PRECEDENT, COMMENTARY, AND LEGAL RULES
IN THE MADHHAB-LAW TRADITION:
IBN QUṬLÜBUGHĀ’S (d. 879/1474)
AL-TAŞHĪH WA-AL-TARJĪH

Talal Al-Azem
St Edmund Hall
University of Oxford

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بسم الله الرحمن الرحيم
To my teachers in the Levant, and to the ustādh
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من لم يشكر الناس لم يشكر الله

He who has not thanked others, indeed has not thanked God.
ABSTRACT

This thesis examines the role that scholarly digests and commentaries played in the formation of legal rules in the Muslim legal institution known as the madhhab. I posit that a shared approach to legal rule-determination, and the respect of juristic precedent that it entails, underlies the jurisprudential processes of all of the four post-classical Sunni madhhab (the Ḥanafi, Mālikī, Shāfi‘i, and Ḥanbali), and unites them in a wider ‘madhhab-law tradition’.

Taking the Ḥanafi madhhab as a case study, the thesis analyses a commentary written by the late Mamluk jurist Ibn Ḥusayn al-Qudūrī (d. 1037) upon the digest of the celebrated Abbasid-era Abū al-Ḥusayn al-Qudūrī (d. 428/1037). In discussing the madhhab’s heritage of precedent, Ibn Ḥusayn al-Qudūrī’s commentary weaves an intricate tapestry of quotations and references from previous jurists and works, providing us with insight into how author-scholars reacted to, and interacted with, other jurists over space and time. Chapter 1 provides a short introduction to the lives of Qudūrī and Ibn Ḥusayn al-Qudūrī, and the contexts within which they produced their works. Chapter 2 employs both quantitative and qualitative analysis of the commentary, in order to deduce historical and geographical patterns out of which a periodisation of rule-determination in the Ḥanafi madhhab is proposed. In Chapter 3, Ibn Ḥusayn al-Qudūrī’s jurisprudential theory of rule-determination is studied, examining both the justifications and the processes employed by jurists in arriving at a legal rule in the Ḥanafi madhhab. Chapter 4 then turns to the craft of commentary itself, analysing over eighty case examples for the logical relationships, rhetorical devices, and legal arguments that inform the actual practice of rule-determination through commentary. A final chapter then summarises the conclusions, and situates them within a broader discussion as to the nature of the madhhab-law tradition.
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Transliteration and dates

The system of transliteration used in this thesis generally follows that of the Library of Congress. However, I do not distinguish between alif and alif maqṣūra (e.g. lā vs. īlā), and I use ‘yy’ in place of ‘yy’ for the medial long vowel plus consonant (e.g. al-Miṣrīyya vs. al-Miṣrīya). In alphabetical lists, al- is ignored at the beginning of a name, but not in the middle. The tā’ al-marbūta is not delineated, save when in an idāfa-construction, in which case it is represented with a ‘t’ (e.g. kitāba vs. kitābat al-Qur‘ān).

Arabic words are transliterated except when an anglicised word is commonly used (e.g. imam for imām; mosque for masjid). Likewise is the case of dynasties (e.g. Buyid for Būyid or Buwayhid; Abbasid for ‘Abbāsid). Familiar geographical names such as Medina and Baghdad are given in their common spelling; other geographical names are transliterated. Transliterated words are italicised, except for proper nouns.

Dates are normally given for both the Muslim or Christian eras, separated by a forward slash. When only one date is given, it is normally the hijra, otherwise it is followed by the letters ‘CE’ for common era; the first century of the hijra roughly corresponds to the seventh century CE, and the fifth century of the hijra to the eleventh century CE. In the case where only a hijra year is known, and not an exact month or day, I use a dash to indicate the correlating common era years in which the event may have occurred; e.g. 428/1036–7.
Abbreviations

Brockelmann = Brockelmann, Geschichte der Arabischen Litteratur
EI2 = Encyclopedia of Islam, 2nd ed.
Fawā'id = al-Laknawi, al-Fawā'id al-bahiyya
Hadiyyat = al-Baghdādi, Hadiyyat al-ārifin
Jawāhir = Ibn Abī al-Wafā’, al-Jawāhir al-mudīyya
Kashf = Kātib Çelebi, Kashf al-żunūn
Sezgin = Sezgin, Geschichte des Arabischen Schrifttums
Tāj = Ibn Quṭlūbghā, Tāj al-tarājim
Tashiḥ = Ibn Quṭlūbghā, al-Tashiḥ wa-al-tarjih

The following abbreviations have also been used: b. = born; c. = circa; d. = died; fl. = floruit;
s. = singular; pl. = plural.
Introduction

This thesis examines the development of legal rules in the traditional institution of Muslim law known as the madhhab, and the primary locus of this process, the legal commentary. The means by which legal rules are determined lies at the heart of any system of jurisprudence, and is central to understanding the nature of that system’s legal institutions. This thesis posits that it is a shared approach to legal rule-determination, and the respect of juristic precedent that it entails, that underlies the four post-classical Sunni madhhabbs (the Ḥanafī, Mālīkī, Shāfī‘ī, and Ḥanbali) and unites them in a wider ‘madhhab-law tradition’. This shared approach determined the nature of the madhhab as an institution: how it values the past, how it reacts to change in time, and how it regulates the present and future juristic activity of its agents — the judges, muftis, authors, and teachers of law who were always legal associates of a particular madhhab. It is the totality of the underlying logic, principles, and processes of this system as it developed through time that I refer to as the ‘madhhab-law tradition’ herein. This tradition engendered a distinctive culture which the agents of this tradition — the jurists — formed, and, in turn, by which they were informed.

The primary argument of this thesis is that the distinctive feature of the madhhab-law tradi-

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1 As intended throughout this thesis, legal rules are defined as general propositions, that serve as standards or regulations or norms, formulated by agents so empowered, which mandate or guide conduct or action in a society or jurisdiction, and which may be enforced in a politically organised society. Cf. Bryan A. Garner and Henry Campbell Black, *Black’s law dictionary*, 7th edn. (St. Paul, Minn: West Group, 1999), s.v. ‘rule’ and ‘law’. To be clear, in the context of the madhhab-law system which is the object of this study, I do not intend to use this term, as it sometimes is in other historical or legal contexts, to mean those maxims or principles which regulate the operations or inner logic of a legal system, nor those collections of principles applicable only to a particular branch of law. Rather, what is intended are society-facing norms, as defined above. Furthermore, in the context of the study of legal rules in the madhhab-law system of medieval and pre-modern Islam, the distinction between a ‘legal rule’ and a ‘law’ is institutional: legal rules are posited by jurists through scholarly activity meant to demarcate the possible range of norms which may regulate the actions of an individual or society, while laws are those same legal rules when effected by individuals or society, and enforced by threat of retribution by a higher order, political or Divine.
Introduction

tion is the binding authority it grants to juristic precedent — the legal opinions of generations of preceding jurist-scholars; and that the primary forum in which post-classical Muslim jurists determined precedent was not the courtroom, the academy, or the halls of a governmental legislative agency, but rather the book, and in particular the genre of legal commentary. I take as my case study the Ḥanafi madhab, and the work of a prominent jurist of the late Bahri Mamluk period, Qāsim Ibn Qutlūbhā (802–879/1399–1474), entitled al-Taṣlīḥ wa-al-tarjīḥ. The Taṣlīḥ is a legal commentary upon a digest of law written more than four hundred years earlier, namely the Mukhtāṣar of the famous Abbasid Ḥanafi jurist, Abū al-Ḥusayn al-Qudūrī (d. 428/1037). As we shall see, it contains citations and quotations from nearly one hundred past authors, with these references forming a virtual tapestry of positions and counterpositions, of reasoned arguments and rebuttals. That there were four centuries between the authoring of the primary text and its commentary — with the majority of the cited authors living in this interval — is not uncommon to the madhab-law tradition. This reflects the characteristic features of the jurists’ legal discipline of fiqh in the madhab-law tradition: probabilistic, pluralistic, exploratory, and conservative. Conservatism here has nothing to do with social or political mores; rather, it indicates that the jurists who were the agents of this activity recognised the past to have value unto itself — a natural conclusion, perhaps, for a scholarly community that ultimately understood its primary purpose to be commentary, extended through time, on revelation.

Before commencing, it is imperative that we establish what is (and what is not) intended by a key number of terms that will be found repeatedly throughout this work.

Like many other terms denoting historical institutions, the term ‘madhhab’ is impossible to translate perfectly. The word can variously (and sometimes simultaneously) be used to mean ‘a way’, ‘doctrine’, ‘practice’, ‘conduct’, ‘a jurist’s opinion on a particular case’, or ‘school of

2Published as al-Taṣlīḥ wa-al-tarjīḥ ‘alā Mukhtāṣar Qudūrī, ed. Diyāl Yūnus (Beirut: Dār al-Kutub al-‘Ilmiyya, 2002).

3Throughout this study, I shall use the term ‘citation’ to refer to a reference in which the original author’s words are not quoted but his position is only summarised or alluded to, and the term ‘quotation’ to a reference where the original passage is reproduced verbatim. The term ‘reference’, as I use it herein, is generic and encompasses both.

4For our current purpose, we may define fiqh as that discipline by which Muslim jurists search for the Divine intent for the actions of man on a given matter, through the mediums of revelation and reason.

5Each of these characteristic features will be further discussed in Chapter 3.

thought’. These usages, with a measure of the historical development of each, have helpfully been discussed elsewhere.\(^7\) George Makdisi built upon Joseph Schacht’s delineation between regional and personal schools by adding upon them their formation into guild schools. He argued that the structure and function of the legal madhhab of the late ninth and tenth centuries fulfilled common definitions of the guild, with their self-regulating professional association in a geographical locale.\(^8\) In this framework he is followed by Christopher Melchert, who but questions the prevalent notion that the Hanafi school developed in Kufa, arguing instead that it developed in Baghdad and Basra.\(^9\) Wael Hallaq challenges the existence of both geographical and personal schools, arguing instead for a transformation from individual juristic doctrines directly to doctrinal school.\(^10\) Neither, however, disputes the final classical development of the madhhabs into guild-schools. Hallaq himself uses the term, while Melchert supports Makdisi’s case, but explains his own use of the more conventional ‘school’ as being due to the inclusion of the pre-classical schools in his study, for which the professionalisation leading to the transformation to guilds had not yet occurred.\(^11\) Sherman Jackson, another student of Makdisi, also sees the later madhhab as a corporate entity, or guild, documenting its function as such amongst later Mālikīs.\(^12\)


\(^12\)Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī*
the historical and institutional scope of the present thesis — namely, legal rule-formulation (taqrīj) in the fifth/eleventh to ninth/fifteenth centuries, as encapsulated by Ibn Qurṭlūbughā’s Ṭaṣḥīḥ — I will be alternating, depending on the historical context, between the terms ‘school of law’, ‘guild-school’, ‘madhab-jurisdiction’, and at times simply ‘madhab’; the first when doctrine is under discussion, the second when the social institution’s structure or function, the third when discussing the novel developments of the Mamluk judicial system, and finally the original Arabic when intending to capture a range of meanings simultaneously. This accretion of meanings will be reflected in my contribution to a history of the Ḥanafī madhab in the High Middle Ages presented in Chapter 2, where I develop a periodisation for the history covered by Ibn Qurṭlūbughā’s work. In this, I build upon the work of my own teacher, Christopher Melchert, in The Formation of the Sunni Schools of Law, as the bulk of Ibn Qurṭlūbughā’s jurists are from periods which succeed the classical era with which Melchert closes his study.

Let us turn now to the second key concept, which the present thesis argues is the driving factor behind the development of the madhab-law system: namely, taqrīj, or rule-determination. The process by which legal rules were determined in the madhab-law system, taqrīj, has been little studied in modern scholarship. The 20th-century Egyptian jurist and scholar Muḥammad Abū Zahra devotes some words to the topic in his study of Abū Ḥanīfa and the Ḥanafī madhab.13 His assessment, like that of other modern Muslim scholars writing on the nature and function of the madhab as an institution, was fairly negative: he finds in the binding-nature of taqrīj-based precedent a cause for the so-called closing of the gates of ijtihād.14 Nonetheless, the few pages he does devote exclusively to the topic of taqrīj represents the only treatment that identifies the two main components of taqrīj and discusses some of the basic procedures that the Ḥanafī jurists were meant to follow in their task of formulating legal rules.

I am aware of no further significant treatments of the subject until the late 1990s and early 2000s, in which a string of scholars began to draw attention to the importance to the concept of taqrīj and taṣḥīḥ as the means by which jurists practised their jurisprudence within the structure of

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14 Ibid., 389. Mohammed Fadel (‘The Social Logic of Taqlīd and the Rise of the Mukhtasār’, Islamic Law and Society, 3/2 (1996), 193–233 at 195–6) surveys other Muslim legal historians of the twentieth century (such as Muḥammad al-Hajawi, Muṣṭafā al-Zarqāʾ, and ‘Umar al-Jidī) who similarly saw the High Middle Period’s age of rule-determination covered in this thesis as one of ‘senility’, ‘decadence’, ‘dissolution’, and similar descriptions. He identifies this as the result of an idealist approach to law which privileges ijtihād over taqlīd, or, to say it another way, independent scholarly opinion-making over the institutional jurisprudence of rule-formulation. We shall return to these points in Chapter 3 of this thesis.
the madhab. Sherman Jackson’s work situates the terminology of ṭarjīḥ within the context of the nature of the madhab, and in the tension that existed between the prerogative of the individual master-jurisconsult and the logic embodied in the corporate group (i.e. the madhab as both doctrinal school and guild) to which he belonged. Mohammad Fadel introduces the correlation between the logic of the jurisprudence of rule-determination and the literature in which it was embodied, arguing that for the Mālikī school the rise of the mukhtāṣar was driven primarily by the need for uniform rules that legal officials could discover and apply, without having to be first-order, ‘master jurisconsults’ (to use Jackson’s phrase; i.e. mujtahids). Building upon Jackson, he shows how the language of rule-determination — through concepts such as ‘al-ṣāḥīḥ’, ‘al-rājīḥ’, and ‘al-mashhūr’ — found their fullest manifestation in the legal handbook (mukhtāṣar), which serves to present a formulation akin to ‘a codified Common Law’, in Fadel’s phrase. Lutz Wiederhold’s contribution correctly identifies ṭarjīḥ as the practice of discerning which, of a number of existing legal opinions, is to be deemed the most appropriate, and possesses the honour of being the only modern work of which I am aware that identifies another of Ibn ʿUqlūbūghā’s works, Mūjābāt al-ahkām, as being an important source for the theoretical and practical relevance of ṭarjīḥ to the system of the madhab. Unfortunately, Wiederhold’s piece vacillates (sometimes in the same paragraph) between discussing ṭarjīḥ in the context of fiqh (i.e. of a madhab’s heritage of legal doctrines) and that of the usūl al-fiqh (i.e. the weighing of conflicting indicators of the law from first-order sources of the Sharīʿa).

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However, it is with two works of the prolific Wael Hallaq that a wider assessment of the language of *tarjih* is provided.\(^1^9\) Hallaq directly addresses the key issue of how a legal system built upon legal pluralism was able to then develop mechanisms to address the difficulties that this pluralism presented to the practice of law. Hallaq attempts to address this fundamental question by enquiring as to both the theoretical elaborations of the medieval jurists, as well as their actual practice in the formulation of positive laws. However, Hallaq’s treatment of the theory of *tarjih* makes the same mistake of Wiederhold’s piece, in that it unnecessarily conflates in its presentation between *tarjih* as the granting of preponderance to one set of indicators over others in the context of *usul al-fiqh*, and that of the internal logic or rule-determination within the *fiqh* of a single madhhab.\(^2^0\) Thus, instead of presenting us with an understanding of the processes of moving from the multiplicity of foundational opinions to the determination of a single rule, as one might have expected, we are returned to the realm of *usul al-fiqh* considerations which — as we shall see later in this thesis — Ibn Qutlûbûghû explicitly negated as having anything to do with the madhhab-law’s mechanisms of rule-determination.\(^2^1\)

His presentation of the practice of *tarjih* in the rest of the chapter does indeed treat the language employed in the formulation of rules in the substantive law (*fiqh*). And insofar as it surveys all four madhhab of the Middle Ages, it provides a magisterial overview of the differences as to the terminology, language, and processes developed by the various madhhab, thus implying an underlying unity of jurisprudential approach.\(^2^2\) But, as is the case with all such lofty perspectives, some of the granularity and detail of the actual decision-making involved in *tarjih* is left general and vague. This bars both a fuller picture of the internal logic and processes (from opinion to determined rule) of any given madhhab, as well as a sense of the historical contexts in which these processes developed and were applied. Nonetheless, though I take umbrage with a number of Professor Hallaq’s detailed points and conclusions alike in my present work, my engagement with his precedent bears testimony to the pioneering importance of his work in this field.

However, the single piece of research that shares, to a large degree, both the subject and object of the present dissertation is that of Norman Calder, ‘The “Uqūd rasm al-muftî” of Ibn ʿAbidin’.\(^2^3\) Calder correctly identifies and analyses the important contribution of the late Ot-


\(^{20}\)Ibid., 127–32.

\(^{21}\)See p. 176 below.


toman Ḥanafi jurist of Damascus, Muḥammad ʿAmin ibn ʿUmar ibn ʿAbidin (d. 1252/1836), to the methodology of rule-discovery in the Ḥanafi madhhhab.²⁴ In so doing, he uses Ibn ʿAbidin’s didactic work of rhymed couplets, the ‘Uqūd rasm al-mufti’, in a fashion similar to part of my own treatment of Ibn Qutlibughā’s work in this thesis: as a window unto the logic and the devices by which the madhhhab operated, and what these processes inform us as to the nature of the madhhhab tradition. As such, Hallaq and Calder have both correctly explicated the relationship between tarjīh as a process of rule-determination and the hierarchy of juristic authorities provided in writings such as that of Ibn ʿAbidin. Where each of the two stopped, however, is in situating this relationship within a broader periodisation of the Ḥanafi madhhhab-law tradition, and in correlating it with the tradition’s later development of a hierarchy of master-jurists (tābaqāt al-mujtahidīn).

The current dissertation, in part, posits and attempts to demonstrate a direct link between these conceptual and historical developments.

As is clear from the above review of the previous literature treating tarjīh, there is a wide array of terms which describe the totality or discrete parts of the process of rule-determination. Ibn Qutlibughā’s work likewise utilises a range of terminology to denote particular phases of the determination of a legal rule. The similarity and interrelation of these terms thus necessitates that we clarify their denotations from the outset. As the present work will demonstrate, a legal rule in the madhhhab-law system begins its life as a legal opinion (qawl) issued by a first-order jurist, a mujtahid, who is widely accepted as being capable of deducing legal opinions from the sources of law (ṣūl). While personal doctrinal schools of the second and third hijri centuries were later named after the most prominent jurist-jurist of that tradition, a number of jurists — also capable mujtahids — were often involved in the issuing of legal opinions which formed part of the school’s doctrinal heritage. Furthermore, any one of these jurists may himself have a number of opinions on one topic attributed to him. What this means for the history of rules in the madhhhab-system is that within a few generations, there often would exist a plethora of legal opinions on any given discrete legal problem, all issued by jurists whom the later madhhhab jurists deemed integral to the legal tradition.²⁵ As enriching as a multitude of legal opinions is to the intellectual aspect of the legal tradition as a doctrinal school studied, developed, and transmitted by scholarly

²⁴On the relationship and differences between rule-formulation and rule-discovery, see p. 193 of the conclusion below.

²⁵E.g. in the case of the Ḥanafi madhhhab, not only the opinions of its eponym Abū Ḥanīfa, but also those of his two most famous students, Abū Yūsuf and Muḥammad ibn al-Ḥasan al-Shaybānī, were the basis of the school’s doctrinal rules, as were (less frequently) the opinions of other students of Abū Ḥanīfa such as Zufar ibn Hudhayl, al-Ḥasan ibn Ziyād al-Lu’lu’i, and others. See Section 2.2.
jurists, such plurality of first-order opinions might prove problematic when it came to move from scholarship of rules to the application of rules in the lives of individuals and in society. Legal functionaries, such as court judges or muftis, who were members of a particular legal tradition were faced with a challenge: out of the multiplicity of legal opinions on any discrete legal issue, which one should functionally be deemed the rule, upon which a judgement or verdict could be issued?

It was this and related questions that Ibn Qutlubughā, along with the jurists whom he cites in his work and many others, attempted to answer, by developing jurisprudential procedures for the determination of legal rules, and a system that was coherent and reliable for the purposes of providing society with a stable system of law. The terms used in the title of Ibn Qutlūbughā’s work — ‘tašīḥ’ and ‘tarjiḥ’ — form the basis of his answer.

![Figure 0.1: Stages of rule-determination](image)

Beginning with the latter term, ‘tarjiḥ’ literally means to grant preponderance to something over something else; its root contains the sense of weighing in order to see which of the items on the scales is the weightier of the two. In the context of Ibn Qutlūbughā’s work, as we shall come to see, it denotes two related but distinct meanings. When viewed from the perspective of a single jurist whose task involves weighing the multitude of legal opinions formulated by the tradition’s mujtahids, and deciding which one he believes should be deemed the doctrinal rule of the school, I will render tarjiḥ as ‘rule-formulation’ (both the Arabic and English being used here as verbal nouns). The output, or result, of the jurist’s efforts was also called his ‘tarjiḥ’, his own formulation of the rule, and it is in this context that the term is often used in the plural (tarjiḥāt) in fiqh works to denote the various conclusions reached by different scholars of this stage of activity. If the jurists practising tarjiḥ as rule-formulation agreed as to which first-order opinion should be deemed the rule, the process was finished; later scholars, at most, would merely
confirm the formulation. If, however, as often happened, there was no consensus, or if later jurists deemed contingencies or other external juristic considerations to necessitate a change in the rule, ensuing jurists would review the logic of the rule-formulations (tarjīḥāt) that had developed in the preceding stage, and would make emendations to the rule. This process, of either confirmation or emendation by post-formulation scholars, is what is known as tasḥīḥ. In light of the nature of this activity, which is the review of preceding juristic rule-formulations, I have rendered this term as ‘rule-review’. As is the case with the term ‘tarjīḥ’, both the Arabic tasḥīḥ and the English rendering can both be used as verbal nouns indicating the process, or as nouns indicating the final object yielded by the jurists’ efforts (in which case, again, we often see the plural ‘tasḥīḥāt’ used to refer to the efforts of a number of jurists to review preceding rules). Finally, this entire process — of jurists assessing the tradition’s heritage of legal opinions and formulating rules (i.e. tarjīḥ), followed by others who review these rules in order to confirm or modify the them (i.e. tasḥīḥ) — is what I herein refer to as ‘rule-determination’. First formulated, then reviewed, the madhhab’s doctrinal rule on any given topic is now determined for the sake of application in life and society. A potential point of confusion should be noted, namely, that the totality of the processes of rule-determination — i.e. rule-formulation as well as rule-review — was corporately referred to as ‘tarjīḥ’ by later scholars who developed typologies of the historical/functional stages of fiqh.26 Thus, when the Arabic term ‘tarjīḥ’ is used, I will clarify which of the two denotations of the word — the complete process of rule-determination, or the part only of rule-formulation — is intended. Finally, the term ‘opinion’ in this thesis will be used exclusively to refer to the Arabic term ‘qawwāl’, and by which I herein intend those legal doctrines developed by first-order mujtahid jurists (e.g. ‘al-fatwā ‘alā qaww Abī Yūsuf’). The term ‘position’, on the other hand, will remain more general, indicating a conclusion arrived at by a jurist of any period.

As stated, I have chosen Ibn Qūṭlūbughā’s al-Tasḥīḥ wa-al-tarjīḥ as my case study for how legal rules were formulated, assessed, revised, and determined via the medium of legal commentary. I have divided the thesis into four chapters: authors, history, theory, and practice of rule-determination in the period under study. In the first chapter, ‘Authors’, we shall be introduced to each of Qudūrī and Ibn Qūṭlūbughā, the authors of the primary text and the commentary, respectively; and we shall briefly familiarise ourselves with the primary intellectual and institutional contexts within which they wrote. In Chapter 2, ‘History’, we begin with our study of Ibn Qūṭlūbughā’s Tasḥīḥ, by asking what we may learn — through its thousands of citations and quotations from nearly a hundred preceding Ḥanafi jurists — about the history of rule-determination.

26 See Section 2.4.
Introduction

within the Ḥanafī madhhab. My approach in this chapter is to use both quantitative and prosopographical analysis in order to develop a topography of juristic activity in our period of study. ‘Theory’, the third chapter, treats the theoretical introduction of Ibn Ḥuṣayn’s work, examining his arguments for respecting precedent and for deeming it binding upon the jurists of the madhhab-law tradition, and his jurisprudential processes for arriving at a legal rule in the Ḥanafī madhhab theory. Chapter 4 then turns to the craft of commentary itself, analysing over eighty case examples for the logical relationships, rhetorical devices, and legal arguments that inform the actual practice of rule-determination through commentary. The thesis ends with a summary of conclusions arrived at, and situates them within a broader discussion as to the nature of the madhhab-law tradition.
1.1 The digest author: Qudūrī

Qudūrī’s biography

Abū al-Ḥusayn Aḥmad ibn Muḥammad ibn Ahmad ibn Jaʿfar ibn Ḥamdān al-Qudūrī was born in Baghdad in 362/972–3.¹ The denotation of the epithet (nisba) ‘al-Qudūrī’ is uncertain: it likely

refers either to the sale of cooking pots (s. qidr, pl. qudir), or a village in the vicinity of Baghdad.² In either case, it apparently was not an unfamiliar epithet during the period, for a number of other scholars unrelated to our jurist were also known thereby.³ It is unknown to whom in Qudūrī’s family this epithet was first applied, though it was used at least for his own father.


²Samʿānī (al-Ansāb, 445a), followed by Ibn al-Athīr (al-Lubāb, 2:19–20), merely states that it refers to cooking pots, without comment as to the reason; Ibn Khallikān follows Samʿānī, but adds that he is uncertain as to the reason for this ascription (Wašafir al-ʿaʾyān, 1:78–9), while Ibn Abī al-Wafāʾ understands Samʿānī to mean the sale of such pots (Jawāhir, 4:285), as does Yāʾīrī (Mirʾāt al-jinān, 3:37). For the ascription to the village, see Kafawi, who provides a possible ascription to a village known as Qudūra in the vicinity of Baghdad (Kataʾīb al-ʾāʾlām al-akhyār, 144–5). While Ibn Qutlūbughā explicitly states that he is unaware as to the reason for the ascription (Ṭāi, 99), the editor, Muḥammad Khayr Ramaḍān Yūsuf, reports two unreviewed marginal notes in two of his manuscripts: one relates the nīsba to a village of Baghdad named Qudūra, while the other to a locale in Baghdad named al-Qudūr in the vicinity of the locale of al-Maydān (Muḥammad Khayr Ramaḍān Yūsuf (ed.), in Ṭāi, 99, n. 1).

al-Qudūrī, was a traditionist, and had met and related stories regarding the mystic and ascetic Abū Bakr al-Shiblī. He was a teacher in Prophetic Traditions to the judge Abū Tamām ‘Ali ibn Muhammad ibn al-Hasan al-Wāṣīṭī. As for children, Qudūrī had at least one child, a son named Muḥammad and known as Ibn al-Qudūrī. Like his father and grandfather, the boy learned traditions, having heard from Abū ‘Alī al-Ḥasan ibn Aḥmad ibn Shādhān and the judge Abū al-Ḥāsim Tānūkhī. However, he died in 440/1048–9, only twelve years after the death of Qudūrī. He died young: the biographers mention that he was too young to even be considered eligible to narrate the traditions he had learnt; furthermore, Qudūrī is said to not have taught his son fiqh, instead instructing others to leave the boy to live a life untroubled by scholastic learning.

Despite his father’s association with Shiblī, the sources do not record Qudūrī’s being affiliated with any of the numerous Sufis or ascetics of his day. However, in a time in which jurists were being criticised for the ascetics for their inattentiveness to their own personal religious life in favour of juristic hair-splitting, arrogant and long-winded debate, and worldly position, Qudūrī was praised for his continual recitation of the Koran, a sign of piety and virtue despite his professional achievements. Kātib Çelbi relates that Qudūrī’s Mukhṭasār itself became an object of veneration: Ḥanafis sought blessings by reciting it during the plaque; it was believed that whoever learnt it by heart would be protected from poverty; and that whoever read it at the hands of a pious teacher who, upon completing the study of the book, prayed that his student be given blessings (baraka), that student would be granted dirhams according to the number of legal matters contained in the book, 12,000 according to Kātib Çelbi.

As a teacher, Qudūrī was apparently firm, but also insightful as to the abilities and constitutions of his students. One story has him becoming angry with two students, Abū al-Ḥārith Muḥammad ibn Abī al-Faḍl al-Sarakhsī and another jurist. Qudūrī then took it upon himself to conciliate with the unnamed jurist, but not so Abū al-Ḥārith, stating, ‘He will return of his own volition, for knowledge will bring him back’; the student returned the following day. He also vetted his potential students, to test their capacity for the difficult study of law. The same Sarakhsī was initially brought in his youth by his father to Qudūrī. The scholar offered to let the boy

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5Jawāhir, 3:64.
6Da‘ūtu ya‘sh li-rāḥīhi.’ Jawāhir, 1:249, cit. the lost Ṭabaqāt al-fuqahā’ of the Shāfi‘ī Abū Muḥammad al-Fāmī. However, when listing Qudūrī’s works, Ibn Abī al-Wafā’ (Jawāhir, 1:248) makes mention of a mukhṭasār which Qudūrī is to have written for his son; either this work was intended to be used by the son later in life, or Qudūrī did in fact have at least one other child.
choose one lesson of the day to attend, in order that the master might then test him. Qudūrī then proceeded to teach twelve lessons, after which he asked the pupil, ‘Which of the classes that you attended would you like to review with your classmates?’ Sarakhsi confidently replied, ‘I would like that my master hear the review from me directly,’ and proceeded to recite the contents of all twelve lessons to the impressed teacher. Perhaps it was for this that Qudūrī is reported to have praised him saying, ‘None have come from Khurasan and ‘Ayn al-Nahr more learned in law than he.’

Abū al-Ḥasan al-Qudūrī died on Sunday, 5 Rajab 428 / 24 April 1037, at the age of 66. He was buried the same day in his home in Darb Abī Khalaf, but was later reinterred in the al-Manṣūr street cemetery next to the Ḥanafī jurist Abū Bakr al-Khwārizmi. He was the subject of a pious dream after his death. His student al-Khaṭīb al-Baghdādī narrates that the vizier Abū al-Qāsim ‘Ali ibn al-Ḥasan Ibn al-Muslima repeatedly related to him a dream of his in which he had seen Qudūrī after the latter’s death. The vizier asks the jurist about his state, in response to which Qudūrī’s face changes, elongating until it looks like a reflection of a face in the mirror of a sword in length and narrowness, signifying the difficulty of the matter. Abū al-Qāsim then enquires about his grandfather, Abū al-Faraj Ahmad ibn Muḥammad Ibn al-Muslima, a traditionist known for his piety who was also a student of law of the Ḥanafī Abū Bakr al-Jaṣṣāṣ, upon which Qudūrī’s face returns to its natural state, and he replies, ‘And who pray tell is like Sheikh Abū al-Faraj?’ Qudūrī then lifted his hand to the sky, upon which the grandson thought to himself, ‘By this, he intends the words of God Most High, “In chambers they dwell, secure.”’

Teachers and students

Qudūrī learnt Prophetic Traditions from ‘Ubayd-Allāh ibn Muḥammad al-Ḥawshabī (d. 375/986) and Muḥammad ibn ‘Ali ibn Suwayd al-Mu’addib (d. 381/991). One assessor of traditionists

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10Al-Khaṭīb al-Baghdādī, Tārīkh Madinat al-Salām, 6:288. The Koranic verse is 34:37. For this Ibn al-Muslima, see al-Khaṭīb al-Baghdādī, Tārīkh Madinat al-Salām, 6:228–9; and Ibn al-Jawzi, al-Muntasam, 15:164–5. On the importance of Ibn al-Muslima in the Sunni revival and his relationship with Qudūrī, see p. 21 below.

11For Ḥawshabī, see al-Khaṭīb al-Baghdādī, Tārīkh Madinat al-Salām, 12:86–7. For Mu’addib, see Ibn Hajar al-‘Asqālānī, Lisān al-mizān, ed. ‘Abd al-Fattāḥ Abū Ghuddā (Beirut: Dār al-Bashā’ir al-Islāmiyya,
1.1. The digest author: Qudūrī

who praised his integrity as a narrator was his first biographer al-Khaṭīb al-Baghdādi, who — despite being famed as a harsh detractor of many Ḥanafis, including the eponym of the madhhab himself, Abū Ḥanīfa — himself learnt and narrated traditions from Qudūrī. Al-Khaṭīb al-Baghdādi, followed by later assessors, held Qudūrī to be a trustworthy and honest traditionist, noting that the number of traditions he narrated was slight.\(^{12}\)

He studied law under Abū ‘Abd-Allāh Muḥammad ibn Yahyā al-Jurjānī (d. 398/1008), who taught in the mosque of Qaṭī’at al-Rabi’ and was also the teacher of Aḥmad ibn Muḥammad al-Nāṭifī.\(^{13}\) Thus, Qudūrī’s intellectual lineage, and in turn his initiatic chain as head of the Ḥanafi guild of Baghdad of his day, is Abū ‘Abd-Allāh Muḥammad ibn Yahyā al-Jurjānī (d. 398/1008) < Abū Bakr Aḥmad ibn ‘Ali al-Jaṣṣāṣ al-Rāzī (d. 370/981) < Abū al-Ḥasan al-Karkhī (d. 340/952) < Abū Sa’id al-Bardhā’i (d. 317/929–30) < Abū ‘Ali al-Daqqāq (fl. late third century) < Mūsā ibn Naṣr al-Rāzī (fl. in early third century); in one chain, Bardhā’i is said to have learnt directly from Rāzī < Muhammad ibn al-Ḥasan al-Shaybānī (d. 189/805) < Abū Ḥanīfa.\(^{14}\)

Qudūrī is thus one person removed from Jaṣṣāṣ, a key Mu’tazili theoretician of Ḥanafi jurisprudence (ṣūl al-fiqh) whose writings influenced the succeeding generations of Ḥanafi jurists; and two persons removed from Abū al-Ḥasan al-Karkhi, the major figure in the transformation of the Ḥanafi madhhab from a regional school into its classical form as a guild-school, upon whose Mukhtasār Qudūrī wrote a commentary; and six masters removed from the eponym of his guild, Abū Ḥanīfa.\(^{15}\)

The sources record that Qudūrī taught law to a number of students. His most famous law students were Abū al-Naṣr Aḥmad ibn Muḥammad al-Aqṭa’ (d. 474/1081–2), and Abū ‘Abd-Allāh Muhammad ibn ‘Ali al-Dāmaghānī (d. 478/1085); Aqṭa’ wrote a lengthy commentary on his teacher’s Mukhtasār, thus inaugurating a centuries-long tradition of commentaries on his master’s work, while Dāmaghānī went on to become chief judge of Baghdad for thirty years.\(^{16}\) His students of law also include the judge Abū al-Mahāsin Muḥammad ibn Muḥammad al-Tanūkī, a Ḥanāfī

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\(^{14}\) Kafawi, Katā’īb, 144–5.

\(^{15}\) On Karkhi’s role in the classical formation of the madhhab, see Melchert, Formation, 116–36.

\(^{16}\) Aqṭa’: Jawāhir, 1:311–12; Dāmaghānī: Dhahabi, Tārīkh al-İslām, 32:247–51.
1.1. The digest author: Qudūrī

Mu'tazīlī Shi'i who became judge of Damascus and Ba'labak, and authored a history of grammarians and linguists; 17 Abū Bakr 'Abd al-Raḥmān ibn Muhammad al-Sarakhsī (d. 439/1047–8), who authored a continuation of Qudūrī's al-Tajrīd; 18 Abū Thābit Mas'ūd ibn 'Abd al-'Azīz al-Rāzī (d. 485/1092), who went on to become a professor specialising in basic Ḥanafī law (al-madhhab) and legal questions discussed within the legal school or between the schools (khīlāf); 19 Abū Aḥmad Muḥammad ibn al-Ḥusayn al-A'lam (d. ?), a Tālībīd; 20 Abū al-Qāsim 'Abd al-Wāḥid ibn 'Ali al-'Ukbarī (d. 456), a famous grammarian who began as a Ḍanbalī then became a Ḥanafī, and learnt (kalām) from Abū al-Ḥusayn al-Baṣrī; 21 Abū Yūsuf 'Abd al-Salām ibn Bundār al-Qazwīnī (d. 488/1095), a judge, Mu'tazīlī, and bibliophile whose collection exceeded 40,000 volumes; 22 Abū al-Ḥārith Muḥammad ibn Abī al-Faḍl al-Sarakhsī (fl. mid-fifth/eleventh century), whom Qudūrī praised as the most learned in fiqh to arrive from Khurāsan; 23 and Abū Ṣāliḥ, the judge of Dāmaghān (d. ?), who studied under Qudūrī's teacher Jurjānī then Qudūrī himself, and in turn was the first chief of Judge Abū 'Abd-Allāh al-Dāmaghānī before he left Dāmaghān for Baghdad. 24,25 In Prophetic Traditions (ḥadīth), his primary students were al-Khaṭīb al-Baghdādī (d. 463/1071) and the aforementioned chief Judge Abū 'Abd-Allāh al-Dāmaghānī.

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17 Ibn 'Asākir, Tārīkh Madīnat Dimashq, 60:91–2; Jawāhir, 3:495–6; Dhaḥabī, Tārīkh al-Islām, 29:508–9; Ibn Taghribirdī, al-Nujām al-zāhira fi mutūk Miṣr wa-al-Qāhira, ed. Ahmad Zaki al-'Adawi et al., vols. 16 (Cairo: Dār al-Kutub al-Miṣriyya, 1929; facs. edn., Cairo: Maṭba'at Dār al-Kutub wa-al-Wathā'iq al-Qawmiyya, 2005, 5:52; Tāj, 296–7; see Kahhāla, Mu'jam al-mu'allīfīn, 4 vols. (Beirut: Mu'assasat al-Risāla, 1414), 3:904–5, for a list of his known works, which include an epistle on the obligation of washing one's feet during ablutions, Risāla fi ghusl al-rīfayn wa-wujūbīhī, a legal point based upon a difference in explaining the relevant verse of the Koran between the Sunnis and Shi'is that found its way into books of Sunni dogmatic theology, such as that of the Ḥanafī Tahāwī.

18 Jawāhir, 2:397–400, and 3:360–7; Tāj, 185.

19 Dhaḥabī, Tārīkh al-Islām, 33:162; Jawāhir, 3:469–70, where no mention is made of Qudūrī being his teacher.


22 Jawāhir, 2:421–2.


24 Jawāhir, 4:56.

25 Ibn Abī al-Wafā' (Jawāhir, 2:133–36) also makes mention of one Abū Bakr al-Rāzī, 'a companion of Qudūrī', as part of the entry on Nūr al-Hudā al-Ḥusayn ibn Naẓẓām al-Zaynūbī. I have found no other mention of such a name, perhaps a mistake for either Abū Bakr 'Abd al-Raḥmān al-Sarakhsī, or Abū Thābit Mas'ūd al-Rāzī, both mentioned above.
1.1. The digest author: Qudūrī

Writings

The following are the known works of Qudūrī:26

1. *al-Mukhtaṣar* (alt. *al-Mukhtaṣar fi al-fiqh*, *Mukhtaṣar al-Qudūrī*, or *Kitāb al-Qudūrī*): Qudūrī’s famous compendium, upon which Ibn Qutlūbüşhâ’s *al-Taṣḥīḥ wa-al-tarjīḥ* is a commentary. It has been published more than fifteen times, from Cairo to Istanbul to Delhi, since 1847.


3. *al-Taqrīb*: a work on khilāf-law between the Ḥanafi and Šafī’ī madhhabs. It has recently been published in twelve volumes.28

4. *al-Taqrīb al-awwal*: a one-volume work on disputed legal matters (khilāf) within the Ḥanafi madhhab, bereft of evidence and legal reasoning. Unpublished.29

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29 As mentioned in *Istidrākāt‘ alā Tārīkh al-turāṭ al-‘arabī*, ed. Ḥikmat Bashīr Yāsīn et al., 8 vols., v: *al-Fīqh* (Dammām: Dār Ibn al-Jawzi, 1422), 96, there is one known manuscript copy of the ‘Taqrīb’ in the Beyazıt Devlet Kütüphanesi of Istanbul, part of the Merzifonlu Kara Mustafa Paşa Collection (34 Dev Mer 167–18832). I have viewed a digital facsimile of this MS, and it does indeed fit the description of Qudūrī’s work. What I have not yet been able to ascertain is whether it is the so-called *al-Taqrīb al-awwal* or *al-Taqrīb al-thānī*. There is another khilāf-work manuscript in Konya, the title page of which identifies the author as Abū al-Ḥasan al-Qudūrī, and is catalogued as *Taqrīb fi’l-Furū fi mesd’il-tīl-hilaf* (Konya: Konya Bölge Yazma Eserler Kütüphanesi, Darende 433/1 (669/1)) on the yazmalar.gov.tr website of the Turkish Ministry of Culture and Tourism (accessed July 5, 2010). Unfortunately, upon ordering a digital facsimile and reading the text, it became clear that it has been misidentified: the text is identical to that of the *Ta’sīs al-naṣar* of Abū Zayd al-Dabūsī, ed. (Cairo: Maṭba‘a‘at al-Imām, n.d.). As the text is part of a majmū‘, it is possible that Qudūrī’s works is in fact to be found in the collection, starting on or after the end of *Ta’sīs al-naṣar* on f. 79a, but I have not yet had the opportunity to ascertain or negate this.
5. **al-Taqrīb al-thānī**: apparently the same as the first *al-Taqrīb*, but supplemented with evidence and legal reasoning. Unpublished\(^{30}\).

6. A volume of Prophetic Traditions (*Hadīth*, or *Juz*’). Unpublished\(^{31}\).

Ibn Abī al-Wafā’ also makes mention of two works which other classical biographers did not:

1. A mukhtāsar that Qudūrī is to have written for his son, but of which Ibn Quṭlūbughā makes no mention. It is possible that this is simply his famous *Mukhtāsar*.

2. *Masā’il al-khilāf bayna aṣḥābinā*: a one-volume work on *khilāf*-law between Ḥanafī scholars. This is probably *al-Taqrīb al-thānī*, as Ibn Abī Wafā’ does not mention a second *Taqrīb*\(^{32}\).

Ibn Abī al-Wafā’ ends his listing by mentioning that Qudūrī had other works; if so, they apparently did not survive long, for Ibn al-Qutlūbughā and others make no mention of the existence of additional works.

The following are sometimes mentioned by modern bibliographers as independent books attributed to Qudūrī, when, in fact, they are sections of his confirmed works, either copied by students, scribes, or printed independently, and thus mistaken as independent works:

1. *Nubdha min manāqib Abī Ḥanīfa*: mentioned by Sezgin\(^{33}\). Kāṭīb Čelebi lists no such independent work; rather, he mentions Qudūrī at the top of his list of authors who included a section on the *manāqib* in one of their works; in the case of Qudūrī, at the beginning of his commentary on *Mukhtāsar al-Karkhi*\(^{34}\).

2. *Kitāb fi al-nikāḥ*: published in Frankfurt in 1828, and mentioned by Zīrīklī (1:212) and Sarkīs (2:1497–8); it is the chapter on marriage-law extracted from the *Mukhtāsar*.

**Scholastic debates**

As a jurist, Qudūrī was celebrated for his intelligence, excellence of language, strong memory, and quick wits in scholastic debate. These skills, according to his biographers, are what led to his becoming the head of the Ḥanafī guild of Iraq, and being respected generally by the Ḥanafīs of his day. This in turn landed him the role of entering into public juristic debates with the most prominent jurists of the Shāfi’ī guild, with whom the Ḥanafīs often vied for dominance in Baghdad and Khurasan during the 10th and 11th centuries. He is known to have engaged in disputation

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\(^{30}\)See previous note.

\(^{31}\)Sezgin, 1:455, with four known manuscripts.

\(^{32}\)Jawāhir, 1:248.

\(^{33}\)Sezgin, 1:455–6; citing a three-folio manuscript at Rāghīb Efendi (Istanbul), 6:1479.

\(^{34}\)Kashf, 2:1838.
(munāzara) with three of the Shāfi‘i’s of his day: the head of the Shāfi‘i guild, ʿAbū Ḥāmid Aḥmad ibn Muḥammad al-Isfarāyīnī (d. 406/1016); ʿAbū al-Ḥasan Aḥmad ibn Muḥammad al-Maḥāmili (d. 415/1024), a top student of Isfarāyīnī; and the chief judge of the Shāfi‘i’s, ʿAbū al-Ṭayyib al-Ṭabarī (d. 450/1058). His debates with Isfarāyīnī and Maḥāmili are not recorded;35 it is clear, however, that Isfarāyīnī impressed his Ḥanafī disputant sufficiently for Qudūrī to declare, ‘We have never seen amongst the Shāfi‘i’s a greater jurist than ʿAbū Ḥāmid!’36 In another instance, he states, ‘In my eyes, the sheikh ʿAbū Ḥāmid is a greater jurist and more excellent debater than Shāfi‘i’, an opinion which angered the source of the story, ra‘īs al-ru‘āsā’ Ibn al-Muslima, and its relator, the Shāfi‘i’s Abū ʿĪsāq al-Shirāzi, who put the statement down to Qudūrī’s strong admiration for Isfarāyīnī and his prejudice for the Ḥanafīs over Shāfi‘i. ‘It should be ignored, for ʿAbū Ḥāmid, as well as those even more superior and more knowledgeable than he, are far from that class (“tabaqā’).37

The juristic disputation between Qudūrī and ʿAbū al-Ṭayyib al-Ṭabarī is recorded by Tāj al-Dīn al-Subkī in his Ṭabaqāt al-Shāfi‘iyya al-kubrā; Subkī does not provide his own source for the lengthy narration.38 Ṭabarī was one of the most preeminent Shāfi‘i’s of his age, the Shāfi‘i judge of Baghdād, and a teacher of many of the most influential Shāfi‘i’s of the next generation, such as Abū ʿĪsāq al-Shirāzi, who would go on to become the first appointed lecturer of the Niẓāmiyya college. He was also long-lived, dying at the age 102 with undiminished intellectual faculties, still participating as a jurist until the end of his days.39 His position as head of the guild, his preeminence as a judge, his longevity, and his role as teacher of many of the major Shāfi‘i’s predisposed his participation as the face of the Shāfi‘i in juristic disputation between the schools. Subkī narrates two debates that Ṭabarī held with his Ḥanafī counterparts: the first with the judge of Balkh, ʿAbū al-Ḥasan al-Ṭālaqānī (d. ?), and the second with Qudūrī. No dates are provided for either of the disputations.

