi‘ī’s *khilāf* with Abū Ḥanīfah and with Mālik, defending al-Shāfi‘ī[802]
- Abū Ja‘far Muḥammad ibn Aḥmad al-Nasafī al-Ḥanafī (d. 414), *al-Ta‘līqah fī al-khilāf*[803]
- Abū al-Ḥasan Aḥmad ibn Muḥammad al-M?ḥām?lī (d. 415), *‘Iddat al-musāfir wa-kināyat al-ḥāḍir* – a work on *khilāf* between Ḥanafīs and Shāfi‘īs[804]
- Ibn al-Sayyid al-Baṭliyūsī, ‘Abd Allāh ibn Muḥammad (d. 421), *Asbāb al-khilāf al-wāqi‘ bayna al-millah al-Ḥanafīyah*[805]
- Ibn Ṭūq, ‘Abd al-Wahhāb ibn ‘Alī ibn Naṣr al-Tha‘labī (d. 422), *Kitāb al-Adillah fī masā’il al-khilāf*[806]
- Aḥmad ibn Muḥammad ibn Aḥmad al-Qudūrī (d. 428), *al-Tajrīd*, *al-Taqrīb fī masā’il al-khilāf*, *al-Taqrīb al-thānī* – the *Tajrīd* is dedicated to the disagreements with al-Shāfi‘ī, and the *Taqrīb al-thānī* appears to contain evidence for the cases in the original *Taqrīb*[807]
- Al-Qāḍī Abū Zayd al-Dabūsī (d. 430), *Ta’sīs al-naẓar fī ikhtilāf al-a’immah*[808]
- Aḥmad ibn Yaḥyā ibn Zuhayr al-‘Uqaylī al-Ḥalabī al-Ḥanafī (d. 434), *Kitāb al-khilāf* – covering the *khilāf* between Abū Ḥanīfah and his companions[809]
- Ibn al-Qazwīnī, ‘Alī ibn ‘Umar ibn Muḥammad al-Ḥarbī al-Shāfi‘ī (d. 442), *Ta‘līqah fī al-khilāf*[810]
- Abū Ya‘lā Muḥammad b Ḥusayn al-Farrā’ al-Baghdādī (d. 458), *Masā’il al-khilāf ‘alā madhhab Aḥmad ibn Ḥanbal*[811]

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[799] Kātib Çelebī, *Kashf*, 1:334.
[800] Al-Baghdādi, *Hadīyah,* 1:577.
[801] Ibid., 1:448
[802] Kātib Çelebī, *Kashf*, 1:760.
[803] Al-Baghdādi, *Hadīyah,* 2:62.
[804] Ibid., 1:72; Kātib Çelebī, *Kashf*, 2:1130.
[805] Ibid., 1:1.
[806] Al-Baghdādi, *Hadīyah*, 1:637.
[807] Ibid., 1:74; Kātib Çelebī, *Kashf*, 1:466.
[808] Al-Baghdādi, *Hadīyah*, 1:648.
[809] Ibid., 1:75.
[810] Ibid., 1:689.
[811] Kātib Çelebī, *Kashf*, 2:1668.

- Ibn ʻAbd al-Barr, Yūsuf ibn ʻAbd Allāh al-Qurṭūbī al-Mālikī (d. 463), *al-Inṣāf fī mā bayna al-ʻulamā' min al-ikhtilāf*[812]
- Abū al-Walīd Sulaymān ibn Khalaf al-Bājī al-Mālikī (d. 474), *Kitāb al-Sirāj*[813]
- Abū Isḥāq Ibrāhīm ibn Muḥammad al-Shīrāzī al-Shafiʻī (d. 476), *Tadhkirat al-mas'ūlīn fī al-khilāf bayna al-Ḥanafī wa-al-Shāfiʻī* – a large voluminous work[814]
- Ibn al-Ṣabbāgh, ʻAbd al-Sayyid ibn Muḥammad al-Shāfiʻī (d. 477), *al-Kāmil fī al-khilāf bayna al-Ḥanafīyah wa-al-Shāfiʻīyah*, *al-Ishʻār bi-maʻrifat ikhtilāf ʻulamā' al-amṣār*[815]
- Abū al-Maʻālī ʻAbd al-Malik ibn ʻAbd Allāh al-Juwaynī (d. 478), *al-Asālīb fī al-khilāfīyāt* – devoted to *khilāf* between Ḥanafīs and Shāfiʻīs – and *Ghunyat al-mustarshidīn*[816]
- Muḥammad ibn ʻAlī ibn Hāmid al-Shāshī (d. 485), *Ṭarīqah fī al-khilāf*[817]
- Abū Yaʻlā Yaʻqūb ibn Ibrāhīm ibn Aḥmad al-ʻUkbarī al-Barzabīnī al-Ḥanbalī (d. 486), *Taʻlīqah fī al-khilāf*[818]
- Abū al-Muẓaffar Manṣūr ibn Muḥammad al-Samʻānī al-Marwazī al-Shāfiʻī (d. 489), *al-Awsaṭ fī al-khilāf*, *al-Burhān* (consists of 1000 cases of *khilāf*)[819]
- Abū al-Ḥasan ʻAlī ibn Saʻīd al-ʻAbdarī al-Ḥanafī (d. 493), *al-Kifāyah fī masā'il al-khilāf*[820]