35Jawāhir, 3:305.
38Subkī, Ṭabaqāt al-Shāfi‘iyya al-kubrā, 5:36–46, in his biography of Ṭabarī; it is apparently the source of Taqī al-Dīn al-Ghazzī’s recounting of the event in al-Ṭabaqāt al-sanīyya, 2:19, in his biography of Qudūrī.
1.1. *The digest author: Qudūrī*

**Government**

While Qudūrī was not known to have taken up any formal governmental posts, his participation in government-backed projects nonetheless place him in the sphere of the political dimensions of the Sunni revival, in addition to the religious and cultural. The madhhab as legal guild, as George Makdisi and Roy Mottahedeh have observed, was not government controlled; the madhhab-guild was a self-regulatory institution in which one of its members rose by academic preeminence or by longevity to becoming the head, and leadership therein during Abbasid times was not subject to government appointment or explicit approval. Nonetheless, Qudūrī’s position as head of the Ḥanafi guild meant that interaction was inevitable. And while there was a tradition amongst some of the jurists and ascetics (two categories that were not necessarily mutually exclusive), including a number of prominent Ḥanafīs, there is nothing in the biographical sources to indicate that Qudūrī followed some of his predecessors in refraining from official interaction with the rulers of his day.

As head of the Ḥanafi madhhab, and a prominent scholar, he participated in a number of religio-political events. In al-Rabi’ al-Ākhir 402/1011, the Caliph al-Qādir issued a decree (*maḥḍar*) to officially pronounce upon the counter-caliphate of the Fatimids of Egypt. The Caliph called upon the heads of the various religious communities and sects — the heads of the descend-ants of the Prophet, judges and jurists — as well as other high public figures, to issue opinions as to the invalidity of the Ismāʿīlī regime. Specialists in lineage weighed in on the attribution of the Fatimids to Dīşān ibn Saʿīd al-Khūramī, and on the lineage of the Fatimid ruler al-Ḥākim, denying that they were descendants of ʿAlī ibn Abī Ṭālib and his wife Fāṭima. According to Ibn al-Jawzī, the signatories included the following notables: from the ‘Alids, al-Murtaḍā, al-Raḍī, Ibn al-Azraq al-Mūsawī, Abū Ṭāhir ibn Abī al-Ṭayyib, Muḥammad ibn Muḥammad ibn ʿUmar, and Ibn Abī Yaḥyā; from the judges, Abū Muḥammad Ibn al-Akāfānī, Abu al-Qāsim al-Kharazī, and Abū al-ʿAbbās al-Suwarī; from the jurists, Abū Ḥāmid al-Isfarāyīnī, Abū Ḥāmid al-Kaṣḥalī, Abū al-Ḥusayn al-Qudūrī, Abū ʿAbd-Allāh al-Ṣaymārī, Abū ʿAbd-Allāh al-Bayḍāwī, and Abū ʿAlī ibn Ḥāmkān; and from the notaries, Abū al-Qāsim al-Tannūkhī. The appeal to authority is clear: Ḥanafīs, Shāfiʿis, and Ḥanbalīs; descendants of the house of ʿAlī; Ashʿarīs, Muʿtazilīs, and Ḥanbalīs; Sunnis and Shiʿis; all, as head of their guilds and sectarian communities, were ready to shore up the legitimacy of the Abbasid caliphate in the face of an ever-growing political and sectarian threat that was often recruiting Abbasid dissidents or adventurers. Each, of course, was heeded

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41Abū Bakr al-Jaṣṣāṣ al-Rāzī (d. 370) refused the post of judge (*Ṭāj*, 96).
by a large following amongst the populace. The signatures of the ‘Alids and the guild-heads such as Qudūrī added not just a religious authoritative stamp, but a statement of loyalty by the various communities, to the Caliph’s political decree.

Qudūrī acted as financial supervisor to the rebuilding of the Shawk Aqueduct over the ‘Īsā Canal, which had fallen into disrepair; the project was completed in Muḥarram 427/1035.\(^{43}\) Whether this was due to his position as head of the Ḥanafi guild, the respect and trust he commanded resulting from this position, or due to personal or other reasons, is not mentioned by the sources. He also had some form of association with the raʾis al-ruʿasāʾ, the grand vizier Abū al-Qāsim ‘Alī ibn al-Ḥasan Ibn al-Muslima (d. 450/1059).\(^{44}\) A number of anecdotes regarding Qudūrī are related by Ibn al-Muslima directly to Qudūrī’s earliest biographers, such as al-Khaṭīb al-Baghdādī and Shirāzī; the posthumous dream especially, and the manner in which it was recounted to al-Khaṭīb al-Baghdādī, indicates that the relationship was more than mere acquaintance.\(^{45}\) The origin of the friendship potentially lies in their shared interests. Khaṭīb portrays Ibn al-Muslima as a man of learning and piety, who had memorised the Koran and studied law, Prophetic Traditions, and other religious and ancillary disciplines before his involvement in government; Khaṭīb himself was on friendly terms with him, having written Prophetic Traditions from him and narrating anecdotes told to him by the vizier. Ibn Muslima was appointed grand vizier by the Caliph al-Qāʾīm in 437/1045, during the waning days of the Buyids; the appointment came seven years after the publishing of the Qādīrī creed heralding the revival of Sunnism in the caliphate against the Buyids’ support of Shiʿism, and ten years before the Buyid rule over Baghdad was extinguished by the Seljuks, an event occurring with the blessing of the Caliph and his vizier Ibn al-Muslima.\(^{46}\) This places Ibn al-Muslima squarely within the Sunni revival camp: a patrician\(^{47}\) involved intellectually, culturally, and politically in the revival of Sunni orthodoxy and its political manifestation through the caliphate against the sultanate of the Shiʿi Buyids, a topic which we will return to below. As head of the Ḥanafi guild, and as a major Ḥanafi intellectual with no known Muʿtazili tendencies, Qudūrī’s authority was surely a major asset to the Caliph’s project of reasserting Sunni power.

\(^{44}\)Ibn al-Muslima: al-Khaṭīb al-Baghdādī, Türkîh Madīnat al-Salām, 13:326–8. See Mottahedeh, Loyalty and Leadership, 134, for Ibn al-Muslima’s title “raʾis al-ruʿasāʾ” and its significance in the waning days of the Buyids, and 143–4 for political leaders as participants in the intellectual life.
\(^{45}\)See p. 14 above.
\(^{47}\)‘Patrician’ as used and justified by Richard Bulliet, The Patricians of Nishapur, ix–x, 20–27.
1.1. The digest author: Qudūrī

The Sunni revival and the probabilism of the madhhab-law tradition

What is most noticeable about Qudūrī’s corpus and career is its tenor. Save for a slim collection of Prophetic Traditions, and intermittent engagements in public life (most likely concomitants of his position as head of the Ḥanafī guild), his preoccupation was largely with things legal, and his identity that of a jurist-scholar. A pronounced dearth of any works of speculative theology (kalām) or jurisprudential theory (uṣūl al-fiqh) is evident. Furthermore, and perhaps tellingly, the sources make no mention of Qudūrī’s own theological predilections or adherence to a theological party. Unlike key figures of the school such as Abū Ja’far al-Ṭahāwī, Qudūrī authored no works in either dogmatic or scholastic theology, and unlike Abū Bakr al-Jaṣṣāṣ al-Rāzī, he wrote no works in uṣūl al-fiqh providing jurisprudential theories that would betray leanings one-way or another in kalām.

Two possibilities suggest themselves. The first is that Qudūrī’s peculiar interest was in matters non-speculative, and thus to write this off as particular to a man whose personality was not conducive to the theoretical. The argument against this possibility, however, is that three of his works are works of khilāf-law, of scholastic legal disputations that require just as much skill in dialectics and theoretical scaffolding in jurisprudence as would be required in the most speculative of scholastic theology. His one recorded debate with a Shāfī’i, the disputation with Abū al-Ṭayyib al-Ṭabarī, also betrays an adroitness requisite to the head of the legal guild-school.

In light of this, a second possibility as to the lack of speculative theology seems stronger: namely, that Qudūrī — consciously or otherwise — was part of a movement of separating Ḥanafīsm from the association with Mu’tazili speculative theology. He was preceded in this by another student of Jaṣṣāṣ, and colleague and friend to Qudūrī’s own master Jurjānī, Abū Bakr al-Khwārazmī (d. 403/1012). Khwārazmī serves as a good representative of a transition figure from the classical to the post-classical period of the Ḥanafī madhhab and the trends it contains. In contradistinction to his own teacher Abū Bakr al-Rāzī al-Jaṣṣāṣ, who was known for his Mu’tazili stances, Khwārazmī is admired by al-Khaṭīb al-Baghdādī for having said ‘My religion (din) is that of old women: I have nothing to do with dialectical theology (kalām),’ as well as to have appointed for himself a Ḥanbali imam who would lead him in prayers. Surely, this was not a smooth or categorical transition: some of his own students, and many of his contemporaries, were still Mu’tazilis. But a divestment it was nonetheless, and it may not be without significance that later Ḥanafīs felt most comfortable in constructing their commentary tradition around the compendium of a man to whom no non-orthodox views could be attributed. This is not to argue that the rationalist and speculative tools of previous Mu’tazili Ḥanafīs were discarded; to the con-

49 Ibid.
1.1. The digest author: Qudūrī

trary, they seem to have been consciously adopted, but within a tradition that had only recently crystallised as a self-conscious community of Sunnis. In other words, we witness in Qudūrī an example of the shift from the ascendancy of speculative theology as practised by the Mu‘tazilis to that of scholasticism in the methodology of orthodoxy, whether legal or theological. To be sure, there remained many who protested even this importation of scholastic methodology, especially amongst the Shāfi‘is; but it was a movement that only picked up steam with Ghazālī and his intellectual descendants such as the Subkis in the following centuries.

In any case, and more importantly for our topic of the history of rule-determination in the Ḥanafi school, what Qudūrī lacked in interest of his school’s past involvement with kalām, he compensated for with his own major contributions to the new developments in legal rule-formulation of the madhhab-law system. While the central importance and position of the Mukhtaṣar for rule-determination will be treated in further detail in Chapter 2,50 Qudūrī’s legal works provide excellent insight into the reasoning behind an individual jurist’s practice of tarjih, and serve as an example of the relationship between the legal literary genres and the above-mentioned three components of tarjih within one era. Qudūrī wrote two works of khilaf-law, assessing the disputed points of law: al-Tajrid in intra-madhhab debate, and al-Taqrib in inter-madhhab disputation; he put forward his own tarjih in the Mukhtaṣar; and he both debated the heritage of the Ḥanafi tradition’s legal opinions, and put forward his own emendations (taṣḥīḥāt) through reviewing the rule-formulations (tarjihat) of the leader (ra‘īs) of the Ḥanafi madhhab a century before him, Abū al-Ḥasan al-Karkhī (d. 340/952), through his commentary on the latter’s digest, Sharḥ Mukhtaṣar al-Karkhī.

A section of this last work, Sharḥ Mukhtaṣar al-Karkhī — which remains unpublished and unstudied — even includes a passage which future research into the early history of tarjih, its operative principles, and its theory, must take into account. The work contains a chapter entitled ‘al-Ibāha wa-al-ḥaqr’ (The licit and illicit) which, in the later digests and commentaries, traditionally discusses topics relating to the permissibility or prohibition of matters related to personal conduct: of looking at or touching members of the same or opposite sex; the use of silk, brocade, gold, and silver; and other matters which are meant to reflect a level of renunciation and scrupu-

50See p. 51 below.
1.1. The digest author: Qudūrī

luousness to be practised by all Muslims.\footnote{Shams al-A’imma al-Sarakhshi emphasises this point of renunciation, arguing that the chapter could very well be entitled ‘the chapter of renunciation and scrupulousness’ (kitāb al-suḥd wa-al-warṣat). Interesting for a historian of fiqh as a discipline, Sarakhshi also states that this chapter, in the books of Ḥanafī fiqh, was at first entitled ‘Kitāb al-istiḥsān’ in the works of Muḥammad ibn al-Ḥasan al-Shaybānī, and continued to be so called until Abū al-Ḥasan al-Karkhi reorganised the topical organisation of fiqh and renamed it ‘al-Īḥā wa-al-ḥaṣr’ (Shams al-Dīn al-Sarakhshī, al-Mabsūṭ, 30 vol. in 15 [Beirut: Dār al-Ma’rifā, 1406/1986], 10:145). My own preliminary research into this topic largely confirms this traditional history of legal literature: in the Kitāb al-ʾAṣl attributed to Shaybānī, it is entitled ‘Kitāb al-istiḥsān’ (Muḥammad ibn al-Ḥasan al-Shaybānī, Kitāb al-ʾAṣl, ed. Abū al-Wafā’ al-ʾAfghānī, 4 vols. in 5 [Hyderābad: Maḥlis Dāʾirat al-Maʿārif al-ʿUthmānīyya, 1966; repr. Beirut: Ālam al-Kutub, 1990], 3:43); similarly in his al-Jāmiʿ al-ṣaḥīḥ ([Karachi: Idārat al-Qurʿān wa-al-ʿUlūm al-Islāmīyya, 1411/1990], 475); under Ṭaḥāwī, many of the same matters are treated under the chapter heading ‘Kitāb al-karāḥa’ (Abū Jaʿfār ʿAlī Ẓāḥīr al-Ḥāfīz, Mukhtaṣar al-Ṭaḥāwī, ed. Abū al-Wafā’ al-ʾAfghānī [Cairo: Dār al-Kitāb al-ʿArabī, 1370], 428); in al-Shahīd al-Ḥākim’s al-Kāfī, with the title ‘Kitāb al-istiḥsān’ [al-Shahīd al-Ḥākim, al-Mukhtaṣar al-kāfī fi al-fiqh [Istanbul: MS 34 Feyzullah 923], 141]; and finally, in Qudūrī’s Sharḥ Mukhtaṣar al-Karkhī, which is the only means by which Karkhī’s work has reached us, we have the first instance of Kitāb al-īḥā wa-al-ḥaṣr (Abū al-Ḥusayn al-Qudūrī, Sharḥ Mukhtaṣar al-Karkhī [Istanbul: MS Damad 563], 484a). Ṭaḥāwī and Qudūrī appear to be responsible for emphasising the prohibited over the licit (as the chapter as a whole is more concerned with what is not permissible to see, touch, use, etc.), the latter renaming the section ‘Kitāb al-ḥaṣr wa-al-īḥā’ in his Taqrīb (Abū al-Ḥusayn al-Qudūrī, al-Taqrīb [Istanbul: Beyazıt Devlet Kütüphanesi, Merzifonlu Kara Mustafa Paşa MS 167/18832], 235a) and his Mukhtaṣar.} In one section of this chapter,\footnote{Qudūrī, Sharḥ Mukhtaṣar al-Karkhī, ‘Bāb ʿakhār fi al-ḥaṣr wa-al-īḥā’, ff. 485b-6a.} Qudūrī casuistically delineates a number of cases which all revolve around one central procedural problem inherent in the probabilistic nature of fiqh: in the face of a multitude of opinions — resulting both from a plurality of madhhabs within a single society’s jurisdiction, and from the plurality of opinions within a single madhhab — upon what legal opinion should one actually act? For example, if one is faced with a judge who issues a legal verdict in response to a court case, or a mufti who produces a response as a result of a request for a religious consultation (istiḥta’), and the judge or mufti’s judgement contradicts one’s own conviction regarding the matter, how should one conduct himself? Furthermore, if one is himself a jurist, and his opinion changes in regards to a particular legal issue which he himself was affected by in the past, and which still has ramifications for him at present, how is he to act — if he had already acted (or begun acting) upon the earlier conviction, and the matter is still unresolved until the present, is he to continue to act in accordance with his initial conviction, or is he to discard it and act upon the new conviction?

These implicit questions and the solutions that Qudūrī provides, embedded in a work of positive-law, reflect a stage of maturation in madhhab-law in Qudūrī’s time. The juristic tradition
1.1. *The digest author: Qudūrī*

had accepted the probabilistic nature of rule-formulation; that this probabilism upon which the
actual practice of jurisprudence by Muslim jurists was based inevitably leads to legal pluralism;
and that the resulting differing opinions issued by different judges and muftis, and acted upon
by different individuals in similar cases, are equally valid and respectable positions. However,
this new pluralistic reality, in turn, resulted in a need to reconcile two consequences between
which there was a natural tension: on the one hand, the rich diversity of scholarly opinion —
a source both of delight to jurists-*qua*-scholars, and of breadth of solutions for society — with
the need for a singular rule at any given moment in time, by which individuals could act with
certain knowledge that their acts, and the consequences of those acts, would be deemed valid. To
say it again, Qudūrī’s responses treated the consequences of this legal pluralism for the certainty,
consequence, and validity of the individual’s acts: otherwise, the practice of *fiqū* could slowly
degenerate into mere learned play; the validity of the mufti’s or judge’s pronouncements, and
of the individual’s actions, would be always doubted; and the efficacy of the law based upon
this *fiqū*, by which society operated, would be undermined. The fact that Qudūrī presents this
discussion in the chapter of *al-ibāḥa wa-al-ḥāẓr* indicates that he deems the pivot of the matter to
be the individual’s act; insofar as a society is the aggregate of its individuals, if the individual was
confident and certain in the validity of the actions prescribed to him by the jurist, then society
could be confident of the efficacy and utility of the madhhab-law tradition.

In Qudūrī, then, we see that that the features of the madhhab-law tradition that had crys-
tallised during the classical period, best represented by Abū al-Ḥasan al-Karkhī and his scholarly
output, had become normative in the period of the Sunni revival in which Qudūrī lived. In
turn, the dynamics of this new regime produced its own original sets of challenges and problems,
which jurists such as Qudūrī set about to address. What is intriguing is how these jurispruden-
tial procedures, such as those we have outlined above, were discussed not in abstract works of
*usūl al-fiqū*, concerned as they were largely with the linguistic and rational bases of scriptural
hermeneutics, but rather in works of *fiqū*, of the positive branches of law. The existence and
acceptance — in fact, the celebration — of dispute embodied in works of *khilāf*-law and com-
mentaries especially was not only a means of academic pleasure (though it was), but rather the
manifestation of the scholarly equivalent to the pluralism that existed within and between the
schools. The madhhab-law system was predicated upon the scholarly activity of jurists, indepen-
dent of the state’s political apparatuses; the locus of the jurist’s activity — of opinion-making
and rule-formulation — in turn were the legal literary works which they produced: the books of
*khilāf*-law, the digests, and the commentaries, in which probabilism and pluralism were at once
celebrated (in the spirit of scholarly freedom and honesty) and vanquished (for the sake of solid
rules that people could apply). In this regard, Qudūrī is one of the best representatives of the
tensions and energy of this juristic period: through his literary output, this one jurist played a role in each of the dimensions of opinion-examination, rule-determination, and rule-review. And his works, as we shall see in the next chapter, prepared the grounds for a further explosion of juristic creativity and activity — as well as a continued dialectic of problems and solutions — in the periods to follow.

1.2 The commentator: Ibn Qulībūghā

Ibn Qulībūghā’s biography

Abū al-‘Adl Zayn al-Dīn Qāsim ibn Qulībūghā ibn ‘Abd-Allāh al-Sūdūnī al-Jamālī (frequently referred to as Ibn Qulībūghā, al-Shaykh Qāsim, or Qāsim al-Hanafī) was born in Cairo in Muḥarram 802/1399.53 His father, Sayf al-Dīn Qulībūghā ibn ‘Abd-Allāh, was one of a number of Mamluk bondsmen freed by the Amir Sūdūn al-Shaykhūnī, a viceroy of the Sultan, and from whence the family received the name ‘Sūdūnī’.54 The father was himself a Ḥanafī faqīh in his time, but


54 Maqrīzī, Durar al-‘uqūd al-farida, 22; Sakkāwī, al-Dawʿ al-lāmiʿ, 184.
died a little over a year after the birth of his son Qāsim, in mid-Jumāda I 803. Ibn Quṭlūbughā thus grew up an orphan; in his youth, he memorised the Koran as well as a number of books that he then recited to al-‘Īzz Ibn Jāmā‘a, all whilst supporting himself as a tailor (at which, Sakhāwī remarks, he became quite accomplished and skillful). He soon turned himself over completely to his studies with a number of teachers, of whom his most long-standing fellowship was with the Ḥanafī jurist Kamāl al-Dīn Ibn al-Humām.

He travelled to Damascus, performed the Ḥajj-pilgrimage multiple times, and visited Jerusalem; during these travels, he accumulated a number of licences to teach, from as early as the year 816/1413. He soon became known for his strong memory and sharp intelligence, and began to draw attention for the breadth of his knowledge, and received the licence to give fatwas and to teach (iǧāzat al-iftā’ wa-al-tadrīs) from an array of scholars. He was soon being described by his own teacher al-Ḥāfiz Ibn al-Dayrī as ‘the sheikh, the scholar, the most intelligent (al-shaykh al-‘ālim al-dhakī)’, and by 835/1431 was praised by Ibn Ḥajar al-‘Asqalānī as ‘the imam, the most learned, the hadith-master, the jurist, the memoriser of hadith (al-imām al-‘allāma al-muḥaddith al-faqīḥ al-ḥāfiz)’, and — after completing a recital of Ibn Ḥajar’s work al-İnār bi-ma‘rifat ruwāt al-āthār — as ‘al-shaykh al-fāḍil al-muḥaddith al-kāmil al-awḥad’, noting that the master had himself benefitted from the student in many instances during their classes together. (Sakhāwī even mentions that the phrase ‘some of our brethren’ and the loving, almost humble, words which follow in the introduction to Ibn Ḥajar’s work is a reference to Ibn Quṭlūbughā.)

As is often the case, fame brought with it enmity, and he soon found himself the object of attacks by a one-time student, Burhān al-Dīn al-Biqā‘i, who — after praising him for his knowledge, and claiming that ‘he left behind him no Ḥanafī of his stature’ — described him as ‘a liar, whose word is unreliable, and whose opinions thus may not be relied upon’. He further charged him with ‘extreme partisanship for the party of unification with the Divine (ittiḥād)’, as a result of Ibn Quṭlūbughā’s staunch support for the Sufi poet Ibn al-Fārid (d. 632/1235) in a debate regarding the poet-saint which consumed Cairo’s scholarly society in 874/1469–70. Biqā‘i went so far as to ascribe the cause behind Ibn Quṭlūbughā’s poor health and incontinence in his seventies to Divine retribution for the stance he took in that affair. Ibn Quṭlūbughā’s staunch defence of Sufis like Ibn ‘Arabī and Ibn al-Fārid may also have been the cause of his falling-out with his

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57Sakhāwī, al-Daw’ al-lāmi‘, 3:186. On this incident, see Th. Emil Homerin, From Arab Poet to Muslim Saint (Cairo: American University in Cairo Press, 2001), Chapter 3; and for a wider context of debates regarding metaphysical Sufism in Mamluk Cairo, see Alexander Knysh, Ibn ‘Arabī in the later Islamic tradition (New York: State University of New York Press, 1999), Chapter 8.
1.2. *The commentator: Ibn Qutlūbughā*

former friend Muḥībb al-Dīn Ibn al-Shiḥna, who at one point in his life was a vociferous critic of Sufis like Ibn ‘Arabī, and his son, the latter of whom Ibn Qutlūbughā had actually been the first to give licence for fatwa. Sakhāwī, attributing it to the jealousy of contemporaries, ‘as is their wont’, relates that they went so far as to denounce him in the audience of the Sultan, attacking him for things ‘far beneath him’. He was defended by the chief judge of the Ḥanbalīs, ‘Īzz al-Dīn al-Kīnānī al-’Asqālānī, who cut off his own relations with the father and son over their actions.58

On the other hand, his colleague, friend, and biographer, Sakhāwī, is clearly an admirer, though not blind to faults. He praises him as a foremost authority of his time, a scholar of numerous disciplines, of high literary taste and ability, and a master in his school of law, peerless in his ability to recollect the finest and most abstruse points of his madhhab tradition. But despite (or perhaps due to) Ibn Qutlūbughā’s eloquence and quick wit in debate, Sakhāwī finds that his power of recall and memory was stronger than his ability in research: he was too taken by love of critique, even of his own masters. This passion of his caused him to pedantically dissect even the plainest of scholarly matters, and to endlessly delve into analysis of disputed points without consideration of his audience, in order to make his position known. His mind was so sharp that he would raise scholarly questions and problemata that even he was unable to answer, causing some of his critics to claim that his speech was of greater breadth than his knowledge. Sakhāwī concurs, commenting that Ibn Qutlūbughā’s ability of verbal expression was far more excellent than that of his pen. But, Sakhāwī marvels, all of this was despite his honest humility; the complete absence of any affectation, false airs, or hypocrisy; and the utter purity of his conscience and attitude towards others. An audience with him was always pleasant, especially in those matters over which he had mastery, and he was free from being hard-headed and uncompromising. He was incessantly willing to benefit others with his knowledge, and was always keen to learn from others, even if they be below him in age or scholarly reputation, if it was a scholarly issue which he had not yet mastered.59

Sakhāwī states that Ibn Qutlūbughā far surpassed the other jurists of his madhhab in his day, causing him to be frequented for his opinions on unprecedented, contemporary matters (*nawāzīl*) and legal problems. His sincerity of concern for others meant that the questioners’ needs were met, for which his fame spread, matched only by the fame of his support for Ibn ‘Arabī and other Sufis like him, but, as Sakhāwī assures us, without any compromise as to the soundness of his own belief and faith. Yet despite his good name, he was never granted appointments that matched his status; rather, for the most part of his life, he could be found in the Ashrafiyya, just one of the number of Sufis participating in the life of the convent. While scholars far less capable were

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appointed to prestigious academic positions, the posts he did acquire were modest in comparison to his learning: lecturer in hadith at the Qubba al-Baybarsiyya, followed by a short-lived post as professor (mashyakha) of a college opened by the contemporary Circassian Mamluk Jānibak al-Jiddāwī in the Qarāfā district.\footnote{Sakhāwī, \textit{al-Ḍaw’ al-lāmi'}, 3:188; On Jānibak al-Zāhirī al-Jiddāwī, see Richard T. Mortel, ‘\textit{Grand Dawādār} and governor of Jeddah: The career of the fifteenth century Mamlūk magnate Ġānibak al-Zāhirī’, \textit{Arabica}, 43/3 (1996), 437–56.}

He had a large family with many dependants, and apparently married a number of times, though Sakhāwī lamented his friend’s poor state of financial affairs. He was often destitute, as a result of his lack of appointments that suited his scholarly rank. This seems to have stemmed from a sense of both pride and largesse: his friend al-Sayf al-Ḥanafī, upon being appointed professor and director of the Mu'āyyadiyya, offered Ibn Ḥuṭlūbughā more suitable living arrangements for his large family, which Ibn Ḥuṭlūbughā refused; and, on the other hand, he was never shy of spending from what he had on others. He did, however, receive a number of stipends; for example, when al-Shams al-Amshāṭī was appointed head judge of the Ḥanafīs, he assigned him out of his own purse a stipend of 800 dirhams monthly, out of his high respect and love for him and long-standing fellowship with him. Likewise, at the end of the jurist’s life, the Grand \textit{Dawādār} Yashbak min Mahdi al-Zāhirī Juqmuq (d. 885/1480), and the most powerful Mamluk amir under Qāṭbāy, appointed for Ibn Ḥuṭlūbughā a stipend of 2,000 dirhams. He was also at the same time appointed as professor of al-Shaykhkhūkhiyya due to the indisposition of al-Kāfiyyājī (d. 879/1474) upon his appointment as consul during the reign of al-Ashraf Qāṭbāy.\footnote{Sakhāwī, \textit{al-Ḍaw’ al-lāmi'}, 3:189; Sakhāwī, \textit{Wajīz al-kalām fi al-dhayl al-tārikh al-Islām}, 2:859.}

But death cut short both the financial stability and academic appointments that had finally arrived: Sakhāwī laments that, at the time of his death, the shaykh had died without having received possibly a single payment, and had not yet assumed his new academic post.\footnote{Sakhāwī, \textit{al-Ḍaw’ al-lāmi'}, 3:188. On Yashbak min Mahdi, see Sakhāwī, \textit{after al-Ḍaw’ al-lāmi'}, 5:272–4; and Igarashi Daisuke, \textit{The financial reforms of Sultan Qāṭbāy}', \textit{Mamlūk Studies Review}, 8/1 (2009), 27–52, esp. 34–8.} Ibn Ḥuṭlūbughā died on the eve of Thursday, 4 Rabi’ II 879 / August–September 1474, in the Daylam neighbourhood of Cairo, after a lengthy and severe illness related to the health problems that had beset him some five years previous. His funeral prayers were led the next day by the chief judge Wali al-Dīn al-Âṣyūṭī at the Mārdānī mosque, and were attended by a great throng of people. He was buried at the gate of the mausoleum of the Prophetic companion ‘Uqba ibn ‘Āmir al-Juhanī, next to his father and children.\footnote{Sakhāwī, \textit{al-Ḍaw’ al-lāmi'}, 3:189; Ibn al-Ḥimṣī, \textit{Ḥawādith al-zamān}, 1:205–6, cited in Taṣbīh, editor’s introduction, 48.}

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1.2. *The commentator: Ibn Qutilughā*

Ibn Qutilughā studied a wide area of linguistic and traditional religious sciences with a number of scholars. After beginning his studies with al-Izz Ibn Jamā'a, he learnt the science of Koran recitation from Zarātīnī; Koranic exegesis (tafsīr) with ‘Alā’ al-Bukhārī; the sciences of hadith with al-Tāj Ahmad al-Farghānī al-Nu'mānī, the judge of Bağhdād; fiqh with al-Izz Ibn Jamā'a, al-Sirāj Qārī’ al-Hidāya, al-Majd al-Rūmī, al-Nazzām al-Sayrāmī, al-Izz ‘Abd al-Salām al-Bağhdādī, and ‘Abd al-Latīf al-Kirmānī; jurisprudential theory (uşūl al-fiqh) with ‘Alā’ al-Bukhārī, a-Sirāj Qārī’ al-Hidāya, and al-Sharafl al-Subkī; the principles of religion (uşūl al-dīn) with ‘Alā’ al-Bukhārī and al-Bisāṭī; theology under al-Sa'd Ibn al-Dayrī, with whom he studied the master's commentary on the ‘Aqā’id al-Nasafi; arithmetic law and timekeeping (miqāt) with Nāṣīr al-Dīn al-Bārnabārī; arithmetic (hisāb) with al-Sayyid ‘Alī, a student of Ibn al-Majdī; Arabic with ‘Alā’ al-Bukhārī and al-Tāj Ahmad al-Farghānī al-Nu’mānī, al-Majd al-Rūmī, and al-Sharafl al-Subkī; morphology (ṣarf) with al-Bisāṭī; the sub-disciplines of Arabic rhetoric (al-ma‘āní and al-bayān) with ‘Alā’ al-Bukhārī, al-Nazzām, and al-Bisāṭī; and logic with Subkī. He spent time reading collections of poetry and literature, and memorising great amounts therefrom. However, he benefitted most as a scholar from his fellowship with Ibn al-Humām. He audited the majority of Ibn al-Humām’s lessons in a range of disciplines, from the year 825/1421–2 until Ibn al-Humām’s death in 861/1457. He read with him the first fourth of the master’s commentary on al-Hidāya, *Fath al-Qadir, a portion of the Tawdīḥ* in scholastic jurisprudence of Şadr al-Shari‘a al-Maḥbūbī, and the entirety of the master’s own work on the Muslim creed entitled *al-Musāyara*.64


Upon being given the licence and returning from his travels, he began to teach to a number

of students ‘beyond count’.\(^{66}\) He was teacher of hadith to the Mamlūk al-Nāṣīrī Ibn al-Ẓāhir Juqmuq, brother of the future al-Malik al-Manṣūr ‘Uthmān (r. 857/1453), who became a long-standing fellow of the scholar, and to members of the family of Muḥibb al-Dīn Muḥammad Ibn al-Shihna, all of whom attended his narration of the Ḥāmid masāniḍ Abī Ḥanīfa of Abū al-Mu’ayyad al-Khwārazmī.\(^{67}\) Both the Shāfi’ī judge Sharaf al-Dīn Yahyā al-Munāwī (d. 871/1467), and the Ḥanafī judge Badr al-Dīn Ḥusayn ibn al-Ṣawwāf benefitted most in the period of their studies from Ibn Quṭlūbughā. Sakhāwī relates that he himself studied under Ibn Quṭlūbughā in hadith and its sciences, after which they formed a lasting friendship.\(^{68}\)

**Writings**

Ibn Quṭlūbughā was a prolific author, having begun writing at approximately the age of 18 according to Sakhāwī. He authored over a hundred works, which have already been documented elsewhere.\(^{69}\) What is noticeable, nonetheless, is the breadth of his involvement in a large number of disciplines, most prominent of which were fiqh and hadith. A number of the works are apologetic works vindicating the Ḥanafī madhab’s principles, particular jurists, or their works, against historical or contemporary critiques.\(^{70}\) Ibn Quṭlūbughā’s participation in juristic and social debates as to the changes in the structure of the social economy of the Mamluk realm has begun to be studied by Baber Johansen and by Martha Mundy and Richard Saumarez Smith,\(^{71}\) based upon works of the Mamluk jurist such as *Ijārat al-iqtā’*.\(^{72}\) The sciences of the Koran, lexicography, prosody, biography, Sufism, hadith-narration criticism, comparative madhab-law, jurispruden-

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\(^{69}\) Diyi’ Yūnus, the editor of *al-Taṣḥīḥ wa-al-tarjīḥ*, has produced what seem to be the most complete catalogue of Ibn Quṭlūbughā’s output, citing 123 works; he has organised them according to discipline, and referenced the bibliographical source for every work he attributes to Ibn Quṭlūbughā (*Taṣḥīḥ*, editor’s introduction, 53–66; compare with the editor’s introduction to *Ṭāj*, 16–38, where he lists 116 titles.). See also Maqrẓī, *Durar al-‘uqūd al-farida*, 22; and esp. Sakhāwī, *al-Ḍaw’ al-lāmi’*, 3:186–7, where Sakhāwī presents brief insights into the motives behind the authoring of the work, and short assessments.


\(^{72}\) *Ṭāj*, editor’s introduction, 16.
1.2. The commentator: Ibn Qutlūbughā

tial theory (uşāl al-fiqh), ethics, worship, logic, inheritance law, and other disciplines all feature prominently. The breadth of the genres in which he wrote is equally wide: he authored fourteen works of takhrīj of hadith (the editing of an existing work in order to attribute hadiths cited therein to their primary sources); five taʿlīqas (legal-reports and notes taken from law-professors’ classroom disputations);\(^{73}\) redactions and summaries of popular scholarly works; various epistles on a range of legal and other scholarly problemata; and a large number of commentaries and super-commentaries, reflecting his involvement with the tradition of juristic and other scholarly debates spanning centuries and continents.

Madhhab literary tradition and Mamluk legal pluralism

What is probably most clear when surveying the literary output of a scholar of this period like Ibn Qutlūbughā, is the degree to which it was based upon, or interacted with, preceding scholarly activity, whether that be in fiqh, hadith, or other branches of scholarship. In the case of madhhab-law, the taʿlīqa, commentary, super-commentary, and gloss were all means of participating in and shaping a long-standing legal tradition. As literary genres, they served to transmit the tradition, review its arguments and conclusions, introduce new considerations to existing positions and — at times — present new cases under the rubric of previously existing ones; and finally, to propose emendations to the rules developed by the precedent-based system of the madhhab. To a scholar of Ibn Qutlūbughā’s rank, the literary tradition in all of its forms — both ‘original’ and ‘derivative’ works — was a tremendously open and rewarding avenue for participation (as one can deduce from Sakhāwi’s comments above that Ibn Qutlūbughā seemed to thrive in scholastic debate). For jurists not as accomplished, however, it is not unreasonable that such a heritage could prove daunting and unmanageable: an official legal functionary, such as a mufti or judge, of the Mamluk era, who was not of the highest training, might easily find himself unsure of where to turn in the labyrinth of positions, rebuttals, and counter-arguments that stretched back approximately 700 years from Ibn Qutlūbughā’s age.\(^{74}\) This then posed a problem for legal education, but more importantly, for the viability of the madhhab-law tradition as the basis of a judicial system like that of the Mamluk realm.

Lower-level legal functionaries were also faced with another problem in the Mamluk judicial system. When al-Malik al-Zāhir Baybars I al-Bunduqdārī established himself as the first


\(^{74}\)See the final paragraphs on the translation of Ibn Qutlūbughā’s introduction to the Taṣḥīḥ, p. 94 below, where our author recognises this problem.
1.2. *The commentator: Ibn Qutlūbughā*

long-reigning Mamluk Sultan, an early act of his was to enact a number of major reforms to the judicial system of the nascent Mamluk empire. In 663/1265, Baybars instated a quadruple judiciary composed of four chief *qādis*, one from each of the Sunni Shāfi‘ī, Mālikī, Ḥanafī, and Ḥanbali madhhabs, in place of the single Shāfi‘ī chief judge (*qādi al-qaḍāt*) system that had been inherited from the Ayyubids. This was first implemented in the Mamluk capital, Cairo, and was soon followed by similar appointments in Damascus, Aleppo, Tripoli, Hama, and other cities. By the early ninth/fifteenth century into which Ibn Qutlūbughā was born, the judicial system of the Mamluk realm was thus effectively pluralistic: in Cairo and many other Mamluk cities, each of the four madhab-law traditions had their own courts and jurisdictions, with each being presided by a judge of that madhab, and the judicial system as a whole being presided over by a chief judge.

These two developments — that of an increasingly broad and intricate juristic tradition, and that of a pluralistic judicial system — posed two distinct but ultimately interrelated challenges to the integrity and functionality of the madhab-law tradition in Ibn Qutlūbughā’s time. Firstly, how was a jurist — who as a scholar was not a master, but as a legal functionary was a mufti or judge — to act when faced with a case? What type of discretion did a judge in particular have regarding the precedent that he found recorded in his madhab-tradition’s repository of opinions and rules? Secondly, as a legal functionary, what was the prerogative of a judge when faced with a judgement passed by a judge of a differing madhab-jurisdiction, if a new case, resulting from a dispute arising out of the consequences of the first judge’s ruling, was brought to his court? Since that jurisdiction differed from his own, and if, in the particular issue at hand, the legal doctrine of that jurisdiction’s madhab conflicted with that of his own, was he at liberty to overturn the

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original judgement?

Two of Ibn Qutilubughâ’s works in particular were meant to address the distinct but interrelated challenges that these two historical developments posed to participants of the madhhab-law tradition. The first is a book entitled al-Taslih wa-al-tarjih, which will serve as the basis for the rest of this study. This work was meant to serve two purposes. First, the introduction of the Taslih is one of our earliest treatments of the jurisprudential theory of the madhhab-law tradition by a Hanafi author: by citing jurists from across the madhhabs, it establishes clearly that there is a shared logic, and common procedures, to all of the madhhabs in the determination of legal rules; these commonalities across the schools of law are rooted in what we shall later define as the madhhab-law tradition. Addressed to the legal functionary (the mufti, the judge), Ibn Qutilubughâ also exhorts the reader to honour the system of precedent, and to be wary of basing issued judgements upon a personal caprice that could destroy both his spiritual well-being as well as the coherency and effectiveness of the legal system. Secondly, the main body of the text is a commentary on the Mukhtasar al-Quduri, and serves as the locus for Ibn Qutilubughâ’s application of the jurisprudential procedures of rule-discovery. This legal-review of the madhhab’s precedent is both a legal and a didactic exercise: by commenting upon hundreds of unresolved or disputed cases in Quduri’s Mukhtasar, he is establishing his own positions as a qualified jurist within the madhhab, but is also showing those not so qualified how rule-formulation is done; this teaches the student why precedent as determined by qualified jurists must be respected, and also how rule-discovery is to be practised if and when the need should arise.

The second work is Mijabat al-abkâm wa-waqqi’at al-ayyâm. Its purpose was to act as a handbook for non-mujtahid, low-level judges, serving as a reference for a set of matters required to proceed in a case brought before the court. It is composed of five parts: (1) the consequential obligations resulting from court judgements (mijabat al-abkâm); (2) the procedures for establishing claims (al-da’âwâ); (3) the procedures for establishing a defence (da’f al-khussât); (4) determining binding precedent (taslih); and (5) official records of minutes of the court and judges’ records (al-mahâdîr wa-al-sijillât). For our purpose of studying the history of madhhab-law jurisprudence in the Mamluk period, the most relevant chapter (and, in light of the work’s title, probably the most important in the eyes of its author) is the first, which treats the consequential obligations resulting from court judgements (mijabat al-abkâm). This chapter addresses how a pluralistic madhhab-law judicial system would protect against courts nullifying each other’s judgements due to differences of doctrine. When a court issues a judgement (hukm), Ibn Qutilubughâ explains, and

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76 Published as Ibn Qutilubughâ, Mijabat al-abkâm wa-waqqi’at al-ayyâm, ed. Muhammed Su’ud al-Ma’ini (Baghdad: Wizârat al-Awqâf wa-al-Shu’ûn al-Diniyya, 1983).

1.2. The commentator: Ibn Ḥuṣayn al-Ṭabarī

A litigant then acts upon that judgement, the legal consequences of that new act (mājahāt) cannot be called into question by a different madhhāb-court on the basis of differences of legal doctrine. In the case that the consequences of these acts lead to new litigation in a different madhhāb’s court, this later court must honour the jurisdiction of the first court which had paved the way for the consequences leading to the new litigation; any judgement the later court passes can only treat the new case at hand, and may not pronounce upon the validity of the earlier case.

In the introduction to Mājahāt al-aḥkām, Ibn Ḥuṣayn al-Ṭabarī provides us with the context which motivated his authoring the work: he laments the action of some judges of the Mamluk judicial system who took it upon themselves to nullify an earlier judgement passed by a judge of another madhhāb-jurisdictions, simply because the ruling disagreed with the doctrine of the nullifying judge’s own madhhāb.78 This, obviously, could lead to a break-down of the judicial system as a whole, and eventually to a destruction of the public’s (or government’s) trust in the practicality and coherence of the system. He thus wished to address procedural challenges facing judges who, as part of the pluralistic judicial system, were often unsure how to respond to judgements passed by other madhhāb-jurisdictions that contradicted their own, if the consequences of those rulings were then disputed, and the case was brought before his own court.79 Equally notable is the fourth chapter, treating how the judge is to determine which of the madhhāb’s numerous legal opinions on any discrete topic is the rule to be applied in a given case. For the theory, Ibn Ḥuṣayn al-Ṭabarī refers the reader to his earlier commentary on Qudūrī (the Taṣāḥīḥ). Here, Ibn Ḥuṣayn al-Ṭabarī states that he will provide the reader with the chosen position (al-mukhtār) on matters not treated in the primary works of the tradition (mīmāmā zāda ‘alā al-uṣūl), while always attributing the cited positions to the jurists who had developed them.80

While Mājahāt al-aḥkām demands dedicated analysis that goes beyond the scope of our present study of al-Taṣāḥīḥ wa-al-taṣrīḥ, we can perceive in this overview of the two works together the problems of the age which preoccupied scholars such as Ibn Ḥuṣayn al-Ṭabarī. Faced as they were with complexities arising out of the nature of the madhhāb-law tradition as embedded in the pluralistic Mamluk judicial system, they were obliged to develop solutions — both pedagogic and jurisprudential — to address the potential fissures that could affect the coherence and viability of the legal system in society. In the Taṣāḥīḥ, Ibn Ḥuṣayn al-Ṭabarī is initiating the reader, through the dialectic of citing contrasting juristic opinions and legal reasoning, into a method of interacting with the long-standing legal tradition of the Ḥanafī madhhāb. Page after page is replete with the names of the jurists and their works who contributed to this edifice, and for this

79 See p. 123 of this study for a discussion of the term ‘madhhāb-jurisdiction’.
80 Ibn Ḥuṣayn al-Ṭabarī, Mājahāt al-aḥkām, 196.
purpose, the reader of necessity must be aware of who they were, and what role they and their works played in its construction. It is towards this end that Ibn Qutlubughā authored his famous biographical dictionary, *Tāj al-tarājim*, wherein he recounts the names of those jurist-authors of the Ḥanafī madhhab, from the earliest times until his own, that had left behind written works that contributed to the school’s tradition. While his work and other works of *tabaqāt* like it are undoubtedly rich sources for deriving a history of a legal school, the next chapter will show how much of this history and its general structure can actually be derived from the works of positive law (*furūʿ*) of the school itself. And it is to this task to which we shall now turn.
2.1 Ibn Qutilubugha’s sources

One virtue of Ibn Qutilubugha’s commentary is that it serves as a window unto the history of the Hanafi madhhab — as well as that of the wider madhhab-law tradition — from the mid-fifth/eleventh century until the author’s own time in the ninth/fifteenth. Through discussion of the opinions and rules produced by preceding jurists, al-Tashih wa-al-tarjih provides us with the names of authors and works that were most central to the development of the Hanafi school of law during this period. The coming chapters will explore both the theoretical framework, as well as the actual practice, of rule-formulation developed by Ibn Qutilubugha and his predecessors in their legal writings. Before doing so, however, we shall first analyse the sources — both scholars and written works of fiqh — with which Ibn Qutilubugha engaged, and upon which he drew, in al-Tashih wa-al-tarjih. Of course, the most important ‘source’ of the work is the Mukhtasar of Abu al-Hasan al-Quduri, the rules of which serve as the frame upon which Ibn Qutilubugha weaves the fabric of his legal review. Quduri’s biography having been provided in the previous chapter, we shall proceed by first studying the early ‘Hanafi’ sources of legal opinions cited by Ibn Qutilubugha (from the late second/eighth century until the end of the third/ninth); then those authorities who, through tarjih, formulated rules by giving preponderance to certain of the early jurists’ opinions; followed by the jurists who, through tashi, confirmed or modified these proposed rules; and ending finally with a survey of all other sources upon which Ibn Qutilubugha has drawn in his work. The chapter will then conclude with an assessment as to the historical import of this data, and what light it sheds upon the development of both the Hanafi school of law and the wider madhhab-law tradition.

Before beginning our analysis of Ibn Qutilubugha’s sources, I would like to refer the reader to two tables which I have provided in the Appendices, upon which the periodisation and analysis
2.1. Ibn Qutlūbughā’s sources

which follow draw in part. The first (Appendix A)\(^1\) is a table of all the jurists referred to by Ibn Qutlūbughā for the purpose of *tarjiḥ* and *tashīḥ*, in the order of the frequency with which they are referenced from most to least. As such, I have not counted those jurists — whether of the Ḥanafī or other schools — mentioned in Ibn Qutlūbughā’s introduction treating the theory of *tarjiḥ*. Since our focus is on the jurisprudence of rule-formulation in the Ḥanafī madhhab, I have not included Abū Ḥanīfa, preceding jurists in his own chain of juristic thought (such as Ibrāhīm al-Nakha’ī), his immediate students (Abū Yūsuf, Muḥammad al-Shaybānī, Zufar ibn Hudhayl, al-Ḥasan ibn Ziyād al-Lu’lu’ī), or other first-order jurists (namely, Shafi’ī). If nothing else, mentions of Abū Ḥanīfa and his immediate students Abū Yūsuf and al-Shaybānī would disproportionately skewer our tabulations, since they are often mentioned a number of times on a single page. Likewise, since the focus is Ḥanafī jurists, I have taken out the names of three compilers of traditions that were cited by Ibn Qutlūbughā only for the sake of mentioning the source of a hadith, namely Bayhaqī, ‘Abd al-Razzāq al-Ṣan‘ānī, and Ibn Abī Shayba.\(^2\) As such, the total number of jurists referenced in the commentary section of *al-Tashīḥ wa-al-tarjiḥ* is ninety-one (91). In the list below, the first number preceding the name of the scholar is an ordinal number representing the number of times that jurist has been referenced in the commentary. The number following the date of death indicates how many times the jurist was referenced therein. The jurist’s locale has been determined in accordance with from whence they hail, and where they learnt their fiqh; in a small number of cases, I have placed two locales, the first indicating where the person learnt fiqh, and the latter where he gained fame as a jurist, usually as part of a larger migration of scholars from Transoxiana to central Muslim lands due to the dissolution or destruction of previously existing governments or states.

The second (Appendix B)\(^3\) is a list of all the texts cited by Ibn Qutlūbughā in the body of his work, organised, again, in accordance with the frequency of which the work is referenced by name. I have counted ninety-eight (98) juristic works referenced in the commentary: these include direct citations (quotations, whether verbatim or summarised), mentions (where the name of the work is mentioned without a quotation), or references cited or mentioned indirectly through the work of a third-party. Of course, works are often referenced by the name of the author instead of the book’s title; thus the number of mentions of a title below may be deceptively small, and it is best to check how often the author himself was referenced above (especially in cases where Ibn Qutlūbughā relies exclusively or primarily on only one of the author’s works). I have kept the two

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\(^1\)See p. 197 below.

\(^2\)Al-Bayhaqī is cited once on p. 155 of *al-Tashīḥ wa-al-tarjiḥ*, al-Ṣan‘ānī likewise once on the same page, and Ibn Abī Shayba once on p. 403.

\(^3\)See p. 203 below.
lists separate in order to give a truer representation of the relative importance and significance of each jurist in relation to others, and of each work in relation to other juristic works. While I did not count any of the immediate students of Abū Ḥanīfah in the list of jurists above, I have included the works of Muḥammad ibn al-Ḥasan al-Shaybānī, since his works are often mentioned as a source of early juristic opinion and legal reasoning by Ibn ʿUṯlūbughā and his interlocutors.

Excluding those whom we have specified above, the following then are the most frequently referenced jurists in Ibn ʿUṯlūbughā’s 

al-Taṣḥīh wa-al-tarjīḥ across all periods:

1. Burhān al-Dīn al-Marghīnānī (d. 593/1197, Transoxiana) [299]
2. Abū al-Barakāt al-Nasafī (d. 710/1310–11, Transoxiana) [265]
3. Burhān al-Sharīʿa al-Maḥbūbī (d. 673/1274–5, Transoxiana) [256]
4. Abū al-Maʿālī al-Isbījābī (ca. 600/1203, Transoxiana) [192]
5. Fākhīr al-Dīn Qāḍīkhān (d. 592/1196, Transoxiana) [137]
6. Abū al-Raḍāʾ (Najm al-Aʿīma) al-Zāhīdī (d. 658/1259–60, Iran) [107]

Ṣadr al-Sharīʿa (d. 747/1346–7, Transoxiana) [107] (jointly held)
7. Abū al-Faḍl al-Mawṣūlī (d. 683/1284, al-Jazīra) [92]
8. Burhān al-Dīn Ibn Māzā (d. 616/1219, Transoxiana) [68]
9. Ibn Ramaḍān al-Rūmī (d. post-616/1219, Anatolia) [56]
10. al-Ṣadr al-Shahīd (d. 536/1141, Transoxiana) [48]

### 2.2 Periodisation

Let us now turn to what we can learn by assessing this data. We shall begin by attempting a periodisation for the jurists mentioned by Ibn ʿUṯlūbughā in 

al-Taṣḥīh wa-al-tarjīḥ.

![Figure 2.1: Number of jurists cited by Ibn ʿUṯlūbughā, by decade (according to dates of death)](image)

Figure 2.1 presents the number of scholars cited by Ibn ʿUṯlūbughā in his commentary, according to the jurists’ dates of death, divided into decades from the years 200 AH to 860 AH. While relatively constant across the represented historical spectrum, the chart does unveil a number of

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4See p. 38 above.
2.2. Periodisation

patterns. The first, unsurprisingly, is that of the beginning and later years of the third/ninth century: the former represents the formative generation following that of Abū Ḥanifa’s own students and ra’y-minded colleagues in Iraq (Abū Sulaymān al-Jūzajānī (d. 200/815–16), Abū Yahyā Mu’allā ibn Manṣūr al-Rāzī (d. 211/826–7), Abū Ḥafṣ (d. 217/832–3), and ‘Īsā ibn Abān (d. 221/835–6)); the latter that of the generation which followed them (Abū ‘Īṣma al-Marwazi (fl. latter 3rd/9th cent.), Abū ‘Abd-Allāh al-Za’farānī (d. mid to latter half of the 3rd/9th cent.?), Abū ‘Abd-Allāh Ibn Salama (d. 278/891–2), and Abū Naṣr Ibn Salām al-Balkhī (d. 310/922–3)). What is noticeable is that while the former group had all learnt their fiqh and resided in Iraq (save Abū Ḥafṣ, who appears to be one of the first major Ḥanafīs to return to his Transoxianan homeland), the latter group already begins to reflect the nascent rise of an eastern Ḥanafīism centred in Balkh and Merv. A further spike is presented in the third and fourth decades of the fourth/tenth century — al-Ḥākim al-Shahīd al-Marwazi (d. 334/945–6), Abū Bakr al-Iskāf (d. 336/947–8), Abū al-Qāsim al-Ṣaffār (d. 336/947–8), and al-A’mash (d. 328/939–40) all died within six years of one another, and all are residents of Merv and Balkh in Khurasan. We find another plateau of constant activity running from the late seventh/thirteenth century until the mid-eighth/forteenth century. We shall return to the significance of both of these periods momentarily. As we shall see shortly, the first period represents the peak of tārijīh activity in the Ḥanafī madhhab, while the second reflects the most intensive period of tashīḥ activity.

While Figure 2.1 provides us with an insight as to the number of Ḥanafī jurists participating in rule-formulation, the above chart (Figure 2.2) is even more telling as to the intensity of activity during the decades, and, in turn, who of the jurists were most influential in the development of legal rules. This chart establishes that Ibn Ḥūṭūbughā was most reliant upon the tārijīh and tashīḥ of jurists who died at the turn of the seventh/thirteenth century up until the first half of the eighth/fortieth century. Excluding Abū Ḥanifa and his immediate circle, Ibn Ḥūṭūbughā mentions or quotes the 90 identified jurists 2,133 times.5 Qādikān and Burḥān al-Dīn al-Marghīnānī, dying one year apart in 592/1196 and 593/1197 respectively, single-handedly account for 20.4% of all the references in al-Tashīḥ wa-al-tarjīh with 437 references between them (al-Marghīnānī providing over two-thirds of them, with the remaining 18 of the 455 of that decade returning to Ibn Makkī al-Rāzī). In the following decade, Abū al-Mā’alī al-Isbījābī (d. ca. 600/1203) accounts for 192 (9%) of all of Ibn Ḥūṭūbughā’s citations and quotations, while Burḥān al-Dīn Ibn Māza and Ibn Ramādān al-Rūmī of the 620s AH together provide 180 (8.4%) of the book’s refer-

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5 In the list of referenced jurists presented in Appendix A, I have provided 91 names. I have excluded from this count Ibn Ḥūṭūbughā’s single mention of one Abū Muḥammad al-Jarrājārī from all of the statistical analysis in what follows, since I have been unable to determine his identity. (It is most likely a orthographic mistake, but one which I have not been able to resolve.)
2.2. *Periodisation*

![Chart showing number of citations by Ibn Quṭlūbughā, by decade](image)

Figure 2.2: Number of citations by Ibn Quṭlūbughā, by decade (according to the cited jurists’ dates of death)

...ences. Scholars passing away during the latter half of the seventh/thirteenth century account for 433 (20.3%) of all references, dominated by Abū al-Rajā’ al-Zāhidi, Burhān al-Shari‘ā (alt. Tāj al-Shari‘ā) al-Maḥbūbī, and Abū al-Faḍl al-Mawsīlī. The last major spike is that of the second decade of the eighth/fourteenth century, with Abū al-Barakāt al-Nasafi providing 265 (12.4%) of the references, and the fourth decade, with Şadr al-Shari‘a al-Asghar al-Maḥbūbī being referenced 107 times (5%).

What does this mean for the periodisation of the Ḥanāfī madḥhab’s development? The above charts provide a broad overview into which periods the jurists cited in *al-Taṣḥīḥ wa-al-tarjih* fall, and upon which period of activity Ibn Quṭlūbughā was himself most reliant for the purposes of legal review in his work. On the basis of this information, I propose the following periodisation for the development of legal rules in the Ḥanāfī madḥhab, as presented in Ibn Quṭlūbughā’s *al-Taṣḥīḥ wa-al-tarjih*:

1. Period 1: 150–200 (Foundational)
2. Period 2: 200–300 (Formative)
3. Period 3: 300–400 (Classical)
4. Period 4(a): 400–500 (Early *Tarjih*)
5. Period 4(b): 500–650 (Late Tarjih)
6. Period 5(a): 650–750 (Early Taṣḥīḥ)
7. Period 5(b): 750–870 (Late Taṣḥīḥ)

We have seen, in the two preceding charts, that though there is no great disparity as to the number of jurists cited throughout the periods and the centuries, there is a tremendous difference in the number of citation and quotes, with the fifth and sixth periods towering above all others in terms of sheer number of references. Furthermore, many of the early jurists mentioned in al-Taṣḥīḥ, are cited not directly but through the intermediary of other works quoted by Ibn Qutlūbughā. In light of this all, and because the primary purpose of Ibn Qutlūbughā’s work is the study of tarjih and taṣḥīḥ as processes, the following biographical notices will be limited only to those jurists who participated in these two activities of madhhab-law rule-formulation. Furthermore, I will highlight only those aspects of the jurist and/or his works that are relevant to the development of rule-formulation in the Ḥanafī madhhab-tradition, or particulars which I believe have not been firmly established or resolved thus far by contemporary scholarship regarding their lives or works. Let us turn to each of the periods.

**Period 1: Foundational ‘Ḥanafi’ opinions (ca. 150–200) [5 jurists]**

Period 1, the foundational, begins with the death of Abū Ḥanīfa in 150/767 [353]⁶ and ends with the death of his own students and a number of his grand-students. Of those jurists mentioned in Ibn Qutlūbughā’s commentary, this period thus includes Zufar ibn Hudhayl al-‘Anbari (158/775) [14], Abū Yūsuf Ya’qūb ibn Ibrāhim (d. 182/798) [316],⁷ Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189/805) [316], and al-Ḥasan ibn Ziyād al-Lu’lu’i (d. 204/819–20) [4]. Al-Ḥasan ibn Ziyād al-Lu’lu’i’s being mentioned only four times confirms the assessment of scholars such as Sezgin, that though he was respected and apparently played an important role in defending ra’y, al-Lu’lu’i was not a heavy transmitter of the madhhab, and was not deemed by the later tradition to have contributed much to the pool of legal opinions that later tarjih jurists would

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⁶In this and all of the following references to jurists in this section, the number between brackets indicates how many times the jurist was mentioned or cited by Ibn Qutlūbughā in al-Taṣḥīḥ wa-al-tarjih. Since, in the preceding section, I have already listed the jurists according to the number of times they were referenced by Ibn Qutlūbughā, and therein provided my sources as to their biographical data, this number also serves as a cross-reference for the reader as to my sources for new biographical information presented below.

⁷In three instances, all lifted from Qudūrī’s Taqrīb, Ibn Qutlūbughā refers to Abū Yūsuf as ‘Ya’qūb’. See Taṣḥīḥ, 206, 247, and 402.
draw upon in formulating their legal rules. While Zufar ibn Hudhayl receives a greater number of references than al-Ḥasan ibn Ziyād, his fourteen are equally paltry compared with those of his colleagues Abū Yūsuf and Muḥammad. Whether the cause of his relative unimportance for the madhhab’s rule-formulation returns to his relatively early death following that of his master (as compared with the ‘Two Fellows’ living for longer periods after the death of Abū Ḥanifa) or other historical or internal madhhab factors, it nonetheless reflects the lower importance he is deemed to have played in the madhhab’s formulation of legal rules.

These are the only foundational ‘Ḥanafīs’ mentioned by Ibn Qutlūbughā, though he also makes mention of Shāfi’i nineteen times: these are the only inter-madhhab comparisons of legal opinions which he makes, and it is most often done in the context of showing that Muḥammad’s and/or Abū Yūsuf’s opinion, when contrasted with that of Abū Ḥanifa, is in alignment with that of Shāfi’i.

**Period 2: Formative transmission (ca. 200–300) [12 jurists, 29 references]**

With the jurists of the second, formative, period, Ibn Qutlūbughā now begins to treat them not merely as sources of legal opinions (as were the jurists of the foundational period), but also references them for purposes of *tarjīḥ al-riwāya* and *tarjīḥ al-aqwāl*. As for the former, the chains of

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8Sezgin, 1:433. See also the editor’s introduction to Abū al-Layth al-Samarqandi, ‘Uyūn al-masā’il and *Khizānat al-fiqḥ*, 2 vols. (Baghdad: Sharikat al-Ṭab’ wa-al-Nashr al-Aḥliyya, 1385/1965), where, on pp. 68–74, he reproduces a small passage that is apparently appended to the end of a MS of al-Nāṭīfī’s *al-Ajnās* (Maktabat al-Awqāf al-’Irāqīyya, MS 580 #3634), wherein Najm al-Dīn Abū al-Mahāmīd Yūsuf ibn Aḥmad al-Ḥasīfī is asked about the jurists named in the works of fiqḥ, and gives brief comments on the importance on a number of them. When he comes to the fifth jurist, al-Ḥasan ibn Ziyād (p. 68), he mentions that he had the strongest memory of all of Abū Ḥanifa’s fellows, and that he was the most incisive of all people: if he were to begin formulating legal cases that needed resolving, none could stand up to him. He then relates that Abū Yūsuf was asked who is superior, Muḥammad or al-Ḥasan, to which he is said to have replied, ‘al-Ḥasan is the better of the two in the formulation of questions, while Muḥammad is the better in providing responses.’

9The Ottoman-era Ibn ‘Ābidīn mentions a number of legal issues in which the opinion of Zufar is taken over the other foundational fellows of the madhhab. Though outside of the scope of the present study, it would be of interest to see if the *tarjīḥāt* of Ibn Qutlūbughā towards Zufar’s opinions (pp. 180 twice, 223, 224, 262, 276 six times, 390, 453, and 454) match with those listed by Ibn ‘Ābidīn, and how these came to be determined or disputed. See Ibn ‘Ābidīn, Muḥammad Amin ibn ‘Umar. *Radd al-muḥtār ‘alā al-durr al-mukhtār*, ed. Ḥusām al-Dīn Farfūr et al., 16 vols. to date (Damascus: Dār al-Thaqāfa wa-al-Turāth, 1421/2000) at 10:588–91 = *Radd al-muḥtār ‘alā al-durr al-mukhtār*, 6 vols. (Cairo: Dar al-Ṭiba’a al-Miṣriyya, 1272; repr. Beirut: Dar Iḥya’ al-Turath al-‘Arabī, 1407/1987) at 2:667–8.
transmission of the legal opinions attributed to the foundational jurists run through the scholars of this generation, and these chains (or, more precisely, the works which they relate from the foundational period) are thus weighed accordingly. As for the latter, tarjiḥ al-aqwal, this generation’s scholars are also mentioned in order to buttress or weaken the tarjiḥ of a foundational jurist’s legal opinion over those of his colleagues. This period effectively contains three generations:

1. The students of the formative jurists: Abū Sulaymān al-Jūzajānī (d. pre-200/815–16) [2], a student of both Abū Yūsuf and Muḥammad ibn al-Ḥasan al-Shaybānī;10 Abū Yahyā Muʿallā ibn Manṣūr al-Rāzī (d. 211/826–7) [1], a student of Abū Yūsuf and Muḥammad ibn al-Ḥasan al-Shaybānī, as well as of the traditionist-jurists al-Layth ibn Saʿd, Mālik ibn Anas, and ‘Abd-Allāh ibn Lahiʿa;11 Abū Ḥafṣ al-Kabīr (d. 217/832–3) [2],12 ‘Īsā ibn Abān (d. 221/835–6) [3],13 and Muḥammad ibn Muqāṭil al-Rāzī (d. 248/862–3) [2],14 all of whom learnt from Shaybānī; and finally Muḥammad ibn Shujāʿ ibn al-Thaljī (d. 257/870–1) [1], a student of al-Ḥasan ibn Ziyād al-Luʿluʾi.15

2. The foundational scholars’ grand-students: Abū Bakr ʿAḥmad ibn ‘Umar al-Khassaḥ (d. 261/874–5) [12], who learnt fiqh from his father ‘Umar ibn Mahyar < al-Ḥasan ibn Ziyād al-Luʿluʾi;16 Nuṣayr ibn Yaḥyā (d. 268/881–2) [3], a student of both al-Jūzajānī and Ibn Samāʿa;17 Abū ʿAbd-Allāh Muḥammad ibn Salama (d. 278/891–2) [1], a student of both al-Jūzajānī and Shaddād ibn Ḥakim (d. 210/826), the latter being a student of Zufar and in contact with Muḥammad ibn al-Ḥasan al-Shaybānī;18 and Abū ʿĪsmaʿ Saʿd ibn Muʿādh al-Marwāzī [1]19 and Abū ʿAbd-Allāh al-Ḥasan ibn Aḥmad al-Zaʿfarānī [1], both of whom probably died in the late third/ninth century.20

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10 Jawāhir, 3:518–19; Tāj, 298–9; Sezgin, 1:433.
11 Jawāhir, 3:492–3; Fawāʿid, 353–4; Sezgin, 1:434.
12 Jawāhir, 1:166; Tāj, 94; Fawāʿid, 39–40.
13 Jawāhir, 2:678–80; Tāj, 226–7; Sezgin, 1:434.
14 Jawāhir, 3:372; Sezgin, 1:436.
15 Tāj, 242; Sezgin, 1:436.
16 Shirāzī, Ṭabaqāt, 140; Jawāhir, 1:230–2; Tāj, 97–8; Fawāʿid, 56; Sezgin, 1:436–8.
17 Jawāhir, 3:546; Fawāʿid, 363.
18 Jawāhir, 3:162. On Shaddād ibn Ḥakim, see Tāj, 171.
19See the comment of the Jawāhir’s editor, ‘Abd al-Fattāḥ al-Ḥulw, in the notice for Abū ʿĪsmaʿ al-Marwāzī (Jawāhir, 4:66, n. 2), wherein he argues that since Abū Aḥmad Nabhān ibn Išāq ibn Miqdās, who died in 310 AH, narrated from him, then this Marwāzī must have flourished in the third/ninth century.
20 Jawāhir, 2:46; Ghazzi, al-Ṭabaqāt al-sanīyya, 3:47; Kashf, 1:562. I have not been able to decisively determine his date of death, nor his geographical location. Kātib Čelebi in Kashf al-zunūn, 1:562, gives the
3. The following generation. Ibn Qurṭlūbughā only mentions one jurist whom I see fit to include in this formative period, and that is Abū Nāṣr Muḥammad Ibn Salām al-Balkhī [1]. He was a student of Nuṣayr ibn Yahyā, and died in 305/917–18.\footnote{Jawāhir, 3:326; Fawā‘id, 276.} I have included him in the jurists of the formative period because he is counted by Ibn Abī al-Wafā’ as being a member of the generation of Abū Ḥafṣ al-Kabīr, despite there being almost ninety years between their dates of death, a fact explained in Laktawi’s al-Fawā‘id al-bahiyya as meaning that he was a member of the highest rank of jurists (‘wa-huwa ṣāḥib al-ṭabaqa al-‘āliya’, i.e. that of Abū Ḥafṣ) — what we are here calling the ‘formative’ period of jurists.\footnote{Jawāhir, 3:326; Tāj, 276.}

As we can see from the numbers of times these jurists were cited, their role in Ibn Qurṭlūbughā’s work was rather minimal, compared to the jurists of the coming periods: only Abū Bakr al-Khaṣṣāf in this period has more than a few references. This is not to underestimate the role of these jurists in the historical development of the Ḥanafī madhhab, an important role already documented in part by Christopher Melchert; rather, it merely emphasises our point that rule-formulation is a process that has little to do with first-order or derivative ijtihād per se, and more with the contingencies surrounding the selection of particular opinions from the pool of those ijtihād-opinions as rules for the doctrinal school.\footnote{It should be remembered that the early part of this period still includes jurists whose approach to fiqh was that of ‘aṣḥāb al-ra’y’ while not actually being direct students of Abū Ḥanifa’s circle, but were nonetheless counted by the later ṭabaqa’t tradition as having participated in the formulation of what became known as the Ḥanafī madhhab. On this point, see Nurit Tsafrir, The History of an Islamic School of Law: The Early Spread of Hanafism (Cambridge, Mass.: Harvard University Press, 2004), esp. the first chapter, entitled ‘Semi-Hanafis and Ḥanafī Biographical Sources’; and Melchert, Formation, ‘Chapter Two: From Regional Schools to Personal’, esp. 32–8 and 41–7, and ‘Chapter Three: The Ḥanafī School of the Later Ninth Century’, 48–63.}
Period 3: Classical consolidation (ca. 300–400) [11 jurists, 109 references]

Period three, from 300–400, is the classical period. One can clearly see an upsurge in the number of jurists in Figure 2.1, and particularly in the number of jurists Ibn Qutlubughā references in Figure 2.2, during this period (109, compared to 29 from Period 2). It is in this period that the madhhab was consolidated as a formal doctrinal school epistemically, and as a guild socially; herein the first mukhtāṣars, some of the earliest commentaries, the first pieces extolling the virtues (manāqib) of Abū Ḥanīfa, and the earliest works of Ḥanafī uṣūl al-fiqh were penned. In contradistinction to the previous period, in which the dates of death of the jurists therein spanned one-hundred years, those of the classical period cover only sixty. This is significant, as it is within reason that a single jurist may have lived through all or most this period, witnessing the changes as to the institutional, pedagogical, and transmissive dimensions of the madhhab, and then proceeded to play a role in its consolidation during the next period.

Abū Jaʿfar al-Ṭaḥāwī (d. 321/933) [21] and al-Ḥākim al-Shahīd al-Marwazi (d. 334/945–6) [3] both exemplify the earliest impetus at classicalisation: they are the two earliest authors of mukhtāṣars in the Ḥanafī madhhab, both works being subsequently commented upon by later prominent classical and consolidatory jurists. Abū Bakr al-Iskāf (d. 336/947–8) [2] was a

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24 See esp. Melchert, Formation, ‘Chapter Six: Al-Karkhi and the Classical Ḥanafī School’, 116–36, for the author’s conditions for the existence of a ‘classical’ period in the madhhab, and where he proposes Abū al-Ḥasan al-Karkhī (d. 340/952) as the defining jurist from whom the classical Ḥanafī school derives. Interestingly, two of the four jurists whom Melchert had proposed as possible candidates as founders of the Ḥanafī madhhab in its classical form — namely, Abū Khāzīm and Abū Saʿīd al-Bardaʿī — do not even find a single mention in Ibn Qutlubughā’s work. And while his other losing candidate, Abū Jaʿfar al-Ṭaḥāwī, does garner third place as to the number of references during this period in al-Taḥḥīḥ, and al-Karkhī receives twenty-four (thus confirming, in light of the other conditions, Melchert’s choice), it is actually Abū al-Layth al-Samarqandi who comes in highest with twenty-six references. On early Ḥanafī uṣūl al-fiqh, see Murteza Bedir, The Early Development of Ḥanafī uṣūl al-fiqh, Ph.D. thesis (University of Manchester, 1999).

25 See, for example, Abū Bakr al-Khwārazmī in the next period below.

26 Jawāhir, 1:271–7; Tāj, 100–2; Sezgin, 1:439–22; EI2, s.v. ‘al-Ṭaḥāwī’ by N. Calder.


28 Taḥāwī’s Mukhtāṣar, for example, was commented upon by Abū Bakr al-Rāzī al-Jaṣṣās (recently published as Sharḥ Mukhtāṣar al-Ṭaḥāwī, ed. ʿIsmaʿīl Allāh Ḥinayat-Allāh Muḥammad et al. (Beirut: Dār al-Bashāʾир al-Islāmiyya, 1431/2010), in eight volumes; while al-Ḥākim al-Shahīd’s al-ʿKāfi fī al-fiqh forms the basis of a work as influential for the transmission of the madhhab as it is voluminous, al-Mabsūt of Shams al-Aʿīma al-Sarakhsi, printed in thirty volumes.

29 Jawāhir, 4:15–16.
student of Ibn Salama, and a teacher of Abū Bakr al-A’mash (d. 328/939–40) [3]. Abū Ja’far al-Hinduwānī (d. 362/972) [18]31 was a student of both Iskāf and A’mash, and a teacher of Abū al-Layth al-Samarqandi (d. 373/983) [26], whose influence and works — alongside those of Ṭahāwī and Karkhī — perhaps best exemplify the impetus of the classical period.32 From this period, the legal positions of Abū al-Qāsim al-Ṣaffār (d. 326/938) [2],33 Abū Ja’far Muḥammad al-Aṣamm (d. after 360/970) [1],34 and Abū Bakr Muḥammad Ibn al-Faḍl al-Bukhārī (d. 381/991–2) [7]35 are also cited by Ibn Ḥuṭlūbughā as means of supporting or arguing against the ṭarjīḥāt of later jurists.

Finally, this period contains two giants of the classical Ḥanafī madhab: Abū al-Ḥasan al-Karkhī (d. 340/952) [24]36 and his student and successor as head of the Ḥanafī guild, Abū Bakr al-Jaṣṣāṣ al-Rāzī (d. 370/981) [2], who ‘graduated’ at the hands of his master (‘alayhi takḥarraja) and is said to have consulted him before embarking on posts with other scholars.37 Yet despite the prominence of Jaṣṣāṣ as an author of a celebrated juristic exegesis of the Koran and of a number of commentaries (on the two works of Shaybānī, the mukhtaṣar of each of Ṭahāwī and Karkhī, and the Adab al-qāḍī of Ḹhaṣṣāfī, amongst other works), and as teacher to nearly the entire next generation of Baghdādian and East Iranian Ḥanafīs,38 it should be noted that he is only mentioned twice in the entirety of al-Taṣḥīḥ, while Karkhī — one of, if not, the most prominent Ḥanafīs of this period — receives twenty-four (as compared to, say, the 299 of Abū Bakr al-Marghīnānī). All of this is to re-emphasise that the primary interlocutors of Ibn Ḥuṭlūbughā are not the early pre-classical and classical sources, but rather the aṣḥāb al-ṭarjīḥ wa-al-taṣḥīḥ — those jurists who used the legal opinions formulated, through first-order ijtihād or second-order derivative opinion-making (takhrīj) by the early and classical jurists, in order to establish and formulate the legal rules of the later madhab. To say it another way: from the perspective of rule-formulation (based as it is in the desire for constancy, predicability, and accountability imbedded in the madhhab-

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31 Jawāhir, 3:192–4; Tāj, 264.
32 Fawā’id, 362; Sezgin, 1:445–50. See also the the editor’s introduction to Abū al-Layth al-Samarqandi, Mukhtalaf al-riwāya, ed. ‘Abd al-Raḥmān al-Faraj, 4 vols. (Riyad: Maktabay al-Rushd, 1426/2005), on 19–24, for a disambiguation of the the various Samarqandis who played a role in the rescension of the Mukhtalaf al-riwāya.
33 Jawāhir, 1:200–1, 4:15–16; Fawā’id, 50.
34 Jawāhir, 3:415.
35 Jawāhir, 3:300–2; Fawā’id, 303–4; Dhahabi, Siyar a’lām al-nubalā’, 16:323.
36 Tāj, 200; Sezgin, 1:444.
37 Jawāhir, 1:223; Tāj, 96; Fawā’id, 53–4; Sezgin, 1:444–5.
38 Jawāhir, 1:223.
law system’s social and institutional logic\(^{39}\), the primary legal opinions of the early jurists were to the latter-day fiqh as the legal dicta of the primary sources were to the first-order mujtahids — they required interpretation, contextualisation, and engagement. Whether one agreed with any particular preceding jurist’s pronouncements or not, they had to be respected as part of the tradition; to respect them was to engage with them; and the vehicle of engagement was the rhetorical device of ‘the comment’.

Period 4: *Tarjih* (ca. 400–650) [48 jurists, 1090 references]

(a) Early *tarjih* (ca. 400–500/1000–1100) [17 jurists, 125 references]

While the first three stages of our periodisation have been developed, documented, and studied by Christopher Melchert, Nurit Tsafrir, and others, the post-classical periods of fiqh and the institution of the madhhab have been less studied with an eye to historical periodisation and geographical spread.\(^{40}\) The work of George Makdisi especially has shown that it is in this period that the methods of legal education and transmission, that the institution of the madhhab as a guild of law, and that the social identity of the madhhab (through an articulation of its memory of its past) all became normalised.\(^{41}\) I shall briefly highlight some of the dominant intellectual features of this period in which the jurists referenced by Ibn Qutlubughah contributed, as a backdrop to the developments in legal rule-formulation of this phase.

This period witnesses the continuing disassociation of Ḥanafism from particular theological (kalām) connections, thus emphasising its legal character as an institution. In our biography

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\(^{39}\) On the deontological, utilitarian, and metaphysical justifications for the precedent-based *tarjih* of the madhhab-law system, see Chapter 3.


of Qudūrī above,\(^{42}\) we have noted Qudūrī’s silence regarding scholastic theology, exposing at least an indifference to the often close association between Mu'tazilism and Ḥanafism in the Baghdad of the preceding period; as well as the vocal disregard for *kalām* provided by Abū Bakr al-Khwārazmī (d. 403/1012) [1], a fellow student of Jaṣṣāṣ with Qudūrī’s own master, Abū ‘Abd-Allāh al-Jurjānī (d. 398/1008) (Khwārazmī also incidentally being the jurist next to whom Qudūrī was interred after his death).\(^{43}\) Khwārazmī was a teacher to the judge Abū ‘Abd-Allāh Ḥusayn ibn ‘Alī al-Ṣaymārī (d. 436/1044–5), the first author to write a biographical work on Abū Ḥanīfa that also contained biographies of a number of the major Ḥanafi jurists who followed him until the author’s own day, and who also authored a commentary on the *Mukhtasar al-Ṭahāwī*.\(^{44}\) As such, both Khwārazmī and his student represent something of the changes and preoccupations which mark this period.

As also has been mentioned above, one of Qudūrī’s known students was a Mu'tazili Shi‘i, Abū al-Maḥāsīn Mufaḍḍal ibn Muḥammad al-Tanūkhi, who later became judge of Damascus and Ba‘labak.\(^{45}\) While this instance shows that the sectarian lines were not yet so rigid as to prevent such things as a Shi‘i Ḥanafi judge, the formalisation of sectarian identity during this period was clearly occurring, and the Ḥanafīs of the day were participants in this dimension of the Sunni revival. One such jurist was *al-Qāḍī* Abū ‘Ali al-Ḥusayn ibn Khaḍir al-Nasafī (d. 424/1032–3) [1], a student of Muḥammad ibn al-Ḥaḍr al-Bukhārī, who studied in Baghdad and Bukhara and died close to the age of 80.\(^{46}\) He debated al-Ṣarīf al-Murtadā, the head of the Shi‘is of the day, regarding the legitimacy of descendants of a prophet inheriting from him, a theological-legal and historical point of contention between Sunnis and Shi‘is of the day.\(^{47}\) This incident thus portrays a Ḥanafi representing not just his madhab but a dogmatic theological-legal point of Sunnism, and likewise depicts the formal fault lines of the period’s Sunni revival, against which a Shi‘i sectarian identity and institutional character formalised into its classical form in the fifth century.

The period also gives rise to clear scholasticising tendencies in madhab-law. Though little is known of his biography other than he having been a judge, *Abū Zayd al-Dabūsī* (d. 430/1038–9 or 432/1040) [4]\(^{48}\) holds a special position in the memory of the madhab. He is credited with

\(^{42}\) See p. 22 above.

\(^{43}\) *Jawāhir*, 3:374–5.

\(^{44}\) *Jawāhir*, 3:374–5.

\(^{45}\) See p. 16 above.


\(^{48}\) *Tāj*, 192–3; Sezgin, 1:456.
2.2. Periodisation

establishing *khilaf*-law as a literary genre and sub-discipline of *fiqh*. Considering that both Abū al-Layth al-Samarqandī and Qudūrī had authored works discussing the disputes existing within the Ḥanāfī madhhāb, it seems that it is the uniqueness of his dialectic approach in *Taṣīs al-nazar* which garnered him this respect. Abū al-ʿAbbās Ahmad al-Nāṣīfī (d. 446/1054–5), another student of Qudūrī’s teacher Abū ʿAbd-Allāh al-Jurjānī,49 also represents this scholastic impulse which so marks this period: the twice-cited *al-Ajnās*, along with his *al-Furūq* — in which cases are juxtaposed with one another in order to highlight juristic similarities and distinctions — are our first known instances of this genre of scholastic legal writing in the Ḥanāfī madhhāb.

Turning more to the formulation of legal opinions and rules themselves, a further development during this period was a genre of legal writing treating new problemata — that of ‘fatāwā’, ‘nawāzīl’, or ‘waqīʿāt’. This genre was the literary forum for high-level jurists to address new contemporary legal and ethical problems, by means of applying the opinions of preceding generations of jurists to matters which fall under their remit.50 In addition to the Majmūʿ *al-nawāzīl wa-al-waqīʿāt* of the previously mentioned al-Nāṣifī, we also have *al-Nutaf fi al-fatāwā of al-Qāḍī ʿAli al-Sughdī* (d. 461/1068–9) [2].51 Sughdī was a contemporary and colleague of Abū Shujāʿ [1]52 and al-QāḍĪ al-Māturūdī al-Ḥusayn; Ibn Abī al-Wafā’ states that if the three of them united upon a particular position for a case requiring a fatwa, no attention was paid to any dissenting opinion, as they were the leaders of the madhhāb in their day.53 It is not unreasonable to assume that some of these new cases, and the trio’s joint pronouncements, may have found their way

49Tāj, 102.


51Jawāhir, 2:567; Tāj, 209.

52Jawāhir, 4:54. No date of death nor particular city is known for Abū Shujāʿ. However, it is known that he was a contemporary and colleague of Sughdī, who died in 461, and operated in Bukhara; as such, we may assume his death date was in the middle of the fifth century, and that he operated in Transoxiana. See Lakhawi’s entry for Karābīsī in *Fawāʿīd*, 80.

into Sughdi’s compilation of *nawāzīl*.

Unsurprisingly, the figure who perhaps best represents the socio-intellectual tendencies of this period which serve as the backdrop to the rise of *tajrīḥ* is the author of our primary text *al-Mukhtaṣar*, Abū al-Ḥusayn Ahmad ibn Jaʿfar al-Qudūrī (d. 428/1037) [17]. His life and writings bear testament to a number of prevailing developments of the period. We have already touched upon his disinterest in topics speculatively theological. The introduction to his commentary *on Karkhī’s mukhtaṣar* is effectively a work of *manāqib* of Abū Hanīfa, defending the memory of the school’s eponym and thus deflecting criticism of the school’s approach, further consolidating its position vis-à-vis critics of the madhhab from partisans of other Sunni schools. His debate with the Shāfiʿi chief judge al-Ṭabarī recorded in Subki’s *Tabaqāt al-Shāfiʿyya al-kubrā*, his respect for the Shāfiʿi al-Isfarāyīnī, and his own inter-madhhab *khilāf*-work, *al-Tajrīḥ*, reflect not just his attested-to competence in employing scholastic dialectic in debate and legal argumentation, but also his simultaneous confidence in his madhhab while maintaining respect for other juristic approaches. This last point results from the wide-spread recognition of the probabilistic nature of the enterprise of *fiqh* during this period. Finally, within this period we may see in the quick adoption of Qudūrī’s *Mukhtaṣar* an example of the standardisation of a curriculum central to the transmission of the Ḥanafī madhhab: aside from the commentary of his own student, Abū

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54 As such, a study of this work, the fatwas it contains, and whether they made their way into later works of *furūʿ* could provide fertile grounds for an assessment of Hallaq’s positions in his previously mentioned article “From *fatwa*s to *furūʿ*.”

55 The seventeen references refer only to those instances of Qudūrī’s being cited from his other works, or indirectly in citations of later works such as that of his student, al-Aqṭaʾ. It does not, of course, count the fact that the entirety of *al-Taṣḥīḥ*, is built upon Qudūrī’s words in the primary text of the *Mukhtaṣar*.

56 An example would be Qudūrī’s own student in hadith, al-Khaṭib al-Baghdādī, who vacillates between vociferous attacks on early Ḥanafī and, as we have seen, at times extolling those of his own generation, apparently on the grounds of their moving away from Muʿtazili *kalām*, their propensity for hadith, and their renunciant lifestyles. On the role of *manāqib* literature in defending eponyms such as Abū Ḥanīfa (and, as such, the school’s entire tradition) against criticism or even anathematisation and charges of heresy, see now Ahmad Khan, ‘The Making and Unmaking of Abū Ḥanīfa as a Heretic: The Socio-Political and Religious History of Hostility towards Abū Ḥanīfa (d. 150/767), Eighth to Eleventh Centuries, CE’, M.Phil. thesis (Oxford Univeristy, 2011), 83–95.


58 To be clear, this is not to say that these features did not exist in previous generations, but rather it is the fact that they became more greatly pronounced and more commonly accepted, across the lines of various madhhabs and social groups of scholarship, that reflects the consolidation of a madhhab-law tradition during this period.
al-Nāṣr al-Aqta’ (d. 474/1081–2) [30], the second most referenced jurist of this period, a further eight complaints were written upon this work by the end of this period — including those of Fakhr al-Islām Abū al-‘Usr al-Bazdawi (d. 482/1089) [4], Bakr Muḥammad Khwāharzādeh (d. 483/1090) [5], ‘Abd al-Rabb ibn Muḥṣur al-Ghażnawi (d. ca. 500/1106) [1], and Rukn al-A’imma ‘Abd al-Karim al-Ṣabbāghi (d. ca. late fifth/eleventh century) [3], all of whom are cited in al-Taṣḥīḥ, — and at least another fifty-five commentaries thereafter (inclusive of Ibn Ḥunayn’s own al-Taṣḥīḥ wa-al-tarjih). Finally, though he wrote no known commentary himself, the once-cited Abū al-Yusr al-Bazdawi (d. 493/1100) [1] — brother to the above mentioned Fakhr al-Islām (Abū al-‘Usr) al-Bazdawi — was head of the Ḥanafīs of Transoxiana of his day, and teacher to two commentators on Qudūrī’s Mukhtasar, the aforementioned Rukn al-A’imma al-Ṣabbāghi, and the forthcoming ‘Ālā’ al-Dīn al-Samarqandi.65

In this unprecedented outburst of commentary upon a single work, however, there lies another dimension: the Mukhtasar as a repository of tarjih, which brings in its wake a need for commentary as a means of unpacking, debating, confirming, and rectifying its author’s choices as to which legal opinions were to be selected as the madhhab’s doctrine and rule. As we shall discuss in greater detail below,66 the later tradition remembers Qudūrī as the exemplar of tarjih par excellence, the model of a jurist qualified to concisely formulate and organise rules out of the morass of the school’s precedent. This development was possible only in light of the new features of the preceding and present period: a more pronounced sense of establishing legitimacy within the madhhab through emphasising one’s direct discipleship under a master (materialised in the ijāzat al-tadrīs wa-al-iftā’), or, alternatively, through commenting upon such a master’s written work. In some cases, such as that of Qudūrī’s student Aqta’, the two were united in one person.67

By every account, Qudūrī represents the pinnacle of the developments of this period for Baghdad. However, for the continued history of rule-formulation after him during this period,

59 Jawāhir, 1:311; Tāj, 103–4.
60 Jawāhir, 2:594–5; Tāj, 205–6; Fawā’id, 209–11.
61 Tāj, 259–60; Sezgin, 1:452.
62 Jawāhir, 2:373; Tāj, 194; Khashf, 1:1632.
63 Jawāhir, 2:456; Tāj, 360; Khashf, 1:1634; Fawā’id, 171; Hadiyyat, 1:608.
64 Jawāhir, 4:98–9.
66 See p. 79 below.
67 Hibshi, Jāmi’ al-shurūq wa-al-ḥawāshi, 3:1890, citing al-Fihris al-shāmil (fiqh), 5:462, mentions a commentary written within Qudūrī’s own lifetime, by one Abū Bakr al-Karkhi (d. ca. 410/1019–20). However, I have been unable to identify this figure in any of the other biographical sources.
and the fulfilment of the madhhab-logic that was set in motion with the developments discussed above, perhaps the most significant change is a dominant shift of Ḥanafī juristic activity to Transoxiana, and the establishment of the guild model therein. Christopher Melchert has documented Khurasanian and Transoxanian resistance (or apathy) in the later fourth/tenth century to the classical guild model formalised by Karkhī and his students, emphasising as it does greater pronouncement of one’s juristic lineage, formal graduation at the hands of a famous master, and the development of a curriculum of commentaries — not on the school’s primary works (i.e. those of Shaybānī, Ḥaṣṣāf, etc.), but now upon those of one’s own master.\(^\text{68}\) Piecing together the individual biographical notices in tabaqāt works like the Jawāhir, into networks establishes that it is Shams al-A’imma al-Ḥalwānī (d. 448/1056–7) [6]\(^\text{69}\) and his student Shams al-A’imma al-Sarakhsi (d. 483/1090) [40]\(^\text{70}\) who signal the establishment of this guild model in Transoxiana, heralding a new phase in the history of the Ḥanafī madhhab and of rule-formulation in the madhhab-law tradition. What our analysis of Ibn Qutlūbughā’s al-Taṣḥīḥ, as a source of madhhab history demonstrates is that their intellectual descendants effectively defined the history of the madhhab forever after them, to the near exclusion of contemporary jurists from other geographical areas, or indeed from other branches of Ḥanafīsm even in Transoxiana (on which more will be said below).

Ḥalwānī himself was a student of the aforementioned al-Qāḍī Abū ‘Alī al-Nasafi, and, in addition to being the master of Shams al-A’imma al-Sarakhsi, he was also a teacher to al-Qāḍī Abū Bakr Muḥammad ibn al-Ḥasan ibn Maṇṣūr al-Nasafi, a transmitter of the al-Amāli; Abū al-Muẓaffar ‘Abd al-Karīm ibn Abī Ḥanifa al-Andaqī (d. 481/1088); and Shams al-A’imma Abū al-Ḵaḍr Bakr ibn Muḥammad al-Zaranjī (d. 512/1118), who is said to have been the final jurist to have related his fiqh, and to have narrated from him Sharḥ ma’ānī al-āthār which Ḥalwānī narrated from Abū Bakr Muḥammad ibn ‘Umar Ibn Ḥamdān < Abū Ibrāhīm Muḥammad ibn Sa’īd al-Yazīdī < Taḥwī.\(^\text{71}\) Thus, though there is little mention of Ḥalwānī’s own written works,\(^\text{72}\) his influence on the development of Transoxanian Ḥanafīsm is patently clear.

It is by his student Shams al-A’imma al-Sarakhsi, however, that the juristic chains of transmission of nearly all the major Transoxanian jurists of tarjīḥ and taṣḥīḥ of the next three hundred

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\(^\text{68}\) Melchert, Formation, 133–6.

\(^\text{69}\) Jawāhir, 2:429; Tāj, 189.

\(^\text{70}\) Jawāhir, 3:78–82; Tāj, 234–5; El2, s.v. ‘al-Sarakhsi’ by N. Calder.


\(^\text{72}\) Ibn Abī Wafā (Jawāhir, 2:429) makes mention of a Mabsūṭ attributed to him, but I have found no discussion of its relation to the more famous Mabsūṭ of his student Sarakhsi.
years explicitly pass through to Ḥalwānī (see Figure 2.3). The chains of three families of prominent Ḥanafi Transoxanian jurists all derive from Sarakhsi: the Üzjandis (most prominent of whom is Fakhr al-Dīn Qāḍīkhān), the Burhānīs, and the Maḥbūbīs. The Burhānīs, followed temporally by the Maḥbūbīs, were both religious and civic leaders of Bukhara under successive regimes, the former being the first to be given the title ‘al-Ṣadr’ (the foremost), which was then inherited by the Maḥbūbīs in turn. The first prominent jurist of the Burhānīs cited by Ibn Quṭlūbughā is al-Ṣadr al-Māḍī (alt. al-Burhān al-Kabīr, Burhān al-A’imma) ‘Abd al-‘Azīz ibn ‘Umar Ibn Māza (fl. 495/1101) [1], who in turn was father and teacher to a number of the most prominent jurists of the coming period. The Maḥbūbīs, coming to prominence as jurists and political leaders only in the early sixth century, intellectually descended from Sarakhsi through a chain of jurists to ‘Ubayd-Allāh ibn ʿĪbrāhīm ibn ʿAbd Allāh, Jamāl al-Dīn al-Maḥbūbī. It is these descendants of Ḥalwānī and Sarakhsi, and their own students, whose names overwhelmingly populate the pages of Ibn Quṭlūbughā’s commentary on Qudūrī’s Muktaşar (by a degree of one to eight). It is because of this change in both quantity and quality (i.e. mode) of tarjih practised before and after the turn of the sixth/twelfth century that I have subdivided this period of tarjih into a minor, early period and a major, later period, to which we shall now turn.

(b) Late tarjih (ca. 500–650) [31 jurists, 965 references]

The latter half of our period of tarjih, with the dates of its scholars’ deaths spanning from the 500/1100s to the 650/1250s, far outweighs all other periods both in the number of scholars cited, as well as in the number of references made to their arguments and positions. As mentioned in the previous section, it also appears that this period is dominated by the school of Ḥalwānī–Sarakhsi. Their intellectual descendants seem to have eclipsed the other, pre-existing branches of Central Asian Ḥanafism. For example, while Abū al-Yusr and Abū al-ʿUsr al-Bazdawi both apparently studied under Ḥalwānī, their pedigree usually given in the works of Ḥanafī tabaqāt passes through the famous Samarqandī theologian Abū Maʿṣūr al-Māṭurīdī (d. 333/944–95): they are said to have learnt fiqh from Ismaʿil ibn ‘Abd al-Ṣādiq al-Bīyārī (d. 494/1101) < Abū al-Yusr al-Bazdawi’s great-grandfather ‘Abd al-Karīm al-Bazdawi (d. 390/1000) < Abū Maʿṣūr al-Māṭurīdī (d. 333/944–5) < Abū Naṣr al-ʿIyāḍi (d. between 301–331/914–943, during the reign of Naṣr II ibn ʿĀbd Allāh al-Samānī) < Abū Bakr al-Jūzajānī (d. ?) < Abū Ṣulaymān al-Jūzajānī (d.