6th Century

- Abū Ḥāmid al-Ghazālī (d. 505), *al-Ma'khadh* – a work on *khilāf* with the Ḥanafīs, and *Ḥiṣn al-Ma'khadh* – a work to strengthen the arguments of the *Ma'khadh*[821]
- Abū Bakr Muḥammad ibn Aḥmad ibn al-Qaffāl al-Shāshī (d. 507), *Ḥilyat al-ʻulamā' fī madhāhib al-fuqahā'*, also known as *al-Mustaẓhirī*[822]
- Maḥfūẓ ibn Aḥmad ibn al-Ḥasan al-Kalūdhānī al-Ḥanbalī (d. 510), *Hidāyah fī al-fiqh wa-al-khilāf*[823]
- Muḥammad ibn al-Walīd ibn Muḥammad al-Ṭurṭūshī al-Mālikī (d. 520), *al-Kabīr fī masā'il al-khilāf*[824]
- Yūsuf ibn ʻAbd al-ʻAzīz ibn ʻAlī al-Shāfiʻī (d. 523), *Taʻlīqah fī al-khilāf*[825]

[812] Al-Baghdādi, *Hadīyah,* 2:550.
[813] Ibid., 1:397.
[814] Ibid., 1:8; Kātib Çelebī, *Kashf*, 1:391.
[815] Al-Baghdādi, *Hadīyah*, 1:573.
[816] Ibid., 1:626; Kātib Çelebī, *Kashf*, 1:626.
[817] Al-Baghdādi, *Hadīyah*, 2:76.
[818] Ibid., 2:544.
[819] Ibid., 2:473.
[820] Ibid., 1:694.
[821] Ibid., 2:79-80; Kātib Çelebī, *Kashf*, 2:1573.
[822] Ibid., 1:690.
[823] Al-Baghdādi, *Hadīyah,* 2:6.
[824] Ibid., 2:85.
[825] Ibid., 2:552.

- Al-Qāḍī Muḥammad ibn Muḥamamd ibn Ḥusayn ibn al-Farrā' al-Ḥanbalī (d. 527), *al-Tabṣirah fī al-khilāf*[826]
- As'ad ibn Abī Naṣr Muḥammad ibn Abī al-Faḍl al-Shāfi'ī (d. 527), *Ṭarīqah fī al-khilāf*[827]
- Abū Ḥafṣ 'Umar ibn Muḥammad al-Sarakhsī al-Shāfi'ī (d. 529), *al-I'tiṣām fī al-khilāf* and also *al-I'tiḍad fī al-khilāf*[828]
- Al-Qāḍī 'Abd al-'Azīz ibn 'Uthmān ibn 'Alī al-Asdī al-Nasafī al-'Uqaylī al-Ḥanafī (d. 533), *al-Ta'līqah fī al-khilāf* – a large work in four volumes[829]
- Muḥammad ibn 'Alī ibn Abī Ṭālib al-Shāfi'ī (d. 535), *Ṭarīqah fī al-khilāf*[830]
- Abū Ḥafṣ 'Umar ibn Muḥammad ibn Aḥmad al-Nasafī (d. 537), *Manẓūmah fī al-khilāf*[831]
- Abū al-Baqā' 'Abd Allāh ibn al-Ḥusayn al-'Ukbarī al-Ḥanbalī (d. 538), *al-Ta'līqah fī al-khilāf*[832]
- Abū Bakr ibn al-'Arabī, Muḥammad ibn 'Abd Allāh al-Mālikī (d. 543), *al-Inṣāf fī masā'il al-khilāf*[833]
- Sharafshāh ibn Malik Dāwūd al-Shāfi'ī (d. 546), *Ta'līqah fī al-khilāf*[834]
- 'Abd al-Raḥmān ibn Muḥammad ibn 'Alī al-Ḥanbalī (d. 546), *Ta'līqah fī al-khilāf*[835]
- Abū al-Faḍl 'Abd al-Karīm ibn Aḥmad ibn 'Alī al-Hamadānī (d. 547), *Ta'līqah fī al-khilāf*[836]
- Abū Sa'īd Muḥammad ibn Yaḥyā ibn Manṣūr al-Nīsābūrī (d. 548), *al-Intiṣāf* - or *al-Inṣāf - fī masā'il al-khilāf*, *Ta'līqah fī al-khilāfīyāt*[837]
- Muḥammad ibn Muḥammad ibn Muḥammad ibn Ḥusayn ibn al-Farrā' al-Ḥanbalī (d. 560), *Ta'līqah fī al-khilāf*[838]
- Yaḥyā ibn Muḥammad al-Shaybānī al-Ḥanbalī (d. 560), *al-Ijmā' wa-al-ikhtilāf*, *Ikhtilāf al-'ulamā'*[839]
- Aḥmad ibn Naṣr al-Sāmānī al-Nīsābūrī al-Shāfi'ī (d. 575), *Ta'līqah fī al-khilāf*[840]
- Al-Qāḍī Abū Sa'd 'Abd Allāh ibn Muḥammad ibn Abī 'Iṣrūn al-Shāfi'ī (d. 585), *al-Taysīr fī al-khilāf*[841]

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[826] Ibid., 2:86.
[827] Ibid., 1:204.
[828] Ibid., 1:782.
[829] Ibid., 1:578; Kātib Çelebī, *Kashf*, 1:424.
[830] Al-Baghdādi, *Hadīyah*, 2:88.
[831] Ibid., 1:783.
[832] Kātib Çelebī, *Kashf*, 1:424. Al-'Ukbarī was a renowned grammarian, but Çelebī mentions this work amongst a list of juristic *khilāf* works, so I mention it here.
[833] Al-Baghdādi, *Hadīyah,* 2:90.
[834] Ibid., 1:415.
[835] Ibid., 1:519.
[836] Ibid., 1:608.
[837] Ibid., 2:91.
[838] Ibid., 2:94.
[839] Ibid., 2:521.
[840] Ibid., 1:87.