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73 Jawāhir, 2:437; Fawā'id, 166–7.
74 Dhahabi, Siyar aʿlām al-nubalā`, 18:177.
75 Bazdawi the grandfather’s date of death is given in Jawāhir, 2:48, citing Tārikh Nasaf.
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pre-200/815–16) < Muḥammad ibn al-Hasan al-Shaybānī.\(^{76}\) This chain is apparently defective: there is a space of 104 years between the death of Biyārī and that of his alleged teacher ‘Abd al-Karīm al-Bazdawī; this need not arise out of forged ties, but could very well indicate either a mistaken date of death or a missing link. Whatever the cause, however, the chains provided for the Ḥalwānī–Sarakhsi family are in comparison clear, reasonable, and well documented — a sign of the more formalised master–teacher relationship marking the guild madhhab system.\(^{77}\)

Though Ābū al-Yūsuf al-Bazdawī’s students (such as Ābū Ḥāfīz Najm al-Dīn ‘Umar al-Nasafi, ‘Alā’ al-Dīn al-Samarqandī, and ‘Alī al-Dīn al-Kāsānī) were amongst the most prominent author-jurists of late fifth/eleventh to the mid-sixth/twelfth century, the jurists most cited by Ibn Qūṭlūbhūghī for purposes of tarjīḥ are rather the students of the Ḥalwānī–Sarakhsi family (namely, the descendants of Shams al-ʿīma Bakr ibn Muḥammad al-Zaranjārī, who lived for nearly ninety years and studied under both Ḥalwānī and Sarakhsi, and of al-Ṣadr al-Mādī).

There are two possibly interrelated explanations for this shift. Firstly, the Burḥānīs began their religious and civic ascent to prominence in the late fifth century under first the Seljuk Sultan Sanjār in 495/1102, who appointed ‘Abd al-ʿAzīz ibn ‘Umar ibn Māza (al-Ṣadr al-Mādī) as the sādīr in place of the reigning leader of Bukhara, Abū ʾIsḥāq Ibrāhīm al-Ṣaffārī. The family was subsequently confirmed in this position by the succeeding Qarakhānīds and Qarakhitays (and briefly under the Khwārazm Shahs), including his sons al-Ṣadr al-Shahīd, al-Ṣadr al-Saʿīd, and other descendants who were roughly contemporaneous to al-Samarqandī and al-Kāsānī.\(^{78}\)

Secondly, Kāsānī and his wife Fāṭima, daughter of his master ‘Alā’ al-Dīn al-Samarqandī, moved westward first to Seljuk Anatolia, and from there to Zengid Aleppo, where he was received by Nūr al-Dīn Zengi some time during the latter’s rule 541–69/1147–74. It could be that the civic and religious rise of the Burḥānīs (succeeded by the Maḥbūbīs under the Tāʾābī movement of Maḥmūd Tāʾābī in 636/1238), followed by the westward migration of Kāsānī and a number

\(^{76}\) Abū al-Yūsuf al-Bazdawī’s fiqh lineage is given in Fawāʾid, 309, where Māturīdī is presented as the direct disciple of Abū Bakr al-Jūzajānī, while Jawāḥīr, 3:360, presents him instead as a student of Abū Naṣr al-ʿIyāḍī, who took from Abū Bakr al-Jūzajānī, as mentioned in ibid., 1:145. On ʿIyāḍī, see ibid., 1:177–9; Ulrich Rudolph, al-Māturīdī und die sunnitishe Theologie in Samarkand (Leiden: Brill, 1997), 145–9.

\(^{77}\) To be clear, this does not mean that the earlier Transoxianan teachers did not have teachers of fiqh, but only that the individual jurist’s reputation was not as dependant upon a pronounced emphasis on the master–teacher relationship and the resulting chains of transmission.

of other Central Asian Ḥanafīs as documented by Wilferd Madelung,\textsuperscript{79} cleared the way for the ascendance of the Ḥalwānī–Sarakhsi school in Transoxiana.\textsuperscript{80}

The prominence of this school for \textit{tarjīḥ} is best reflected in the fact that it is one of its later scions, \textbf{Burhan al-Din ‘Ali ibn Abī Bakr al-Marghinānī} (d. 593/1197)\textsuperscript{81} [299], who is the most frequently referenced post-formative jurist cited in the entire work (thus exceeded only by Abū Hanîfa, Abû Yusuf, and Muhammad al-Shaybâni); the next most referenced jurist of the period, \textbf{Abū al-Ma‘ālî al-Isbījābī} (d. ca. 600/1203?)\textsuperscript{82} [192], is referenced 107 times less than Marghinānī. While a number of his works are cited, it is undoubtedly Marghinānī’s \textit{al-Hidāya} that holds the greatest position for rule-formulation during this period: it is the single-most referenced work by name (259 times) in \textit{al-Taṣīḥ wa-al-tarjīḥ}, receiving more than twice the number of citations than the next most referenced work, the \textit{Fatāwā} of \textbf{Fakhr al-Dīn Qāḍīkhān} (d. 592/1196)\textsuperscript{83} [137]. The next most referenced jurist of this period is \textbf{Burhan al-Dīn Maḥmūd ibn Tāj al-Dīn Ibn Māza} (d. 616/1219)\textsuperscript{84} [124], grandson of the first of the Burhānis, ‘Abd al-‘Azīz ibn ‘Umar, through his son al-Ṣadr al-Sa‘īd Tāj al-Dīn Aḥmad ibn ‘Abd al-‘Azīz Ibn Māza (d. ca mid-sixth/twelfth century). After \textbf{Ibn Ramadān al-Rūmī} (d. post-616/1219),\textsuperscript{85} cited 56 times through his commentary on the \textit{Mukhtaṣār al-Qudār} entitled \textit{al-Yanādī} fi \textit{ma‘rifat al-ūsūl al-tafārī}, the next most-referenced jurist of \textit{tarjīḥ} is \textbf{al-Ṣadr al-Shahīd Ḥusām al-Dīn ‘Umar ibn ‘Abd al-‘Azīz Ibn Māza} (d. 536/1141)\textsuperscript{86} [48], under whom both Marghinānī and Burhān al-Dīn Ibn Māza studied, Burhān al-Dīn being the fraternal nephew of al-Ṣadr al-Shahid. The


\textsuperscript{80} There is a note in Ibn Abī al-Wafā’s entry for Abū Bakr Muhammad ibn ‘Abd-Allāh al-Surkhakatī (\textit{Jawāhir}, 3:191) stating that Surkhakatī was a disputant and enemy of al-Burhān in Bukhara (\textit{wa-kāna min munāṣir al-Burhān wa-khuṣūmāhi bi-Bukhāra}). Assuming that this ‘Burhān’ is indeed al-Ṣadr al-Mādhī, the first of the Burhānis, this might reflect evidence of a tension between other lines of Ḥanafism in Transoxiana, and that of the new Sarakhshi school (or at least its Burhānī branch); while, alternatively, it could be a civic or political issue due to the Burhānīs prominence therein, the term ‘munāṣir’ intimates a scholastic dimension.

\textsuperscript{81} \textit{Jawāhir}, 2:627–69; Tāj, 206–7; EL2, s.v. ‘al-Marghinānī’ by W. Heffening.

\textsuperscript{82} \textit{Jawāhir}, 3:74; Tāj, 256–7; Kashf, 1:1632; \textit{Fawā’id}, 260.

\textsuperscript{83} \textit{Jawāhir}, 2:93–4; Tāj, 151–2; EL2, s.v. ‘Kādī Khān’ by G. Juynboll and Y. L. de Bellefonds.

\textsuperscript{84} \textit{Fawā’id}, 336–8, and 314 for disambiguation of his works from those of Raḍī al-Dīn Muhammad ibn Muḥammad al-Sarakhsi, a fellow student with Burhān al-Dīn’s uncle al-Ṣadr al-Shahid ‘Umar ibn ‘Abd al-‘Azīz Ibn Māza.


\textsuperscript{86} \textit{Jawāhir}, 2:649–70; Tāj, 217–18; \textit{Fawā’id}, 242; EL2, s.v. ‘Ṣadr’ by C. E. Bosworth et al.
next most cited jurist of this period is Niẓām al-Dīn al-Marghinānī (d. post-600/1203)\textsuperscript{87} [32], son of Burhān al-Dīn al-Marghinānī, author of the *Ḥidāya*; his Jawāhir al-ḥiqāḥ was apparently replete with analysis and legal reasoning to support the *tarijīh* of certain positions over others,\textsuperscript{88} and in providing the *riwāyas* by which a formative period jurist’s opinion was transmitted in the madhhab.\textsuperscript{89}

Until now, all of the above jurists (with the possible exception of Abū al-Maʿālī al-Isbījābī\textsuperscript{90}) have been jurists of the Ḥalwānī–Sarakhsi school. The significance of this should not be lost: not only did the school of Ḥalwānī–Sarakhsi produce the most referenced scholars of the period of *tarijīh*, but it comprised the most referenced jurists on the whole up of the second, third, fourth, and fifth periods. It is only when we take into account jurists of *taṣḥīḥ* of the sixth period that others are mentioned; but even then, Sarakhsi and the above mentioned seven jurists of period 5(b) still dominate eight of the top twelve places of most frequently referenced scholars of Ibn Qutlūbughā’s entire work, across all periods.\textsuperscript{91}

The two next most-referenced jurists both represent branches of Transoxianan Ḥanafism that do not pass through Sarakhsi. ‘Alā’ al-Dīn al-Samarkandi (d. 540/1145–6)\textsuperscript{92} [31] was a student of Abū al-Yusur al-Bazdawī and Abū al-Mu’īn Maymūn ibn Muḥammad al-Nasafi al-Makhūlī (d. 508/1115, and more famously known as a Māturidi *mutakallim*, author of *al-Tamhid li-qawā'id al-tawḥīd* and *Tabshirat al-adilla*).\textsuperscript{93} The lineage of Jamāl al-Islām al-Karābīsī (d. 570/1174–5)\textsuperscript{94} [29], goes through al-‘Alī al-‘Ālim al-Usmandi (d. 552/1157)\textsuperscript{95} < al-Sayyid al-Asraf al-‘Alawī (d. ?) < his father, al-Sayyid Abū al-Waḍḍāḥ ibn Abī Shujā’ (d. 491/1098)\textsuperscript{96} < al-Sayyid Abū

\textsuperscript{87} Jawāhir, 2:657; Fawā’id, 243; Kashf, 1:615; Ḥadiyyat, 1:785.

\textsuperscript{88} For example, Taṣḥīḥ, 291.

\textsuperscript{89} For example, Taṣḥīḥ, 149.

\textsuperscript{90} No information is provided in the Ḥanafī *tabaqāt* or other biographical sources which I have consulted as to Isbījābī’s life, aside from his being a teacher of Jamāl al-Dīn al-Maḥbūbī, and his hailing from Isbījāb (a town and district being north/north-east of Samarkand, and immediately above the district of Shāsh, and thus close to Kāsān and Margīnān and the rest of Farghana). It is thus likely that Abū al-Maʿālī had studied with a jurist of the Ḥalwānī–Sarakhsi school, as by the period of his death (estimated to be late sixth/twelfth century), they had come to dominate Transoxiana and beyond.

\textsuperscript{91} See Appendix A, ‘Jurists cited by Ibn Qutlūbugha, according to date of death’, on p. 197.

\textsuperscript{92} Jawāhir, 3:18; Tāj, 252, 328; Kashf, 2:1634; Fawā’id, 260; Brockelmann, 1:374; Zirikli 5:317; Ḥibshi, Jāmī ʿal-shurūḥ wa-al-hawāshī, 3:1890.

\textsuperscript{93} Jawāhir, 3:527.

\textsuperscript{94} Jawāhir, 3:86–7; Tāj, 132; Kashf, 1257 (with an apparently mistaken death date); Fawā’id, 80.

\textsuperscript{95} Jawāhir, 3:208–9; Tāj, 243–4; Brockelmann, 1:375.

\textsuperscript{96} Jawāhir, 3:317–18.
Shujā’ (d. ca. mid-fifth/eleventh century),\textsuperscript{97} the above-mentioned contemporary and colleague of Rukn al-Islām ‘Alī ibn al-Ḥusayn al-Sughdī and al-Qāḍī al-Māturidi.\textsuperscript{98}

These nine jurists are the most frequently cited from the latter period of \textit{tarjīh}. The next two most referenced works are both commentaries on the \textit{Mukhtasār}: the \textit{Khulāsāt al-dalā’il} of \textit{Ḥusām al-Dīn Ibn Makkī al-Rāzī} (d. 593/1196–7)\textsuperscript{99} [18] — a Khurasanian who became established in the madrasas of Damascus and Aleppo — was a commentary well received in the later middle period; while ‘Alā’ al-Dīn al-Kāsānī’s (d. 587/1191)\textsuperscript{100} [14] \textit{Bada‘ī‘ al-ṣanā‘ī} is an interlinear commentary on his master’s \textit{Tuhfah al-fuqahā’}, itself based largely upon \textit{Mukhtasār al-Qudārī}.

Though as individuals they are not as important for \textit{tarjīh} as the preceding ten, a number of the remaining jurists who find voice in \textit{al-Tashīh}, give further weight to the centrality of the Ḥalwānī–Sarakhšī school of this period. ‘Abd al-‘Azīz al-Faḍlī (d. 533/1106)\textsuperscript{101} [2] was a student of al-Ṣadr al-Māḍī ‘Abd al-‘Azīz al-Burhānī; \textit{Najm al-Dīn Abū Ḥaṣf} ‘Umar ibn Muḥammad al-Nasafī (d. 537/1142)\textsuperscript{5} [5], a student of Abū al-Yusr al-Bazdawī, was teacher to Burhān al-Dīn al-Marghīnānī, and a prolific author, including of the celebrated and oft-commented upon \textit{Manṣūma} in \textit{khilāf}.\textsuperscript{102} Abū al-Faṭṭāḥ ‘Abd al-Rashīd al-Walwālījī (d. post-540/1145)\textsuperscript{103} [1] — after beginning his studies in Balkh, and before specialising (\textit{ikhtassā}) under Abū Muḥammad al-Qatwānī (d. 506/1112–13) in Samarqand — studied fiqh in Bukhara under the Burhān (most likely al-Ṣadr al-Māḍī ‘Abd al-‘Azīz Ibn Māza).\textsuperscript{104} Jamāl al-A’īmma al-Khāṣṣī (d. early seventh/thirteenth

\textsuperscript{97}Jawāhir, 3:28, 4:53–4; Fawā’īd, 255, and 80 (in entry for Karābīsī). The editor of \textit{al-Jawāhir}, ‘Abd al-Fattāḥ al-Hulw, says that entries for ‘Abū Shujā’ on 3:28 and 4:54–5 are for two separate people, and intimates that Kafawi and Laknawi conflated them. I see no reason that this must be the case: the point mentioned by both Kafawi and Laknawi on 4:54–5 as to the biographer’s being a colleague of Sughdī and al-Qāḍī al-Māturidi is perfectly plausible of the father of Abū al-Waḍḍāḥ: while we do not know the date of death of the Abū Shujā’ of either entry, we do know that Abū al-Waḍḍāḥ dies in 491, which would make reasonable his father dying in the mid-fifth/eleventh century, a period matching that of the contemporary of Sughdī mentioned in \textit{Jawāhir}, 4:53–4.

\textsuperscript{98}See p. 51 above.

\textsuperscript{99}Jawāhir, 2:543; Tāj, 207; Kashf, 1:1632; Fawā’īd, 118; Ḥadīyyat, 1:703; Ḥibshī, Jāmī‘ al-shurūṭ wa-al-ḥaṭā‘īshī, 3:1891.


\textsuperscript{101}Jawāhir, 2:431–3; Tāj, 190–1.

\textsuperscript{102}Jawāhir, 2:657–60; Tāj, 219–20.

\textsuperscript{103}Jawāhir 2:417–19; Tāj, 188.

\textsuperscript{104}Jawāhir, 3:319.
2.2. Periodisation

century)\textsuperscript{105} [2] was a student of al-\textsuperscript{-}Ṣadr al-Shahid and Qāḍīkhān, and thus an intellectual descendant of Sarakhsi; his 
Fatāwā was a widely relied upon work for providing the fatwa, or tarjīh, position on a given case. 
Itīkhār al-\textsuperscript{-}Dīn Tāhir ibn Ahmad al-\textsuperscript{-}Bukhārī (d. 541/1147)\textsuperscript{106} [2] and 
\textsuperscript{-}Zahir al-\textsuperscript{-}Dīn Muḥammad ibn Ahmad ibn \textsuperscript{-}Umar al-\textsuperscript{-}Bukhārī (d. 619/1222–3)\textsuperscript{107} [5] were both, along with Qāḍīkhān, students of \textsuperscript{-}Zahir al-\textsuperscript{-}Dīn Abū al-Maḥāṣin (d. ?), himself a student of each of al-\textsuperscript{-}Ṣadr al-Māḍī ‘Azīz ibn \textsuperscript{-}Umar Ibn Māza, Shams al-\textsuperscript{-}A’imma al-\textsuperscript{-}Ūzjandi, and Zakī al-\textsuperscript{-}Dīn al-\textsuperscript{-}Kushānī (d. 520/1126), all of whom were students of Shams al-\textsuperscript{-}A’imma al-\textsuperscript{-}Sarakhsi.\textsuperscript{108}

There remain a number of jurists of this period cited by Ibn Qutlūbughā who are not known to be students of the Ḥalwānī–Sarakhsi school, and of whom little if anything is known of their biographies. 
\textsuperscript{-}Rūk\textsuperscript{\texttrademark}n al-\textsuperscript{-}Dīn Abū al-\textsuperscript{-}Faḍl \textsuperscript{-}‘Abd al-\textsuperscript{-}Rahmān ibn Muḥammad al-\textsuperscript{-}Kirmānī (d. 543/1149)\textsuperscript{109} [3] studied in Merv under its judge, but only after having completed his ta‘līqa on the madhhab in Balkh (in which we may see support for the thesis that education and transmission of law was a formal matter). 
\textsuperscript{-}Sīrāj al-\textsuperscript{-}Ulūsī (fl. 569/1173)\textsuperscript{110} [1] is author of a work of Fatāwā and a more famous didactic poem in Māturidi theology entitled Bad’ al-\textsuperscript{-}amāli. 
\textsuperscript{-}Zayn al-\textsuperscript{-}Mashā\textsuperscript{-}yikh al-\textsuperscript{-}Baqqālī al-\textsuperscript{-}Khwārazmī (d. 562/1167)\textsuperscript{111} [1] was a student and successor of the famous Mu’tazīli Ḥanafī grammarian and theologian Abū al-\textsuperscript{-}Qāsīm al-\textsuperscript{-}Zamakhshārī (d. 538/1144)\textsuperscript{112} [1], while 
\textsuperscript{-}Zayn al-\textsuperscript{-}Dīn Abū Naṣr Aḥmad ibn Muḥammad al-\textsuperscript{-}‘Attābī (d. 586/1190–1)\textsuperscript{113} [4] was a respected teacher of his period, authoring commentaries on a number of formative period works and origi-


\textsuperscript{106} \textit{Jawāhīr}, 2:276–7; \textit{Tāj}, 172–3; \textit{Fawā‘īd}, 146; Brockelmann, 1:374. The biographee’s dates of birth and death are given in Ghazzi, al-\textsuperscript{-}Ṭabaqāt al-\textsuperscript{-}saniyya, cited by the editor of \textit{Jawāhīr}, in a note to the biographee’s notice on 2:276.


\textsuperscript{109} \textit{Jawāhīr}, 2:388–90; \textit{Tāj}, 184; Brockelmann, 1:364.

\textsuperscript{110} \textit{Jawāhīr}, 2:583; \textit{Kashf}, 2:1224.

\textsuperscript{111} \textit{Tāj}, 267; \textit{Kashf}, 1:595 (where he gives the death date as 586), 2:1829 (where he gives it as 562). As to the determination of his death date, I am following Ṣafādī, al-\textsuperscript{-}Wāfi bi-al-\textsuperscript{-}wafayāt, 4:340, and \textit{Kashf}, 2:1829. I believe the middle dates are more likely, as his teacher Abū al-\textsuperscript{-}Qāsim al-\textsuperscript{-}Zamakhshārī dies in 538/1144, and his student Muḥammad ibn Sa’d ibn Muḥammad ibn Muḥammad al-Dībājī al-\textsuperscript{-}Marwāzī was born Muḥarram 517/1123, and died on Ṣafar 18, 609 (Yāqūt al-\textsuperscript{-}Ḥamawī, \textit{Mu’jam al-\textsuperscript{-}udabā}), ed. Iḥsān ‘Abbās, 7 vols. (Beirut: Dār al-\textsuperscript{-}Gharb al-\textsuperscript{-}Islāmī, 1993), 6:2538). So, while all the dates given by biographers are possible, the earlier ones are likely more correct.

\textsuperscript{112} \textit{Tāj}, 292.

\textsuperscript{113} \textit{Jawāhīr}, 1:298–300; \textit{Tāj}, 103.
nal writings of his own. Little is known of either Sirāj al-Dīn al-Sajāwandi (fl. 595/1200)\textsuperscript{114} [1] or of Abū ‘Abd-Allāh al-Farā‘iḍī (d. pre-616/1219)\textsuperscript{115} [1], other than their being participants in the transmission of inheritance law, the former having authored a famous work in the field which is studied until today. Al-Qāḍī al-Imām Abū al-Maḥāmid (probably Maḥmūd ibn Maṣ‘ūd, who died in the early seventh/thirteenth century)\textsuperscript{116} [1] abridged al-Fatāwā al-kubrā and added to it many useful details of law (furū‘). ‘Alā’ al-Dīn Maḥmūd ibn ‘Ubayd-Allāh al-Ḥārithi (d. 606/1209–10)\textsuperscript{117} [9] was a specialist in khilāf, whose referenced work, al-‘Awn, is based upon the Mukhtālaf al-riwāya of Abū al-Layth al-Samarqandi. Of Bāḍī’ al-Dīn Aḥmad ibn Abī Bakr al-Qazwīnī (d. after 620/1223)\textsuperscript{118} [1] little is known other than his having authored a work on the Koran and lived in Siwās. Najm al-A‘imma al-Ḥafṣī (d. early seventh/thirteenth century)\textsuperscript{119} [1] was author of a work entitled al-Fuṣūl fi ‘ilm al-ṭāṣul, but, more importantly for this history of rule-formulation, was teacher to Najm al-Dīn al-Zāhīdī, an important figure of the next period. Yūsuf ibn Abī Sa‘īd al-Sijistānī (d. post-638/1240) [1] authored Munyat al-muftī; the singular quotation taken from it in al-Taṣḥīḥ, indicates that it (like other Ḥanafi works with the term ‘fatāwā’ in the title) was meant to assist the mufti and judge in knowing which legal opinion of the early jurists was the rule upon which to issue one’s edict, and — when the tarjih differed according to locale, what the mashā‘iykh of each locale held to be the fatwa position.\textsuperscript{120} Nāṣir al-
Din Abū al-Qāsim Muḥammad ibn Yūsuf al-Samarkandi (d. 656/1258)\textsuperscript{121} [1], whose *al-Fiqh al-nāfi‘* Ibn Qutlūbughā cites, and was apparently well received in its day.

There remains one figure: Jamāl al-Dīn ‘Ubayd-Allāh ibn Ibrāhīm ibn Ahmad al-Maḥbūbī, also known as Abū Ḥanīfa al-Thānī (d. 630/1233) [1], is the first known member of the Āl al-Maḥbūbī, and appears towards the end of this latter period of *tārijih*.\textsuperscript{122} While his role in Ibn Qutlūbughā’s work is minimal, his juristic lineage returns to the Ḥalwānī–Sarakhsi school of the turn of the sixth/twelfth century, though he also took from other branches of Transoxanian Ḥanafism. He learnt from Muḥammad ibn Abī Bakr Imām-zādeh (d. 630/1233), author of the influential *Shīr‘at al-Islām*, as well as from Imām-zādeh’s own teacher Shams al-A‘īmma ‘Imād al-Dīn ‘Umar ibn Abī Bakr Muḥammad al-Zaranjārī (d. 584/1188–9),\textsuperscript{123} who studied fiqh under his father, Shams al-A‘īmma Bakr ibn Muḥammad al-Zaranjārī (d. 512/1118).\textsuperscript{124} Born in 427/1035–6, this Bakr al-Zaranjārī is reported to have studied under both Ḥalwānī and Shams al-A‘īmma al-Sarakhsī; he also learnt fiqh from his father Shams al-A‘īmma Abī Bakr Muḥammad ibn ‘Alī ibn al-Fadl al-Zaranjārī (d. ?),\textsuperscript{125} also teacher to our previously encountered Abū Ḥafṣ ‘Umar ibn Muḥammad al-Nasafi.\textsuperscript{126} Finally, Jamāl al-Dīn al-Maḥbūbī also studied fiqh with Abū al-Ma‘ālī al-Isbijābī (whose own chain of transmission I have been unable to determine).\textsuperscript{127} With his honorific of ‘Abū Ḥanīfa al-Thānī’, there can be little doubt as to his importance for the transmission of fiqh in his time; but for the history of rule-formulation in the madhhab-law system, it is his more famous descendants of the next period with whom we will be more greatly concerned.

In summarising this fourth period — the period of *tārijih* — we may conclude that the most central figures were Qudūrī in the early part, and Ḥalwānī–Sarakhsī in the latter. Christopher Melchert has shown how Abū al-Ḥasan al-Karkhī defined the trajectory of the classical Ḥanafi madhab of Baghdad in his age, and thus deserved to be deemed the founder of that guildmadhab tradition. One could equally justifiably make the argument that the most defining figure of this fifth period is in fact Burḥān al-Dīn al-Marghīnānī: no jurist comes close to being referenced as frequently as he in the *Tārijih*. Nonetheless, if we take as our measure who had the greatest effect on the orientation for the madhhab as a whole, then the honour must be given to Shams al-

\textsuperscript{121} *Jawāhir*, 2:710 and 3:409 (where the biographee is apparently the same); *Ṭāj*, 339 and 229 (same); *Kashf*, 2:1921–2.

\textsuperscript{122} *Jawāhir*, 490.

\textsuperscript{123} *Jawāhir*, 2:640–1, where it mentions that he died near the age of 90.

\textsuperscript{124} *Jawāhir*, 1:465–7.

\textsuperscript{125} *Jawāhir*, 3:267.

\textsuperscript{126} See p. 59 above.

\textsuperscript{127} See p. 57 above.
2.2. Periodisation

A’imma al-Halwānī: he had a tremendous effect on many branches of sixth-century Transoxianan Ḥanafism, acutely formalising the master–student relationship there as Karkhī had done in Iraq; and it his student Shams al-A’imma al-Sarakhṣī who stands as the most important transition figure for the explosion of tarjiḥ activity in the last sixth century. The Ḥalwānī–Sarakhṣī school thus cemented the shift of the madhhab’s centre of activity away from Baghdad to Transoxiana for the coming three centuries. While outside the scope of the present work, the influence and role of Ḥalwānī — ‘imam of the fellows of Abū Ḥanīfa of Bukhara in his time’ according to Ibn Abī al-Wafī,\(^{128}\) — and of his student in establishing and transmitting Ḥanafism in Bukhara specifically, and in Transoxiana more broadly, deserve dedicated future study.

**Period 5: Taṣḥīḥ (ca. 650–870) [19 jurists, 900 references]**

Our final periodisation for the jurists referenced in Ibn Qutlūbghā’s al-Taṣḥīḥ wa-al-tarjiḥ is that of the years 650/1270 to 861/1457 (the year of death of Ibn Qutlūbghā’s master, Ibn al-Humām, who is the latest figure historically to be referenced in the work). This is the period of taṣḥīḥ — of reviewing, correcting, and emending the legal rules formulated by preceding jurists of tarjiḥ. While more on the jurisprudential theory and practice and taṣḥīḥ, and how it is distinguished from tarjiḥ will be discussed in Section 3.4, we will now review the primary participants in this act of legal review. In accordance with the tabulation of juristic activity displayed in figures 2.1 and 2.2, I have split this period into two sub-periods: the early and the later.

**(a) Early taṣḥīḥ (ca. 650–750) [15 jurists, 873 references]**

The first sub-period, which includes those scholars whose dates of death are covered by the years 650 to 740, is the major period of taṣḥīḥ activity.

Abū al-Barakāt ‘Abd-Allāh ibn Ḥāmīd al-Nasafī\(^{129}\) (d. ca. 710/1310) [265] was originally from Nasaf (alt. Nakhshab, being one-third of the distance from Bukhara to Balkh) whose last whereabouts were in Baghdad. He is the author of a number of relied-upon works in the Ḥanafī madhhab: his *Kanz al-daqaʿīq, a mām of furūʿ*, garnered a host of commentaries, as did his textbook in *uṣūl al-fiqh, al-Manār*. While Ibn Qutlūbghā cites him by name as one of the scholars capable of correction (*ašḥāb al-taṣḥīḥ*), he rarely cites his works, mentioning his *al-Kāfī*, a commentary on his own textbook *al-Wāfī*, fifteen times, and the celebrated *Kanz* only once. However, we may be fairly certain that it is indeed *al-Wāfī* (along with its commentary *al-Kāfī*) that Ibn Qutlūbghā relied upon, for in the final lines of his introduction of *al-Taṣḥīḥ*, he cites Nasafī as stating ‘In

\(^{128}\) Jawāhir, 2:429.

this book, I mention the most relied-upon position of any given matter (al-mu’awwal ‘alayhi fi al-bāb’), the phrasing of which is in fact found in al-Wāfi. Abū al-Barakāt learnt fiqh from a student of ‘Attābī and Marghīnānī, Shams al-A’immā Abū al-Wajd Muḥammad ibn ‘Abd al-Sattār al-Kardārī, presumably in Bukhara where the latter lived, thus reflecting a continuation of the Ḥalwānī–Sarakhshī school.

The next two jurists and their works reflect a continuum of more than one sort. Burhān al-Shārī’ī (alt. Tāj al-Shārī’ī) Maḥmūd ibn ‘Ubayd-Allāh al-Maḥbūbī (d. 673/1274–5) [200] is the grandson of the previously discussed Jamāl al-Dīn al-Maḥbūbī, and thus member of the Maḥbūbī family which took over the ṣadāra of Bukhara from the Burhānī family in the mid-thirteenth century. The passage quoted by Ibn Ḥūlībūghā at the end of his introduction identifies the work as Burhān al-Shārī’ī’s Maḥbūbī’s Wiqāyat al-riwāya fi masā’il al-Hīdāya, which emerges as the third-most cited work in al-Taṣḥīḥ wa-al-tarjīḥ, and — after al-Nasafi’s al-Wāfi — the second-most central work for the purpose of taṣḥīḥ. Ṣadr al-Shārī’ī al-Asghar, ‘Ubayd-Allāh ibn Masʿūd ibn Maḥmūd al-Maḥbūbī (d. 747/1346–7) [107] is the grandson of this

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130 See p. 94.


133 Jawāhir, 4:369–70; Tāj, 291; Fawā’id, 338; Hadiyyat, 2:406.

134 The tables provided by Pritsak (‘Āl-i Burhan’, 94–5) should not be considered final, as the genealogical tables for both the Āl al-Burhān and the Maḥbūbīs seem to contain some imprecision. As to the Āl al-Burhān, its seems his ‘8. Muḥammad II’ should be Maḥmūd ibn Tāj al-Dīn Ahmad, Burhān al-Dīn Ibn Māzā, who dies in 616/1219 as does this Muḥammad II, while he also provides a sibling for him by the name of Maḥmūd; I have come across no reference to a Muḥammad II ibn Ahmad in the Ḥanafi biographical dictionaries; it is possible that the names were crossed, and that Muḥammad II was an older brother (dying ca. 570/1174 as he states) to Burhān al-Dīn. As to the genealogical list for the Maḥbūbī family, Pritsak gives the first instance of the honorific ‘Ṣadr al-Shārī’ī’ to ‘Ubayd-Allāh’, apparently the son of one ‘Shams al-Dīn Maḥmūd’ who is meant to have died 636/1238. Rather, according to Tāj, (p. 115) and Fawā’id, (p. 48), the older Ṣadr al-Shārī’ī is in fact Aḥmad ibn ‘Ubayd-Allāh, and is himself given the honorific Shams al-Dīn al-Maḥbūbī. Thus, the list should more properly be given as: Aḥmad — Ibrāhim — ‘Ubayd-Allāh (Jamāl al-Dīn al-Maḥbūbī, Abū Ḥanīfa al-Thānī, author of Sharḥ al-Jāmī’ al-ṣaghīr) (d. 630/1232–3) — Aḥmad (Shams al-Dīn al-Maḥbūbī, Ṣadr al-Shārī’ī al-Akbar, author of Taḥṣīḥ al-‘uqūl) — Maḥmūd (Tāj al-Shārī’ī, Burhān al-Shārī’ī al-Maḥbūbī, author of al-Wiṣāya) (d. 673/1274–5) — Masʿūd — ‘Ubayd-Allāh (Ṣadr al-Shārī’ī al-Asghar, author of al-Niṣāyīa) (d. 747/1346–7). Laknawi provides a good disambiguation of many of the names in his long entry for ‘Ubayd-Allāh ibn Masʿūd in Fawā’id, 185. See my chart on p. 54 above for a graphic representation of the family lineage.

135 Jawāhir, 4:369–70; Tāj, 203; Fawā’id, 185–9; Hadiyyat, 2:406.
2.2. Periodisation

Burhān al-Shari‘a, and author of a number of influential works in the later Ḥanafī madhhab. His al-Tanqīḥ, along with his own commentary upon it entitled al-Tawdīḥ, is a work of ṭusūl al-fiqh that merges between ‘the way of the jurists’ (i.e. the Ḥanafīs) and between ‘the way of the scholastics’, combining and reorganising the works of the Ḥanafī Fakhr al-Islām al-Bazdawī and the Mālikī Ibn al-Ḥājib into a new synthesis. While this work reflects a new development in the scholasticisation of Ḥanafī jurisprudential theory, I know of no study that has discussed the effect this had (or did not have) upon the process of rule-formulation in fiqh itself. Rather, for this purpose, Ibn Quṭlūbughā turns to Ṣadr al-Shari‘a’s work al-Niqāya — a commentary on his grandfather Burhān al-Shari‘a al-Maḥbūbī’s Wiqāyat al-riwāya fi masā‘il al-Hidāya. These two works — the grandfather’s al-Wiqāya, and his grandson’s al-Niqāya — perfectly represent the continuation of juristic tradition inherent in the practice of taṣḥīḥ. Both works take as their starting point the rule-formulation decisions and legal reasoning made by a practitioner of tarjīḥ, Burhān al-Dīn al-Marghinānī. They then continue to confirm his decisions, or to modify and propose counter-arguments to those found in al-Hidāya, shoring up their review not necessarily with lengthy counter-arguments of their own, but those of preceding contrary tarjīḥāt of other, earlier practitioners of tarjīḥ.

Abū al-Rajā’ (Najm al-A‘imma) al-Zāhidi (d. 658/1259–60)[137] [107] was a student in fiqh of Najm al-A‘imma al-Ḥaṣīṣ, ‘Alā‘ al-Dīn Sadīd ibn Muḥammad al-Khayyāṭī (fl. early seventh/thirteenth century),138 Burhān al-A‘imma Muḥammad ibn ‘Abd al-Karīm al-Turkistānī al-Khwārazmī (fl. early seventh/thirteenth century).139 In scholastic theology (kalām) he was a Mu’tazili, having studied under Yūsuf al-Sakkākī al-Khwārazmī (d. 626/1228–9); and authored an apologetic work establishing the veracity of the prophethood of the Prophet Muhammad against Christian doubters, for the sake of Berke (Baraka) Khān (r. 655–65/1256–67), grandson of Chingiz through his eldest son Jochi, ruler over Khwārazm and South Russia, and an early convert to Islam amongst the ruling Mongols. Zāhidi’s commentary on Mukhtāṣar al-Qudūrī, entitled al-Mujṭabā, is a major source of reference for Ibn Quṭlūbughā: it provides a wealth of rule-reviews of the positions of later tarjīḥ-period works such as the Muḥīṭ al-Burhāṇī and Tuḥfat al-fuqahā‘, and in the process fine-tuning the tarjīḥ-positions of the Taṣḥīḥ’s primary text, the Mukhtāṣar al-Qudūrī.

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136 He was preceded in this type of merging of the two traditions of jurisprudential writing by Ibn al-Sā‘ātī, whose al-Badi‘ was based upon the works of al-Bazdawī and the Shāfi‘ī Sayf al-Dīn al-Āmīdī.
137 Jawāḥir, 3:460; Tāj, 295; Fawa‘īd, 212.
138 Jawāḥir, 4:198.
139 Jawāḥir, 3:237.
2.2. Periodisation

Abū al-Faḍl al-Mawṣili (d. 683/1284)\textsuperscript{140} (92), a jurist from Mosul who studied in Damascus before becoming judge in Kufa and a teacher at the mausoleum of Abu Ḥanifa in Baghdad, is author of al-Mukhtār li-al-fatwā and his own commentary upon it, al-Ikhtiyār li-ta’līl al-Mukhtār. In the titles themselves, as is often the case, we can perceive the author’s own understanding as to the role of his works: in the former, he has selected for the jurist the legal positions upon which legal responses and judgements (fatwā) should be made; in the latter, he provides the legal reasoning supporting these selections. Ibn ṬuṭlūbUGHā refers to the Mukhtār itself only once; to the Ikhtiyār twenty-six times; and to Abū al-Faḍl al-Mawṣili himself by name for the remaining sixty-five references. A perusal of Ibn ṬuṭlūbUGHā’s use of Mawṣili shows that he relies upon him primarily for establishing the ‘correct’ (ṣaḥīh) position, or to provide the legal evidence and reasoning which shores up that position, when there has been dispute amongst the practitioners of al-tarjīḥ on a given case.

The important role played by commentaries of khilāf, and especially on the Manṣūma of Najm al-Dīn al-Nasafi, in the process of legal review embodied in taṣḥīḥ may be perceived in three works cited by Ibn ṬuṭlūbUGHā. Abū al-Maḥāmīd al-Lu’lu’ī al-Bukhāri (d. 671/1273)\textsuperscript{141} [20] was born and died in Bukhara, being killed during the third sacking of Bukhara by the Ilkhānids in 671/1273.\textsuperscript{142} He is known for his commentary on the Manṣūma of Nasafi in khilāf-law, entitled ‘al-Ḥaqā’iq’, which is the work cited by Ibn ṬuṭlūbUGHā. The author often resolves the presented disputes by citing the decisions found in tarjīḥ works from the fifth period, and giving brief juristic rationale behind this taṣḥīḥ. In commenting upon the Manṣūma al-Nasafiyya he is joined by a student of the aforementioned ‘Alā’ al-Dīn al-Ḥarithī, Abū al-Mafā’ir al-Zūzānī (d. post-695/1295)\textsuperscript{143} [10], in his work Multaqā al-bīḥār min muntaqā al-akhbār. Muṣaffar al-Dīn Aḥmad ibn ‘Ali, Ibn al-Sā‘ātī (d. 694/1294–5)\textsuperscript{144} [2] authored Majma’ al-bahrayn, a work that joins between the Mukhtāṣar of Qudūrī and the Manṣūma of Nasafi.

‘Abd al-Ḥayy Lakhnawī states in al-Fawā’id al-bahiyya that the latter-day jurists (muta‘akhkhirūn)\textsuperscript{145} rely largely upon four works which they have called ‘the four primary texts’ (al-muṭā‘in al-arba’a): the Mukhtār of Mawṣili, the Kanz of Abū al-Barakāt al-Nasafi, the Wiqāya of Burhān

\textsuperscript{140} Jawāhir, 2:349; Ghazzā, al-Ṭabaqāt al-saniyya, 1:239; Tāj, 88–9; Fawā’id, 180–1; Kashf, 1:1632; Hādīyyat, 1:11.
\textsuperscript{141} Jawāhir, 3:449–50; Tāj, 293; Kashf, 2:1868; Fawā’id, 345; Hādīyyat, 2:405.
\textsuperscript{143} Jawāhir, 3:364; Tāj, 278–9; Hādīyyat, 2:140.
\textsuperscript{144} Jawāhir, 1:208–12, 4:122; Tāj, 95; Fawā’id, 51–2.
\textsuperscript{145} On the meaning of this term, see p. 70 below.
al-Shari‘a al-Maḥbūbi, and the Majma‘ al-Bahrāyn of Ibn Sā‘īti (others jurists, he says, rely only on three: the Mukhtār, the Kanz, and the Mukhtasār of Qudūrī).\footnote{Laknawi, al-Jāmi‘ al-ṣaghīr, 23.} It is the second of these works, Kanz al-daqa‘īq, which forms the basis of the commentary by Fakhr al-Dīn al-Zayla‘i (d. 743/1343)\footnote{Jawāhir, 519–20; Tāj, 204; Fawā‘id, 194–5.} [7] entitled Tabyin al-ḥaqā‘iq. The tarjīḥ-selections had been made by Nasafi and placed into this mukhtasār format; Zayla‘i now engages in tāṣṭīḥ-review.

We have seen how, in period five, Ḥanafī works with the title fatāwā were often works of tarjīḥ, in which ‘fatwa’ represented the chosen position upon which lower-level jurists were to issue their legal opinions. We have in this sixth period one referenced work with a similar title, namely al-Fatāwā al-Ghiyāṭīyya. Little is known of its author Dāwūd ibn Yūsuf al-Khaṭīb (d. post-720/1320)\footnote{Idāh al-maknūn, 2:157} [2] save that he is said to have completed his work for Sultan Ghiyāth al-Dīn Tughluq Shāh (r. 720–5/1320–5) of the Tughluqid Delhi Sultanate in 720/1320–1.\footnote{I have found no mention of his place of origin or residence, but it is reasonable to assume that he came to India and the court of the Delhi Sultanate with the many other refugees, including scholars, from Transoxiana and Persia who were fleeing the Mongols. See C. E. Bosworth, The New Islamic Dynasties (Edinburgh: Edinburgh University Press, 2004), 300.} While it continues the approach of previous such books of its genre, the Fatāwā al-Ghiyāṭīyya most frequently cites jurists of our later fifth period of tarjīḥ: it engages with these preceding jurists’ rule-formulations by confirming or modifying them, which thus qualifies his work as one primarily of tāṣṭīḥ.

The final set of works, though referenced only once each, collectively show the central place that Marghinānī and his Hidāya came to assume not just as a textbook of fiqh, but as the locus of later jurists tāṣṭīḥ-review of preceding jurists’ tarjīḥ. Abū al-‘Abbās al-Sarūjī (d. 710/1310)\footnote{Fawā‘id, 32.} [1], a Ḥanbali who converted to Ḥanafism, authored al-Ghā‘aya, a commentary on the Hidāya. Ḥusām al-Dīn al-Signāqī (d. 711/1311–12)\footnote{Tāj, 160.} [1] wrote al-Nihāya, also a commentary on Marghinānī’s work. Jamāl al-Dīn al-Zayla‘i (d. 726/1325–6)\footnote{Fawā‘id, 378–9.} [1] was a student of Fakhr al-Dīn al-Zayla‘i, producing a a commentary on the Hidāya in which he cites the hadith collections in which the Hidāya’s hadith-reports appear. The final such work is that of one Qiwām al-Dīn al-Kākī (d. 749/1348–9)\footnote{Jawāhir, 4:294–5; Tāj, 364; Kashf, 2:2033.} [1], which — though not mentioned by name by Ibn Qutlūbghā — is probably his commentary entitled Mi‘rāj al-dirāya. Finally, Abū al-Fath ‘Imād al-Dīn ‘Abd

\footnote{Jawāhir, 519–20; Tāj, 204; Fawā‘id, 194–5.}
al-Raḥim ibn Ābī Bakr ibn ʿAbd al-Jalīl al-Marghīnānī (d. post-651/1253) 154 [2] was the grandson of Marghīnānī, and is reported to have studied with him.

(b) Late ṭaḥṣīḥ (ca. 750–870) [4 jurists, 27 references]

I have divided the period of ṭaḥṣīḥ into two, in light of the clear reduction in the number of references made by Ibn Ṭabīṣūrī of jurists who passed away after the 750s. Only four jurists, in fact, are cited who pass away between 750/1350 and the time of his authoring the work in the mid-ninth/fifteenth century.

The first two works continue the tradition of the previously-discussed ‘fatāwā’ works, organised according to the normal fashion of fiqh compilations. The first of these is ʿĀlam ibn al-ʿAlāʾ al-Anṣārī al-Andarpatī al-Dahlawī (d. 786/1384–5)155 [1]. He is the author of Ẓād al-safar, more famous as al-Fatāwā al-Tātārkhanīyya, which he authored in the year 777/1375–6 for the Senior Amir of the Tātārkhan, who was a contemporary and friend of the king Fayruz Shāh of the Tughluq dynasty. The second is the Fatāwā al-Bazzāzīyya of Ḥāfīz al-Dīn Ibn al-Bazzāz al-Kardāri (d. 827/1424)156 [1]; his single mention is as a brief confirmation of a ṭarjīḥ reached in al-Kāfī. In both works, we find the same logic at work as with other works of these latter periods: the review of precedent, and the establishment of the correct (ṣaḥīḥ) position for legal issuance and judgement.

The third author is Yūsuf al-Ṣūfī al-Bazzāz al-Kādūrī (d. 832/1428–9)157 [2], whose cited Jāmiʿ al-muḍmarāt wa-al-mushkilāt is a commentary on Mukhtasar al-Qudārī. Appearing in only two manuscript copies of al-Ṭaḥṣīḥ, the two instances in which the work is cited by Ibn Ṭabīṣūrī only confirm rule-decisions made by preceding jurists.