- ‘Abd Allāh ibn Abī al-Waḥsh al-Shāfi‘ī (d. 582), *al-Ikhtiyār fī ikhtilāf a’immat al-amṣār*[842]
- Maḥmūd ibn ‘Alī ibn ‘Abd Allāh al-Iṣbahānī al-Shāfi‘ī (d. 585), *Ta‘līqah fī al-khilāf*, *Ṭarīqah fī al-khilāf*[843]
- Abū al-Faraj ‘Abd al-Raḥmān ibn ‘Alī ibn al-Jawzī al-Ḥanbalī (d. 591/), *al-Inṣāf fī masā’il al-khilāf* – he mentions in it that he did not see any [Ḥanbalī] treatises in *khilāf* other than the *ta‘līqah* of al-Qāḍī Abū Ya‘lā, so he authored this work[844]
- Aḥmad ibn Muḥammad ibn Maḥmūd al-Ghaznawī al-Ḥanafī (d. 593), *Rawḍat ikhtilāf al-‘ulamā’*[845]
- Al-Ḥasan ibn al-Khaṭīr ibn Abī al-Ḥasan al-Ḥanafī (d. 598), *Ikhtilāf al-ṣaḥābah wa-al-tābi‘īn wa-fuqahā’ al-amṣār*[846]

7th Century

- ‘Urāqā ibn Muḥammad ibn al-‘Urāqā al-Ṭāwūsī al-Shāfi‘ī (d. 600), *Ṭarīqah fī al-khilāf*[847]
- Muḥammad ibn Muḥammad al-Ṭāwūsī al-Ḥanafī (d. 600), *Ta‘līqah fī al-khilāf* – in three copies (*nusakh*): a large, medium and small[848]
- Rukn al-Dīn Abū al-Faḍl Muḥammad ibn Muḥammad al-‘Irāqī al-Hamadhānī (d. 600), *al-Ta‘līqah fī al-khilāf* – there are three copies (*nusakh*): a large, a medium and a small[849]
- Ibn al-Māshiṭah Ismā‘īl ibn Ja‘far al-Baghdādī al-Ḥanbalī (d. 601), *Ta‘līqah fī al-khilāf*[850]
- Muḥammad ibn ‘Abd al-‘Azīz ibn Muḥammad ibn ‘Umar ibn ‘Abd al-‘Azīz ibn Māzah al-Hanafī (d. 603), *Ta‘līqah fī al-khilāf*[851]
- Muḥammad ibn Yūnus ibn Muḥammad ibn M?n‘ah al-Shāfi‘ī (d. 608), *Ta‘līqah fī al-khilāf*[852]
- Aḥmad ibn Jamāl al-Dīn al-Ḥaṣīrī al-Bukhārī al-Ḥanafī (d. 616), *Ṭarīqah fī al-khilāf*[853]
- Raḍī al-Dīn al-Mu’ayyad ibn Muḥammad ibn ‘Alī al-Nīsābūrī al-Ṭūsī al-Ḥanafī (d. 617), *Ṭarīqah fī al-khilāf*[854]

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[841] Ibid., 1,457.
[842] Ibid., 1:457.
[843] Ibid., 2:404.
[844] Kātib Çelebī, *Kashf*, 1:182.
[845] Al-Baghdādi, *Hadīyah,* 1:89.
[846] Ibid., 1:280.
[847] Ibid., 1:662.
[848] Ibid., 2:106.
[849] Kātib Çelebī, *Kashf*, 1:424.
[850] Al-Baghdādi, *Hadīyah,* 1:212.
[851] Ibid., 2:107.
[852] Ibid., 2:108.
[853] Ibid., 1:90.
[854] Ibid., 2:483.

- Sayf al-Dīn ʻAlī ibn Muḥammad ibn Sālim al-Āmīdī al-Shāfiʻī (d. 631), *al-Taʻlīqah al-ṣaghīrah fī al-khilāf*, *al-Taʻlīqah al-kabīrah fī al-khilāf*, *Dalīl muttaḥid al-iʼtilāf wa-jārin fī jamīʻ masāʼil al-khilāf*, *Ṭarīqah fī al-khilāf*, *Kitāb al-Tarjīḥāt fī al-khilāf*[855]
- Maḥmūd ibn Aḥmad ibn ʻAbd al-Sayyid al-Ḥaṣīrī al-Bukhārī al-Ḥanafī (d. 636), *al-Ṭarīqah al-ḥaṣīrīyah fī ʻilm al-khilāf bayna al-Shāfiʻīyah wa-al-Ḥanafīyah*[856]
- Isḥāq ibn Yaʻqūb ibn ʻUthmān al-Marāghī al-Shāfiʻī (d. 639), *Taʻlīqah fī al-khilāf*[857]
- Muḥammad ibn Abī Bakr ibn Manṣūr al-Shāfiʻī (d. 691), *al-Ishrāf fī taṣḥīḥ al-khilāf*[858]

8th Century

- Ḍiyāʼ al-Dīn ʻAlī ibn Aḥmad al-Yamanī al-Shāfiʻī (d. 700), *Muʻīn ahl al-taqwā ʻalā al-tadrīs wa-al-fatwā* – a work dedicated to internal *khilāf* in the Shāfiʻī school[859]
- Muḥammad ibn Bahrām al-Dimashqī al-Shāfiʻī (d. 705), *Tuḥfat al-nubahāʼ fī ikhtilāf al-fuqahāʼ*[860]
- Muḥammad ibn ʻAbd al-Raḥmān ibn Muḥammad al-Samarqandī al-S?njārī (d. 721), *ʻUmdat al-ṭālib li-maʻrifat al-madhāhib* – a work that mentions internal Ḥanafī *khilāf* as well as the *khilāf* with al-Shāfiʻī, Mālik, Aḥmad ibn Ḥanbal, Dāwūd al-Ẓāhirī and Shīʻīs[861]
- Sirāj al-Dīn Yūnus ibn ʻAbd al-Majīd al-Armantī (d. 745), *al-Masāʼil al-muhimmah fī ikhtilāf al-aʼimmah*[862]
- Qiwām al-Dīn Muḥammad ibn Muḥammad ibn Aḥmad al-Kākī (d. 749), *ʻUyūn al-madhāhib al-arbaʻah al-kāmilī* – legal cases from the four schools of law[863]
- ʻUmar ibn Isḥāq al-Hindī al-Ghaznawī al-Ḥanafī (d. 773), *Zubdat al-aḥkām fī ikhtilāf madhāhib al-aʼimmah al-arbaʻah al-aʻlām*[864]
- Ṣadr al-Dīn Muḥammad ibn ʻAbd al-Raḥmān al-Dimashqī, *Raḥmat al-ummah fī ikhtilāf al-aʼimmah*, completed in the year 780[865]
- Muḥammad ibn ʻAbd Allāh ibn Abī Bakr al-Ḥathīthī al-Yamanī al-Shāfiʻī (d. 792), *al-Maʻānī al-badīʻah fī ikhtilāf ʻulamāʼ al-sharīʻah*[866]

[855] Ibid., 1:707.
[856] Ibid., 2:405.
[857] Ibid., 1:201.
[858] Ibid., 2:137.
[859] Kātib Çelebī, *Kashf*, 2:1744.
[860] Al-Baghdādi, *Hadīyah,* 2:141.
[861] Kātib Çelebī, *Kashf*, 2:1168.
[862] Al-Baghdādi, *Hadīyah,* 2:572.
[863] Kātib Çelebī, *Kashf*, 2:1187.
[864] Al-Baghdādi, *Hadīyah,* 1:790.
[865] Ibid., 2:170; Kātib Çelebī, *Kashf*, 1:836.

9th Century

- Muḥammad ibn Muḥammad al-Asdī al-Maqdisī al-Shāfi‘ī (d. 808), *Wasā’id al-inṣāf fī ‘ilm al-khilāf*, *Rasā’il al-inṣāf fī ‘ilm al-khilāf*[867]
- Aḥmad ibn Muḥammad al-Ḥusaynī al-Samarqandī al-Ḥanafī (d. 854), *Mu‘īn al-ummah fī ma‘rifat al-wifāq wa-al-khilāf bayna al-a’immah*[868]
- Khalīl ibn Shāhīn al-Ẓāhirī (d. 893), *al-Mawāhib fī ikhtilāf al-madhāhib*[869]

10th Century

- Jalāl al-Dīn ‘Abd al-Raḥmān ibn Abī Bakr al-Suyūṭī (d. 911), *Jazīl al-mawāhib fī ikhtilāf al-madhāhib* – covering *khilāf* amongst the four *madhhab*s[870]

12th Century

- Shāh Walī Allāh al-Dihlawī Aḥmad ibn ‘Abd al-Raḥīm al-‘Umarī (d. 1180), *al-Inṣāf fī masā’il al-khilāf*[871]

13th Century

- Muḥammad Ṣāliḥ ibn Aḥmad al-Waghlīsī al-Mālikī (d. 1285), *Risālah fī gharā’ib al-khilāf bayna al-a’immah*[872]

Undated:

- Yūsuf ibn ‘Abd al-‘Azīz al-Faqīh, *al-Ta‘līqah fī al-khilāf* [the title indicates this work was authored between the 5th and 7th centuries][873]
- Abū al-Ḥusayn Aḥmad ibn ‘Abd Allāh ibn Ḥasan ibn Abī al-Ḥanājir al-Shāfi‘ī al-Ḥamawī, *Falak al-fiqh* – a work on *khilāf* between the four *imām*s, addressing 525 legal cases, with proofs for each case [the description indicates that this was authored after the 7th century][874]

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[866] Al-Baghdādi, *Hadīyah,* 2:173.
[867] Ibid., 2:178.
[868] Ibid., 1:130.
[869] Ibid., 1:354.
[870] Ibid., 1:538; Kātib Çelebī, *Kashf*, 1:590.
[871] Ibid., 1:177.
[872] Ibid., 2:378.
[873] Kātib Çelebī, *Kashf*, 1:424.
[874] Ibid., 2:1291.

# Appendix B

## A List of Early *Mukhtaṣar*s

The following is a list of *fiqh* works described as *mukhtaṣar*s until the end of the fifth century as found in Sezgin's *GAS*, Ibn al-Nadīm's *Fihrist*, al-Baghdādī's *Hadīyat al-'ārifīn*, and Kātib Çelebī's *Kashf al-ẓunūn*. With each author is mentioned the *fiqh* school and geographic location to which he is associated, where available, and the name of the *mukhtaṣar*, where one is provided. To show the relative impact of these *mukhtaṣar*s, mention is made of commentaries, as well as abridgements and versifications, recorded for them in these sources. Names are ordered chronologically in order of death date, where available.

2nd cent?:

- Jubayr ibn Ghālib (d. ?) – a contemporary of Mālik ibn Anas (d. 179/795) and a scholar of the Khawārij.[875] No commentaries mentioned.

3rd cent:

- Abū 'Iṣmah 'Iṣām ibn Yūsuf al-Balkhī (d. 210/825-6) – a leading Ḥanafī jurist of Balkh.[876] No commentaries mentioned.
- 'Abd Allāh ibn 'Abd al-Ḥakam – a student of Mālik ibn Anas from Egypt. He authored three *mukhtaṣar*s, one large (*kabīr* ), one medium (*awsaṭ*)[877] and one small (*ṣaghīr*). One third century commentary on the small *mukhtaṣar* was mentioned.[878]

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[875] This is clear from Ibn al-Nadīm calling him one of the *'ulamā'* of the Shurāh (Ibn al-Nadīm, *al-Fihrist*, 291), which is a name given to the Khawārij: See al-Ash'arī, *Maqālāt al-islāmīyīn*, 1:111. Furthermore, he was a transmitter of Khārijī theological doctrine: Ibn al-Nadīm, *al-Fihrist*, 228-9. Al-Baghdādī's calling him one of the Shī'ah (al-Baghdādī, *Hadīyat al-'ārifīn*, 1:250) appears erroneous.
[876] Ibn Abī al-Wafā', *al-Jawāhir al-muḍīyah*, 1:347; al-Sam'ānī, *al-Ansāb*, 2:304.
[877] *Awsaṭ* is the word used by Qāḍī 'Iyād, who refers to the small as *aṣghar*: 'Iyāḍ al-Yaḥṣubī, *Tartīb al-madārik wa-taqrīb al-masālik*, 3:365.
[878] Ibn al-Nadīm, *al-Fihrist*, 249.