Thus, the only figure of this period who features prominently is Ibn Ṭabīṣūrī’s own teacher, Muḥammad ibn ʿAbd al-Wāḥid, Kamāl al-Dīn Ibn al-Humām (d. 861/1457)158 [23]. He studied the Hidāya under Sirāj al-Dīn ʿUmar ibn Ṭālī Qārī al-Hidāya (d. 829/1425–6),159 and thereafter authored his own famous commentary on the work, entitled Faṭḥ al-Qadiḥ, which Ibn Ṭabīṣūrī refers to simply as ‘Sharḥ al-Hidāya’. Known for the breadth of his learning, precision as a scholar, and his open-mindedness and lack of partisanship in matters related to the

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154 Jawāhir, 4:74 n.6; Tāj, 159; Kashf, 1270–1; Ḥadīyyat, 1:560.
156 Tāj, 354; Kashf, 1:1633; Ḥadīyyat, 2:185.
157 Kashf, 1:572, 1632–3, 1838; Fawāʾid, 380.
158 Fawāʾid, 296–9.
madhhab, his work is known simultaneously for its excellence as well as for containing positions that do not reflect the rājiḥ of the madhhab, prompting later jurists — including Ibn Qutlūbughā himself — to caution students as to some of Ibn Qutlūbughā’s rule-formulations as being contrary to the relied-upon positions of the madhhab.¹⁶⁰ Such caution, however, was not severe enough to cause him to abandon his teacher’s work, which he cites both in his theoretical introduction and in the commentary proper, the first instance occurring in the very first case under review. In fact, despite such mild criticisms of some of his irregular stances regarding particulars of the madhhab, Ibn al-Humām was widely regarded as a mujtahid-jurist within the madhhab in his own right, which in turn ‘absolved’ him of some of these irregularities. His case is thus somewhat peculiar: despite being, historically, the last jurist to be cited by Ibn Qutlūbughā, and though he falls within the period of taṣḥīḥ, in many ways he is implicitly referred to by Ibn Qutlūbughā as someone performing tarjiḥ. He engages not only with the rules formulated by preceding jurists, but with the very reasoning or transmission of the early opinions leading to these rule themselves. As such, despite falling at the very end of this final period, it would be more appropriate to place him amongst the practitioners of tarjiḥ, a conclusion that I believe would find support in an attentive reading of Ibn Qutlūbughā’s citing and quoting his teacher throughout al-Taṣḥīḥ.¹⁶¹

In closing this section on taṣḥīḥ, a few distinctive traits should be noted. First, Ibn Qutlūbughā relies most for the purpose of rule-review upon a handful of jurists, namely Abū al-Barakāt al-Nasafi, Burhān al-Shari’a al-Maḥbūbī, Şadr al-Shari’a ‘Ubayd-Allāh ibn Mas‘ūd al-Maḥbūbī, and (less frequently) Abū al-Faḍl al-Mawsīlī. Secondly, the rhetorical language of taṣḥīḥ, in consonance with its nature as rule-review, differs substantially to that of tarjiḥ. Unlike the jurists of the tarjiḥ period, rarely are the practitioners of taṣḥīḥ quoted verbatim or brought in to discuss legal reasoning. Rather, they are usually represented with a mere mention of a name, or, less frequently, a pithy statement of ‘and this is the correct position’ attributed to one of them. Most often, they are mentioned in a rapid-fire listing of two, three, or all of their names at the end of a case, in order to confirm the preceding instance of tarjiḥ. Both of these traits tally well with the respective end of each procedure: rule-formulation revolves around analysing the legal reasoning of previous opinions in order to select one as a rule; rule-review, following upon this selection,

¹⁶⁰Ibn Qutlūbughā’s peer and friend, Shams al-Dīn al-Sakhāwī, gently chided his colleague for himself being quick to find fault with those who preceded him, including his own teachers, in scholarly matters. See Sakhāwī, al-Daw’ al-lāmi’, 6:188.

only requires that they affirm this ‘correct’, chosen position, or alternatively disagree and instead support a dissenting opinion’s nomination to be the legal rule.

Who are the ‘latter-day jurists’ (al-muta’akhkhirūn)?

In a brief passage above, we came across the term ‘latter-day jurists’ in reference to the most-relied upon juristic works of taṣḥīḥ; the student of fiqh and its history will no doubt repeatedly have come across it in other contexts as well. It is a term pregnant with a sense of periodisation for the doctrinal history of the Ḥanafi madhhab, beginning as it does with the definite article ‘al-’, and being used by jurists to refer to a group who held a position that stood in conflict to those of the earlier jurists, and especially when the earlier positions had been established as the school’s dominant doctrine. The term is found repeatedly in numerous work of fiqh which precede Ibn ḤCourtesy of Saqqā, Samarqandi’s Tuhfat al-fuqahāʾ, Kāsānī’s Badāʾiʿ al-ṣanāʾiʿ, Fatāwā Qāḍīkhān, al-Hidiyya of Marghinānī, and Burhān al-Dīn Ibn Māzā’s al-Muḥiṭ al-Burhānī — all notably Central Asian Ḥanafi works of the latter period of tarjīḥ. A cursory survey, however, finds that the term is first employed extensively by the fourth-/tenth-century Ḥanafi jurist Jaṣṣās: his redaction of Tāḥāwi’s Mukhtaṣar Ikhtilāf al-fuqahāʾ; his juristic exegesis, Aḥkām al-Qurʿān; and in his work on legal theory, al-Fuṣūl fī al-ʿusūl. Ibn ḤCourtesy of Saqqā, and the jurists whom he cites and mentions, refer to these ‘latter-day scholars’ seventeen times in al-Taṣḥīḥ. He refers to them himself five times, with the remaining twelve instances being provided by Zāhīdī (twice). Ibn al-Ḥumām’s Fath al-Qadīr, al-

\[162\] As the purpose is to demonstrate the existence of the term used to refer to later jurists whose opinions often modified or contradicted those of the earlier scholars, I shall not provide the references to every instance of the term in the above works, but as an illustration only to the fifty-one references to it in the earliest work in which I have found it, namely al-Sarakhshī’s Mabsūt: 1:131, 159, 249, 2:5, 10, 3:89, 4:127, 5:4, 25, 184, 193, 6:52, 73, 122, 169, 9:87, 185, 201, 10:131, 189, 195, 202, 11:67, 113, 147, 231, 254, 12:161, 13:76, 112, 14:28, 15:80, 118, 131, 16:98, 22:35, 45, 138, 169, 170, 171, 175, 26:74, 27:4, 23, 29:143, 149, 184, 30:164, 202, and 213.


\[164\] Taṣḥīḥ, 245, 257, 296, 323, and 429.

\[165\] Ibid., 161; and as Najm al-Aʿīma on p. 350.

\[166\] Ibid., 168.
Fatāwā al-Zāhiriyya of Ẓahrīr al-Dīn Ḥasan ibn ‘Alī Abū al-Maḥāsin,167 Ibn Ramaḍān al-Rūmī in al-Yanābī,168 Bada’i’ al-sanā‘i’ of Kāsānī,169 al-Wāqi‘āt of al-Ṣadr al-Shahīd,170 al-Hidāya of Burhān al-Dīn Marghīnānī,171 Ṭabyīn al-ḥaqā‘iq of Fakhr al-Dīn al-Zayla‘ī,172 Burhān al-Dīn al-Marghīnānī’s Mukhtārāt al-nawāzīl,173 Burhān al-Dīn Ibn Māzā’s al-Dhakhīra,174 and Niẓām al-Dīn al-Marghīnānī’s Jawāhir al-fiqīh.175 What is noticeable is that all of these secondary authors come from the fourth and fifth periods of our periodisation, those of tarjīḥ and taṣḥīḥ respectively. In none of these secondary references to the muta‘akhkhirūn, though, are we given a sense of to whom exactly they are referring. However, it is in the midst of a discussion as to how to determine when a legal guardian is to be deemed ‘unreachable’ for purposes of consenting to a charge’s marriage that Ibn Quṭlūbghā provides us with a singular instance of defining whom he intends, in this context, by ‘muta‘akhkhirūn’. On this topic, Ibn Quṭlūbghā cites the tarjīḥ of the Hidāya and Ṭabyīn al-ḥaqā‘iq, both of which posit that the position of the latter-day jurists is that the guardian is deemed ‘unreachable’ if caravans cannot reach his location within a month. At the words ‘muta‘akhkhirūn’, Ibn Quṭlūbghā states: ‘of these [latter-day jurists who hold this position] are al-Quḍī Abū ‘Alī al-Nasafī (d. 424/1032–3), Sa‘d ibn Mu‘ādh al-Marwāzī (d. late third/ninth), Muhammad ibn Muqāṭil al-Rāzī (d. 248/862–3), Abū ‘Alī al-Sughdī (d. 466/1068–9), Abū al-Yusr al-Bazdawī (d. 493/1100), and al-Ṣadr al-Shahīd (d. 536/1141); and that their formulated rule was confirmed (wa-ṭabī‘ahum) by [Abū al-Barakāt] al-Nasafī (d. 710/1310–11).176 Thus, the ‘latter-days’ cover almost three hundred years: the earliest two figures, Muḥammad ibn Muqāṭil al-Rāzī and Abū ‘Īsāma Sa‘d ibn Mu‘ādh al-Marwāzī, both belong to our early formative period, while the remaining four are members of the fourth period of tarjīḥ. Lastly, Abū al-Barakāt al-Nasafī is not included in that group, but is mentioned as one who confirmed their position by following them — befitting of someone from our sixth period of taṣḥīḥ, or confirmation.

Unsurprisingly, the term is also found in the work of Ḥanafīs following Ibn Quṭlūbghā. Ibn Mūllā Farrūkh al-Makki (d. after 1052/1642, Mecca)177 gives examples to define his usage of the

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167Ibid., 255.
168Ibid., 276.
169Ibid., 276.
170Ibid., 276.
171Ibid., 323.
172Ibid., 323.
173Ibid., 350.
174Ibid., 409.
175Ibid., 414.
176Taṣḥīḥ, 323.
177Idāḥ al-maknūn, 2:249.
term, stating in the introduction of his *al-Qawl al-sadiq fi baʾḍ masāʾil al-ijtihād wa-al-taqlīd*: ‘...of the early, major mashāyikh of our madhhab such as Abū al-Ḥasan al-Karkhi, Abū Jaʾfar al-Ṭahāwī; and of the latter-day jurists, such as Shams al-A’imm al-Ḥalwānī, his student al-Sarakhsi, Fakhr al-Islām al-Bazdawi, and others like them in the fifth century who possess great insight, and the imam Qāḍīkhān and Khusrawayh, the author of the *Hīdāya*, and other insightful jurists like them who are of amazing stature in the sixth century...’

However, Ibn Mulla Farrūkh continues on to use the term to describe his own master, Ibn Nujaym (d. 970/1562, Egypt), as ‘the seal of the latter-day jurists’ (*khātimat mutaʾakkhirīn*). Ibn Nujaym himself is cited by ‘Abd al-Ghānī al-Nābulsi (d. 1641/1731, Damascus), as debating some of the ‘mutaʾakkhirīn’ as to the validity of composing judgements from different doctrines of different legal traditions (*talfiq*).

All of this goes to show, then, that the term — as indicated in its very lexical meaning, and as used by Ibn Quṭlūbghā and the sample of jurists cited above — is relative: while it definitely stands in contradistinction to the earliest Ḥanafi jurists of our foundational period (ca. 150–200 AH), it is intended to be understood in relation to the era of the author-jurist employing it. As we see in Ibn Quṭlūbghā’s own usage, it could be used for any scholar following that earliest of periods, though for him it often referred to jurists of our two periods of *taqlīd* (4(a) and 4(b)). As such, we can conclude that the term does not refer to a specific generation across the writings of jurists, in the way that later Ottoman-era taxonomies of jurists definitively periodise the centuries of Ḥanafi fiqīḥ activity, but is used flexibly, and must be understood in the context of each author, and if possible through an explicit reference to whom that author intends by the term. While *tarjīḥ* is largely the activity of jurists from the fifth and sixth centuries, Ibn Quṭlūbghā’s specified set of ‘latter-day’ jurists is defined more by their function in relation to preceding legal opinions than by historical period: two of the earliest Ḥanafis, including a direct student of Shaybānī’s (Ibn Muqāṭīl), could be deemed to have been involved in the determination of rules, so long as there existed a mass of pre-existing and contrary legal opinions for them to assess and choose from. Being a ‘late’ jurist, then, has intrinsically less to do with period, and more to do with function:

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179 See the editor’s introduction to Ibn Nujaym, *Kitāb al-fawāʾid al-zayniyya fi madhhab al-Ḥanafiyya*, ed. Muḥammad al-Ruḥayyil Ghorayibā (Amman: Dār al-Furqān, 1999), p. 14, where he establishes that the author’s death is not in 969 AH as claimed by some, but rather 970, since Ibn Nujaym penned one of the epistles included in his *Rasāʾīl* in the beginning of the year 970 AH.

180 Ibn Mulla Farrūkh al-Makki, 7.

2.3  Historical geographical patterns

Having established our periodisation based upon the death date and primary juristic activity of each of Ibn Ḥanbal’s references, we are now in a position to apply this to the geographical distribution of his jurists. This will provide us with a clearer picture of what Ibn Ḥanbal’s *al-Tashīḥ wa-al-tarjīḥ* informs of as to the relative importance of particular geographical areas of Ḥanafi activity, and the historical shifts that occurred. That we are doing this from a book of fiqh, rather than a work of ʿabaqāt or general history, is particularly helpful: it provides a sense not just of sheer numbers, but of who the most important jurists for the process of legal rule-formulation were, and where they operated. Having established the patterns, these modest conclusions set the stage for further research as to the historical significance of these trends, and what information they may provide as to the development of particular madhhab doctrines, internal madhhab procedure, and the development of the wider madhhab-law tradition.

![Figure 2.4: Geographical spread](image)

We shall begin with a general overview of the geographical spread of jurists cited or mentioned by Ibn Ḥanbal in his work. As will be further demonstrated in Chapter 4, Ibn Ḥanbal’s primary concern in his commentary on the Mukhtasar of Qudūrī is the assessment of
previous *tarīḥ*, by means of engagement with those assessments, as well as by surveying and regularly relying upon the rule-reviews, or ‘corrections’ (*tāshīḥāt*), of later jurists. It is thus not surprising to find that the majority of jurists referenced are not those of the central Muslim lands of the formative and classical periods, but rather hail from the East. Figure 2.4 show us that nearly half of all the jurists cited in *al-Tāshīḥ wa-al-tarīḥ* — inclusive of both direct citations made by Ibn Qutlūbūghā himself, and indirect citations or mentions arrived at by citing the works of others — hailed from Transoxiana (46%); if we add jurists hailing from the Iranian plateau and Central Asia, the percentage swells to 69%. The references from the Iranian plateau are dominated by Eastern Persian lands — Astrabadh (1), Balkh (7), Khwarazm (6), Merv (4), and Nishapur (2) — with only two references coming from the West (one each from Rāmahurmuz and Rayy). It is Transoxiana that stands as the undisputed seat of rule formulation: Bukhara (23), Farghana (3), Isbijāb (2), Nasaf/Nakhshab (1), Samarqand (7), and Sighnaq (1), with two further jurists known to come from unspecified or unknown parts of Transoxiana.\(^{182}\)

Applying our periodisation unto the geographical spread gives a more detailed view into which provinces were most active in particular periods of rule-formulation. We can perceive

![Geographical distribution, by time period](image)

**Figure 2.5: Geographical distribution, by time period**

\(^{182}\)Namely, Dāwūd ibn Yūsuf al-Khaṭīb and Sīrāj al-Dīn al-Sajāwandi.
other partisans of *ahl al-ra‘y*. In Period 3, the classical period, we already see the beginnings of an eastward shift. Period 4(a) sees the rapid development of Transoxiana as a centre of Ḥanafī *tarjih* activity under the school of Ḥalwānī–Sarakhsi and others, such that in period 4(b), Iraq is not represented even by a single jurist in Ibn Ḥuṭlūbughā’s work: Central Asia, and Transoxiana in particular, has come to tower over all other geographical areas. The prominence of Central Asia begins to decline in the period of ṭashīḥ, with the rise of juristic activity in Mamluk Egypt and Syria, and disappears completely in the final phase, reflecting the destruction of Transoxiana’s role as a cultural capital due to the city’s repeated pillaging at the hands of various Mongol parties over the seventh/thirteen to eighth/fourteenth centuries.

Finally, since Central Asia is of such central importance, let us briefly track the relative significance of the various centres of Ḥanafī activity there. Predictably from what we know from previous scholarship, in the first two periods immediately following that of Abū Ḥanīfā and his students, it is Balkh that is the centre of juristic activity in the East. However, with our documented rise of the Ḥalwānī–Sarakhsi school in Transoxiana, we see in the two phases of period four the dominance of Bukhara and Samarqand, such that no jurist from Balkh is even referenced by Ibn Ḥuṭlūbughā (Figure 2.6). Transoxanian Ḥanafīsm thus clearly deserves further, dedicated study.  

Nonetheless, the prominence of the early jurists of Balkh is acutely felt in *al-Tashīḥ*. Throughout the work, Ibn Ḥuṭlūbughā and those whom he cites often refer to the jurists of a geographical local with a corporate identity (*mashāyikh* X), indicating thereby that they shared a particular

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183 This chart only tracks those jurists who are known to have been active in the particular cities mentioned, and does not reflect those Transoxianan jurists whose locale is either outside the scope or unknown.

2.3. Historical geographical patterns

approach to their jurisprudence of rule-formulation, or held particular juristic doctrines distinguishing them from their fellow Ḥanafis. In this fashion, despite the fact that it is the jurists of Bukhara who, individually, are most referenced throughout the work, it is actually the ‘mashāyikh Balkh’ who are referenced as a corporate group of jurists most often [16 mentions], followed by ‘mashāyikh Bukhāra’ [9], ‘mashāyikh Samarqand’ [8], ‘mashāyikh Isfahān’ and ‘mashāyikh Rayy’ [3 each], ‘mashāyikh al-‘Irāq’ [2], and finally ‘mashāyikh Khurāsān’ [1].

Two case examples will illustrate this. In one issue regarding who possesses the right to the guardianship of an established waqf, we find Qāḍīkhān stating: ‘The mashāyikh of Balkh have adopted the position of Abū Yūsuf (i.e. that the guardian is the de facto guardian of a waqf he established), while our mashāyikh (i.e. of Transoxiana) have adopted the position of Muḥammad (i.e. once validated by the judge, the founder has no claim to guardianship unless he had so stipulated at the outset).’185 Another case which appeals to the mashāyikh of a particular locale treats the validity of a condition in which the labourer in a sharecropping contract is alone responsible for the costs of the sharecropping; Ibn Qutlūbughā begins commenting on this case by affirming Qudūri’s position that the contract is invalid, since this is the zāhir al-riwāya position, and was the fatwa-position of al-Ṣadr al-Shahid in his al-Fatāwā al-κubrā. However, he continues on to quote Marghinānī’s Hīdāya as stating, ‘According to Abū Yūsuf, such a condition upon the labourer is valid, due to this being common practice, out of consideration that sharecropping is similar to a ‘made-to-order’ business contract (istiṣnā) [in which such a condition is valid]. This is the choice of the mashāyikh of Balkh, and Shams al-A’īmma al-Sarakhsi has stated, “This is the more correct position in our lands.”’ Ibn Qutlūbughā then affirms this position with a statement of confirmation from ‘Abd al-‘Azīz al-Fadli, after which he cites al-Yanābī of Ibn Ramadān al-Rūmī which states, ‘This is the choice of the mashāyikh of Khurasan, and the Faqīḥ’186 stated: “this is the position which we take.”’187

As is apparent in the two examples above, the reference to groups of jurists identified by locale are made by jurist-authors of the third and fourth periods, who often refer to the doctrines of mashāyikh of other locales in contradistinction to those of their own. This logically necessi-

185 Tashīḥ, 295.

186 The title ‘al-Faqīḥ’ was used for one of two purposes: either as an honorific for the highest-ranking jurists in the tradition; or, alternatively, to distinguish between scholars who shared similar names, but where one scholar was more prominent as a jurist than the other. Ḥanafi jurists who have received this appellation include Abū Bakr Muhammad ibn Abī Sa’īd al-A’mash, Abū Ja’far al-Ąṣamm, Abū al-Layth al-Samarqandi, Abū ‘Abd-Allāh al-Za‘farānī, and Ibrāhīm ibn Ahmad al-Mawṣīlī. In this context, it would seem to refer to Abū al-Layth al-Samarqandi.

187 Tashīḥ 316–17.
tates that these localised doctrines, and the underlying forms of legal reasoning and justification supporting them, were formulated and became commonly known at a time previous to that of the author-jurists whose works Ibn Ḥuṭlūbughā cites. This, then, would explain how the school of Bukhara, despite effectively dying out as a source of tarjiḥ for Ibn Ḥuṭlūbughā by the end of the fourth century could still be the most often referenced corporate group of jurists mentioned by Ibn Ḥuṭlūbughā and his sources: the practitioners of tarjiḥ of the fourth period onwards were drawing on the precedent, often historicised in a language of local mashāyik; and these opinions were then written not in the shorter, didactic digests (mukhtāsarāt), but rather in their expan-
sums (mutawwalāt) and commentaries, which by their nature tended to delve into (and attempt to resolve) long-standing disputes, such as that of differing Ḥanafi geographical schools.

All of the above clearly establishes the central role that eastern scholars, and especially the Bukharans, played in the development of the Ḥanafi madhhab of the post-classical period. Wilferd Madelung has already documented some of the transfer of this eastern Ḥanafism back westwards during the eleventh to thirteenth centuries; however, it is clear from the above that the tarjiḥ and tarjiḥ activity of Transoxianan and Central Asian Ḥanafism did not end with the migration of figures like Burhān al-Dīn ‘Alī ibn Ḥasan al-Balkhi al-Sikīkandi (d. 548/1153, student of al-
Ṣadr al-Mādī Ibn Māza of Bukhara), Raḍī al-Dīn al-Sarakhṣī (d. 571/1176, student of al-
Ṣadr al-Mādī’s son, al-
Ṣadr al-Shahid Ibn Māza) and the famous ‘Alā’ al-Dīn al-Kāsānī (d. 587/1191). In fact, juristic rule-formulation actually continued strong until the end of the eighth/thirteenth century, until the eventual destruction of Bukhara and other Transoxianan centres as a result of repeated Mongol sackings. The final hundred years of tarjiḥ-activity cited by Ibn Ḥuṭlūbughā is indeed dominated by non-Transoxianan or Iranian jurists: of the four cited who died between 750/1350 and Ibn Ḥuṭlūbughā’s authoring of his work, ‘Ālam ibn al-‘Alā’ al-Ḥanafī (d. 786/1384–5) authored his al-
Fatāwā al-
Tāārkhānīyya in Delhi, India; Yūsuf al-
Ṣūfī al-Bazzār al-Kādūrī (d. 832/1428–9), who receives two mentions, seems to have died in Egypt; and Ibn Ḥuṭlūbughā’s own teacher, Ibn al-
Ḥumām (d. 861/1457) — referenced 23 times — taught and wrote in Egypt; only one, Ḥāfīẓ al-Dīn al-Bazzāzī (d. 827/1424) was from the East (Khwarazm). The fact that it is Ibn Ḥuṭlūbughā — a Cairene of Turkish descent — who wrote the most classical work of tarjiḥ of his generation, treating both the theory and practice of the art, serves as a most fitting terminus ad quem and closure for the many centuries of Eastern dominance in the formulation of Ḥanafi doctrine.

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188 Madelung, ‘The Westward Migration’.
2.4 Periodisation and the typologies of jurists (tabaqāt al-fuqahā’)

The prosopographical periodisation developed above is empirically based upon a study of the dates of death of the jurists cited by Ibn Qutlūbughā in al-Taṣḥīḥ wa-al-tarjīḥ, coupled with information provided by the biographical dictionaries as to the juristic roles played by these jurists. This has allowed us to see the patterns of juristic activity over time.

Of course, numbers and years are by their nature exclusive: a jurist either was or was not alive in a particular year. As a result, historical periodisations tend to portray a greater degree of exclusivity and rigidity than need necessarily have been the case. The dominant juristic activity by which each period was characterised was not necessarily confined to that period alone, and often quite logically continued to be practised by jurists of later periods. Furthermore, it is possible that a jurist who lived in a later period, and in fact participated in the dominant activity of that age, was also a participant in some aspects of rule-formulation that were dominantly practised in preceding periods. We have already seen the example of Ibn Qutlūbughā’s master, Ibn al-Humām: someone who — by the fact that he has historically followed the jurists within his tradition who had preceded him, and as such was forced to interact and deal with the ever-increasing amount of legal positions and arguments produced by his predecessors — could play multiple roles: at once a practitioner of taṣḥīḥ when affirming or correcting an existing tarjīḥ-position; a practitioner of tarjīḥ when unconvinced of all the preceding instances of tarjīḥ, thus leading him to pronounce as to the correct primary legal opinion on his own by engaging directly with the legal evidence, reasoning, and chains of transmission; and respected as a mujtahid of his age. Yet there was a further dimension which transcended these, namely that of participating in the development of the underlying jurisprudential system of the madhhab-law tradition, and the mechanics of this system’s operation, the theory of which we shall return to in Chapter 3.

A number of later Ḥanafī scholars developed a range of typologies of jurists, and proceeded to debate the placing of particular jurists within a specific period. What did they dispute? Viewed in terms of death dates and years, there is little space for disagreement as to which ‘generation’ a jurist falls into; but seen as periods reflecting juristic developments, it could be and often was argued that a jurist was of a higher (or lower) ranking than most of his colleagues in his age, or that the typology did or did not properly reflect the various juristic duties practised by scholars of a given rank to which they were assigned.

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189 Ibn Nujaym refers to Ibn al-Humām as ‘the seal of those who verify preceding positions by means of their investigations (khāṭimat al-muḥaqiqin)’, and in numerous cases cites the tarjīḥ of Ibn al-Humām; e.g. al-Baḥr al-rā’diq, 8 vols. (Beirut: Dār al-Ma’rifa, 1413/1993), 1:330.
2.4. *Periodisation and the typologies of jurists (ṭabaqāt al-fuqahā’)*

The first scholar known to develop a Hanafi typology was the Ottoman jurist and statesman, Shams al-Dīn Muḥammad ibn Sulaymān ibn Kamāl Pāštā (d. 940/1534). Ibn Kamāl divided Hanafi jurists into seven ranks, based upon their primary juristic activity: (1) the rank of those who are mujtahids concerning the revelation (*al-shar‘*), such as Abū Ḥanīfa and the other eponyms of the madhhabs; (2) the rank of those who are mujtahids within the madhab, such as Abū Yūsuf and Shaybānī; (3) the rank of those who are mujtahids in particular cases not addressed by the eponym, such as Khaṣṣāf, Ṭahāwī, Karkhī, Ḥalwānī, Sarakhsī, Fakhr al-Īsām al-Bazdawī, and Qāḍīkhan; (4) that of those who, though muqallids, are capable of takhrij, deducing new legal rules from the opinions of their predecessors, such as Abū Bakr al-Jaṣṣās al-Rāzī; (5) the rank of those who are muqallids but are capable of tarjih, such as Qudūrī and the author of the *Hidāya*, Marghinānī; (6) that of those who are muqallids but capable of distinguishing between the strongest, strong, and weaker positions, or between the authoritative and the non-authoritative positions of the madhab, such as the authors of the four *mutūn*, Abū al-Barakāt al-Nasafi, Mawṣūlī, Ṣadr al-Shari‘a, and Ibn al-Sā‘āti; and finally (7) the rank of the mere muqallids, ‘those unable to perform any of that which has been mentioned’. Thus, Ibn Kamāl has performed two tasks: he has provided a typology of juristic ranks according to their function, and has assigned a corresponding rank to a number of the most prominent Hanafi jurists throughout history, up until his age.

As a window onto the dispute over this typology, we shall take as our case study his ranking, and the criticism he received thereof, for the two most prominent jurists of our periods 4(a) and 4(b) of our periodisation, Abū al-Ḥusayn al-Qudūrī and Burhān al-Dīn al-Marghinānī. We have already seen above — according to our periodisation, and in respect of both the number of times each was mentioned by Qāḍīkhan and the dominant task of tarjih performed by each — how the two were quantitatively the most prominent practitioners of *tarjih* within their respective periods of 4(a) and 4(b). Interestingly, Ibn Kamāl places both Qudūrī and Marghinānī into the fifth of his seven ranks of jurists, that of asḥāb al-tarjih, saying:

The fifth is the rank of the practitioners of *tarjih*, and who are of the *muqallids*, such as Abū al-Ḥasan al-Qudūrī, the author of the *Hidāya*, and others like them. Their responsibility is to give preponderance (*tarjih*) to some transmissions over other, by

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191 See p. 66 above. Hallaq incorrectly attributes the *Kanz* to Aḥmad ibn ‘Alī Fakhr al-Dīn Ibn al-Faṣīḥ, who in fact only versified (*naẓẓama*) the work of Nasafi. See *Ṭāj*, 117–18.
saying ‘this is more in accordance with juristic reasoning (qiyyás)’, and ‘this is easier upon people’.

Ibn Kamāl is making a statement of category: the activity of tarīj is one of taqlid and not of ijtihād, in contradistinction to the first three ranks which preceded. He then presents Qudūrī and Marghinānī as examples of this type of juristic activity. What he is ranking, then, is not people in the first instance, but juristic responsibility and practice; his illustration of that activity by citing particular jurists need not be read excluding the jurists from any other ranked level of juristic activity.

Ibn Kamāl’s typology was quoted nearly verbatim and approvingly by a number of jurists and biographers who followed him, including ‘Alā’ al-Dīn al-Ḥumaydī Ibn al-Ḥinnā’ī Qināli-zādeh (d. 979/1572) in his Ṭabaqāt al-Ḥanafīyya,193 al-Tamimī al-Dārī (d. 1010/1601 AH) in al-Ṭabaqāt al-saniyya,194 ‘Umar ibn ‘Umar al-Dufarī (?) al-Azhārī al-Miṣrī (d. 1079/1668–9) in his al-Jawāhīr al-nafīsa sharḥ al-durr al-manifa fi madhhab Abī Ḥanīfa,195 and Ibn ‘Abīdīn (d. 1258/1842) in both the introduction to his Radd al-muḥtār and in his epistle on the procedure to be followed by the muftī entitled ‘Sharḥ uqūd rasm al-muftī’.196 Each of these scholars affirms and approves both of the structure of Ibn Kamāl’s typology, and his illustrating them with the names of particular jurists as exemplars of the tasks which define each rank.

However, Ibn Kamāl was taken to task by a number of jurists of the early modern period at the turn of the late thirteenth/nineteenth and early fourteenth/twentieth centuries. The first and by far most vociferous is the Tatar scholar Shihāb al-Dīn Hārūn ibn Bahā’ al-Dīn al-Marjānī (d. 1306/1889) of Kazan, who provides the strongest attack, and upon whom the others rely and transmit in part.197 In a scathing piece reproduced by each of ‘Abd al-Ḥayy al-Laknawi (d.

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1304/1886), 198 ‘Abd al-Qādir al-Rāfī’ī (d. 1323/1905), 199 and Muḥammad Zāhid al-Kawtharī (d. 1371/1951), 200 Marjānī attacks both Ibn Kamāl’s typology as well as his assignment of jurists to particular ranks. In relation to our case study of Qudūrī and Marghīnānī, he states:

Then [Ibn Kamāl] places Qudūrī and the author of the ʿHidāya amongst the practitioners of tarjīh, while Qāḍīkhān is counted amongst the mujtahids. If Qudūrī precedes Shams al-ʿĀrma in time, and is of greater stature and higher rank...then how should Qudūrī be ranked in relation to Qāḍīkhān? As for the author of the ʿHidāya, all attention turned to him during his age, and it was he who was most elevated in his era. It has been mentioned in al-Jawāḥir and other works that the people of his age readily admitted to his excellence and prominence, including the imam Fakhr al-Dīn Qāḍīkhān, Zayn al-Dīn al-ʿAttābī, and others; and that he surpassed his contemporaries, and in fact his own masters, in fiqh. So then, how is he to be ranked below Qāḍīkhān? Impossible! Rather, Marghīnānī is far more deserving than Qāḍīkhān to be ranked as a mujtahid, and is far more solid in all that would support this rank.201

What, then, is it that draws Marjānī’s critique? Earlier in his attack of Ibn Kamāl’s typology, what appears to most bother Marjānī (and Kawtharī after him) is Ibn Kamāl’s placing Abū Yūṣuf, Muḥammad al-Shaybānī, and the other students of Abū ʿAbd Allāh Ḥanīfa in a secondary ranking as ‘mujtahids within the madhhab’, which would imply that they were below the rank of non-Ḥanafi eponymous mujtahids such as Mālik, Ṣafī’ī and others. Now, in our example of Qudūrī and Marghīnānī, we have the same driving principle: though Marjānī does not deny that they practised tarjīh, he deems it an affront that — despite Qudūrī’s chronologically preceding others whom Ibn Kamāl deemed as mujtahids — Qudūrī should be ranked as a mere muqallid; and that Marghīnānī, who was said to have surpassed his own teachers in fiqh, should be ranked lower than they. Neither he nor Kawtharī after him provide an alternative typology.202

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201 Marjānī, Nāṣīrat al-ḥaqq, 63.
202 ‘Abd al-Ḥayy al-Laknawi, in al-Nāfī’ al-kabīr, provides an alternative typology that he derives from the Ottoman jurist and biographer Maḥmūd ibn Sulaymān al-Kafawi (d. 990/1582–3), author of the ʿtabaqāt work Katāʿib al-aʿlām al-akhyār. While it provides only five levels as opposed to seven, it does so by merely dropping the first (ʿtabaqāt al-mujtahidin fi al-sharīʿ, namely the eponyms of the madhhab), and the seventh and final level (the pure muqalīdīs who are unable to differentiate between correct and incorrect positions), while renaming the second rank ʿtabaqāt al-mutaqaddīmin min asḥābīn, and the third ʿtabaqāt akābīr al-muta'akhkhirīn, thus perhaps reflecting his displeasure with typologies that cause Abū ʿAbd Allāh Ḥanīfa’s immediate fellows to appear as any less of mujtahids than the eponymous imams. It should be noted, however, that the
2.4. *Periodisation and the typologies of jurists (ṭabaqāt al-fuqahā’)*

In short, then, Marjānī and his supporters assessed the ranking of the jurist in accordance with his individual juristic capability and the highest level of activity he was known to perform. Ibn Kamāl’s assessment, on the other hand, is based upon the jurist’s dominant activity within, and greatest contribution to, the development of the Ḥanafī madhhab-law tradition. Marjānī’s is a ranking of individuals with a sense of precedence based upon chronology (such as his argument for Qudūrī’s superiority over Shams al-A’īmma partly due to his preceding him in time); Ibn Kamāl generally recognises the change of generations through time, but primarily as reflections of the dominant juristic concerns of the madhhab in that age. In one sense, Marjānī’s and Kawthari’s critique almost seems rooted in a very modern attitude of individualism, while the pre-modern Ibn Kamāl — and his supporters such as Ibn ‘Abidīn — have fewer quibbles with a typology that, above celebration of individual juristic prerogative and brilliance, emphasises the long-view of rule-formulation within the tradition.

This ‘long-view’ — i.e. the logic of the juristic activity through history — means that all generations of scholars who follow after their predecessors must of necessity engage with the earlier jurists’ positions in order to remain part of that madhhab’s tradition. Thus, jurists of our second period, in addition to the original works and legal opinions they produced, informed the transmission and legal ramifications of the opinions of the first period. Likewise, the jurists of the fourth period of necessity had to deal with a large number of primary opinions of the generations that preceded them; in the case that those opinions cover all of the possibilities in regards to that case, these later scholars will then of necessity practice some form of *tarjih* in their assessing and selecting the most *rājīh* position (and in the case that possibilities remained, they could and often did practice first-order opinion making themselves). And likewise with those who follow upon them: once a number of jurists have submitted, in their written works, their positions as to which

*description of each rank still matches nearly word-for-word that of Ibn Kamāl, despite the change of label (Laknawi, *al-Nāfi’ al-kabīr*, 8–9). Without comment, he then goes on to relate Ibn Kamāl’s typology, only to then criticise both the typology and those who adopted it after Ibn Kamāl (on the basis that they merely emulated him therein); he argues that there are numerous weaknesses in his presentation, mentioning only Ibn Kamāl’s ‘placing a jurist of a higher rank in a rank lower than that which he deserves’. He then proceeds to provide a summarised version of Marjānī’s critique (Laknawi, *al-Nāfi’ al-kabīr*, 11). ‘Abd al-Qādir al-Rāfī’ī seems to disapprove of the critique, stating that Laknawi ‘was excessive’ in his quoting Marjānī’s text (*bālaghā fi raddiha naqland an Ḥārūn ibn Bahā’ al-Dīn al-Ḥanafī*). In his later *al-Fawā’id al-bahiyya*, Laknawi presents a six-fold typology, identical to Ibn Kamāl’s in all but his dropping the Ottoman’s first rank, namely of the *mujtahid muṭlaq* (*Fawā’id*, 23.) Unlike Laknawi, Muḥammad Zāhid al-Kawthari does not provide an alternative taxonomy: after criticising the structure of the taxonomy and distribution of jurists within it, he simply reproduces Marjānī’s critique at the end of his work, ‘in order to alert those many people who have been fooled by the words of Ibn Kamāl’ (Kawthari, *Husn al-taqāḍī*, 25).*
of the early opinions should be deemed the rule (rājiḥ), later jurists (such as Abū al-Barakāt al-Nasafi, Zāhidi, and indeed Ibn Quṭlūbghāʾ) must have had to engage with those decisions, affirming or correcting them, and thus performing taṣḥīḥ. Again, this does not bar these later scholars from being intellectually capable of, or even from actually and actively, partaking in higher levels of juristic activity, whether ijtiḥād, takhrīj, or tarjīḥ: rather, it is a reflection of the logical movement of a legal tradition in time that recognises and respects the role of precedent.

This reading is further affirmed by our case study of Qudūrī and Marghīnānī. As jurist-authors, there is good reason to see them as the exemplars of tarjīḥ: both of them wrote the most celebrated of digests, that genre of early tarjīḥ par excellence, the very process of writing of which necessitates that the jurist-author make decisions as to which of the early madhhab’s opinions were to be selected as rules, and which were not. Furthermore, the other works of the two authors — such as Qudūrī’s Taqrib and his commentary on the mukhtarāṣ of Karkhi, and Marghīnānī’s Hidāya and al-Tajnis — are virtual repositories of the ‘weighing’ of proofs, evidence, and chains of transmission which underlie the practice of tarjīḥ which is encapsulated in their digests. It is not that they did not write other works, of higher or lower effect in the madhhab; it is that these works defined tarjīḥ in their periods and thereafter, and thus earned them the epithet of exemplars of rule-formulation par excellence (aṣḥāb al-tarjīḥ).

Thus, what we see in the typology of Ibn Kamāl presented in the ṭabaqāt al-fuqahāʾ and later rasām al-mufīṭ treatises is an acknowledgment of juristic roles in the construction of a historical awareness of a legal tradition (in our case, the Ḥanafī madhhab-law tradition). The inclusion of particular scholars in this or that rank is not meant to delimit the sphere of their juristic activity; instead, they stand as reflections of the overall preoccupations, and the natural historical development, of a legal system that is traditional yet generative. This is apparent in Ibn Kamāl’s presentation; for example, he includes Karkhī as an exemplar of the third rank of the mujtahid in particular cases not addressed by the earliest jurists of the madhhab, but also mentions Karkhī, via a quotation from the Hidāya, as having contributed to activity of the ‘lower’ rank of takhrīj. It is also apparent in our above analysis of the presented periodisation, where the nature of time and accumulating a history of opinions and rule-formulations, and that of law embedded in wider

\[\text{\textsuperscript{203}}\text{Qudūrī, his famous al-Mukhtarāṣ; Marghīnānī, the base text upon which his Hidāya was the commentary, Bidāyat al-mubtadi’, which is largely based upon Qudūrī’s digest and the works of Muḥammad al-Shaybānī. Nonetheless, as we shall see in Chapter 4, Qudūrī’s Mukhtarāṣ left a large number of legal issues unresolved, mentioning more than one opinion from the foundational jurists on a given point; and it was jurists like those cited by Ibn Quṭlūbghāʾ (and at times Ibn Quṭlūbghāʾ himself), who resolved these indeterminacies through tarjīḥ and taṣḥīḥ until his own day.}\]

\[\text{\textsuperscript{204}}\text{Ibn Kamāl, Ţabaqāt al-fuqahāʾ, pp. 558–9.}\]
societal structures requiring coherency as well as transmission, led to the development of certain concerns amongst the jurists that required fitting solutions, regardless of the jurist’s own individual juristic capabilities. It is interesting to note that while our periodisation, empirically derived from a quantitative analysis of a fiqh work of legal-review (taṣḥīḥ), finds so many correlations with the ‘rankings’ of jurists in Ibn Kamāl’s conclusions. Though the two are obviously not identical in structure (one being a periodisation, the other a typology), it indicates that Ibn Kamāl’s work is at once both historically and functionally minded: though his primary concern is the various functional role of jurists in the making of legal rules, it nonetheless reflects a sense of a necessary, logical, and historical movement from the primary function of one generation developing into the next, but coherently united by the underlying system of the developing madhhab-law tradition.

In closing, I wish to emphasise that this chapter was not intended to have provided a history of the Ḥanafi madhhab; a complete assessment of the social, intellectual, or juristic nature of any given period; nor even an assessment of the nature of the most prominent jurists or local corporate identities and their approach to the law. Rather, it is an exploration as to what basic historical information a fiqh work of positive law (furū‘) can provide us as to some of the contours of Islamic law. Until now, histories of the madhhab have relied primarily on works of ṭabaqāt and universal or local histories; and for good reason: they provide the type of data that is essential to understanding something of the milieu in which the jurists practised their art, interacted with and affected society, and participated in the building of its institutions. Nonetheless, it should by now be clear from this chapter that any proposed history of the madhhab, both institutionally and intellectually, can and must take into account works of fiqh. I believe this chapter reveals that a proper historical periodisation and geographical history of any given madhhab must take into consideration the writings of the jurists-qua-jurists. However painstaking the process of sifting through pages of legal minutiae might be, a close reading reveals stores of rich, if subtle, historical detail to the patient reader of these texts.
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Theory

Having derived a clearer picture of the historical topography of the Ḥanafi madhhab between the authoring of Qudūrī’s Mukhtāsar and that of the Taṣḥīḥ, we shall now commence with a study of Ibn Qutlūbüşahh’s approach to rule-formulation (tarjīḥ), beginning with the theoretical introduction which opens his work. The first and most noticeable characteristic of the theoretical introduction is that, like the bulk of the commentary on Qudūrī’s Mukhtāsar which constitutes the body of the text, it is formed out of a masterful weaving of narratives, quotations, and opinions from jurists who preceded or were contemporary to our author, interlaced with Ibn Qutlūbüşahh’s own formulations as to the necessity and methodology of tarjīḥ. At the highest level, it contains essentially two arguments: first, for the necessity of all jurists to respect the coherency of the institution of the madhhab and the wider madhhab-law tradition’s approach to determining legal rules; and secondly, for the necessity of Ḥanafi legal functionaries to respect and follow the processes of rule-discovery as developed specifically within the context of the Ḥanafi school and its literary heritage. For the first purpose, he marshals a wide range of jurists from across the four madhhabs; for the latter, he calls upon on a set of the most authoritative exponents and practitioners of legal rule-formulation (tarjīḥ) and rule-review (taṣḥīḥ) within the Ḥanafi madhhab.

For the latter of these two tasks — the mapping of the procedures to be followed by a Ḥanafi in discovering the legal rule — Ibn Qutlūbüşahh’s treatise relies heavily upon the only Ḥanafi work to have previously treated this topic: namely, the introductory tract which opens the Fatāwā of Fakhr al-Dīn Qāḍīkhān (d. 592/1196), known as the ‘rasm al-muftī’ (the formal procedure to be followed by the muftī).1 According to my findings, Qāḍīkhān’s presentation — authored nearly a century and a half after Qudūrī’s passing — is the first instance of a description of the procedure to be employed by the muftī or judge in rule-formulation, or of a justification for legal practitioners’ binding themselves to those rules. As we shall see, it is also the first theoretical treatment (though not the first mention) of the term ‘zāhir al-rīwāya’ in Ḥanafi literature. That

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Qādikhān’s ‘Rasm al-muftī’ is presented as a prefatory section (faṣl) to his famous Fatāwā is not without significance. The Fatāwā Qādikhān is a work in the Transoxianan Ḥanafi tradition of using the term ‘fatāwā’ in the title of a work, not to indicate a collection of legal responses, but rather a standard theoretical fiqh compendium distinguished by its containing only the most authoritative, relied-upon position (i.e. often denoted in fiqh works by the phrase “alayhi l-fatāwā”) on any given legal case, in the assessment of its author. The fact that he prefaces his work of ‘fatāwā’ (used in this sense) with a theoretical treatment of the procedures of rule-discovery is thus to state that this was the procedure of tarjih which he himself employed in discovering and establishing the authoritative rulings in his book. Qādikhān’s preface is succinct, and limited: assuming the reader already has an understanding of what is intended by ‘zāhir al-riwāya’, he proceeds to delineate the procedure to be followed in arriving at the rule, through weighing and selecting between competing preceding legal opinions, for the case at hand.

As such, my treatment of tarjih-theory — the relationship of its topoi to the development, coherency, and stability of the (Ḥanafi) madhhab-legal tradition — will cover the contributions of both Qādikhān and Ibn Quṭlūbughā. We will assess how the latter jurist incorporated the work of the former, and how he made use of it for the needs of his own context which had changed not insignificantly from that of Qādikhān. While Qādikhān was mainly interested in delineating the steps the mufti is to take in determining the rule from the corpus of the tradition’s legal opinions, Ibn Quṭlūbughā’s presentation provides a wider array of justifications, procedures, and consequences of tarjih, as an introduction to his commentary on Qudūri’s Mukhtaṣar. In framing his discussion of the procedure to be followed by the mufti in rule-discovery, Ibn Quṭlūbughā begins by reproducing verbatim all of Qādikhān’s treatment. Ibn Quṭlūbughā then expands upon Qādikhān’s treatment, revisiting certain topics by way of citing other authorities on how the mufti is to proceed, thus confirming and providing further nuances to Qādikhān’s procedure.

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2 On the use of the term fatāwā in this genre, see Schacht, ‘On the Title of the Fatāwā ‘Ālamgirīyya’; regarding its use in Qādikhān’s work, see El2, s.v. ‘Kādi Khān’ by G. Junynboll and de Y. L. Bellefonds.

3 It should be noted that in the printed edition of Fatāwā Qādikhān, there is a section treating the definition of the term ‘mujtahid’ that does not exist in the version transmitted by Ibn Quṭlūbughā. Since our primary concern is to treat Ibn Quṭlūbughā’s presentation of tarjih, and since there are internal textual indications that the passage may have been interpolated into Qādikhān’s text, breaking as it does the flow of his mapping of the mufti’s procedure, I have opted to not translate it or incorporate it into my analysis.