- Yūsuf ibn Yaḥyā al-Buwayṭī – an Egyptian student of al-Shāfi‘ī (d. 204/819) who died in Baghdad.[879] His authored two *mukhtaṣar*s, one large and one small.[880] No commentaries mentioned.
- Abū Muṣ‘ab al-Zuhrī (d. 242/857) – a student of Mālik and *qāḍī* of Medina.[881] No commentaries mentioned.
- Ḥarmalah ibn Yaḥyā al-Zamīlī (d. 243/858) – an Egyptian Shāfi‘ī scholar.[882] No commentaries mentioned.
- Mūsā ibn Naṣr al-Rāzī (d. 261/874-5) – a Ḥanafī scholar of Rayy and student of Muḥamad ibn al-Ḥasan al-Shaybānī.[883] No commentaries mentioned.
- Abū Ṭayyib Ḥamdūn ibn Ḥamzah (d. 261/874-5) – a Ḥanafī jurist. [884] No commentaries mentioned.
- Ismā‘īl ibn Yaḥyā al-Muzanī – an Egyptian student of al-Shāfi‘ī, who authored two *mukhtaṣar*s, one large, which, Ibn al-Nadīm notes, was ignored (*matrūk*), and one small, which inspired commentators.[885] Thirty commentaries were mentioned: thirteen from the fourth century, eight from the fifth, two from the sixth, two from the seventh, two from the eighth, two from the ninth and one from the tenth.[886]
- Ismā‘īl ibn Isḥāq ibn Ismā‘īl al-Azdī (d. 282/896) – a Basran Mālikī *qāḍī* who settled and died in Baghdad. He authored a *Mabsūṭ* and then authored a *mukhtaṣar* of his *Mabsūṭ*.[887] No commentaries mentioned.

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[879]Ibn Khallikān, *Wafayāt al-a‘yān wa-anbā’ abnā’ al-zamān*, 7:61-4.
[880] Ibn al-Nadīm, *al-Fihrist*, 262,
[881] Sezgin, *Tārīkh al-turāth al-‘arabī*, 154; al-Dhahabī, *Siyar a‘lām al-nubalā’*, 11:436-40.
[882] Al-Baghdādī, *Hadīyah*, 1:264; Ibn Khallikān, *Wafayāt*, 2:64-5.
[883] Al-Baghdādī, *Hadīyah*, 2:477; Ibn Abī al-Wafā’, *al-Jawāhir*, 2:188.
[884] Al-Baghdādī, *Hadīyah*, 1:335.
[885] Ibn al-Nadīm, *al-Fihrist*, 262.
[886] Al-Baghdādī, *Hadīyah*, 1:6, 61, 62, 66, 71, 100, 269, 270, 309, 374, 445, 447, 451, 499, 827; 2:38, 49, 60, 65, 80, 81, 156, 180, 518, 528; Kātib Çelebī, *Kashf al-ẓunūn*, 2:1635; Sezgin, *Tārīkh al-turāth*, 195-6.
[887] Ibn al-Nadīm, *al-Fihrist*, 248; al-Dhahabī, *Siyar*, 13:339-42.

4th cent:

- Aḥmad ibn ‘Umar ibn Surayj (d. 306/918) – a Baghdadi Shāfi‘ī jurist who was appointed *qāḍī* of Shiraz.[888] No commentaries mentioned.
- Muḥammad ibn Jarīr al-Ṭabarī (d. 310 /923)– a widely travelled scholar from Tabaristan, who settled finally in Baghdad. He founded his own legal school for which he authored a *mukhtaṣar*, the *Kitāb al-khafīf*,.[889] One fourth century commentary mentioned.[890]
- Al-Zubayr ibn Aḥmad ibn Sulaymān (d. 317/929-30) – a Shāfi‘ī scholar from Basra and author of a *mukhtaṣar* entitled *al-Kāfī.*[891]No commentaries mentioned.
- Abū Ja‘far Aḥmad ibn Muḥammad al-Ṭaḥāwī – an Egyptian Ḥanafī scholar, and author of two *mukhtaṣar*s, one large and one small which was the subject of several commentaries.[892] Eleven commentaries were mentioned: one from the fourth century, four from the fifth, three from the sixth, one from the seventh, one from the ninth, and one undated.[893]
- Muḥammad ibn Muḥammad al-Ḥākim al-Shahīd al-Marwazī – an Iranian Ḥanafī scholar who was a *qāḍī* of Bukhara and then a vizier for the ruler of Khurasan.[894] He authored *al-Kāfī*, a *mukhtaṣar* that compiles rulings from the

[888] Ibn al-Nadīm, *al-Fihrist*, 263; Ibn Khallikān, *Wafayāt*, 1:66-7.
[889] Ibn al-Nadīm, *al-Fihrist*, 288; al-Dhahabī, *Siyar*, 14:267-82.
[890] Ibn al-Nadīm, *al-Fihrist*, 1:289.
[891] Al-Baghdādī, *Hadīyah*, 1:373; al-Dhahabī, *Siyar*, 15:56-7.
[892] Ibn al-Nadīm, *al-Fihrist*, 257; Ibn Khallikān, *Wafayāt*, 1:71-2. I ascribe two *mukhtaṣar*s to him as mentioned in the bibliographical works consulted. Abū al-Wafā’ al-Afghānī, in the introduction to his edition of al-Ṭaḥāwī’s *Mukhtaṣar*, makes them three *mukhtaṣar*s, based on a statement in Ibn Abī Wafā’’s *al-Jawāhir al-muḍīyah*: See al-Ṭaḥāwī, *Mukhtaṣar*, 5. I have not found this stated elsewhere. However, given that al-Ṭaḥāwī was influenced by his Egyptian environment, as discussed above, it is worth noting that the Egyptian Mālikī, Ibn ‘Abd al-Ḥakam, did indeed author three *mukhtaṣar*s: a large, a medium and a small (Brockopp, “The Minor Compendium,” 162), so Abū al-Wafā’’s conclusion is possible, but requires further documentation.
[893] This is the commentary of Aḥmad ibn ‘Alī al-Warrāq. Kātib Çelebī, *Kashf*, 2:1627; al-Baghdādī, *Hadīyah*, 1:67, 80, 309, 697, 831; 2: 76, 106, 477; Sezgin, *Tārīkh al-turāth*, 95-6.
[894] Al-Laknawī, *al-Fawā’id al-bahīyah*, 185.

books of Muḥammad ibn al-Ḥasan al-Shaybānī.[895] Five works on it were mentioned: one from the fourth century, three from the fifth and one from the ninth.[896]

- ‘Umar ibn al-Ḥusayn al-Khiraqī – a Ḥanbalī scholar of Baghdād who died in Damascus.[897] Eight commentaries on his *mukhtaṣar* were mentioned: one from the fourth, one from the sixth century, three from the seventh, one from the eighth, one from the ninth and one from the eleventh.[898]
- Aḥmad ibn Abī Aḥmad al-Ṭabarī al-Qāṣṣ (d. 335/346-7) – a Shāfi‘ī scholar of Tabaristan who settled in Baghdad and died in Tarsus. He authored *al-Talkhīṣ fī al-furū‘*, a *mukhtaṣar* that indicates both legal rulings and principles.[899] Three commentaries were mentioned: two from the fourth century and one from the fifth.[900]
- Abū al-Ḥasan ‘Ubayd Allāh ibn al-Ḥasan al-Karkhī– the leading Ḥanafī jurist of Baghdad.[901] Five commentaries on his *mukhtaṣar* were mentioned: two from the fourth century, two from the fifth, one from the sixth.[902]
- Muḥammad ibn ‘Abd Allāh ibn ‘Īshūn (d. 341/952) – a Mālikī jurist from Cordoba who travelled to the east. He authored a *mukhtaṣar* in which he abridged the main early compilation of Mālikī law, the *Mudawwanah*.[903] No commentaries mentioned.

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[895] Kātib Çelebī, *Kashf*, 2:1378; al-Baghdādī, *Hadīyah*, 2:37.
[896] Kātib Çelebī, *Kashf*, 2:1378; Sezgin, *Tārīkh al-turāth*, 100-1. This includes a *sharḥ* on the “*mukhtaṣar* of al-Ḥākim” by al-Dāmighānī (d. 478/1085) which I assume is the same *mukhtaṣar* mentioned here: al-Baghdādī, *Hadīyah*, 2:74; al-Laknawī, *al-Fawā’id*, 172-3.
[897] Al-Dhahabī, *Siyar*, 15:363-4.
[898] Kātib Çelebī, *Kashf*, 2:1415; al-Baghdādī, *Hadīyah*, 1:460, 462, 583; 2:86, 156, 268; Sezgin, *Tārīkh al-turāth*, 236.
[899] Kātib Çelebī, *Kashf*, 1:479; Al-Dhahabī, *Siyar*, 15:371-2.
[900] Kātib Çelebī, *Kashf*, 1:479; al-Baghdādī, *Hadīyah*, 2:48, 55.
[901] Ibn al-Nadīm, *al-Fihrist*, 258; al-Dhahabī, *Siyar*, 15:426-7.
[902] Kātib Çelebī, *Kashf*, 2:1634; al-Baghdādī, *Hadīyah*, 1:67, 74, 307; Sezgin, *Tārīkh al-turāth*, 102.
[903] Al-Baghdādī, *Hadīyah*, 2:41; Ibn Farḥūn, *al-Dībāj al-mudhahhab fī ma‘rifat a‘yān ‘ulamā’ al-madhhab*, 2:204; Kaḥḥālah, *Mu‘jam al-mu’allifīn*, 10:230.

- Aḥmad ibn Kāmil al-Shajarī (d. 350/961) – a Baghdadi Ḥanafī *qāḍī*.[904] No commentaries mentioned.
- Ḥaydarah ibn ‘Umar al-Ṣaghānī (d. 358/968-9) – a Baghdadi scholar of the Ẓāhirī school.[905] No commentaries mentioned.
- Muḥammad ibn al-Ḥusayn al-Ājurrī (d. 360/970) – a Baghdadi Shāfi‘ī scholar who died in Mecca.[906] No commentaries mentioned.
- ‘Abd Allāh ibn Abī Zayd al-Qayrawānī – a leading Mālikī scholar from Qayrawān, author of the famous *mukhtaṣar* in Mālikī *fiqh*, the *Risālāh*, as well as a *mukhtaṣar* of the *Mudawwanah*.[907] Twenty-nine commentaries were mentioned for his *Risālah*: one from the fifth century, two from the sixth, four from the eighth, five from the ninth, eleven from the tenth, two from the eleventh, three from the twelfth, one from the fourteenth.[908] No commentaries mentioned for his *mukhtaṣar* of the *Mudawwanah*.
- 'Abd al-Ḥamīd ibn Sahl (d. second half fourth-century) – a Mālikī *qāḍī* of Kufa who washed the body of Sayf al-Dawlah (d. 356/967), the Ḥamdānid ruler.[909] He authored two *mukhtaṣar*s in *fiqh*, one large and one small.[910] No commentaries mentioned.