4 In addition to the two treatments of rasm al-muftī described here, perhaps the most famous treatment in later Ḥanafi literature is that of Ibn ‘Abidin (d. 1258/1842), in his epistle “Uqūd rasm al-muftī”, and in the introduction to his super-commentary, Radd al-muhtār ‘alā Durr al-mukhtār, regarding which, see Calder, ‘The “Uqūd rasm al-muftī” of Ibn ‘Abidin’, a translation and study of the didactic poem minus Ibn ‘Abidin’s substantial commentary. In addition, diyā’ Yūnus, the editor of Ibn Quṭlūbughā’s al-Tashīḥ wa-al-
Beyond his expanded treatment of the mufti’s procedure, Ibn Qutlubughā also introduces and further develops other themes related to tarjīḥ: the distinction between a mufti and a judge; the moral and practical responsibility of the mufti or judge to observe precedent, as a legal practitioner; the relevancy (or lack thereof) of the judge’s personal conviction, in light of his rank as a jurist; the requirements and problems resulting from fiqh’s legal-indeterminacy (through discussion of the invalidity of reneging on an issued legal opinion post-factum); the invalidity of composing judgements from distinct doctrines of different legal traditions (taḥfīq); the definition of an ‘independent jurist (mujtahid)’ in contradistinction to an ‘adherent to a legal tradition (muqallid)’; and the historical disappearance of independent jurists as a result of the establishment of precedent (tarjīḥ).

What follows is a description and analysis of each of these topoi of tarjīḥ-theory. I will treat Ibn Qutlubughā’s treatise as a whole, including his discussion of the procedure of the mufti as delineated by Qādīkhān in the latter’s tract. For the purpose of cataloguing and analysing the topoi of tarjīḥ-theory, I will treat the two tracts together, as presented as a united whole by Ibn Qutlubughā, but when necessary will highlight the shifts and changes of historical context that occurred in their respective understandings of madhhab, ijtihād, taqlīd, and tarjīḥ. A translation of the entire tract precedes the analysis. Providing the translation in full is necessary in order to appreciate the rhetorical connotations resulting from the structuring and layering of the arguments as employed by the author; Ibn Qutlubughā returns to a discrete number of themes, especially those first addressed by Qādīkhān, in a circular fashion, tying procedure to moral and institutional import, and redefining key concepts in the new context of the pluralistic Mamlūk madhhab-law system. The section numbers referenced in the analysis below correspond to the section numbering that I have placed in the inside margin of the translation.

3.1 Ibn Qutlubughā’s introduction to al-Taṣḥīḥ wa-al-tarjīḥ

In the name of Allah, the Beneficient, the Merciful. All praise is due to Allah, Lord of the Worlds. And may Allah bless our master Muḥammad, his folk, and his Companions. To proceed: the one in dire need of the mercy of his bountiful Lord, Qāsim al-Ḥanafi, says:

*tarjīḥ*, states that there is, attached at the end of one manuscript copy of Ibn Qutlubughā’s work, an epistle treating the topic of tarjīḥ by an unknown author (whom Yūnus ventures may be the scribe, one Jaʿfar ibn ʿAbd al-Qādir al-Rūmī al-Ḥanafi, himself), entitled al-Ṭirāṣ al-mudhhab fi tarjīḥ al-ṣaḥīḥ min al-madīḥhab, (Süleymaniye, Istanbul, part of a Majmūʿa, no. 915, 986 AH, 8 pp.). Though the copy which survives in this manuscript is apparently incomplete, the work itself was well-known enough to be mentioned by Ibn ʿĀbidin in his own *Rasm al-muṣṭiʿ*. See Ibn Qutlubughā, al-Taṣḥīḥ wa-al-tarjīḥ, editor’s introduction, 96.
I have observed people capriciously abusing the legal tradition (madhhab) of our Imams (may Allah be pleased with them), to the extent that I have even heard a certain judge ask, ‘Is there any interdiction against this?’ ‘Indeed there is!’ I responded. ‘To follow one’s caprice is impermissible, and the non-preponderant opinion (marjûh) is, in the face of a preponderant opinion (râjih), effectively non-existent. To grant preponderance (tarijih) to one ruling over its contrary without grounds (bi-ghayr murâjihi) is forbidden.’

[Burhân al-Din İbrahîm Ibn Farhûn] Ya’âmûrî (may Allah have mercy upon him) has stated in Usûl al-aqdiya:5 ‘Whoever is unable to determine which of two transmissions (riwâya) or positions (qawl) is the most prominent (mashhûr), is not allowed to capriciously judge by whichever position he desires, and without observing the procedure of determining preponderance (tarijih).’

Imam Abû ‘Amir [Ibn al-Salâh] says in Adab al-mufti: ‘Know that, in regard to any given legal matter (mas’ala), whoever allows himself to be satisfied with providing legal responses (fatwâ) or basing his own conduct in accordance with any legal position (qawl) or argument (wajh), haphazardly using them as he wishes, and does not observe the procedure of determining preponderance: such a person is indeed ignorant, and has broken all bounds of juristic consensus.’

[Abû Walîd] al-Bâjî reports that a matter once befell him, and he was given a legal response (fatwâ) injurious to him. When he then followed up on the matter [with those who had issued the opinion], they said: ‘We did not know that the matter concerned you!’ and they proceeded to issue him a response, according to an alternative transmitted opinion, which would suit his ends. Bâjî states, ‘There is absolutely no disagreement, amongst those Muslims [whose opinion is] of consideration regarding juristic consensus, that such an action is impermissible.’

Ya’mûrî states in Usûl al-aqdiya: ‘No distinction is made between a mufti and a ruling judge (hâkîm), save that the decision (hukm) of a mufti is [merely] declarative, while that of the ruling judge is binding.’

The jurists have unanimously agreed that it is invalid to renego on an issued legal decision deemed binding, once it has been acted upon (lâ yasîrih al-rûjû ‘an al-taqîlîd ba’d al-’amal); and this is the chosen opinion (mukhtar) of the [Hanâfî] legal tradition (madhhab).

Abû al-Hasan al-Khaṭîb [Taqi al-Din al-Subkî] says in his al-Fatâwâ: ‘If a mufti providing legal responses in accordance with a particular legal tradition (al-muftî ‘alâ madhhab) issues a legal response, stating that the ruling of a matter is such-and-such according to the legal tradition of a [particular] Imam, he is not permitted to base his legal opinions upon a different legal tradition (laya lahu an muâjallîd ghayrâhu) and to issue responses that contravene his legal tradition, for such an action is pure capriciousness.’ He also said, ‘By associating himself to the legal tradition of a given Imam, he is responsible to act in accordance with it. This, so long as he does not develop a contrary position, which, as a jurist bound by precedent (muqallîd), he is not qualified to develop. In this he differs from an independent jurist (mu’tahîd) whose qualifications enable him to proceed from one position to another.

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5Tabûrat al-‘ukkâm fi usâl al-aqdiya wa-mînhâj al-‘ubkâm.
[Subki] has hereby addressed a topic of jurisprudence in which consensus has been claimed; he states: ‘By juristic consensus, it is not valid to issue a binding decision composed of two discrete processes of independent legal issuance (lā yaṣīḥ al-taqlīd fī shay’ murakkab min ijtiḥādīn mukhtalifayn bi-al-ijmā’).’ An example of this would be if one were to perform the ritual ablutions, but only wiping upon a portion of one’s hair, and then to proceed to perform the prayer whilst carrying upon one’s body an impurity from a dog. It is written in Tawqīf al-ḥukkām ‘alā ḡawāmid al-aḥkām,⁶ ‘Such a prayer is invalid (bāṭil), by juristic consensus.’ The author also wrote, ‘A legal ruling artificially composed of a number of discrete opinions (al-mulaffaq) is invalid, by juristic consensus of the Muslims. If a judgement is drafted by a Mālikī, and issued by a Shāfi’i, it is not to be enforced (fa-law athbata al-khaṭṭ Mālikī fa-hakama Shāfi’iyya lam yunaffadha).’ After providing a further example, he then said, ‘A great number of ignorant judges do this’, meaning, [they pass] judgements composed of a number of discrete opinions.

It has been said by a certain person ignorant of the intent of the scholars: ‘The scholars have said, “Whenever the Imam holds one opinion, and the Two Fellows another, the mufti and the judge may choose according to their discretion.”’ To this I reply: ‘The matter is not as you claim. The most-learned scholar, al-Ḥasan ibn Mansūr ibn Maḥmūd al-Ūjandā, also known as Ḥaqīkhān, states in his work al-Fatāwā, [in the section] ‘Rasm al-mufti (the formal procedures of the mufti)’:

In our age, if a mufti who is one of our fellows (mīn aṣḥābinā) is asked for a legal response regarding a case (masʿala), and is asked about a matter which has occurred (wāqʿa), [he is to proceed as follows]:

If, in regards to the case, an opinion of one of our fellows is related (marwīyya) in the corpus of clearly-transmitted opinions (al-riwāyāt al-ẓāhirā), with no known dispute between our fellows [as to its veracity], then he is to adopt their position, and to give a response accordingly (yamil ilayhim wa-yufti bi-qawālāhim). He is not to contradict them with his own opinion (raʾy), even if he is a capable independent jurist (muṭahād mutaṣīn), for it is more apparent (al-ẓāhir) that the truth is to be found with our fellows and not with others; his legal reasoning (ijtihād) is not equal to theirs. The opinion of him who contradicts our fellows is paid no heed, nor is his proof (ḥujiya) accepted, for they knew the evidence (adillā), and distinguished between that which is correct and well-established and that which is not.

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⁶The author is Shīḥāb al-Ḍīn Aḥmad ibn ‘Imād al-Aqqahṣi, an Egyptian Shāfi’ī jurist (d. 808/1405–6).
If, however, there exists a disagreement between our fellows as to [the ruling in] the case, [the mufti is to proceed as follows]: if Abū Ḥanīfa (may Allah Most High have mercy upon him) is supported in his opinion by one of his Two Fellows (ṣāḥibayn), then their [joint] opinion is chosen [as the established position], due to [their] fulfilling all the conditions [necessary for issuing legal opinions], and their collecting [between them] the correct evidence. If, however, Abū Ḥanīfa (may Allah Most High have mercy upon him) is contradicted by his Two Fellows in the case at hand, [the mufti is to proceed as follows]: if the disagreement between them stems from changes of the age and times — such as in [the case of] passing judgement according to the apparent probity [of a participant in a legal proceeding] — then the opinion of his Two Fellows is chosen, out of consideration for the changes in the circumstances of people (abwāl al-nās). Likewise, in matters regarding sharecropping (muzāra‘a), transactions (mu‘āmala), and other similar matters, it is the position of the Two Fellows that is to be chosen, as is agreed upon by the latter-day scholars (muta‘akhkhirin). In all other matters: some scholars hold that the independent jurist (mujtahid) possesses the discretion to choose [between the transmitted opinions], and to act in accordance with his preference (ra‘y), while ‘Abd-Allāh Ibn al-Mubārak declares that [the jurist] must accept the opinion of Abū Ḥanīfa (may Allah have mercy upon him).

In the scenario that the case is not to be found in the corpus of clearly-transmitted opinions (ẓāhir al-riwāya): if the [ruling regarding the] case accords with [the rulings found in] the primary works (uṣūl) of our fellows, it is to be implemented (yu‘mal biḥā). If it happens that no transmitted opinion from our fellows is found to support [the ruling], but the latter-day scholars have in fact developed a position upon which they agree regarding the matter, then, again, it is to be implemented. If, however, the latter-day scholars are found to be in dispute regarding the matter, then the mufti is to exert himself in arriving at a ruling (yaj-tahid), and is to provide a legal response in accordance with what he believes to be correct. However, in the case that the mufti is himself bound by precedent (muqallid) and is not an independent jurist, he is to adopt the position (qawl) of the most learned of jurists in his estimation, and must attribute the legal position to that jurist. If this most learned jurist is only found in another town (miṣr), the mufti is to write to him [soliciting his opinion]. He is to adhere to the response accorded him (wa-yatathhabbat fi al-jawāb) and not to conjecture, out of fear of ascribing to Allah Most High a falsehood, by making impermissible a matter which is licit, or permissible that which is illicit.

A similar argument is presented in al-Muhīṭ [al-burhānī], in the chapter regarding [the tasks of] judges.
The most learned scholar, Abū Bakr Masʿūd ibn Aḥmad al-Kāsānī, writes in his work Badāʿiʿ [al-ṣanāʿiʾ]: ‘If a judge is of the rank of those capable of independent legal reasoning, and his opinion settles upon a certain position, he is obliged to act in accordance with his conviction. However, if he is not of the rank of those capable of independent legal reasoning, [then he is to proceed as follows]: if he is familiar with the numerous opinions (aqāwil) of our fellows, and has learned them with proficiency and precision, he is to act in accordance with the opinion of he whose position he considers to be accurate, by way of being associated to the tradition (ʿalā al-taqlīd). If, however, he is not learned in their opinions, he is to act in accordance with the position of the most perspicacious jurists (ahl al-fiqh) who are fellows of our legal tradition in his town. If, however, in his land there is only a single jurist who is a fellow of ours, he is permitted to follow that jurist’s opinion.’

He also said, in [the section regarding] the description of the judiciary: ‘judgements must be passed purely in order to please Allah, for the issuance of legal judgements is a form of worship, and worship is to make pure one’s actions entirely for Allah Most High.’

Burhān al-Aʿimma writes in his Sharḥ Adab al-qadāʾ liʿl-Khaṣṣāf: ‘All cases examined by judges are one of two types. The first is a case in regards to which [our fellows] are in agreement as to its ruling; the judge is to pass judgement accordingly, for truth is not found outside the confines of the legal opinion of our fellows. The second type is that in regards to which there is disagreement; in this, ‘Abd-Allāh Ibn al-Mubārak has said: “He is to accept the position of Abū Ḫanifa, for the latter encountered the Companions, and participated with the Successors in issuing legal opinions; as such, his positions are stronger and more reliable, unless the disagreement stems from changes of age and times.” The latter-day scholars state that he should seek counsel (yastafti).’
The author of *Sharh al-Hidāya* — after relating the disagreement regarding an independent jurist who issues a judgement [in his capacity as judge], contrary to his own conviction — states that the relied upon position (*fatwā*) is that his judgement is not to be enforced in either case, i.e. regardless of whether this occurred due to a lapse of memory or it was done intentionally. He then wrote: ‘The appropriate course (*wajh*) in today’s age is that he pass judgement according to the position of the Two Fellows. For he who intentionally disregards his own legal tradition only does so out of a vain caprice, and not out of some virtuous purpose. As for him who does so due to a lapse in memory, a person who subjects himself to a particular madhhāb-jurisdiction (*muqallid*) has only accepted the jurist’s judgement because such a person knew that the judgement was to be issued in accordance with a specific legal tradition, and not according to another. All this is in regards to a judge who is also an independent jurist. As for the judge who himself is bound by precedent (*muqallid*), he has been only appointed [by the ruler] with the sole purpose of judging according to the legal tradition of, for example, Abū Ḥanīfa; the judge has no right to contravene his tradition: he would be dismissed and his decision revoked (fa-yakūn ma’aṣūla bi-al-nisba lā ḍhālikā al-ḥukm; lit. “he would be dismissed in relation to that judgement”).’

It is mentioned in *al-Qunya*, citing *al-Muḥīṭ* and other works: ‘The transmitted opinions differ as to the status of a judge who, as an independent jurist, passes judgement contrary to his conviction; as for a judge bound by precedent (*muqallid*) and who passes judgement contrary to his legal tradition, his ruling is not to be enforced.’

Abū ‘Abbās Ahmad ibn Idrīs [Shihāb al-Dīn al-Qarāfī] poses the question: ‘Is it obligatory upon a judge to issue a judgement in accordance solely with what he holds to be the preponderant opinion (*rājīḥ*), in the same way that it is obligatory upon the mufti to not provide legal responses save in accordance with what he holds to be the preponderant opinion? Or does the judge [possess discretion to] issue a judgement according to either legal opinion (*qawl*), even if the opinion selected for the judgement is not what he believes to be the preponderant position?’ He responds: ‘If the judge is an independent jurist, it is not permissible for him to issue a judgement or to issue a legal response save in accordance with what he holds to be the preponderant opinion. If, however, he is bound by precedent (*muqallid*), he is permitted to respond is accordance with the most prominent position (*mashhūr*) of his legal tradition, and to issue a judgement accordingly, even if he personally does not hold it to be the preponderant position in his estimation; in this, he is subject to the decisions of the Imam to whose tradition he is subject (*muqallid*) regarding the preponderance of a given opinion, just as he is [so bound] in his legal responses. As for issuing judgements and responses in accordance with one’s caprice, there is juristic consensus that such [a practice] is forbidden. As for issuing legal judgements and responses to petitions according to a non-preponderant opinion (*marjūḥ*), such an act contravenes juristic consensus.’

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7This ‘*Sharḥ al-Hidāya*’ is *Fath al-Qadīr* of al-Kamāl Ibn al-Humām (d. 861/1456–7), the teacher of our author Ibn Qutlūbughā.
3.1. Ibn Qutilughah’s introduction to al-Taṣḥīḥ wa-al-tarjih

It has been said by a certain person ignorant of the intent of the scholars: ‘[Our age] is bereft of independent jurists (mujtahid) and perfectly-learned jurists (afqah).’ To this I reply: As to those legal matters for which there exist transmitted opinions (riwāyat), we are to proceed in accordance with the statement of Ibn al-Mubārak, understanding that the world had not become bereft of independent jurists until such jurists had fully examined the disputed points of law (naṣarū fi-al-mukhtalaf), stated which [opinions] are preponderant (rajiah), and emended previous assessments (ṣaḥḥahā). Their written works bear testimony to the granting of preponderance (tarjīḥ) to Abū Ḥanīfa’s arguments (dalil), and the reliance [of the jurists] upon his positions, save in a small number of legal issues, in which the jurists determined that the official edict [of the madhhab] (al-fatwā) is to be in accordance with the opinion of the Two Fellows, or with the opinion of one of the two, even when the other had sided with the Imam. Similarly, they have selected the position of one of the Two Fellows in those legal matters regarding which there is no express statement (nasṣ) from the Imam, for reasons already elucidated by Qāḍīkhān (may Allah have mercy upon him). In fact, the jurists have even preferred a number of opinions issued by Zufar over and above the opinions of his fellows for similar reasons. Their evaluations as to the preponderant opinion (tarjīḥ) and their emendations (taṣḥīḥ) have been preserved, and it is incumbent upon us to follow the most preponderant positions and to act in accordance with them, just as if they had directly issued us these edicts during their own lifetimes.

It has been said that, in regards to those legal matters for which no position has been transmitted from the Imams, opinions (aqwāl) are sometimes related unaccompanied by any evaluation as to the preponderance of one position over the others (bi-lā tarjīḥ), and the jurists may disagree as to the more correct position (taṣḥīḥ). To this I reply: [A jurist faced with this situation] should follow the same procedures that [earlier jurists] had followed, by taking into consideration changes in local custom (‘urf), changes in people’s circumstances (ahwāl al-nās), what is of greater advantage to people’s welfare (mā huwa arfaq bi-al-nās), what customary practice has settled upon (mā sahara ‘alayhi al-ta’āmul), and the strengthening of the arguments of a given opinion (mā qawiyya waḥihu). There is never an age in which there do not exist jurists truly capable of distinguishing [the preponderant and correct opinions] with certainty, and not due to mere supposition through emulation of others (bi-taba’iyyatin).

One who is incapable of distinguishing these matters must have recourse to those who are so capable, in order to absolve himself of liability (li-bārā’at dhimmatihi).

§11 Disappearance of independent jurists only occurred after evaluations of preponderance had occurred

§12 Procedure when no precedent exists, or when disagreement as to taṣḥīḥ exists between later jurists
Upon concluding my examination [of the responsibilities of the mufti], I saw fit that I comment upon the digests (mukhtasarāt) which are memorised in our day, highlighting the evaluations as to the most correct positions (taṣḥiḥāt), with full attribution as to the source and transmittor of a given evaluation (qāʾilīhā wa-nāqilīhā). In this, I am emulating the most learned of the Shafi’i’s in their treatment of their [own legal tradition’s] digests. For despite such evaluations already being present in [their tradition’s] commentaries (shurūḥ) and compendia (muṭawwalāt), they included the evaluations [in their commentaries upon the digests] as an aid to those incapable of accessing these longer works.

The most learned scholar, Burhān al-A’imma al-Maḥbūbī, states in the introduction to his work: ‘[This book] comprises the most correct of legal opinions and legal selections (aṣaḥḥ al-aqāwil wa-al-ikhtiyyārāt).’ The most learned scholar, Abū Barakāt al-Nasafi also mentions at the outset of his own work: ‘In this book, I mention the most relied-upon position of any given matter (al-mu’awwal ‘alayhi fi al-bāb).’ Thus, in enumerating the established legal cases, I highlight what these two scholars have declared regarding the said cases, and at times I also mention who of other scholars have concurred with their evaluations.

All this I have performed in the form of a commentary upon the Mukhtasar of Qudūrī (may Allah have mercy upon him), with supplementary material (ziyādat) from the corrections (taṣḥiḥ) provided by the most learned judge, Fakhr al-Dīn Qāḍīkhān, in his work, al-Fatāwā, for he is of the most deserving to be relied upon in his corrections.

Allah is the true patron who grants aid. He suffices me, and is the best reliance.

3.2 Analysis of the topoi

The following is a survey of the topoi developed by Ibn Qutlūbughā in the above passage, re-organised under a number of rubrics for analytical purposes. Their location in the translation is provided in parentheses in-text, allowing for quick cross-referencing in the translation above.

Definitions

The distinction between a mufti and a judge

The first difference which occurs between the treatise of Qāḍīkhān and that of Ibn Qutlūbughā is in regards to their respective target audiences: in the case of the earlier Qāḍīkhān, he addresses the mufti faced with delivering a legal response to a petition or an opinion regarding a new matter without precedent (wāqi‘a); with Ibn Qutlūbughā, the concern has shifted from the mufti to the judge. The historical reasons for this shift, and the effects of this upon the madhhab-law tradition, will be more fully discussed below.8 For now, it suffices to note that — insofar as precedent is

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8See p. 122.
3.2. Analysis of the topoi

deemed binding upon jurists associated with the legal tradition — the procedures delineated by Qāḍīkhān, and the warnings (both religious and legal) against ignoring these procedures, apply equally to both judges and muftis. The only difference between the two public legal figures is one of jurisdiction; citing the Mālikī jurist Ibn Farḥūn al-Ya‘murī:

No distinction is made between a mufti and a ruling judge (ḥākim), save that the decision (ḥukm) of a mufti is [merely] declarative, while that of the ruling judge is binding. [§2]

Thus, while the petitioner who requests a legal consultation from a mufti is legally free to seek out another opinion, a litigant in a legal case presided over by a judge and provided a ruling is bound by the judgement provided; the fact that it is ‘binding’ means that the litigant is required to act upon the ruling issued, and that it must be enforced. The opinion of a mere mufti is, ipso facto, of no relevance once a judgement has been issued.

We should also take note of what Ibn Qutlūbughā does not state in this section. In regards to the binding nature of a judge’s ruling, Ibn Qutlūbughā does not comment upon the possibility of a further appeal within the same madhhab-jurisdiction, another madhhab-jurisdiction, or to the chief judge, who might be of the same or a different madhhab, but who, as chief judge, would have the final judicial say in the land regardless of his own affiliation. Furthermore, in regards to the consultation of a mufti, he makes no distinction as to whether there is a moral or religious disapproval of seeking out the opinion of another jurisconsult, in the case that the opinion of the first consulted mufti did not convince or suit the petitioner. Finally, he makes no distinction, either by affirmation or negation, as to the purview of the respective roles of mufti and jurist in regards to matters strictly moral or ritual, and between matters strictly legal regarding the resolution of civil or criminal disputes between litigants in a court.\(^9\)

The distinction between a mujtahid and a muqallid

The second definitional distinction provided by Ibn Qutlūbughā is that of the mujtahid (independent jurist, master) against the muqallid (adherent, associate, fellow, one bound by precedent).\(^10\) In §4.1, he cites the Shāfi‘ī Taqī al-Dīn al-Subkī, who — in the context of establishing that a muqallid-ranked jurist within a madhhab must provide responses according to that tradition, and

\(^9\)Similarly, Ibn Qutlūbughā makes no mention of the procedures to be followed by the educator (the professor or lecturer in law) or the author-jurist, even though these roles as to the jurist had clearly been delineated within the wider madhhab-tradition by his time. They are both mentioned explicitly by ‘Abd al-Ghani al-Nābulṣi (see p. 120 below).

\(^10\)For the justification and contextualised use of these different renderings for the single Arabic terms, see p. 97.
3.2. Analysis of the topoi

is not permitted to offer a response according to a different madhhab — distinguishes between the mujtabihid and the muqallid based upon the ability of each type to develop his own legal opinions:

This, so long as [the mufti providing legal responses in accordance with a particular legal tradition] does not develop a contrary position, which, as a jurist bound by precedent (muqallid), he is not qualified to develop. In this he differs from an independent jurist (mujtahid) whose qualifications enable him to proceed from one position to another.'

Thus, the difference between the mujtahid and the muqallid is one of qualifications, presumably in knowledge and ability as a jurist, allowing the former to develop an independent legal opinion, and to change it to a different position if his conviction is changed.

A further subdivision of the rank of muqallid is provided in §7, by the Transoxianan Ḥanafi jurist Kasâni (d. 593/1196–7), after confirming the discretion of an independent jurist, and the obligation for him to act upon his own conviction: one who has command of the opinions of the school’s masters, and one who is unlearned therein. The former may practise tarįḥ, by choosing the opinion he considers most accurate, though even he must admit attribution of the legal opinion to the legal tradition and not to himself; the latter, unskilled jurist must follow the tarįḥ of higher ranking fellows associated with the madhhab in his land, even if there be only one such fellow in all the land. This nuance is an important introduction in the theoretical treatment of the ranks of jurists, a point we shall return to later.

Nonetheless, further on in §10, there is discussion as to whether or not even a mujtahid associated with a madhhab, insofar as he is a public office holder in his capacity as judge, may issue an opinion contrary to the legal tradition which he represents in his office. Citing the commentary on the Hidāya, entitled Fath al-Qadir, of his own teacher Ibn al-Humām (d. 861/1457), the legal opinion of a judge who is a mujtahid yet contravenes the legal tradition within which he is appointed as a judge is not to be paid heed. His ability to perform ījtihād has no significance for the jurist in his role as a holder of a public office representing a particular legal tradition, or guild (al-mufti ‘alā madhhab); high-ranking fellows and lower associates alike must provide responses and judgements, when queried, according to the guild with which their office is associated. Ibn Qutlûbughû then cites an earlier treatment of the Hidāya, the Qunya by Najm al-Dîn al-Zâhidî (d. 658/1259–60), who relates that the mujtahid’s lack of independent discretion is disputed. However, both authors concur that no such discretion is provided to a muqallid:

The transmitted opinions differ as to the status of a judge who, as an independent jurist, passes judgement contrary to his conviction; as for a judge bound by precedent (muqallid) and who passes judgement contrary to his legal tradition, his ruling is not to be enforced.

Ibn Qutlûbughû’s final treatment of this topic (§10.3) is provided in the form of an extended quotation from the famous Mālikī jurist Shihāb al-Dîn al-Qarāfî (d. 684/1285), in the context of
3.2. *Analysis of the topoi*

a similar but slightly more nuanced discussion: what type of discretion can the judge exercise through the practice of *tarjih* rather than *ijithad*? In this context, Qarafi argues, the judge who is a mujtahid is obliged to follow his own conviction, while the *muqallid*-judge is ‘permitted to respond in accordance with the most prominent position (*mashhur*) of his legal tradition, and to issue judgement accordingly’. In fact, the *muqallid*-judge is bound to do so, just as a similar mufti would be: his personal opinion is of no consequence due to his low ranking as a jurist. The choice of the word ‘permitted’ is meant to set off the lack of responsibility of a judge who is a mere guild-associate against the responsibility of the task faced by a mujtahid-judge: the former is relieved, in the full sense of the word, from the onerous task, while the latter has no recourse but to exert himself.

In summary, what must be noted in the distinction between the mujtahid and the *muqallid* in all of these discussions from jurists of various legal traditions is the assertion of the responsibility of both types of jurists to honour their duties as public office holders, whether as judge or mufti. Assuming public office not only bequeathed considerable responsibility, but — as the legal system developed in Mamluk times — became systemically pluralistic, leading to a need for greater regulation as to the application of law within each madhhab’s new ‘jurisdiction’. This need was reflected in the argument presented by some jurists that even the mujtahid, in his institutional role as holder of public office (as opposed to his private role as scholar-jurist), must honour the precedent established by the legal tradition within which his appointment was made. This signals a significant historical shift in the meaning of ‘madhhab’: from doctrinal school, to guild, to something approaching a jurisdiction. This madhhab-jurisdiction entailed procedures that had to be respected by all who held its judicial office, regardless of personal intellectual merit.

Based upon the above, I believe that our understanding of the intended extensions of the terms *muqallid* and mujtahid, at least as used during the Mamluk period, may be further refined, in accordance with their frame of reference. The proposed renderings revolve around noting the distinctions between an *epistemic* context — that of the jurist’s knowledge of the madhhab-as-repository of doctrine (commonly translated into English as ‘school of law’) — and an *institutional* context — that of the jurist’s rank and consequent responsibilities in the madhhab-as-guild (see Figure 3.1).

As for the term *muqallid*, I propose that it be rendered in a number of ways in accordance with the context in which it is found. When the context is epistemic, I use the term ‘adherent’ (i.e. to the doctrine). Thus, both a low-ranking jurist as well as a layman with no juridical training would be ‘adherents’ and bound by precedent. Alternatively, when the Arabic word is being used to distinguish the *muqallid* from the mujtahid in an institutional context, signifying the jurist’s rank and his ability to manipulate the law of a given madhhab-tradition, a further level
MADHHAB

Epistemic
(madhhab as school of law)

Master
(mujtahid)

Adherent
(muqallid)

Institutional
(madhhab as regulatory guild)

Master
(mujtahid, capable of first-order legal opinion-making)

Fellow
(muqallid capable of manipulation of the law)

Associate
(muqallid incapable of manipulation of the law)

Advanced fellow
capable of second-order law manipulation (sāhib takhrīj)

Regular fellow
capable of third-order law manipulation (sāhib tarijih/taṣḥīh)
of distinction must be made. I propose we use the term ‘fellow’ to indicate a jurist of high rank within a legal tradition, while the term ‘associate’ be used to indicate a jurist who is a member of the madhhab, but without the advanced knowledge (in the doctrine of the madhhab-quaschool of law) necessary to manipulate the law, and is thus of a lower rank (in the madhhab-quaguild) than a fellow. Possessing as he does sufficient knowledge (epistemic ranking), the fellow is permitted a degree of discretion in derivative opinion-making (in the second-order practice of takhrīj), or merely in rule-formulation (in the determining of precedent through tarjih and taṣḥīh). On the other hand, the associate is, epistemically, merely an adherent, and thus, institutionally, bound to precedent with no such discretion. \[11\] This usage dovetails with Kāsānī’s introduction of two levels of muqallid, as we shall see shortly.

Following with the above distinction between epistemic and institutional context, I believe the term ‘mujtahid’ may faithfully be rendered as ‘master’ in both contexts: epistemically, the mujtahid’s scholarly rank is that of epistemic mastery of the madhhab’s historical tradition; this, in turn, renders him capable, institutionally, to possess some form of primary ījīthād-capability. Though not discussed by our authors, the later epistemic rankings of mujtahid muṭlaq, mujtahid fi al-madhhab, and the mujtahid fi al-maṣā’il — as discussed by authors such as Ibn Kamāl Pāshā — would also comfortably be subsumed in such a rubric.

I believe this distinction as to the renderings is justified in the historical move of emphasis between Qāḍīkhān (assuming §6.3 is legitimately his) and Ibn Qutlūbughā: Qāḍīkhān provides a definition of the mujtahid according to what the jurist knows of the doctrine and methodologies of the legal tradition, and does not actually define the term ‘muqallid’, though he does outline the responsibilities of such a jurist in §6.4.2.3. Ibn Qutlūbughā, on the other hand, vacillates between the institutional and the epistemic contexts. To be clear, the two are obviously and necessarily related (the institutional following from the epistemic), but the contexts justify a different emphasis in translation.

**The procedures of rule-determinacy**

**Rasm al-muṭfī revisited**

A major preoccupation of Ibn Qutlūbughā’s treatise is the proper procedure to be observed by the jurist in determining the rule. He begins in §6 with reproducing the complete text of Qāḍīkhān’s ‘Rasm al-muṭfī’ treatise which prefaces his Fatāwā, with the rest of Ibn Qutlūbughā’s introduction

to al-Taşfüh wa-al-tarjīḥ effectively being an expansion on the main themes presented therein, and further delineation of procedure and considerations that Qāḍīkhān had not considered in his work.

The following is a brief description of the procedure to be followed by the jurisconsult, highlighting the reasoning deployed. Since much of Qāḍīkhān’s ‘Rasm al-mufrī’ is largely an exercise in process, the procedural steps he prescribed for the mufti may be presented in the form of a schematic diagram (see Figure 3.2). The highest level division Qāḍīkhān makes is between cases which are found to be explicitly treated in the corpus of zāhir al-rīwāya (§6.1) versus cases which are not (§6.2). If the case is found in the zāhir al-rīwāya, the mufti’s response must always align with the case found in the corpus; any further decision-making as to discovering the rule is a largely automatic process (though exceptions to the case exist): it requires assessing how much agreement or disagreement exists between Abū Ḥanīfa and his fellows. In the scenario that Abū Ḥanīfa and his Two Fellows are of one opinion in a given case, he is obliged to follow their agreed-upon position. In the scenario that some of Abū Ḥanīfa’s Fellows dispute their teacher’s opinion, a further step is required. If Abū Ḥanīfa’s position is supported by even one of his main Two Fellows, the mufti must adopt this position; if Abū Ḥanīfa is contradicted by both of them, then the mufti is obliged to assess their reasons: if the disagreement stems from changes of wider social circumstance (‘the age and times’), or in matters regarding worldly transactions of trade and contracts (the example of sharecropping is given), which had occurred in the time of the Two Fellows, then the mufti is to follow their opinion, ‘out of consideration for the changes in the circumstances of people’ (i.e. public interest). The problem of a disagreement that does not stem from such changes in circumstance, presents the singular instance in which Qāḍīkhān relates two positions from earlier scholars as to how the jurist is to proceed, without decisively establishing which position is stronger: the first is the position related of Ibn al-Mubārak, in which the position of Abū Ḥanīfa is to be followed; the second is a position attributed to anonymous other scholars, stating that the jurist possesses the discretion to choose between the transmitted opinions from the early jurists of the tradition.

After quoting Qāḍīkhān’s tract in full (summarised in the schematic diagram in Figure 3.2),

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12See, for example, ‘Kitāb al-raḍā’, where, in the case of two women’s breast-milk being mixed together and fed to an infant, it is the opinion of Muḥammad Shaybānī — who holds that both women become the infant’s milk-mothers, and thus ties of kinship-through-wetnursing are established with both of them and their blood relatives — which is taken, over the opinion of Abū Ḥanīfa and Abū Yūsuf — who hold that only the woman whose milk was dominant is considered his milk-mother. To support this tarjīḥ, Ibn Qutlūbughā posits that Muḥammad Shaybānī’s position is more precautionary in matters in which impermissibility is established thereby. See Ibn Qutlūbughā, al-Taṣḥīh wa-al-tarjīḥ, 337.
Is the case found in the Zāhir al-riwāyat?

Yes:

Is there a known dispute between Abu Hanīfa and his Two Fellows?

No:

Does the case accord with a ruling found in the primary works (ṣūl) of our fellows which supports it?

Yes:

He must adopt their agreed-upon opinion

Yes, supported by one of them:

Is Abu Hanīfa supported by either of Two Fellows?

No, contradicted by both of them:

Their joint opinion must be followed

Does the disagreement stem from changes of the age and times; matters of sharecropping, transactions, or similar matters?

Yes:

The ruling must be implemented

No:

Have the latter-day scholars (mutaḥakkin) agreed upon a position?

Yes:

Their position must be implemented

No:

Is the mufti a mujtahid or a muqallid?

Mujtahid:

He must exert himself in arriving at a ruling

Muqallid:

He must solicit the opinion of the most learned jurist in his estimation, and attribute the opinion to him

Opinion of Two Fellows is to be followed

Ibn al-Mubārak: the opinion of Abu Hanīfa must be followed

Other scholars: the jurist possesses discretion to choose between the transmitted opinions

No:

Have the latter-day scholars (mutaḥakkin) agreed upon a position?

Yes:

Their position must be implemented

No:

Does the case accord with a ruling found in the primary works (ṣūl) of our fellows which supports it?

Yes:

The ruling must be implemented

No:

Is the case found in the Zāhir al-riwāyat?
Ibn Qutlubughah returns to the problem of a legal functionary unqualified to issue a judgement, due either to the functionary’s uncertainty as to the relevant precedent or his inability to assess the contingent factors necessitating his exercising of discretion. Towards a clarification of this point, Ibn Qutlubughah cites the Ḥanafi ‘Būrḥān al-A’īmma’ al-Ṣadr al-Shahīd (d. 536/1141)\(^\text{13}\), who confirms that ‘the latter-day scholars state that [a jurist in this predicament] should seek counsel (yastaftī)’ (§9). This is re-emphasised in §11, in which — after providing a historical explanation for the disappearance of the mujtahids of the highest rank (as attested to by his use of the word ‘‘afqah’’), with the establishment of consistent rules through the rule-formulation process of tarjiḥ in following eras — Ibn Qutlubughah himself argues:

Similarly, they have selected the position of one of the Two Fellows in those legal matters regarding which there is no transmitted statement (naṣṣ) from the Imam, for reasons already elucidated by Qāḍīkhān (may Allah have mercy upon him). In fact, the jurists have even preferred a number of opinions issued by Zufar over and above the opinions of his [Two] Fellows for similar reasons. Their evaluations as to the preponderant opinion (tarjiḥ) and the most correct position (tashīḥ) have been preserved, and it is incumbent upon us to follow the most preponderant positions and to act in accordance with them, just as if they had directly issued us these legal opinions during their own lifetimes.

What is of importance here is the emphasis not on the legal opinions of the earliest scholars, but (as per the phrase in bold) the tarjiḥ-evaluations resulting in rule-determinacy performed by later scholars such as Qudūrī, Qāḍīkhān, Būrḥān al-Shari’a al-Maḥbūbī (d. 673/1274–5), and Abū al-Barakāt al-Nasafi (d. ca. 710/1310–11), as Ibn Qutlubughah states in §13. Ibn Qutlubughah’s citing of these statements intimates a change: it is no longer assumed that a legal public office holder is sufficiently qualified, qua jurist, to implement Qāḍīkhān’s procedures; he is no longer trusted to be capable of deciding whether the case necessitates giving precedence to Abū Ḥanīfa’s doctrine, or choosing amongst the other opinions of the early jurists preserved by the tradition. The public functionary is now directed to seek out the counsel of a higher ranking scholar-jurist of the madhhab, and to issue his response or judgement accordingly.

Returning to ‘Rasm al-muftī’, Qāḍīkhān’s second division is for cases not to be found in the zāhir al-riwāya. The crux of the matter revolves around whether the ruling can be found in what Qāḍīkhān terms the ‘usūl’, the primary works of the early jurists of the madhhab.\(^\text{14}\) If the case is found therein, then that ruling must be implemented. If it is not found in the primary works of the tradition, the mufti must look towards the latter-day scholars (al-muta’akkhirīn): had they


\(^{14}\)The relationship of which to the zāhir al-riwāya I shall return to in Section 3.5.
developed and agreed upon a position? If so, then this position must be adopted; if not, one further step must be taken: if the mufti trying to determine the rule is a mujtahid, he must exert himself in arriving at a suitable ruling; if a muqallid, he is obliged to solicit the opinion of the most learned jurist in his estimation, wherever he might be, and — when issuing his response — attribute the opinion to that scholar-jurist.

Ibn Qutlūbūghā also confirms Qāḍīkhān’s obliging of a mufti to solicit the opinion of a more senior jurist, when the zāhir al-rīwāya does not contain a solution to the case at hand, and the later works do not record an agreed-upon opinion from the latter-day scholars (al-muta’akhkhirūn). However, in §12, he introduces a variant to the problem of indeterminacy (bold emphasis added to indicate the newly-introduced variant):

It has been said that, in regards to those legal matters for which no position has been transmitted from the Imams, opinions (aqwāl) are sometimes related unaccompanied by any evaluation as to the preponderance of one position over the others (bi-lā tarijī), and the jurists may disagree as to the more correct position (tāshīh).

To this I reply: [A jurist faced with this situation] should follow the same procedures that [earlier jurists] had followed, by taking into consideration changes in local custom (’urf), changes in people’s circumstances (aḥwāl al-nās), what is of greater advantage to people’s welfare (mā huwa arfaq bi-al-nās), what customary practice has settled upon (mā zahara ’alayhi al-ta’āmul), and the strengthening of the arguments of a given opinion (mā qawīya wajhuḥu). There is never an age in which there do not exist jurists truly capable of distinguishing [the preponderant and correct opinions] with certainty, and not due to mere supposition through emulation of others (bi-tabāʿiyatin). One who is incapable of distinguishing these matters must have recourse to those who are so capable, in order to absolve himself from liability (li-barā’at dhimmatiḥi).

The section in bold betrays a surge in the number of legal works composed in the centuries between Qāḍīkhān and Ibn Qutlūbūghā, leading Ibn Qutlūbūghā to address the even greater problem of rule-indeterminacy caused by this profusion. This point is alluded to by Ibn Qutlūbūghā in §13, when he lists the works which he relied upon for establishing the tarijī and tāshīh in his commentary on Qudūrī’s Mukhtāṣar. Selecting certain works, of course, entails that others were not selected for reasons that are left unspoken, but which the passage above perhaps intimates.15

In conclusion, aside from the particularities of their respective descriptions of procedure and their warnings as to the spiritual and moral consequences of capricious decision-making, each of Ibn Qutlūbūghā’s and Qāḍīkhān’s treatment of rasm al-muftī seek to establish the subservient

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15Ibn ‘Abidin, in his ‘Uqūd rasm al-muftī, addresses the authority of the latter-day works authored within the tradition: which works are to be relied upon and which are not, giving examples of works — such as the Tanwīr al-abṣār of Muhammad ibn ‘Abd-Allāh al-Tamartāshī al-Ghazzi (d.1004/1596) — which contain weak positions and unreliable transmissions. See Ibn ‘Abidin, Majmū‘at rasā‘il Ibn ‘Abidin, 34–7. On Tamartāshī, see Muḥammad al-Muḥībbī, Khulāṣat al-athar fi a’yān al-qarn al-ḥādī ‘aṣhr, 4 vols. (Cairo: al-Maṭba’a al-wahbiyya, 1868–1916), 3:475.
3.2. Analysis of the topoi

relationship between the public legal functionary and the scholar-jurist, a concomitant of the fiqh being a scholarly jurist’s law.

Invalidity of a judgement based on a non-preponderant opinion

In the opening lines of his treatise (§1.1), Ibn Qutilbughah establishes a maxim: ‘The non-preponderant opinion (marjñâh) is, in the face of the preponderant opinion (rájñîh), effectively non-existent’, immediately followed by doctrinal judgement: ‘To grant preponderance (tarjñîh) to one ruling over its contrary without grounds (bi-ghayr murajñîh) is forbidden.’ Further, in §10.3, he offers Qarññî’s already cited argument that a mujtahid is obliged to follow his own tarjñîh, while a muqallid abdicates this responsibility by following the most prominent position (mashñârûr) of the legal tradition, stating at the end of the quoted passage, ‘As for issuing legal judgements and responses to petitions according to a non-preponderant opinion (marjñâh), such an act contravenes juristic consensus.’

Thus, in addition to his appeal to juristic authority (of the non-ññanañî Qarññî) and juristic consensus as to establishing the invalidity of issuing decisions according to non-preponderant opinions, Ibn Qutilbughah is drawing a parallel between the procedural tarjñîh-theory of fiqh, and the hermeneutical-theory of usñîl al-fiñq in his first maxim: namely, that the non-preponderant opinion (marjñâh) is akin to an abrogated text (mansñûkh), while the preponderant opinion (rájñîh) is akin to the abrogating text (násîkh); both the marjñâh and mansñûkh are effectively of no consideration in establishing rules or first-order legal opinions, respectively.

Transmission-assessment, opinion-assessment (tarjñîh al-riñwñâyât, tarjñîh al-aqwñâl)

From what has preceded, it is clear that Qðññîññ and Ibn Qutilbughah were most concerned with the practising jurist’s implementing the strongest legal opinion, and — in light of the dearth of qualified independent jurists — not following his own uninformed opinion, or, worse yet, his caprice. Determining the rule from the multitude of legal opinions issued by earlier jurists associated with the madhñhab necessitated that the muñfti or judge be able to perform two different evaluative tasks, two different kinds of tarjñîh. The first task was formal: to distinguish between the various transmitted legal opinions as to their strength in transmission; this was known as ‘the assessment of the opinion’s transmissions’ (tarjñîh al-riñwñâyât). The second task was substantive: assuming that the transmitted legal opinions were transmitted equally reliably, the task was to assess the legal opinion itself; this was known as ‘the assessment of the legal opinions’ (tarjñîh al-aqwñâl). The following will analyse each concept as utilised by Qðññîññ in turn.

Transmission-assessment (tarjñîh al-riñwñâyât): The first type of tarjñîh is transmission-assessment (tarjñîh al-riñwñâyât): assessing a given legal opinion on the basis of the reliability of its transmission, presumably according to the ranking and importance accorded by the tradition to the
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fiqh work(s) in which it is preserved. The importance of being able to distinguish between strong and weak transmissions is alluded to in the beginning of Qāḍīkhān’s treatment (§6.1), in his use of the term ‘clearly-transmitted opinions (*al-riwāyāt al-ẓāhira*)’. The term, though seemingly used non-technically in a natural-language context, is clearly a cognate for the technical term ‘ẓāhir *al-riwāya*’, as used in the following major section (cf. §6.1 and §6.2). The exact denotation of the term, however, is not provided. He makes a connection between these ‘clearly-transmitted opinions’ and the ‘primary works of our fellows (*usūl ashābinā*)’ in §6.2, but again, provides no denotation of the term.\(^{16}\) What his schemata does do is emphasise the importance for a mufti to know which of the primary jurists of the legal tradition was reported to have developed a given legal opinion, and followed the procedures outlined above in establishing the rule based upon the respective weight given to each jurist. What is missing, however, is an assessment of the transmission process itself; as will be discussed below,\(^{17}\) we are left with Qāḍīkhān’s assumption that the reader was already as familiar with the term’s denotations: the locus where these so-called transmissions of the opinions may be found.

**Opinion-assessment (*tarjiḥ al-aqwāl*)**: In contrast to transmission-assessment, the weighing of legal opinions-quai-opinions, or opinion-assessment (*tarjiḥ al-aqwāl*), is given a more definite treatment. From Qāḍīkhān’s presentation of the process to be followed by the mufti, we can deduce two aspects of ‘opinion-assessment (*tarjiḥ al-aqwāl*)’: (1) assessment of the legal opinion according to who issued it, and (2) assessment of the strength of the opinion itself in view of the case at hand.\(^{18}\) To be clear, this assessment of the opinion’s supporting argument does not entail a critique on the level of jurisprudential first-order proofs, such as the veracity of the hermeneutics employed, or the scriptural proofs. Rather, as Qāḍīkhān’s examples patentely show, what is meant is an assessment of the relevancy of the opinion’s supporting reasoning to the circumstances in which the mufti must provide a decision; if the circumstances have sufficiently changed, the mufti would forego what, according to regular procedure, should be the ‘rule’, and may issue a decision according to the opinion of another of the tradition’s first-order jurists (§6.1.2), or indeed an agreed-upon opinion of latter-day jurists (§6.2.2.1).