[904] Al-Baghdādī, *Hadīyah*, 1:64; Ibn Abī al-Wafā’, *al-Jawāhir*. 1:90.
[905] Al-Baghdādī, *Hadīyah*, 1:342; al-Ṣafadī, *al-Wāfī bi-al-wafīyāt*, 13:138.
[906] Al-Baghdādī, *Hadīyah*, 2:46-7; al-Dhahabī, *Siyar*, 16:133-6.
[907] Ibn al-Nadīm, *al-Fihrist*, 240; al-Baghdādī, *Hadīyah*, 1:447; al-Dhahabī, *Siyar*, 17:10-13.
[908] Al-Baghdādī, *Hadīyah*, 1:117, 169, 361, 453, 455, 621, 743, 758, 765; 2:231; Kātib Çelebī, *Kashf*, 1:841; Sezgin, *Tārīkh al-turāth*, 168-72. I ignore from Çelebī’s list Jalāl al-Dīn al-T?bānī (d. 793/1391), as he was a Hanafi scholar to whom no other source I consulted ascribed a commentary on the *Risālah*. For a brief biography on him, see al-‘Asqalānī, *al-Durar al-kāminah fī a‘yān al-mi’ah al-thāminah*, 2:97-9.
[909] Al-Ṣafadī, *al-Wāfī*, 21:127.
[910] Ibn al-Nadīm, *al-Fihrist*, 249.

5th cent:

- ‘Abd al-Wahhāb ibn ‘Alī (d. 422/1031)– a Mālikī *qāḍī* of Baghdad who died in Egypt. He authored a *mukhtaṣar* entitled *al-Talqīn*.[911] One commentary from the eighth century was mentioned.[912]
- Aḥmad ibn Muḥammad al-Qudūrī – the leading Baghdādī Ḥanafī scholar. Forty-five commentaries were mentioned: two from the fifth century, ten from the sixth, fourteen from the seventh, three from the eighth, five from the ninth, five from the tenth, two from the eleventh, three from the twelfth, one from the thirteenth.[913]
- ‘Abd Allāh ibn Yūsuf al-Juwaynī (d. 438/1047) – a Shāfi‘ī scholar of Nishapur.[914] His *mukhtaṣar* had two commentaries: one from the fifth century and one from the sixth.[915]
- Khalaf ibn ‘Abd Allāh al-Barīlī (d. 443/1051-2) – a Mālikī jurist from Valencia in Spain.[916] He authored a *mukhtaṣar* of the *Mudawwanah*.[917] No commentaries mentioned.
- ‘Abd Allāh ibn al-Ḥusayn al-Nāṣiḥī (d. 447/1055-6) – a Ḥanafī head-judge of Bukhara who authored his *mukhtaṣar*, entitled *al-Mas‘ūdī*, for the Ghaznavid Sultan Mas‘ūd ibn Maḥmūd (d. 432/1040-1).[918] No commentaries mentioned.[919]

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[911] Al-Baghdādī, *Hadīyah*, 1:637; Kātib Çelebī, *Kashf*, 1:481; al-Dhahabī, *Siyar*, 29:85-9.
[912] Kātib Çelebī, *Kashf*, 1:481.
[913] Ibid., 2:1631; al-Baghdādī, *Hadīyah*, 1:11, 13, 19, 80, 81, 109, 202, 235, 236, 291, 511, 561, 562, 594, 597, 608, 703, 799; 2:76, 97, 106, 109, 128, 129, 143, 164, 185, 234, 250, 370, 403, 405, 462, 488, 491, 559; Sezgin, *Tārīkh al-turāth*, 117-23.
[914] Al-Dhahabī, *Siyar*, 17:617-8.
[915] Kātib Çelebī, *Kashf*, 2:1626.
[916] Al-Ṣafadī, *al-Wāfī*, 13:228.
[917] Al-Baghdādī, *Hadīyah*, 1:348.
[918] Al-Dhahabī, *Siyar*, 17:660; Kātib Çelebī, *Kashf*, 2:1676.
[919] No specific commentaries were identified, although Çelebī appears to be quoting from a commentary in his entry: Ibid,, 2:1676.

- Sulaym ibn Ayyūb al-Rāzī (d. 447/1055) – a Shāfi'ī scholar who trained in Baghdad and taught in Ṣūr in the Levant.[920] One commentary on his *mukhtaṣar* was mentioned, authored in the fifth century.[921]
- Khalaf ibn Abī al-Qāsim al-Barādhi'ī – a Mālikī scholar of Qayrawan who settled first in Sicily and then Isfahan. He authored *al-Tahdhīb*, a *mukhtaṣar* of the *Mudawwanah*.[922] No commentaries mentioned.
- 'Alī ibn Muḥammad al-Māwardī (d. 450/1058) – a Shāfi'ī scholar from Basra who was a *qāḍī* in multiple locations, and finally settled in Baghdad.[923] He authored a *mukhtaṣar* entitled *al-Iqnā'*.[924] No commentaries mentioned.
- Abū Isḥāq Al-Shīrāzī (d. 476/1083) – an Iranian Shāfi'ī scholar who settled in Baghdad.[925] His *Tanbīh* was a *mukhtaṣar* on which seventy-one commentaries were mentioned: one from the fifth century, five from the sixth, twenty-one from the seventh, twenty-one from the eighth, twenty-one from the ninth and two from the tenth.[926]