Issues of transmission being assumed equal, Qāḍīkhān establishes the supremacy of the early, first-order jurists of the tradition in general, that of Abū Ḥanīfā in particular, and the binding nature of their opinions upon even an *ijtihād*-capable mufti who is associated with the madhhab:

\(^{16}\) For a further discussion of the use of the term ‘*usūl* and its relation to the ẓāhir *al-riwāya*, see p. 126.

\(^{17}\) See p. 125 below.

\(^{18}\) This is what the modern Egyptian scholar Abū Zahra, in his work *Abū Ḥanīfa*, calls *‘tarjiḥ al-dalīl’* i.e. assessment of the opinion’s evidence, as a subset of opinion-assessment (*tarjiḥ al-aqwāl*). See Abū Zahra, *Abū Ḥanīfa*, 398.
...for it is more apparent (al-zāhīr) that the truth is to be found with our fellows; he is not of their ranks, and his legal reasoning (ijtīhād) is not equal to theirs. The opinion of he who contradicts our fellows is paid no heed, nor is his proof (hujiya) accepted, for they knew the evidence (adilla), and distinguished between that which is correct and well-established and that which is not. (§6.1)

He continues, in §6.1.2.2.1 and §6.1.2.2.2, to provide the types of circumstantial reasons that would dictate giving preference to the legal opinion of the Two Fellows (or others) over that of the eponym. Thus, the order of authority is clear: the opinion of Abū Ḥanīfa, as eponymous master of the tradition, is to be deemed the general rule, unless circumstances related to people’s welfare (usually worldly, but sometimes spiritual as well) require the taking of an opinion from one of his Two Fellows, or indeed — in new matters — from latter-day scholars. Thus, while not explicitly ruling them out, Qāḍīkhān does not address the authoritative status of the opinions of other of Abū Ḥanīfa’s fellows, such as Zufar ibn al-Hudhayl, al-Ḥasan ibn Ziyād al-Lu’lu’ī, or others. In any case, Qāḍīkhān clearly assumes the existence of mujtahids of some degree — whether beyond or within a madhhab-tradition — and the ability of the type of ‘mufti’ he is addressing to be one of these high-ranking jurists, or to have relatively easy access to one.

Thus, Qāḍīkhān had given the weighing of legal opinions-quas-opinions (tarjīḥ al-aqwāl) relatively more treatment than he had that of assessing a given legal opinion on the basis of the provenance of its transmission (tarjīḥ al-riwāyāt). As we have seen, he outlined the reasons for preferring the opinions of other than Abū Ḥanīfa, even when the transmission of his opinion is well-established, as well as the circumstantial reasons for preferring the legal opinion of the Two Fellows (or others) in rule-determinacy. Ibn Quṭlūbughā confirms this point in §11, and simply provides further detail and examples, explaining that even certain opinions of Zufar al-Hudhalī, another of Abū Ḥanīfa’s fellows, have been accepted as the dominant positions for similar reasons. It will be left until the following chapter to study examples of such rule-formulation which takes into consideration circumstances of the case in order to overrule a sound transmission of a legal opinion that otherwise should have become the rule.

In concluding this section on the two types of tarjīḥ, we should take note of two matters. First, the concepts of tarjīḥ al-riwāyāt and tarjīḥ al-aqwāl were not exclusively Ḥanāfī: Ibn Quṭlūbughā quotes the Mālikī Ibn Fāṭḥūn (al-Ya’mūri), who — in warning against capriciousness in tarjīḥ — states that the jurist issuing judgement must be able to distinguish and decide which of two transmissions (riwāya) or two primary legal opinions (qaww) is the more prominent (mashhūr) (§1.2). Of course, the historical development and doctrinal content of each legal tradition would dictate that the exact procedures to be followed, as well as the terminology used to denote these processes, would differ from madhhab to madhhab. Such formalities aside, the problems of rule-determinacy facing all the madhhabs resulted in similar solutions to the problem of tarjīḥ amongst
the legal traditions.

Secondly, while Qādikān is the first jurist to describe the place of the źāhir al-riwāya in the process of tarjih, he does not provide a scholastic definition. Unfortunately, Ibn Qutlūbushā Likewise fails to deliver a definition; again, it is assumed that the exact denotation of the term is known to the jurists of his day. What we lose by this omission in both tracts is a sense of historical development as to the term’s denotation: does the term, from the time of our authors, denote transmissions of legal opinions that take place through specific works (namely, the ‘six books’ of al-Shaybānī, as clearly defined by Ibn ʿAbidīn), or was it — in earlier times — equally applicable to opinions found in works written by and transmitted from other formative jurists, or transmitted in alternative recensions of Shaybānī’s works? We shall return to this question of the history of the denotation of ‘ţāhir al-riwāya’ below.¹⁹

Judicial discretion

A central concern of Ibn Qutlūbushā’s is the scope of discretion afforded to a legal functionary when issuing a decision, in light of his ability to determine, as a scholar, the most suitable opinion of the tradition’s corpus for the case at hand. A distinction is consistently made between the dimensions of the practising jurist: between his mastery of the learned tradition as a scholar, he a master (mujtahid), a fellow (a muqallid capable of tarjih), or an associate (muqallid incapable of tarjih)²⁰ — an epistemic assessment; and between his role as a public functionary — a socio-legal assessment. Such a distinction is most clearly enunciated in the following statement of Subkī as to the responsibility of the judge (§4.1):

By associating himself to the legal tradition of a given Imam, [the mufti] is responsible to act in accordance with it. This, so long as he does not develop a contrary position, which, as a jurist bound by precedent (muqallid), he is not qualified to develop. In this he differs from a first-order jurist (mujtahid) whose qualifications enable him to proceed from one position to another.

Qādikān’s framework, upon which Ibn Qutlūbushā’s treatment expands, establishes a two-tier approach in regards to the discretion of a mufti or judge, between what we might term first-order precedent and second-order precedent (§6.1). The distinction returns to the strength of the source of the legal opinion. First-order precedents are those legal opinions established by one of the tradition’s masters and transmitted authoritatively through the źāhir al-riwāya. If a precedent is first-order, it must be established by the mufti practising tarjih as the rule. All legal practitioners and functionaries must establish their issuance of consultations and judgements

¹⁹See p. 125 below.
²⁰See Kāsānī’s distinctions in §7, and our discussion thereof previously on p. 96.
upon this rule; the functionary possesses no discretion to contradict it, and any such judgement he passes is invalid and revoked:

If, in regards to the case, an opinion of one of our fellows is related (marwiyya) in the corpus of clearly-transmitted opinions (al-riwāyāt al-żāhirā), with no known dispute between our fellows [as to its veracity], then he is to adopt their position, and to give a response accordingly (yamī iltayhim wa-yuft bi-qawlihim). He is not to contradict them with his own opinion (ra‘y), even if he is a capable independent jurist (mujtahid mutqin), for it is more apparent (al-żāhir) that the truth is to be found with our fellows; he is not of their ranks, and his legal reasoning (ijtihād) is not equal to theirs. The opinion of he who contradicts our fellows is paid no heed, nor is his proof (hujja) accepted, for they knew the evidence (adīlā), and distinguished between that which is correct and well-established and that which is not.

If, on the other hand, it is a second-order precedent — meaning, the case is not found in the corpus of clearly-transmitted opinions (ẓāhir al-riwāya) — then the public functionary, if suitably qualified as a master scholar, is permitted discretion in selecting what he feels is the most suitable rule for the case at hand, or if he were of the rank of mujtahid scholar-jurist, he could even employ his own ijtihād in his judicial capacity (§6.2.2.2.1). A mere associate scholar, on the other hand, would have to consult a higher ranked scholar if he felt the case required a rule other than the established precedent, and would have to pass judgement accordingly upon being given a response, regardless of his own conviction (§6.2.2.2.2). For to do otherwise, in Qāḍīkhān’s phrase, ‘ascribes to Allah Most High a falsehood, by making impermissible a matter which is licit, or permissible that which is illicit’ (§6.2.2.2.2).

All of the above, Ibn Qutlūbughā and his sources make clear, is predicated on the assumption that the circumstances of the present case do not differ from that of the precedent due to changes in custom or practice. In such a case, a suitably-qualified practitioner would possess the discretion to alter the rule when issuing his judgement, while a non-qualified jurist, again, would have recourse to one more qualified than himself (§6.2.2.1, §6.2.2.2).

After citing Qāḍīkhān’s treatment of this topic, Ibn Qutlūbughā proceeds to quote Qarāfī, who frames the matter in terms of a judge’s ‘right’ not to have to be encumbered by his own ijtihād, which relieves him of the moral and religious responsibility to God (§10.3), and the consequences of passing a judgement that, in Qāḍīkhān’s previously quoted phrase, ‘ascribes to Allah Most High a falsehood, by making impermissible a matter which is licit, or permissible that which is illicit’ (§6.2.2.2.2).

What Ibn Qutlūbughā was battling against was lack of methodological consistency. This is due to three responsibilities of the jurist. The first is a personal theological-moral responsibility to God, by discharging his duty of serving his fellow man, through observance of His commandments to honesty and equity, not following his caprice (such as by passing judgement that would serve his or his acquaintances own personal ends), and — in the case of an appointed judge or mufti —
acting only within the remit of devolved responsibility (§1, §6.3.2.3, §8.3, §10). The second is a responsibility to his fellow man, by discharging his duty towards the fatwa-petitioner or judicial-litigant with fairness and consistency, through issuing judgements constant with precedent; this ensures the predictability and equality of law, such that a petitioner or litigant sufficiently familiar with the fiqh (whether viewed as deontology or as law) could reasonably understand the consequences of his actions, and thus plan his life for both spiritual and worldly purposes. The third is a social-institutional responsibility to his madhhab, by discharging his duty as an associate of his madhhab-qua-guild, through upholding the coherency of both the particular legal tradition (madhhab) and that of post-classical Muslim society's pluralist legal system. In other words, his role as a practising jurist entails theological responsibilities (to God), deontological responsibilities (to the rights of individuals), and utilitarian responsibilities (to societal welfare).

Thus, the judge's or mufti's own conviction was of import only if he was a sufficiently learned scholar-jurist. It is important to note here that — under the madhhab-jurisdiction as it developed in the Mamluk era — even a judge capable of ijtihad could be obliged, if appointed to a post of judgeship for a particular madhhab's jurisdiction, to abide only by the precedent established within the legal tradition of that jurisdiction. The justifications for this and other aspects of tarjih and taqlid are presented in the section which follows.

3.3 Arguments for binding precedent

While Ibn Qutlubughâ expanded upon Qâdîkhân's treatise, adding nuances and a number of novel topoi to his presentation of the procedure of rule-determination, it is in his arguments for the necessity of binding precedent (taqlid) as established through precedent-evaluation (tarjih) that Ibn Qutlubughâ's treatise signals a substantial advance. Interspersed throughout his tract, Ibn Qutlubughâ employs a number of arguments for the necessity of a judge or mufti's abiding by precedent: the ethico-religious argument, the argument from legal-system consistency, the argument from legal-system coherency, the argument from historical necessity, the argument from strengthened decision-making, and the argument from predictability.21

The ethico-religious argument

Ibn Qutlubughâ begins his tract with a rhetorical display of incredulity against the unethical capricious abuse of the madhhab-tradition by judges of his day:

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I have observed people capriciously abusing the tradition (madhab) of our Imams (may Allah be pleased with them), to the extent that I have even heard some judges be so brash as to ask, ‘Is there any interdiction against this?’ ‘Indeed there is!’ I responded. (§1)

He proceeds to root his argument for tarjih in a critique of this capriciousness rampant amongst the judges of his day. The selection of one legal opinion over another without grounds is forbidden, he argues, on the basis that passing judgement by caprice is illicit (ittibā‘ al-hawā ḥarām). He continues in §4 to buttress this ethico-religious reasoning with citations arguing the same, from prominent theoreticians and jurists across the madhhab; the Mālikī Ibn Farḥūn (al-Ya‘muri), the Shāfi‘i Ibn al-Ṣalāḥ, and the Mālikī Abū al-Walid al-Bāji are all cited in succession to establish the same point: there is consensus amongst the jurists that issuing judgement by caprice (tashahhūt) is morally repugnant and religiously impermissible (§1.1–§1.4). The Shāfi‘i Taqī al-Din al-Subki adds that such capricious decision-making legally invalidates the ruling issued, which must then be revoked: for a mufti to provide rulings from a legal tradition other than the one to which he is associated by training is not permitted, ‘for such an action is pure capriciousness’ (§4). This position is echoed by the Mālikī Shihāb al-Dīn al-Qarāfī, who cites juristic consensus (jimā‘) as to the impermissibility of issuing judgement in accordance with one’s caprice (§10.3). A jurist of insufficient knowledge and rank to make use of the rasm al-muftī heuristic, states Qāḍīkhān, must consult the most learned jurist he can, and refrain from conjecture, ‘out of fear of ascribing to Allah Most High a falsehood, by making impermissible a matter which is licit, or permissible that which is illicit’ (§6.2.2.2.2). This, then, is the place of God-fearingness and purity of intention for God in the role of a legal functionary; as stated by a Ḥanafī jurist of no lesser rank than ‘the King of Scholars’, ‘Alā‘ al-Dīn al-Kāsānī, the act of ‘issuance of judgement is a form of worship, and worship is to make pure one’s actions entirely for Allah Most High’ (§8). As Ibn Quṭlūbughā concludes towards the end of the tract, ‘one who is incapable of distinguishing these matters must have recourse to those who are so capable, in order absolve himself of liability (li-barā‘at dhimm-matīḥ)’ — a liability, in light of the arguments put forth by his cross-madhab sources, with both legal and spiritual ramifications. This liability is affirmed by Ibn Quṭlūbughā in his emphasising repeatedly the obligation upon an unqualified legal functionary to seek counsel before issuing a decision (§6.2.2.2.2, §7, §9, §12); to do otherwise is to legally risk dismissal from his post and the overturning of his ruling (§10.2), and to spiritually entail the displeasure of God.

The argument from legal-system consistency

The second argument that Ibn Quṭlūbughā employs in support of binding precedent is that of legal-system consistency. Consistency of a legal-system implies that the rules are stable, and
their application uniform. This in turn engenders benefits for both the legal system (it economises judicial resources, and ensures accountability which in turn further strengthens the respect and trust given to the legal system and its institutions) and its subjects (it enhances law’s predictability and dictates that similar cases be ruled similarly, both of which result in increased fairness for the general public subjected to the legal system). Legal consistency is what lies behind two of Ibn Qutṭūbūghā’s arguments: the invalidity of _ex post facto_ decision-changes, and the necessity of binding judges to their tradition in a concurrent-madhhab jurisdiction.

**The invalidity of _ex post facto_ decision-changes:** The first argument put forth by Ibn Qutṭūbūghā which is implicitly based upon the necessity of legal-system consistency is presented in §3:

> The jurists have unanimously agreed that it is invalid to renge on an issued legal decision deemed binding, _ex post facto_ (lā _yasībiḥ al-rujūḥ ‘an _al-taqlid_ ba’d al-‘_amal_); and this is the chosen opinion (mukhtār) of the [Hanafi] legal tradition (madhhab).

Let us unpack this statement: A litigant or petitioner asks for a ruling from a judge or mufti, respectively; using the due process of rule-determination (or having recourse to a scholar-jurist who can), he delivers a decision; once delivered, it is binding upon the litigant or petitioner, as a result of the correctness of procedure followed by the legal functionary in determining and delivering the rule. The decision (and, hence, the rule which was determined as applicable in this case) is then acted upon by the concerned parties. What, then, if the jurist who determined the rule (be it the judge or mufti himself, or the scholar-jurist to whom they had recourse), changes his mind and determines that another opinion should instead be deemed the binding precedent (_al-rājīḥ_) or more correct rule (_al-āṣahḥ_) in this case, after the decision had already been acted upon or enforced?

This is the scenario upon which Ibn Qutṭūbūghā weighs in, stating that — once the litigant or petitioner has acted upon the issued decision — the judge or mufti may not then renge on that decision, even if he (or the jurist whose _tarjīḥ_ he applied) truly and authentically has changed his mind, and considers the rule used in the decision incorrect. This change may be due to the scholar having made a mistake of _tarjīḥ_ through lapse of memory as to the correct rule (as stated, in a related scenario, in §10), or to a change in legal reasoning (_ṣīḥāḍ_) if he is so qualified. In either case, once the concerned party had acted upon the issued decision, the act itself must be considered legal and valid, as a result of the due procedure that was followed. It is inferred, however, from Ibn Qutṭūbūghā’s phrasing, that if the decision had not yet been acted upon or

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22I have interpreted the phrase ‘_al-rūḥ ‘an _al-taqlad_’ as ‘to renge on an issued legal decision deemed binding’, reading in this context the word ‘taqlid’ as a verbal noun of the second verb form pattern, i.e. ‘(the process of) making something binding’.
enforced, it would be valid for the decision to be changed; likewise, other similar cases may, in the future, validly be given a different ruling.\footnote{What, then, would be the response if a future litigant in a different case, having known of the decision in this first case, argued that the rules were not being applied fairly and consistently — in other words, his moral right to be able to predict the law, and base his actions thereupon, was harmed by this change? The answer, it appears, would be that a procedural error had occurred during determination of which precedent amongst the tradition’s numerous opinions was to be deemed binding; as such, the previous ruling could have no weight for future cases. This, then, would be a difference between the madhhab-system and a common law system: the fact that the former is a jurist’s law means that the judicial decisions qua decisions do not have the force of precedent, but rather the rules they invoke do, which — if determined incorrectly — could be changed in regards to future judicial proceedings.}

We see to what lengths Ibn Qutilubah and the theoreticians of taqlid went in order to ensure consistency in the madhhab-system. First, to renge upon the decision \textit{ex post facto} would destroy the trust with which the public views the legal system: if the rule regarding a particular act in a particular case can thus be altered after the act, changing the status of the act they committed on the basis of the judgement from valid to invalid, or from licit to illicit, the lack of consistency would engender a loss of trust on all who would consider having recourse to the legal system in order to resolve disputes or be provided a solution to a query. Secondly, it could have consequences which could be material (e.g. property may have been transferred and consumed), personal/relational (e.g. a legal separation may have been decided and the woman since remarried), or otherwise irreparable for the litigants or petitioners in a given case. Lastly, permitting a change of decision retroactively would offer loopholes to the legal functionaries themselves, or to those with access to them, allowing for an abuse of the system, personally or through cronyism (the matter which dismayed Baji in the story he relates in §1.4).\footnote{For a discussion of some similarity in contemporary legal philosophy, see S. Hurley ‘Coherence, Hypothetical Cases, and Precedent’, \textit{Oxford Journal of Legal Studies}, 10/2 (1990), 221–51.}

\textbf{The necessity of binding judges to their tradition in a concurrent-madhhab jurisdiction:} Ibn Qutilubah further supports this argument of \textit{tarjih} by the necessity of legal-consistency in the next section. Here, he introduces the legal obligation of the functionary to issue decisions in accordance with the madhhab for which his post is established, and — further in the text — cites an opinion that judgements issued contrary to this procedure must be revoked, and the judge who fails to follow due process dismissed from his office. He begins by citing Taqi al-Din al-Subki:

\begin{quote}
If a mufti providing legal responses in accordance with a particular legal tradition (\textit{al-mufti `ala madhhab}) issues a legal response, stating that the ruling of a matter is such-and-such according to the legal tradition of a [particular] Imam, he is not permitted to base his legal opinions upon a different legal tradition (laya lahu an yuqalid ghayrahu)
\end{quote}
nor to issue responses that contravene his legal tradition, for such an action is pure capriciousness.... By associating himself to the legal tradition of a given Imam, he is responsible to act in accordance with it.

We have, in this passage, the phrase ‘al-muṭṭī ‘alā madḥhab’ — a muṭṭī providing legal responses in accordance with a particular madḥhab — and the requirement that such a legal functionary not be permitted to contradict the madḥhab with which he is associated. In light of the grammatical structure of the phrase (literally, a muṭṭī ‘upon a way someone else has gone’, i.e. in accordance with a madḥhab) and the time period in which Subki is writing (mid-Mamluk), the term ‘madḥhab’ should be understood as a legal tradition institutionalised into a guild of jurists. In its regulatory and institutional capacity, the madḥhab thus incorporates but goes beyond the meaning of a mere ‘school of doctrine’. As such, Ibn Ḥuṭṭūbūghā’s incorporation of this quotation by Subki would be to buttress the implicit argument from legal system consistency: a jurist whose public office is explicitly defined according to membership of a particular guild is thus limited in his decision-making to the jurisdiction afforded it. For, as Subki argues further in the passage, by accepting a position as public functionary which entails implementing the rules of that legal tradition to a particular jurisdiction, he is obliged to respect the office, and provide responses according to the procedure and doctrines of the madḥhab-tradition of his appointed post, and not according to his personal conviction.

The argument of limited jurisdiction is furthered by a citation from Ibn al-Humām in Ḵaṭ al-Qadīr (cited as Sharḥ al-Hidāya):

As for the judge who himself is bound by precedent (muqallīd), he has been only appointed [by the ruler] with the sole purpose of judging according to the legal tradition, for example, of Abū Ḥanīfa; the judge has no right to contravene his tradition: he would be dismissed and his decision revoked (ja-yakīn mazāli bi-al-nisba ilā dhālika al-ḥukm; lit. ‘he would be dismissed in relation to that judgement’). (§10.2)

The muṭṭī or judge appointed to such an office is thereby bound to decide according to the established precedent of that tradition, i.e. the rules formulated through tarjīḥ out of the array of legal opinions which comprise the tradition’s heritage (§9, §10.3). His opinion as a jurist is inconsequential to this type of post; it was established in order that a particular madḥhab-system be given jurisdiction, and the jurist-as-judge or -muṭṭī observe this.

The argument from legal-system coherence

A further argument for binding precedent offered by Ibn Ḥuṭṭūbūghā is that of legal-system coherence. Subkī and Shihāb al-Dīn al-Aqfahṣi, another Shāfī’ī author, are cited in order to establish the invalidity of two procedures that, if employed by judges or muṭṭīs, would threaten the coherency of the legal system of a given madḥhab: the composing of decisions out of distinct doctrines
3.3. Arguments for binding precedent

from different legal traditions (*talīf*) (§5), and the drafting of a decision by an associate of one madhhab which is then issued by a judge of another (§5.1).

The passage begins with Subki’s statement of juristic consensus as to the invalidity of composite decisions:

‘By juristic consensus, it is not valid to issue a binding decision composed of two discrete processes of independent legal issuance (*lä yaṣīḥ al-taqlīd fi shay’ murakkab min ijīthādāyin muḥktafalīfān bi-ajīmā’*). An example of this would be if one were to perform the ritual ablutions, but only wiping upon a portion of one’s hair, and then to proceed to perform the prayer whilst carrying upon one’s body an impurity from a dog. It is written in *Tawqīf al-ḥukkām ‘alā ghawāmid al-ḥākām*, ‘Such a prayer is invalid (bāṭīl), by juristic consensus.’

The problem, then, is that such a procedure would threaten the coherency of each of the two respective legal systems. For in each system is embedded not only the individual independent legal reasoning, hermeneutics, or other first-order processes which produce primary legal opinions, but also the processes by which an opinion is weighed against others and then chosen as the rule, while the others simply remain part of the juristic tradition but without implementation. This process was meant to ensure consistency of method in rule-determination, and is undermined at its source by a cherry-picking of first-order opinions with complete disregard for the process of rule-determinacy and juristic-precedent establishment. As evidenced in the example of prayer provided, an act composed of disparate doctrines would potentially be valid in neither system, as it fully fulfilled the conditions or stipulations of neither. It is notable that he presents a case example from the rules of ritual: aside from providing an easily comprehensible example (the conditions of prayer), it also serves as a reminder that the procedure of rule-formulation applied in the madhhab-law system must be consistent in its methodology, regardless whether the subject matter it is being applied to be strictly ‘legal’, ‘deontological’, or ‘ritual’.

The passage then continues with a statement as to the procedural consequences of such disregard for the coherence of a legal system:

The author also wrote, ‘A legal ruling artificially composed of a number of discrete opinions (*al-mulāfāq*) is invalid, by juristic consensus of the Muslims. If a judgement is drafted by a Mālikī, and issued by a Shāfi‘i, it is not to be enforced (*fa-law athbata al-khāt Mālikīyya Shāfi‘īyy lam yunfadh*). After providing a further example, he then said, ‘A great number of ignorant judges do this,’ meaning, [they pass] judgements composed of a number of discrete opinions.

This passage affirms the respect due to the jurisdiction of each madhhab, and to that tradition’s procedures and positive doctrines within its jurisdiction. The drafting of a judgement according to the doctrines and rule-determining procedures in a madhhab other than that of the

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25Lit., ‘It is not valid to deem binding a matter composed...’.
jurisdiction in which it is being issued would result in systemic incoherency within that madhhab. With the rise of a pluralistic legal system, there grew the potential for abuse by unscrupulous judges — and this abuse needed to be curtailed. Thus, in this passage we witness the development of a judicial procedural doctrine (the invalidity of composite rulings, and the imperative not to implement them in the courts) in response to changes in the institution of the judiciary; this doctrine is then prefaced to a work of fiqh (i.e. Ibn QutlūbUGHā’s commentary on Qudūrī’s MUKHTAṢAR), establishing it as a binding rule itself upon all members of that legal tradition.

The argument from strengthened decision-making

As previously mentioned,26 Qarāfī argues that a muqallid-judge is ‘permitted to respond in accordance with the most prominent position (mashhūr) of his legal tradition, and to issue judgement accordingly’ (§10.3, bold emphasis added). Permission entails freedom; the judge in charge of a given case is free from the responsibility of investing time and energy into the legal research normally necessary when producing a novel decision. Implicit in this stated freedom from responsibility are benefits not merely to the judge, but to the judicial system as a whole: by conserving its representatives’ decisional resources (time and energy), the legal system thus gains both greater efficiency, and enhanced stability in decision-making. The increase in efficiency means a greater number of cases may be reviewed and resolved in a given amount of time, thus entailing benefits for all the parties involved (judicial functionaries and litigants alike). The enhanced stability in decision-making engenders a greater degree of predictability (which we will analyse next), and a further strengthening of trust for the legal system by its subjects.

The argument from predictability

Another argument provided by Ibn QutlūbUGHā for the binding nature of precedent is that of predictability. After having demonstrated the necessity of a non-mujtahid jurist observing precedent as established through tarjīḥ in §10, Ibn QutlūbUGHā introduces a new consideration: even a judge who as a scholar is capable of ījṭāḥād must observe the legal rules of the tradition if he has been appointed to a madhhab-specific judicial post, due to the moral right of the public to predictability of the law:

A person who subjects himself to a particular madhhab-jurisdiction (muqallid)27 has only accepted the jurist’s judgement because he knew that the judgement was to be

26See Section 3.2, p. 97.
27I justify my translation of the term ‘muqallid’ as a person who subjects himself to a particular madhhab-jurisdiction here on the grounds of context: the individual whose case is put in front of a judge, and is thus subject to his decision, does so in his capacity as a private individual, his profession as a scholar or non-
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issued in accordance with a specific legal tradition, and not according to another.

While this argument follows from that of legal consistency, it is distinct insofar as its focus is not utilitarian (i.e. focused on the sum of social welfare by strengthening the rule of law and the respect of the legal system), but deontological (i.e. focused on the individual people’s moral right to fairness, through being treated alike in similar cases).\(^{28}\) Precedent allows for the predictability of law, making possible for people to plan their lives by knowing the consequences of their actions. By submitting to a judge of a known madhab-jurisdiction, the person subjected to a legal jurisdiction has a moral right to legal predictability — to know the consequences his actions will entail in his jurisdiction’s law — which outweighs a judge’s prerogative to pass judgement according to his personal conviction, even if he be of mujtahid-ability.

**The argument from historical determinism**

Section 11 begins with what appears to be a challenge from a mere associate-level functionary who, upon being faced with instructions to solicit the opinion of the most learned jurists of their age if faced with a perplexing case, protests that jurists of the highest order no longer exist; the implicit corollary being that judges and muftis should be allowed to perform rule-formulation and decision-making themselves:

It has been said by certain persons ignorant of the intent of the scholars: ‘[Our age] is bereft of independent jurists (mujtahid) and perfectly-learned jurists (afqah).’

Ibn Qutlūbughā immediately moves to deconstruct this argument, and does so on the basis of the inevitable decline of *ijtihād* with the development of *tarjīḥ*. Not only had first-order jurists such as Abī Ḥanifa and his fellows formulated legal opinions which have been preserved and transmitted to us, but later generations of scholars had exerted themselves in assessing these first-order legal opinions, and resolving the rule-indeterminacy resulting from the plurality of juristic opinions, through *tarjīḥ*:

To this I reply: As to those legal matters for which there exist transmitted opinions (*riwāyāt*), we are to proceed in accordance with the statement of Ibn al-Mubārak, understanding that the world had not become bereft of independent jurists until such jurists had fully examined the disputed points of law (*nazarū fi-al-mukhtalaf*), stated which [opinions] were preponderant (*rajjahāt*), and emended previous assessments (*ṣaḥḥahāt*).

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3.3. *Arguments for binding precedent*

Ibn Qutlūbughā appeals to the jurist to respect the sum of the individual efforts of rule-formulation, as embodied in the historical madhhāb-law tradition. This process of rule-formulation was a multi-generational effort, involving a number of stages of what we may call ‘rule-review’, each stage of which built upon that which preceded it: first, the examination of the tradition’s corpus of disputed legal opinions (*naẓar*); second, the actual granting of preponderance to some opinions over others, producing rules (*tarjīḥ* proper); and finally, reviewing the assessments and granting of preponderance accomplished in the first two stages, and emending the rules those stages produced (*tasḥīḥ*). The Ibn Qutlūbughā is describing here are the subprocesses which in total constitute the historical stage of *tarjīḥ* within a madhhāb-tradition (and not the rule-formulation of a single jurist). After briefly summarising the relevant points from the section on *rasm al-muftī*, Ibn Qutlūbughā concludes with a final argument for the duty of honouring the very historicity of binding precedent:

Their evaluations as to the preponderant opinion (*tarjīḥ*) and their emendations (*tasḥīḥ*) have been preserved, and it is incumbent upon us to follow the most preponderant positions and to act in accordance with them, just as if they had directly issued us these edicts during their own lifetimes.

To observe precedent, then, is to respect not only the opinion-making and rule-determination of individual jurists’, but the multi-generational undertaking of rule-review, as reflected in *tarjīḥ* and *tasḥīḥ*. However brilliant the legal ability of a single jurist, he is unable to single-handedly match the sum of the juristic efforts, throughout the history of a madhhāb, in producing, reviewing, and perfecting the rules of the tradition.

This then, for Ibn Qutlūbughā, is the reason underlying the decline in first-order mujtahids who would establish entirely new legal systems, or even of second-order mujtahids who would substantially redefine an existing system’s doctrine and identity. The practice of *fiqh* had matured from independent opinion-making to a rigorous and self-critical tradition, embodying the undertakings of generations of jurists in producing not just opinions, but procedures, rules, rule-reviews, and numerous theories of jurisprudence, to say nothing of the societal embedding of this madhhāb-law tradition in institutions such as legal guilds and the judiciary. It was not a task that a single jurist, even of *iṭḥād*-calibre, could likely claim to achieve.

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29The location of these ‘rule-reviews’, as I shall discuss further in the dissertation, were the literary genres of *fiqh*, in particular that of the commentary (*sharḥ*), of which Ibn Qutlūbughā’s *al-Tarjīḥ wa-al-tasḥīḥ* itself is a prime example.

30Supporting this understanding are the claims to *iṭḥād* by Ibn Qutlūbughā’s younger contemporary Jalāl al-Dīn al-Suyūṭī (d. 911/1505), as embodied in his work *al-Radd ‘alā man akhlada ilā al-ard*. His statement that, despite his being a mujtahid, he never stepped out of the boundaries of the tradition of Shafi‘ī, intimates an understanding that even the highest form of independent legal reasoning in his age was to respect the
Again, neither this argument of historical determinism, nor any of the previous arguments, necessarily precludes the exercise of *ijtihād* by a jurist; in fact, a number of the jurists Ibn Qutlūbughā cites, such as Taqī al-Dīn al-Subkī and Qāḍīkhān, are widely respected and accepted as *mujtahids*, and Ibn Qutlūbughā himself is ranked by the later Ibn ‘Abīdīn as a jurist capable of *ijtihād.* 31 Rather, the historical necessity of *tarjīḥ* meant that the age of first-order *ijtihād*, in which entirely new legal-systems entailing new doctrine and new procedures, was no longer necessary or possible; the madhhab-law system was the fulfilment of the nature of fiqh as a jurist’s law based within a revelatory tradition. The reign of *taqlīd*, in so many words, is the concomitant of the development of *tarjīḥ*.

### 3.4 Historical developments

Having analysed Ibn Qutlūbughā’s text in regards to its topoi and arguments, we shall turn now to an assessment of the historical developments represented therein, by contrasting the content and rhetoric of Ibn Qutlūbughā’s tract with that of his predecessor, Qāḍīkhān.

**Target audiences: muftis and muftis**

Let us begin with the first point of departure in any rhetorical analysis: the intended audience of the written works. Qāḍīkhān writes to an audience who he assumes are sufficiently well-versed, as scholars of law, in the inherited transmitted legal opinions of the tradition, and thus capable of performing *tarjīḥ*, whereas with Ibn Qutlūbughā, the author’s language and argumentation reflects a loss of confidence in the capacity of the muftis and judges of his age to perform the *tarjīḥ* themselves.

‘Mufti’ in the nomenclature of Qāḍīkhān means ‘ṣāḥib *tarjīḥ*, a scholar-jurist capable of establishing which legal opinion of the tradition should be deemed to be the rule, the binding precedent; thus, his book of ‘*fatāwā*’ is a book of his *tarjīḥāt*. Thus, the type of jurist Qāḍīkhān had in mind while writing his prefatory tract ‘Rasm al-muftī’ was a scholar of a sufficient rank who could comprehend and perform the task of *tarjīḥ*. And one of Qāḍīkhān’s own primary roles, then, in the history of the madhhab’s development, was the establishment of rules out of the corpus of transmitted legal opinions.

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Ibn Qutlūbughā, on the other hand, was writing with different concerns in mind. His primary consideration was not with establishing the heuristic of rule-determinacy, per se, but with establishing the parameters of rule-observance by public functionaries. Again and again through his introduction, he cites earlier authorities regarding the importance and process of tarjiḥ, but then personally emphasises the necessity of respecting these rules (and the processes which produced them) by legal functionaries. Again, this does not bar judicial discretion, but it must be predicated on sufficient scholarly qualifications of the functionary. Thus, the term ‘mufti’ in Ibn Qutlūbughā’s context is used differently from the way it is in that of Qāḍīkhān: the mufti here is the juriscutlnt, the public legal functionary who provides a consultation (a non-binding judgement) in response to a query by a member of the general public.32

Rule-determination (tarjiḥ) vs. rule-review (taštih)

Just as Qāḍīkhān used the introduction of the Fatāwā to both provide a theoretical treatment of the mufti’s task, and to declare the procedure he employed throughout his work, so too does Ibn Qutlūbughā, in the introduction to his commentary on Qudūrī’s Mukhtāṣar, communicate both theory and his own practice as an author-jurist. Qāḍīkhān’s Fatāwā is an application of the rules of establishing the fatwā, meaning the tarjiḥ, in respect to the cases which make up his treatment of fiqh. Similarly, al-Taštih wa-al-tarjiḥ may be read as an extended study of how the procedures and principles delineated in the introduction may be applied to previous juristic efforts: the process of tarjiḥ through the examination of Qudūrī’s granting of preponderance, and the process of taštih through examination of post-Qudūrīan scholars’ critical reviews of and emendations to Qudūrī’s choices (including those of Ibn Qutlūbughā himself). This is the process of ‘rule-review’, or taštih.

Qāḍīkhān’s principal contribution in his ‘Rasm al-muftī’ is the formalisation of the process of rule-making, or rule-discovery: the procedure to be followed (by the sufficiently qualified jurist) in assessing the heritage of legal opinions from the early generations of independent jurists associated with a particular (here, the Hanafi) legal tradition, and ascertaining the rule according to both formal processes and the considerations of one’s contingencies and context. Ibn Qutlūbughā’s work, on the other hand, is predicated on the assumption that, as a stage in legal history, the rules have already been determined, i.e. the precedent deemed binding had been established through tarjiḥ (in its more limited sense). It also assumes that the capabilities, and hence the responsibilities, of functionary-jurists had, on the whole, become more limited. Exceptional circumstances aside, the generational role of the era following the ‘stage of rule-formation’ (tabaqat

32I do not mean to say that this meaning could not also apply to Qāḍīkhān’s ‘mufti’, but rather that the distinction I’ve highlighted is one of dominant role as a scholar.
al-tarjiḥ) was that of ‘rule-review’ (taṣḥīḥ, lit. ‘correction’). In such a stage of legal history, the duty of the author-jurist is to assess the heritage of legal texts containing arguments as to binding precedent; for institutional functionaries, such as muftis and qadis, it is to deploy the conclusions of the senior jurists in their decisions.

This is not to imply that the legal functionary was left with no scope for discretion in rule-application. The contingency of the context presented to the mufti or judge was not to be ignored in providing a solution to the legal case at hand. This may be recognised in Ibn Qutlūbughā’s injunction to a mufti or judge faced with a case in which there exists no binding precedent, or in which the jurists capable of tarjiḥ themselves differed as to the most correct position (§10). In such a scenario, it is the jurist’s responsibility to show consideration of local custom, people’s circumstances, greater welfare, and disputes settled by de facto societal practice. I wish to emphasise that Ibn Qutlūbughā here is addressing not independent jurists associated with the tradition, as he did in earlier sections — and to whom such an address would be superfluous — but madhhab-associates normally bound by precedent who are nevertheless capable of distinguishing between valid and invalid opinions in an indeterminate context.\footnote{While outside of the historical scope of this thesis, it is informative to briefly note how the concept of juristic discretion developed in the Ḥanafī madhhab in the period following that of Ibn Qutlūbughā. A confirmation of the discretion of a mufti or judge (in fact, even of a teacher or author of law) is posited by the two later Damascene Ḥanafī jurists, ‘Abd al-Ghānī al-Nābulṣī (d. 1143/1731) and Ibn ‘Abbīdīn (d. 1258/1842), as presented in the latter’s discussion of the utility of the maxims of law (al-qawāʿid al-fiqhīyya) (Ibn ‘Abbīdīn, ‘Tanbīḥ dhawī al-aṣḥām ‘alā aḥkām al-tablīgh khalīf al-imām’, in Majmūʿāt rasā’il Ibn ‘Abbīdīn, 1:148–9). While Ibn Qutlūbughā’s focus in §10 was with problems resulting from contingencies, Ibn ‘Abbīdīn apparently goes even further in providing creative interpretative scope to muftis, judges, teachers, and authors. The following is a paraphrasing of Ibn ‘Abbīdīn’s argument (with emphasis added to highlight the most relevant points to our discussion of interpretative discretion): Since there are always new legal matters which appear with the changing of the times, if the mufti, qādis, or teacher was always required to have an explicit text as to the ruling of one of these matters, the entire vitality of the legal system would become impossibly bogged down and unworkable. Thus, instead of such an impossible task, the scholars of the Sacred Law have placed universal maxims under which the particular legal rulings to many new matters may be included. It is from these maxims that the mufti may deduce his legal pronouncement, this having precedent in the Ḥanafī madhhab in such works as al-Hāwi and al-Qadsī. Furthermore, this mechanism of deduction from the maxims should not be confused with the process of qiyyūs, or judicial syllogistic reasoning, the gate of which, according to Ibn ‘Abbīdīn, is closed in the Ḥanafī madhhab; rather, as delineated by ‘Abd al-Ghānī al-Nābulṣī (in the section on the conditions of the ritual prayer (‘ṣūrūṭ al-salāt’) in his Sharḥ Hadīyyāt Ibn al-‘Imād), some matters are left to the particular understanding of the mufti, teacher, or author, who give further legal answers, through their understanding of the matter, to such new matters. This is because the matters discussed in the books of fiqh are universal rulings,}
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Understood historically, then, *tarjih* is the stage of the madhab-law system’s development towards a regime of stable and predictable rules, or the rule of law. From this historical vantage point, indeed *tarjih* and *tashih* can be viewed synonymously and be used interchangeably;\(^{34}\) both terms refer to the ‘stage of rule-formulation’ (*tabaqat al-tarjih*) delineated in later madhab historians’ *tabaqat al-fuqahā*. In contradistinction, when used to refer to the above delineated sub-processes as practised by a specific jurist in regards to preceding legal opinions or rule-formulations, the two terms are different: *tarjih* is the formulation of the rule, while *tashih* is the reviewing, correcting, and emending of other jurists’ rule-formulations; both are necessarily

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**not particulars.** Thus, it cannot be said regarding those particular legal matters upon which the universal rulings are applicable that their rulings are not mentioned in the books of fiqh, nor can one say that they are explicitly mentioned; for there are many particular legal rulings which were not explicitly mentioned due to their being deduced *a priori* from some other universal ruling. Thus, the application (*taštiq*) of the universal maxims to particular legal situations is different from deduction (*takhrīj*) (i.e. from the *usūl* by means of *qiyās*) in that **application (taštiq) is no more than an explanation of what is meant by that universal ruling a priori**, while deduction is a type of analogical reasoning.

Tying this back to our discussion of the discretion of the practising jurist, Ibn ‘Ābidin highlights a number of relevant issues. He establishes that the judge, mufti, teacher, or author (i.e. those who are approached by non-jurists, be they laymen or beginning students of the law, to provide clarity on a point of the law) all necessarily possess a degree of discretion in interpreting the rules found in the books of law, and thus in applying the textbook case in a particular contingent situation. This entails a distinction between a legal concept and a legal case, or in the terminology he uses further on in the passage, a distinction between universal rulings and particulars. His justification would appear to be utilitarian: without this discretion, the legal system would be crushed under the weight of the infinitude of particular cases that would have to be worked out theoretically by judges of higher ranks. Considering his treatment of the rankings of jurists in another epistle, “‘Uqād rasm al-muftī”, Ibn ‘Ābidin is hardly arguing for unfettered opinion by any claimant to knowledge of the law; nonetheless, he is here establishing an obligation upon any jurist so deserving of the name — even if he or she be a mere teacher — to clarify the pregnant meanings of the texts in light of the particular contingencies of a new case, through what he terms ‘taštiq’, or ‘application’ of the universals to particular circumstances. Ibn ‘Ābidin emphasises the theoretical difference between this ‘application’ and deduction through analogy (*takhrīj*), corresponding to a significant difference in process between fiqh and *usūl al-fiqh*: the former, one could argue, is a matter of rule-discovery (latent as the particular rule is in the pregnant universal concepts of fiqh, and simply waiting to be delivered through *a priori* reasoning); the latter would be legal opinion-formulation, the job of mujahids. Nonetheless, from the perspective of the non-specialist who wishes to understand, and most likely act upon, the law through the response provided him by the judge, the distinction is scholastic: a rule has been provided where one had not been known to exist before.

\(^{34}\)See Hallaq, *Authority, Continuity, and Change*, 126–38, for an argument as to their interchangeability.
3.4. Historical developments

preceded by examination of the tradition’s corpus of disputed legal opinions, what Ibn Qutlûbughâ termed ‘al-naissance fi al-mukhtalaf’.

From monist to pluralistic legal systems

As previously discussed, Qāḍīkhân’s addressed target was the mufti-as-scholar, while Ibn Qutlûbughâ’s is the legal functionary, the judge or mufti as public office holder. This, I would argue, reflects the changes in institutional legal history that occurred between the times of the two authors: Qāḍīkhân (d. 592/1196) is writing in the sixth century in Uzgen, Farghana, Transoxiana, in the latter half of the Qarakhânid dynasty’s rule; the state’s legal system was exclusively Ḥanafī. As such, Qāḍīkhân’s concerns were naturally oriented towards discussions of proper procedure within a single madhhâb-tradition. His tract contains directives to ensure honest and systematic application of Ḥanafī legal doctrine by capable mujtâhid-jurists, and warnings against irresponsibility and caprice by unqualified jurists, within a singular tradition. Nowhere does the tract betray a concern for the judicial system per se, for as a legal monoculture it left no scope for abuse of the other madhhâb-traditions.

However, already during his era, but in the more Western lands of Egypt, the development of a pluralistic judiciary, in which more than one madhhâb operated within the jurisdiction of one state, had already begun. This was first temporarily experimented with by the Fatimids in 525/1130–1 with the appointment of a judge from each of the Shâfi‘i, Mâlikî, Ismâ‘îli, and Imâmi madhhâbs, all of whom operated under an Ismâ‘îli chief judge. It was then more fully and permanently established by the Mamluks in 663/1265, with the appointment of each of a Shâfi‘i, Mâlikî, Ḥanafī, and Ḥanbâli judge, a juristic system which then spread over the coming century to other domains under Mamluk suzerainty. This was the socio-legal culture in which Ibn Qutlûbughâ was operating in mid-9th/15th century Mamluk Cairo. His concerns, thus, were different. First, as witnessed by the plethora of citations of authorities from beyond the Ḥanafī legal tradition, one can clearly delineate in Ibn Qutlûbughâ’s polemic a statement as to the inherent unity of the four Sunni legal traditions in their processes and procedures regarding precedent and taqâlid, within the wider legal system (i.e. the judiciary of the Mamluk state), in addition to a respect for the distinctive internal particulars of these processes, as well as of the particular legal doctrines, of the co-existent rival traditions. Secondly, the pluralistic system bequeathes a responsibility of upholding the distinctive particulars of each tradition within the wider system; thus, the judge is under obligation to respect and observe madhhâb-specific sanctioned judicial procedure as to rule-determination when passing a judgement, in order to ensure consistency in judicial procedure and provide coherency to the rulings issued within the jurisdiction of that madhhâb within the judicial system. These virtues in turn benefit the populace who are under the jurisdiction of
that system: consistency bequeaths predictability, in turn entailing fairness for the jurisdiction’s subjects, and their ability to understand the consequences of their actions.  

**Madhhab-law: tradition, system, concurrent jurisdictions**

Finally, we have in Ibn Qutilubah’s tract a reflection of three interrelated developments regarding the interaction between madhhab and the legal system of the Mamluk era: the clear enunciation of a unitary madhhab-law tradition; a resulting madhhab-law jurisdiction; and resulting concurrent/exclusive madhhab-specific jurisdictions. The first, a unitary madhhab-law tradition, is the awareness, by the jurists of the various Sunni legal traditions, of the common functional juristic procedures shared by all of the madhhab that had survived the transition from doctrinal schools to guilds. The second, madhhab-law jurisdiction, we may define as ‘a place where the legal system derives ultimately from the madhhab-law tradition’. The third, concurrent/exclusive madhhab-specific jurisdiction, refers to the unique relationship of each particular Sunni madhhab to the wider madhhab-law jurisdiction: all four madhhab operate within the same territorial jurisdiction concurrently, but have their own exclusive jurisdiction as to their school’s doctrines, specific procedures, etc. that is applicable to any member of the public who wishes to raise their legal matters to that particular madhhab-jurisdiction.