[920] Al-Dhahabī, *Siyar*, 17:645-7.
[921] Kātib Çelebī, *Kashf*, 2:1630.
[922] Sezgin, *Tārīkh al-turāth*, 178.
[923] Al-Dhahabī, *Siyar*, 18:64-8.
[924] Kaḥḥālah, *Mu'jam al-mua'llifīn*, 1:81; al-Baghdādī, *Hadīyah*, 1:689.
[925] Al-Dhahabī, *Siyar*, 18:452-64.
[926] Kātib Çelebī, *Kashf*, 1:489; al-Baghdādī, *Hadīyah*, 1:91, 94, 98, 101, 103, 111, 112, 116, 128, 217, 236, 253, 337, 383, 433, 461, 525, 529, 561, 579, 586, 610, 640, 699, 708, 714, 718, 721, 727, 732, 791, 792; 2:93, 132, 145, 147, 153, 154, 161, 173, 175, 176, 179, 194, 196, 216, 250, 469, 479, 524.

# Appendix C

## A Table Comparing the *Kitāb al-Ṭahārah* in Four *Mukhtaṣar*s

The table below shows a comparison of chapter organisations between the four *mukhtaṣar*s of al-Muzanī, al-Ṭahāwī, al-Karkhī and al-Qudūrī. The chapters of al-Muzanī are grouped together to show how al-Ṭaḥāwī simplified the organisation; and likewise, the chapters of al-Karkhī are grouped together to reflect how al-Qudūrī combined them, although at times in a different order. There is often no direct correlation between the organisation of al-Ṭaḥāwī and al-Karkhī.

| Al-Ṭaḥāwī simplifies al-Muzanī | | Al-Qudūrī simplifies al-Karkhī | |
|---|---|---|---|
| Al-Muzanī | Al-Ṭahāwī | Al-Karkhī | Al-Qudūrī |
| *Bāb al-ṭahārah* (short discussion on types of water) | *Bāb mā yakūnu bihi al-ṭahārah* (types of water, purifying wells, left over animal drinking water) | *Bāb al-awānī wa-al-ābār* | |
| *Bāb al-āniyah* (using tanned animal hides, parts of animals not filthy upon death, gold and silver containers) | *Bāb al-āniyah wa-julūd al-maytāt siwā al-khinzīr* (tanning animal hides, parts of animals not filthy upon death, gold and silver | *Bāb al-ṭahārah* (the ritual ablution); *Bāb mā yūjib al-wuḍū';* *Bāb mā yūjib al-ghusl* (what | *Kitāb al-ṭahārah* (performing ritual ablution, nullifiers of ritual ablution, performing ritual bath, what necessitates ritual |

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| | containers) | necessitates ritual bath, menstruation); *Bāb al-mā' alladhī yajūz al-wuḍū' bihi; Bāb fī al-maṣāni' wa-al-ghudur wa-al-mā' al-mustanqa';* *Bāb al-āsār* | bath, water used in ritual purity, animal hides, purifying wells, left over animal drinking water) |
| *Bāb al-siwāk* (using the *siwāk* toothstick); *Bāb nīyat al-wuḍū'* (the intention for ritual ablution); *Bāb sunnat al-wuḍū'* (performing ritual ablution) | *Bāb al-siwāk wa-sunan al-wuḍū'* (performing ritual ablution) | *Bāb al-anjās; Bāb al-miqdār alladhī yamna'u al-ṣalāh min hādhihi al-najāsāt; Bāb taṭhīr hādhihi al-najāsāt; Bāb taṭhīr julūd al-maytah; Bāb al-istijmār* | [These are all in al- Qudūrī's last section below] |
| *Bāb al-istiṭābah* (cleaning oneself after the toilet, what | *Bāb al-istiṭābah wa-al-ḥadath* (cleaning oneself after using | *Bāb al-tayammum;* Section on wiping | *Bāb al-tayammum Bāb al-masḥ 'alā al-khuffayn* |

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|---|---|---|---|
| nullifies ablution); *Bāb mā yūjib al-ghusl* (what necessitates the ritual bath); *Bāb ghusl al-janābah* (performing the ritual bath); *Bāb faḍl al-junub wa-ghayrihi* (using left over bathwater) | the toilet, what nullifies ablution, what necessitate the ritual bath, how to perform the bath) | on footgear [No title given] *Bāb al-tayammum li-al-'udhr* (wiping over bandages) | |
| *Bāb al-tayammum*(dry ablution); *Bāb jāmi' al-tayammum* (miscellaneous scenarios concerning dry ablution) | *Bāb al-tayammum* (the dry ablution) | | *Bāb al-ḥayḍ* |
| *Bāb mā yufsid al-mā'* (what makes water filthy, animals dying in water); *Bāb al-mā' alladhī yanjus wa-alladhī la* | [discussed by al-Ṭaḥāwī in the opening section] | | *Bāb al-anjās* (what is filth, purifying filth, cleaning oneself after the toilet) |

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|---|---|---|---|
| *yanjus* (amounts of water that do not become filthy) | | | |
| *Bāb al-masḥ ʻalā al-khuffayn*(wiping over footgear)*; Bāb kayf al-masḥ ʻalā al-khuffayn* | *Bāb al-masḥ ʻalā al-khuffayn* | | |
| *Bāb ghusl al-jumuʻah wa-al-aʻyād* (ritual bath for Friday and Eid prayers) | | | |
| *Bāb ḥayḍ al-mar'ah wa-ṭuhruhā wa-istiḥāḍatuhā* | *Bāb al-ḥayḍ* (menstruation) | | |
| [after the first eight sections of the Book of Prayer] *Bāb al-ṣalāh bi-al-najāsah wa-mawāḍīʻ al-ṣalāh min masjid wa-ghayrihi* (what is filth and how to purify from it) | [after the first six sections of the Book of Prayer] *Bāb al-ṣalāh bi-al-najāsah* | | |

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