But there is a further, important point, related to this third feature: the madhhab as school of legal doctrine, based as it is on fiqh as a jurist’s law, remains a repository of doctrinal precedent by means of literary genres such as the mukhtasar. The madhhab-guild system, and from thence the madhhab-jurisdiction system, are thus rooted in a doctrinal system that is oblivious of the changes of political-territorial jurisdiction or era; contingency-related legal opinions aside, the conclusions of the jurist’s interpretative exercises in fiqh — in his role as scholar-jurist, and not as functionary — are just as applicable in Samarqand as they are in Cairo. As such, while the rules or original legal opinions developed by qualified scholar-jurists residing in the Mamluk domain were naturally to be implemented by legal functionaries in those jurisdictions, they also...
Figure 3.3: Diagrammatic schema of the interrelationship between the madhhab-law tradition, madhhab-law jurisdictions, and madhhab-specific jurisdictions

potentially established new rules and precedents for jurists living in other realms and succeeding ages. This obvious point is mentioned only to clarify the intent of our third category of madhhab-specific jurisdiction, in contrast with the more general madhhab-law jurisdiction: the jurisdiction of the functionaries was domain-specific, but that of the madhhab-as-doctrinal school of which they were associates was beyond territorial limitations of jurisdiction. (See Figure 3.3.)

Further evidence of an awareness as to the unity of the madhhab-law tradition is to be found in Ibn Ḥaṭṭāṭ’s claims of juristic consensus regarding the impermissibility of ex post facto reneging on decisions passed,\textsuperscript{39} and in his argument for precedent from predictability. The claimed *ijmāʿ* reflects a recognition that — though distinct in doctrine and particularities of jurisprudential-theory — the madhhab are united by a shared attitude towards legal system. That is to say, it is not merely a basic agreement as to the roles of scripture, hermeneutical reasoning, and other first-order ‘sources’ of the law that unite the four Sunni madhhab — but their agree-

\textsuperscript{39}See Section 3.3, p. 111.
ment as to the rule of law: the binding nature of rules (taqlid) produced through the procedures of tarjih. At least in the literature, such an awareness is an apparently novel development of this era. It reflects an understanding that, with the complexity resulting from the pluralistic madhhab-law system, comes an obligation upon the legal system and its functionaries to ensure that the system of law is respected, regardless of the individual merit of even the greatest of jurists.

To conclude, Subki’s concept of the mufti ‘alā madhhab, and the warning of dismissal for a judge who fails to respect the jurisdiction of his office, thus entail two interrelated notions: firstly, that of concurrent jurisdiction in the madhhab-system of the Mamluk era; secondly, that of the judge’s being bound to the legal doctrines and procedures of his office’s madhhab-jurisdiction. This is a unique and new form of jurisdiction, which — building upon the madhhab’s development from doctrinal school to guild in the mid-‘Abbasid era — only comes to full fruition in the Mamluk period. The concurrent jurisdiction of the Mamluk era entailed that the court of each madhhab exercised jurisdiction over the same subject matter and within the same territory (which, in the Mamluk system, was delimited by city). These concurrent madhhab-jurisdictions all operated within the Mamluk’s wider madhhab-law jurisdiction; i.e. the Mamluk territory in which the judicial system derives ultimately from the madhhab-law tradition.40 This hierarchy — madhhab-tradition (i.e. doctrinal school), madhhab-law system (i.e. guild with procedural rules), madhhab-law jurisdiction (e.g. the Mamluk), concurrent madhhab-jurisdictions (e.g. Ḥanafi, Mālikī, and Shāfi‘i judgeships operating concurrently in Cairo) — in turn required the binding (taqlid) of judges to the madhhab of their office, to ensure that the rules were determined and applied consistently within these new jurisdictions.

3.5 The (lack of) definition of ẓāhir al-riwāya

In our earlier discussion of the Rasm al-mufti of Qāḍīkhān,41 we noted that that the terms ẓāhir al-riwāya and al-riwāyāt al-ẓāhira were invoked by Qāḍīkhān and others previous to him, but without providing a definition: what such ‘riwāyāt’ might be comprised of, or where one would go to find or determine them, is not stated, and it is assumed that the reader is familiar with the terms. Unfortunately (for the historian), neither author provides any indication as to where the term might have originated. And though Ibn Qutilubughā finds it opportune, in his tract, to expand upon his predecessor’s treatment of the definition of the ‘mujtahid’, and though his

40 I base this definition upon that of Black’s Law Dictionary for common-law jurisdiction: ‘A place where the legal system derives ultimately from the English common-law system’. See Black’s Law Dictionary, 7th edn., s.v. ‘common-law jurisdiction’.

41 See p. 100 above.
introduction is full of referenced names and works, he provides no further reference or quotation that would betray the provenance of the ‘zāhir al-riwāya’.

Later taxonomies, such as that developed by the (historically far) later jurist Ibn ʿAbidin, would identify the zāhir al-riwāya with those legal opinions found in six particular works transmitted from Abū Ḥanīfa’s fellow, Muḥammad Shaybānī (in contradistinction to two other corpuses of works and transmitted opinions, namely, the nawādir and the wāqi‘āt). By the time of Ibn ʿAbidin, the term zāhir al-riwāya came to denote the collective corpus of these six works (as opposed to the narration and transmission of the legal opinions themselves). Whether this was the initial denotation of the term, when it apparently first went into currency in Transoxiana by the sixth century, is something we do not currently know; what we do know from the treatment of Qāḍīkhān above, is that the term zāhir al-riwāya was already in circulation sufficiently enough, it would seem, that he did not feel the need to provide an explicit definition; but this neither proves nor disproves that the definition he had in mind for the term would denote the six books attributed to Shaybānī. If anything, Qāḍīkhān’s phrasing (‘If, in regards to the case, an opinion of one of our fellows is related (marwiyya) in the corpus of clearly-transmitted opinions (al-riwāyât al-zāhirâ)...) would seem to indicate that the authoritative corpus was that of transmissions, and not works; what was paramount was that the mufti ensure the chain of transmission was solid and reliable before narrating the legal opinion in the course of delivering his legal opinion, just as a hadith-specialist would ascertain the veracity of the chain of transmission of a hadith he wished to narrate.

Thus, the defining of the process of tarjîḥ al-riwāyât as requiring knowledge of the hierarchy of works (as opposed to the oral or written transmission of individual legal opinions) — the ‘kutub zāhir al-riwāya’, versus the ‘kutub al-nawādir’ and the ‘wāqi‘āt’ — was a matter that apparently developed, or was only made explicit, at a historical juncture following Qāḍīkhān.

I have come across no contemporary academic scholarship which explicitly relates the historical appearance and development of zāhir al-riwāya as a concept, and as juxtaposed against the level of nawādir and the level of wāqi‘āt and nawāsīl. Hallâq treats its theory in Authority, Continuity, and Change, summarising the doctrine largely from the late Ḥanâfi jurist Ibn ʿAbidin (d. 1258/1842), writing as theoretician and historian of the madhhab. But as to when and where the term and its denotations first start being used, Hallâq does not comment. In an endnote,
3.5. The (lack of) definition of ḵāhir al-riwāya

Brannon Wheeler speculates that the agreement to this classification perhaps originated at the end of the sixth century (= 12th CE).\footnote{Brannon Wheeler, Applying the Canon in Islam (Albany: State University of New York Press, 1996), 276, n. 15.} Nurit Tsafrir only makes passing reference to it, also in a footnote, relying in any case on the 19th-century Laknawi’s al-Nāfi’ al-kābīr.\footnote{Tsafrir, Early Spread of Hanafism, 165, n. 25.} Eyup Kaya treats it briefly, assuming the classification’s existence in the tenth century CE (= 4th HE), ‘though it had not yet been definitively defined’.\footnote{Kaya, ‘Continuity and Change in Islamic Law’, in P. J. Bearman, Rudolph Peters, and Frank E. Vogel (eds.), The Islamic School of Law: Evolution, Devolution, and Progress (Cambridge, Mass.: Islamic Legal Studies Program, Harvard Law School, 2005), 33–4.} Most recently, Benjamin Jokisch argues that the ḵāhir al-riwāya — which he often freely translates as ‘code’ — was the basis of an ill-fated attempt at an Abbasid imperial law, devised by Abū Yūsuf and Shaybānī; but though he relies upon it to frame his thesis on the intent of Shaybānī’s corpus, his footnote to the term simply refers to Hallaq, which, as has been mentioned, treats the topic in a non-historical fashion.\footnote{Jokisch, Islamic Imperial Law (Berlin, New York: Walter De Gruyter, 2007), 279–80, also 105–9.}

The term ḵāhir al-riwāya is not used, to the best of my knowledge, by Qudūrī in any of his works. However, within seventy years of his death, the term is used over 323 times by Shams al-A’īmma al-Sarakhsi, in his al-Mabsūt; 99 times by Abū Bakr ‘Alā’ al-Dīn al-Samarqandi, in Tuḥfat al-fuqaha’, a work largely based upon Qudūrī’s Mukhṭaṣar; and 373 times by al-Kāsānī, in Badā’ī’ al-ṣanā’ī’, itself an interwoven commentary upon the work of his father-in-law, al-Samarqandi.\footnote{Additionally, the term is used twice by al-Marghinānī, al-Hidāya, and 276 times by Burhān al-Dīn Ibn}
3.5. *The (lack of) definition of ḵāhir al-riwāya*

far been able to ascertain is provided more than a century and a half after Qudūrī, by Qāḍīkhān, in the introduction section of his al-Fatāwā al-Khāniyya, ‘Rasm al-Muftī’, where he uses the terms al-riwāyāt al-ẓāhira and ḵāhir al-riwāya. In other words, both the first employment, as well as the first descriptive treatment of the concept, are provided by Transoxanian Ḥanafis.

As witnessed in the high number of times it was used by Sarakhsi, the term ḵāhir al-riwāya — and the correlative categorisation of narrations into those which accord with this ḵāhir, or with nāwādir, or with nāwāzīl — must already have been in circulation by the last quarter of the fifth century; Sarakhsi’s frequent usage of the term, and the manner in which he employs it, indicates that it was familiar to his audience. This, along with the other citations mentioned above, argue against Wheeler’s speculation that it came into currency only at the end of the sixth century; it would appear, rather, that it was in much wider circulation amongst the jurists at least of Transoxiana by the late fifth century, and possibly earlier.

It is outside the scope of this thesis to pursue a full treatment regarding the historical development of the concept of ḵāhir al-riwāya, and to assess whether, in juxtaposition to Wheeler’s late dating, Kaya’s much earlier dating of the classification to the late tenth century CE is definitive. However, by analysing works such as Qudūrī’s for taḏjīḥ that may then be measured against the opinions of ḵāhir al-riwāya positions as found in the corpus of Shaybānī\(^{48}\) which was later explicitly referred to by this title, we may be able to assess the feasibility of this dating. We end our study of rule-formulation theory, then, on a note of ‘negative research’, but with trails which, if followed, may help in solving this particular historical puzzle.

\(^{48}\)One might argue that, per Calder, the dating, content, and ascription of the corpus of Shaybānī is tendentious. Assuming this position for the sake of argument, the positive content of the ḵāhir al-riwāya positions as reorganised into the later Muktaṣar al-kāfī of al-Hākim al-Shahid (d. 334/945–6) may serve as an equally suitable control for the ḵāhir al-riwāya against which to measure Qudūrī’s legal selection of taḏjīḥ.
4.1 Ibn Quṭlūbughā’s practice of rule-review

Upon moving from Ibn Quṭlūbughā’s introduction into the commentary proper, the most notable aspect of *al-Tašīḥ wa-al-tarjīḥ* is that the overwhelming activity is that of rule-review (*tašīḥ*). This is, one may assume, indicated in the title of the work, in which the term ‘*tašīḥ*’ precedes ‘*tarjīḥ*’. But the scale of which this is the case is only unveiled through an analysis of all the terms used to refer to these twin activities. According to my count, there are 203 unique phrases used by Ibn Quṭlūbughā to indicate rule-formulation and rule-review, in 6,454 instances throughout the text; these 203 are further reducible to 42 morphological triliteral roots. The following graphic in Figure 4.1, however, provides a simple and more intuitive overview as to the most commonly repeated terms.¹

![Word cloud of terms of rule-determination](image)

**Figure 4.1:** Word cloud of terms of rule-determination (largest is most frequently used, smallest least)

The proportional frequency of all 203 words are represented in this graph (though quite

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¹In this word cloud graph, the size of the term is proportional to the frequency in which it is used, relative to all the other terms which are used: the larger the term, the more often it appeared in Ibn Quṭlūbughā’s text; the smaller the term, the less frequently it was used.
4.1. Ibn Qutlūbughā’s practice of rule-review

a large number of them are obviously illegible, as their minute size reflects the infrequency of their usage). We quickly notice that the five most common words are ‘al-ṣāḥīḥ’, ‘al-fatwā ‘alā’, ‘i’tamadahu’, ‘al-ṣāḥīḥ’, and ‘mashā ‘alayhi’. What does this tell us? It informs us that the work is overwhelmingly concerned with taṣḥīḥ: all but the term ‘al-fatwā ‘alā’ are used exclusively in rule-review (taṣḥīḥ), being used most often to delineate the positions taken by jurists of our fifth period. However, even the term ‘al-fatwā ‘alā’ is actually shared by the processes of tarjih and taṣḥīḥ, as expansums such as the Muhīṭ al-Burhānī of Burhān al-Dīn Ibn Māza or the Fatāwā of Qāḍīkhān discuss alternative opinions at length before often establishing their view with the words ‘wa-al-fatwā ‘alā qawl’. Equally, the emendations to earlier instances of tarjih that occur through the process of rule-review (taṣḥīḥ) will often use the term ‘fatwa’ especially in cases that the school’s doctrine is deemed to have been adjusted due to changes of time, custom, or other exigencies. In short, what we come to understand is why, perhaps, Ibn Qutlūbughā entitled his work al-Taṣḥīḥ wa-al-tarjih: coming as he did, in history, after the age of the great āshāb al-tarjih of the fourth period, the dominant activity of his generation was to review, check, confirm, or emend the rules that had been established by the legal tradition.\(^2\) However, since the process of rule-review necessarily entails the evaluation of preceding legal positions, his work uniquely conveys the rule-formulations (tarjih) of earlier periods (beginning with those of Qudūrī himself).

This chapter, then, intends to serve as a study of Ibn Qutlūbughā’s actual practice of taṣḥīḥ, and, through his citations, that of the earlier generations’ tarjih. We shall do so by analysing dozens of actual cases of rule-formulation presented in Ibn Qutlūbughā’s work. Our goals in so doing are multiple. The first is to analyse the rhetorical tools by which taṣḥīḥ and tarjih were practised in the act of commentary. In order to do so, we will analyse the work both as to the functional logical relationships between the individual comment (ṣahr) and the commented-upon text (matn), as well as to the legal reasoning employed by the jurists to argue for their contended rule. This will be done by presenting classifications for each of these two aspects of legal commentary, with case illustrations drawn from the Taṣḥīḥ.\(^3\) The second goal is to analyse

\(^2\)At the end of the chapter of criminal offenses (jināyāt) (Taṣḥīḥ, 386), Ibn Qutlūbughā further confirms that the primary purpose of the work is rule-review (taṣḥīḥ): ‘I have mentioned a number of case examples (ṣawar) in this chapter, even though they have nothing to do with rule-review (taṣḥīḥ), due to the frequency of judicial error in these matters, and God knows best.’

\(^3\)Classifications have the virtue of providing an analytic insight into the structure of an object, but their danger lies in the superimposition of the author’s own desired outcomes unto the data; effectively, of rewriting what the data denotes. While it may well be impossible to detach the subjective thesis of the scholar from the material under study, I have attempted to at least mitigate this possibility by taking an empirical approach to the comments written by Ibn Qutlūbughā: the taxonomies below were not first created and then placed onto the material, but instead slowly appeared, by tagging each comment or phrase of the text
the degree of congruence between the prescribed procedures of rule-determination presented in Chapter 3, and the actual practice in the commentary. Rule-determination (in both of its stages of *tashīḥ* and *tarijīḥ*), like many other dimensions of the madhhab-law tradition, was something practised before it was theorised or abstracted in tracts. The *rasm al-muftī* was only written about after more than two centuries of rule-formulation had already taken place.⁴

Towards this, we shall assess a number of cases in order to determine how closely their processes and outcomes follow the formal procedures known as the *rasm al-muftī* which were described in Chapter 3. In that chapter, we also discussed the topic of discretion: when a mufti or a judge is deemed qualified enough such that his own use of discretion is justified. Here, we shall present a number of cases in which the final rule is that the matter is to be left to juristic personal discretion, even at the expense of preceding legal juristic opinion, and why this was the case. Finally, a listing of eighteen operative principles which were deduced from the work will be presented; these principles were either stated explicitly by the jurists as a justification for their decision, or were implicit in their legal reasoning (in which case, part of the present author’s task was to deduce them from the legal arguments presented). The principles underwrote a number of instances of rule-formulation and rule-review, though, as we shall see, they were not largely represented amongst the principles put forward in the *rasm al-muftī* section of Ibn Qutlūbughā’s introduction; as such, they are a valuable measure as to the correspondence between theoretical considerations and practical considerations of rule-determination.

4.2 The functional relationships of commentary

The first taxonomy — that of the logical functions of the comment (as a rhetorical unit) — provides us with an overview as to the structure and rhetorical schemes employed in the genre of legal commentary, as exemplified in the *Tashīḥ*. It surveys functional relationships between commentary and the passage from the primary text (*mān*) which the comment explicates. In his commentary-writing, Ibn Qutlūbughā begins by demarcating a passage from Qudūrī’s primary text, followed by a comment which — according to the data of my textual analysis, presented below — falls into one of five principal functions: (I) to resolve a juristic dispute, (II) to clarify a point of ambiguity, (III) to further expand upon the passage, (IV) to identify the primary or trans-

⁴On some problems of the categories of ‘theory’ and ‘practice’ in the context of Islamic law, see Mohammad Fadel, ‘Rules, judicial discretion, and the rule of law in Nasrid Granada’, 49–50.
mission sources used in the *tarjīḥ*, or (V) to identify an editorial problem in the passage itself. An example of the most basic form of his demarcation and commentary would be as follows:

(The judge obliges her to provide a guarantor) i.e. for her financial support. The author of the *Muḥīṭ* stated: this is the correct position.⁵

The text in bold and between parentheses is the demarcated passage from *Muktaṣar al-Qudūrī*. The context of the passage is Qudūrī’s description of the steps a wife is to take in order for the court to provide her with legal justification for taking loans on an absentee husband’s name, in order to provide for her own financial maintenance costs and those of the couple’s dependants. In this instance, Ibn Quṭlūbūghā used the commentary to clarify that the role of the guarantor is to guarantee the money she is taking on her husband’s account for her maintenance costs, in case it later becomes clear that she was claiming fraudulently. Ibn Quṭlūbūghā then confirms his interpretation through appealing to a preceding jurist who had arrived at the same interpretation, namely Burḥān al-Dīn Ibn Māza, who had lived in the period of *tarjīḥ* between the author of the *matm* and the commentator, and, as noted on page 39 above, is the eighth-most cited jurist in the *Taṣḥīḥ*. In this example, then, there are thus two individual comments: one being Ibn Quṭlūbūghā’s explaining what type of guarantor is intended, and the other being Burḥān al-Dīn Ibn Māza’s confirmation.

Let us now look at a more involved example. In the chapter treating lease, Ibn Quṭlūbūghā cites and comments upon a case from the *Muktaṣar* as follows:

(If a person subdues an animal by pulling on its reins or hitting it, and thereby renders it lame, he is liable for its value according to Abū Ḥanīfa) unless the owner had granted him permission to do so. The (Two Fellows) hold that if he was not excessive in reignining in or hitting the animal, he is not liable. Imam Maḥbūbī and Nasāfī adopted the opinion of the Imam (Abū Ḥanīfa). However, Isbījābī and Zāwzanī both explicitly declared that his (i.e. Abū Ḥanīfa’s) opinion is the *qiyyās*-position, while that of the Two Fellows is the *istiḥsān*-position.⁶

Figure 4.2 presents a schematic of this instance of *matm*-commentary. In this case, there are two ‘commentary-clusters’: two groups of comments, each serving a distinct purpose in relation to the *matm*-passage. In ‘Commentary-cluster 1’, Ibn Quṭlūbūghā directly comments himself upon the case presented in the *matm*, the purpose of the comment being to make an exception to the general rule established by Qudūrī; it thus assumes the validity of the rule. Moving to ‘Commentary-cluster 2’, we see that the purpose of this set of comments is to ultimately contradict the position

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⁵*Taṣḥīḥ*, 376.

⁶*Taṣḥīḥ*, 253–4. A *qiyyās*-position is one arrived at in accordance with regular syllogistic reasoning, ostensibly by ‘following the rules’ (so to speak) of the hermeneutical approach later described in the discipline of *ustūl al-fiqh*. An *istiḥsān*-position is when the jurist discerns a greater end that is not achieved through the standard syllogistic reasoning, in which case the latter is dropped for the sake of this higher good.
adopted by Qudūrī: Ibn Qutlūbughā first states the Two Companions’ dissenting position; cites Maḥbūbī and Nasafi as having confirmed Qudūrī’s choice of Abū Ḥanīfa’s opinion as the rule; but then ends the commentary-cluster with the dissenting opinion of Isbijābī and Zawzanī, who, in their rule-review, base their position on the principle that an opinion based on istiḥsān is to be chosen over an opinion arrived at by the default juristic syllogistic reasoning (qiyyās). By citing this dissenting opinion last, and providing their legal reasoning (while having failed to do so in the affirming position of Maḥbūbī and Nasafi), Ibn Qutlūbughā is implicitly lending this rule-formulation his support in this instance of rule-review.

What we learn from this case study and the diagram is that every matn-passage may have one or more ‘comment-clusters’, and where every such cluster serves one function, or end; each cluster may be composed of one or more distinct comments (where I define a ‘comment’ as a unit of text, attributable to one authority, and treating one discrete topic). According to my calculations, Ibn Qutlūbughā’s commentary contains 632 commented-upon matn-passages, or questions (masā’il), from Qudūrī’s Mukhtasār. Ibn Qutlūbughā, as commentator, then develops 839 ‘commentary-clusters’ on the basis of these matn-passages: each cluster either treats the concept raised in the cited passage itself, or uses the cited passage as an occasion to introduce a new concept. The
total number of individual comments are 2,534. In view of their source, the individual comments are either Ibn Qutlūbughā’s own (331), verbatim quotations from earlier jurists (1,232), or non-verbatim citations from earlier jurists (971).

As such, it should by now be clear that the taxonomy of the functions of commentary presented next applies not to the individual comments, but to the 839 so-called ‘comment-clusters’, or groups of comments which serve one end. I have thus tagged each such cluster with one or more functions. Since each comment-cluster may serve a single or multiple purposes, there are naturally more ‘tags’ than there are clusters, thus explaining how the 839 clusters have been tagged a total of 1,198 times, as we shall see below.

The following is a taxonomy of the functions of legal commentary, as derived from Ibn Qutlūbughā’s work. Each category is presented in bold, followed by square brackets enclosing the number of instances in which this comment-function was employed in *al-Tashīḥ wa-al-tarjih*. As there exists the possibility of ambiguity and overlap in the category title, an explanation of what each such category means is provided following the title. Case examples from the *Tashīḥ* are then provided as brief illustrations of the functional relationship at hand.

I. To resolve a juristic dispute [406]

The first major category is that in which the comment is meant to resolve existing disputes as to which preceding juristic opinion was to be deemed the legal rule of the madhhwb. In light of the author’s introduction, this is ostensibly one of the primary purposes of the *Tashīḥ*, and makes up one-third of the topics treated in the comment-clusters.

1. **Resolution of indeterminacy** [154]: A *resolution of indeterminacy* is where the *matn*-author has presented two or more legal opinions, without explicitly or implicitly stating which should be deemed the madhhwb’s rule, leaving the ruling of the case indeterminate; the commentator then selects one of the opinions to become the rule.

   **[Case 1]** Qudūrī relates that if a tailor and customer disagree as to whether a cloth owned by the customer was worked upon for an agreed fee or for free, with the customer claiming that they had agreed that it was to be done at no charge, Abu Ḥanīfa holds that the word of the owner of the cloth is taken over that of that of the tailor, though he is made to swear an oath to that effect. Abū Yūsuf, on the other hand, states that one must look into the details: if the tailor made use of an employed worker in order to sew the cloth, then he receives the payment he claims to be due; if not, then he does not. Finally, Shaybānī holds that if the tailor is well known for his craftsmanship in this craft, then his word is

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7 *Tashīḥ*, 134.
to be taken over that of the customer. Ibn Qutlubughah then comments that the Hidāya granted preponderance to the argument (ra'jaba dalil) of Abū Ḥanīfa, and responded to the evidence provided by each of the Two Fellows; this rule-formulation was then confirmed by each of Maḥbūbī, Nasafī, and Şadr al-Sharī‘a.8

2. Precedent assessment

a) Affirmation

i. Unsupported alternative [141]: An unsupported alternative view is when the commentator presents a view which differs from the rule presented by the matn, with the intention only of bringing to the reader’s attention the range of possible historical legal opinions from which the established rule was selected, and not with the intention of contradicting the author’s chosen rule. As such, the affirmation is implicit. It is often denoted by the term ‘qīl’.

[Case 2] Qudūrī recounts the case of a person who is performing the prayer sitting due to an ailment, but then, whilst praying, recovers from the ailment: he may continue the prayer without starting anew, but must stand up from that point forward. Qudūrī’s student, Abū Naṣr al-Aqṭa‘, is cited by Ibn Qutlubughah as saying that this is the well-known position according to the reports of the madhhab’s primary texts (hādhā huwa al-mashhūr min riwāyat al-ustūl), though Bishr (al-Marisi)9 relates that Abū Ḥanīfa held that the person was obliged to begin his prayer anew.10 Thus, the quotation of Aqṭa‘ served to confirm Qudūrī’s rule-formulation, while mentioning an unsupported alternative transmitted opinion.

ii. Confirmation [49]: A confirmation is a comment in which the commentator explicitly affirms that the rule provided by the original author is the correct position, by explicitly stating so himself. Often, the commentator simply confirms the original author’s position by providing supporting quotations from other scholars.

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8 Tashīḥ, 259–60.

9 Bishr (al-Marisi) was a student of Abū Yūsuf’s. (See Jawāḥir, 1:447–50; Tāj, 142–3.) More famous as a speculative theologian (mutakallim), he was a transmitter of many of Abū Yūsuf’s opinions, and — through Abū Yūsuf — a number of Abū Ḥanīfa’s. He is mentioned five times in the Tashīḥ, all in the context of transmitting the opinions of Abū Yūsuf (twice, on p. 402) and of Abū Ḥanīfa (thrice: twice explicitly through Abū Yūsuf on p. 402, and once implicitly on p. 181, which is the case at hand). Because he was not cited for his own legal opinions, I did not mention him in my periodisation of those jurists cited by Ibn Qutlubughah.

10 Tashīḥ, 181.
4.2. The functional relationships of commentary

[Case 3] Qudūrī defines ‘usufruct’ (ʿāriya) as ‘granting another person the right to benefit (tamliḵ: lit., ‘ownership’) from one’s property’. In the commentary, Abū Naṣr al-Aqṭa‘ is cited as confirming this position by the simple confirming statement ‘ṣaḥīh’. He then adds, by way of clarification, that Abū al-Ḥasan al-Karkhi used to define it as ‘granting permission’ (ibāḥa) of use, probably to indicate that the substance of the property does not actually change hands, which might be misunderstood from the term ‘tamliḵ’.

b) Disagreement

i. **Contradiction** [38]: A contradiction is a comment in which an alternative legal opinion is presented as being the de jure correct position (i.e. chosen as the tarjih-opinion); the commentator’s disagreement is with the substance of the rule.

[Case 4] Qudūrī states that in the case of a debtor who has defaulted, and after other means of collection have been exhausted, the judge is to imprison the debtor for two or three months. In the commentary, Ibn Ḥuṭlūbughā cites the Hidāya, Zāhidī, and Qāḍikhān as all arguing that the duration of the imprisonment is actually to be left to the discretion of the judge in accordance with the particulars of the case; while Abū Ja‘far al-Ṭaḥāwī’s position of a maximum imprisonment of one-month is cited by Isbījābī, and supported by Shams al-A‘imma (al-Sarakhshi) as being the more lenient position, only for Isbījābī to then likewise support that the correct position (al-ṣaḥīḥ) is that no exact period is binding, and that instead it is left to the discretion of the judge.

ii. **Qualification** [10]: A disagreement as to qualification occurs when the rule presented by the author is not entirely incorrect, but requires further qualifications as to its applicability. Upon these qualifications being presented by the commentator, it appears that the cases in which the original rule does not hold out–number the cases in which it does hold, thus leading to the commentator’s disagreement and qualification.

[Case 5] Qudūrī defines wine (khamr) as the juice of grapes that has been boiled, has fermented, and has frothed. In the commentary, Isbījābī attributes this opinion to Abū Ḥanīfā, and states that the Two Fellows hold that once it ferments, even if it has not frothed, it is to be considered wine. He then states that the correct position is that of Abū Ḥanīfā, and this tarjih is then confirmed by Maḥbūbī, Nasāfī, and others. However, Ibn Ḥuṭlūbughā subsequently cites

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11Ibid., 303.
12Ibid., 445.
4.2. The functional relationships of commentary

Hidayā as positing that, out of precaution, the mere fermenting of the juice should render it forbidden to drink, and Qādīkhān’s relating that the formative-era Abū Ḥaḍī al-Kabīr adopted the position of the Two Companions. Thus, the role of this cluster of comments was to attribute the opinion to Abū Ḥanīfa while disagreeing with one of his qualifications (the frothing of the grape juice).13

iii. Ḥukm category [7]: A disagreement of Ḥukm category is one in which the commentator agrees with the ruling itself, but disagrees as to the legal (ḥukm) category which previous jurists have assigned to it.14

[Case 6] Qudūrī states that there is no harm in a jurist’s assuming the post of judge if he trusts himself to honour its responsibilities. In the commentary, the Hidayā states that the correct position is that assuming a judgeship is a legal dispensation (ruḵṣa) which should be taken only with the hope of establishing justice; however, the primary injunction, and thus the stricter position, is that it should be left out of fear of falling into errors and having no one to assist one therein. Thus, the Ḥukm category changes from permissibility to interdiction.15

iv. Scope [6]: A disagreement of scope occurs when the basic ruling is deemed correct, but its scope — its applicability to certain types of actions or cases which fall within its possible remit — is disputed.

[Case 7] In the section on the ritual ablutions to be performed before the prayer, Qudūrī states that it is a sunna to wash one’s hands at the beginning of ablutions when one has arisen from sleep. The commentator states that the more correct position (al-aṣaḥḥ) is rather that it is a sunna at all times, citing Fast al-Qadīr, Jawāhir al-ḥiqāh, Najm al-A’imma al-Zāḥidi in his commentary on Mukhtasar al-Qudūrī,16 al-Muḥfit al-Burhānī, and Tuhfat al-fuqahā’ all as disagreeing with the Mukhtasar, and instead expanding the scope to include all ritual washings, even if one has not just arisen from sleep.17

v. Division [1]: A disagreement as to division occurs when the commentator provides an alternative division within a case than that proposed by Qudūrī.

13Ibid., 411.
15Ibid., 444.
16Namely, al-Mujtabā.
17Ibid., 135–6.
4.2. The functional relationships of commentary

[Case 8] In the singular instance of this type of comment–matn relationship, Qudūrī states that there are two types of fasting: mandatory (fard) and supererogatory (nafl). Ibn Quṭlūbūghā then quotes the Ḥidāya saying that the fasting of Ramadan is fard, while the fasting of an oath (nadhr) is obligatory (waqib). Thus, one concludes, there are three ḥukm categories of fasting: mandatory (fard), obligatory (waqib), and supererogatory (nafl). This is different from ‘ḥukm category’, because in the latter, the commentator is disagreeing with the application of a particular ḥukm category to a particular case (mas’ala).¹⁸

II. To clarify a point of ambiguity [28]

The second category of the functions of commentary is that in which a point of ambiguity is clarified. The ambiguity may stem from the wording of the text of the matn, or from a referenced source in the commentary.

1. Explanation of legal reasoning [14]: An explanation of legal reasoning is a comment in which the commentator provides the legal reasoning behind the decisions of previous opinions or rule-formulations.

[Case 9] In the chapter on trusts (waqf), Qudūrī states that if a person builds a watering place, an inn, or other such public work, his ownership remains until a judge formalises it by decree, according to Abū Ḥanīfa, while Muḥammad al-Shaybānī holds that once people begin to drink from the watering place, or reside in the inn, etc., his ownership thereof ceases, and it goes into trust thereby. Ibn Quṭlūbūghā then comments that, for Shaybānī, it is a condition that the founder surrender the property before it be deemed to have gone into trust; however, he considers it sufficient that he make the property open to the general public, by which his ownership ceases.¹⁹

2. Explanation of cited commentator’s intent [7]: An explanation of cited commentator’s intent is when the commentator discusses and explains a passage of a work he has cited as part of his commentary on the primary text (matn).

[Case 10] In the chapter on lost-and-found articles (al-laqta), Qudūrī states that if there is an interest in the maintenance of the found item, the judge is to pass judgement to that effect, such that everything spent by the person safekeeping the object shall be debt upon the item’s owner. In the commentary, the Ḥidāya mentions that Shaybānī’s al-Asl stipulates that ‘evidence must first be established’. Ibn Quṭlūbūghā explains Marghīnānī’s statement

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¹⁸Ibid., 204.
¹⁹Ibid., 298.
to mean that the claimant must first establish evidence that he indeed did find the item, before the judge can decree that whatever he spends is owed to him as debt by the owner, since it is possible that the item was stolen from its rightful owner.20

3. **Illustration** [5]: An illustration is when the commentator provides an example that helps render the concept of the case clear to the reader. The term ‘mithl’ is often used to denote this.

[Case 11] In the chapter on retribution (qiṣāṣ), Qudūrī states that if a group murders an individual, retribution is taken from every member of the group. A quotation from al-Jawāhir illustrates the case, stating: ‘The illustration of this case is a scenario in which each member of the group injures him with a wound that itself would be fatal.’21

4. **Explanation of the process of tarjiḥ** [2]: Explanation of the process of tarjiḥ is when the commentator describes the process that goes into performing an instance of tarjiḥ.

[Case 12] In the chapter treating indemnity (diya), Qudūrī states that any injury that is not to the face or head (dūn al-mūḍīḥa) is to be assessed by a fair independent assessor (hukūmat ‘adl), who appraises the degree of the injury and determines the amount of indemnity to be paid. In the commentary, the Khulāṣat al-dalāʾil relates two alternate positions on how the indemnity is to be assessed, but ends by stating: ‘If, however, the matter is difficult for the judge to decide [i.e. as to which of the two positions applies in the case at hand], he is permitted to issue judgement according to the first position whatever the circumstances might be, since that position is easier to apply.’22

III. **To identify the opinion or the transmission used in the rule-formulation** [185]

1. **Identification of the opinion’s source (aqwāl)** [130]: The identification of the opinion’s source occurs when the commentator attributes a primary legal opinion (qawāl) that is mentioned in the matn but without attribution to the jurist who formulated it (stating, for example, ‘wa-huwa qawāl Abi Ḥanīfa’, or of Abū Yūsuf, Shaybāni, Karkhī, etc.). It is often a precursor to the author’s granting preponderance to one opinion over another (tarjiḥ al-aqwāl), one of the two forms of tarjiḥ.

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20Ibid., 306.
21Ibid., 386.
22Ibid., 389–90.
4.2. The functional relationships of commentary

The work is replete with this function of commentary, an example of which was already presented in Case 5 above, where the opinion transmitted by Qudūrī is attributed to Abū Ḥanīfa in the commentary.23

2. Identification of the chain of transmission (riwāya) [55]: The identification of the chain of transmission (riwāya) occurs when the commentator analyses the intermediary transmitters (whether people or works) of the legal opinion. It is often the precursor to the author’s granting preponderance to one chain of transmission over another (tarjih al-riwāyāt), the second of the two forms of tarjih.

[Case 13] In the chapter treating partnerships (šarīka), Qudūrī states that each of the partners has the right to invest the partnership’s money into a commenda contract (muḍāraba). Abū Naṣr al-Aqṭa’ is then quoted in the commentary as stating that the opinion that each partner has the right to invest into such a contract is transmitted in Shaybānī’s al-Āṣl; however, al-Ḥasan (ibn Ziyād al-Lu’lu’i) relates from Abū Ḥanīfa that the partners do not have the right to do this (i.e. unilaterally). However, al-Aqṭa’ gives preponderance to the transmission (riwāya) of al-Āṣl, deeming it the more correct transmitted opinion.24 Assumedly, this is because Shaybānī’s al-Āṣl is deemed one of the reliably transmitted works (zāhīr al-riwāya), though, as mentioned earlier in this thesis, we know of no theoretical treatment of this concept or the rankings of primary Ḥanafi texts at the time of Aqṭa’’.25

IV. To further expand upon the passage [552]

Further expansion entails that the primary case presented in the mātin is not contested. Rather, the commentator uses the comment or comment-cluster as an opportunity to introduce new information, involving expanding or limiting the remit of the original case’s ruling, or introducing new cases that share some similarity to the case or branch of law at hand.

1. Derivative case (far‘) [71]: A derivative case (far‘) is when the commentator introduces a new case or enquiry (mas‘ala) which — while related to the original issue discussed by the primary author (mātin) — is not within its scope. Rather, the uniting factor is often only the topic, or chapter, of law in which they are both treated. At other times, the uniting factor is simply a similarity of form, though not of legal reasoning or conclusion (see ‘parallel case’ below). Often (though not always) introduced with the term ‘far‘’, this device allows the

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23 See p. 136 above.
24 Ibid., 268.
25 See p. 125 above.
commentator to introduce particular cases or branches of law that the *matn* text had not covered, and were outside of the purported remit of the commentary.26

[Case 14] In the chapter treating leases (*ijāra*), Qudūrī treats the consequences of a leased property that is then usurped by a third party. As this is the final case in the chapter, Ibn Qutṭlūḥughā uses this as an occasion to introduce four cases that have to do with lease, but not with the final topic of usurpation. Demarcating these cases with the term ‘far’*, he cites Qāḍīkhān’s statement as to the validity of a contract in which the nullification of the lease is specified as occurring tomorrow or the next day, but the invalidity of a contract in which the lease is specified as being nullified at the beginning of the following month. (The cause being that the date in the first contract is knowable, while the date mentioned in the second — as the months begin with the sighting of the moon — is not knowable and thus introduces ambiguity and a chance for dispute, which contracts are meant to avoid.)27

2. **Parallel case** [59]: A parallel case is one in which the commentator presents additional cases that, though not of the same genus as the original case, share the same legal reasoning and similar conclusions.

[Case 15] In the chapter treating ‘the prohibited and the permissible (of personal conduct)’ (*al-ḥazr wa-al-ibāha*), Qudūrī states the impermissibility of men’s dressing in silk, but that there is no harm in their reclining on silk pillows according to Abū Ḥanīfa, while Abū Yūsuf and Shaybānī had held that it was prohibitively disliked to do so (*yukrah*). In the commentary, the *Hidāya* presents the parallel cases of sleeping on silk, or using silk curtains: Abū Ḥanīfa held that likewise there was no harm in these usages of silk, while the Two Fellows held that this was not permissible.28

3. **Stipulation** [56]: A comment regarding a given stipulation is one in which the commentator agrees with the ruling, but wishes to reword, redefine, or otherwise comment upon the stipulation which had been mentioned by the original author.

[Case 16] In the chapter on the alms-tax (*zakā*), in the section of the charity given at the close of Ramadan (*zakāt al-fitr*), Qudūrī states that the father is responsible to pay this charity on behalf of his non-adult children. In the commentary, the *Hidāya* states that this ruling applies in the case when the children have no wealth of their own; in the case that they do, the charity is to be given out of their wealth according to Abū Ḥanīfa and Abū Yūsuf, while Muḥammad disagreed. Ibn Qutṭlūḥughā then states that the position of Abū

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26 Such as the aforementioned passage treating criminal offenses (*jināyāt*) on p. 386 of the *Taḥḥīḥ*.  
27 Ibid., 260.  
28 Ibid., 462.
Hanifa and Abū Yūsuf was given preponderance by Ibn al-Humām in Faṭḥ al-Qadīr, and that this rule-formulation was confirmed by Maḥbūbī, Nasafī, and Ṣadr al-Shariʿa. Thus, the rule provided by Qudūrī itself is not disputed, but an extra condition (that the children not be in possession of sufficient wealth) is added; if the stipulation is not met, a different rule is provided.

4. Khīlāf of mujtahids [45]: The category khīlāf of mujtahids represents those comments in which the commentator introduces into the commentary a dispute which existed amongst the early foundational mujtahid jurists. This type does not involve merely assigning the opinion to its progenitor (which was the purpose of III.1, ‘Identification of the opinion’s source’); instead, building upon the rule posited in the matn, a new degree of legal complexity is introduced, based upon, but going beyond, the matn’s topic.

[Case 17] In the chapter treating prayer, in the section discussing the Friday congregational prayer, Qudūrī states that this prayer is only valid if performed in a ‘miṣr jāmiʿ’. The commentary cites the Hidāya as relating that the early jurists were in dispute as to how to define such a town. According to Abū Yūsuf, the term refers to those towns in which there is a political leader (amīr) and an appointed judge whose decisions are enforced. An alternative transmission has Abū Yūsuf defining it as a town in which the largest mosque could not contain all of the town’s residents. The first definition was chosen by Karkhī, to which Marghinānī lends his support and was also confirmed by Nasafī, while the second was the opinion adopted by Muḥammad ibn Shujāʿ al-Thaljī, and supported by Burhān al-Shariʿa. Thus, this instance of commentary introduces a degree of juristic dispute amongst the foundational and formative jurists that is not apparent in the matn — namely, how to define a key term of the rule.

5. Clarification [44]: A clarification is a comment in which the commentator explicates the intent of the author’s choice of words, by using the term ‘āyy’, or some other phrase (e.g. ‘arāda’, ‘maʿnāhu’, etc.), followed by a rewording meant to make clear what was intended by the matn’s original phrase.

[Case 18] In the chapter on the rules of military engagement (al-siyar), Qudūrī states that, in the case of a treaty, if the enemy vitiates the treaty through treachery, then the Muslim party need not formally declare the end of the treaty, so long as the treacherous action was executed by agreement of the opposing side. This last clause being unclear, Ibn Qutlūbughā cites Zāhidi, who explains that what is meant is that the treacherous action

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29 Ibid., 202.
30 Ibid., 184.
4.2. *The functional relationships of commentary*

must have been executed by agreement of all the members of the opposing force (and not only by rogue members thereof, in which case the treaty stands).

6. **Specification** [44]: *Specification* is used to determine an amount that had been left undetermined; to detail a sequential order that had been left un-detailed; to disambiguate a range of logically legal consequences by specifying which one is intended; or to define any other such quantitative or sequential measure that can be known concretely and definitely, but had not been in the *matn*.

[Case 19] In the chapter treating the marriage contract (*nikāḥ*), Qudūrī states that the husband becomes obliged to provide the complete dowry once the marriage has been contracted and the couple have been in seclusion together (*khalwa*). If, however, if there existed any preventative to their consummating the marriage — such as an illness, their both being in a state of pilgrims on the Hajj, etc. — then only half the dowry is due. The commentary cites the *Hidāya*, which specifies that ‘illness’ in this context denotes a malady which would physically prevent intercourse, or — though physically possible — would be so harmful that relations would not have taken place. In this instance, the commentary serves to specify what type of illness is deemed, for legal purposes, a preventative to the consummating of the marriage, as a result of which only half the dowry would be due if the couple were to divorce.

7. **Particular** [40]: A *particular* is a comment in which the commentator provides a particular case (usually one which is borderline, and thus disputed) which serves as a subset to the original rule’s universal, or general, position. After demarcating this new particular subset, he provides its legal ruling.

[Case 20] In the chapter treating court procedure (*adab al-qāḍī*), Qudūrī states that if a judge is removed from his post, and a new judge appointed, the old judge is to turn over to his replacement all of his registers (*diwān*). Ibn Qutlūbughā comments, citing the *Hidāya* and Zāhīdi, that this holds true even if the physical ledgers are actually the property of the disputant or of the former judge himself.

8. **Detail** [38]: A *detail* is a comment in which the commentator adds further details and operational specifications to the rule presented by the original author. In other words, the original rule is affirmed, and specifics as to its operation are provided by the commentator. This type of comment implicitly confirms the position provided in the *matn*, but provides

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31 Ibid., 455.
32 Ibid., 327.
33 Ibid., 444.
new information to the nature or function of the rule without creating new categories. Possible types of detail include details of implementation, details of the options inherent within the general rule, etc.

[Case 21] In the chapter treating sales (buya‘), in the section on the option to cancel the sale (khiyār), Qudūrī states that if a person acts as an agent without having been so commissioned (fuḍūlī), and as such sells the property of a third party, the rightful owner of the property has a choice: he may either validate the sale or invalidate it. In the commentary, Qāḍīkhān is quoted as stating that so long as the rightful owner has not yet validated or invalidated the sale, the purchaser of the item retains the option to cancel. Thus, the original ruling is not compromised, but a corollary detail which had not been mentioned is brought to the fore.

9. Khilāf of the later jurists [29]: The category khilāf of the later jurists represents those comments in which the commentator introduces a dispute that existed amongst later, non-foundational jurists, usually of our fourth or fifth periods, involving not the formulation of opinions but the selection of preceding opinions as rules.

[Case 22] In the chapter treating divorce (talāq), Qudūrī states that a pronouncement of divorce issued by a person who was coerced or drunk has effect. The commentary launches into the validity of this rule, in light of a number of case scenarios which Ibn Quṭlūḥughā provides through citing preceding juristic works. In the case that the man had consumed the intoxicant by an action which was not forbidden (e.g. by drinking something which is not itself forbidden, but does not sit well with him and causes inebriation), or by being coerced to do so and thus becoming inebriated against his will, the post-foundational jurists are in great dispute. The Taṣḥīḥ lists no less than four alternative positions as to the rule in this case: that the divorce is effected regardless (Yanābī‘); that the divorce does not occur if the inebriation resulted from a non-forbidden act (Ruḵn al-Dīn al-Ṣabbāghī, cited by Zāḥiḍī); such a divorce is effected, unless he lost control of his reason due to a malady and not as the result of wilful, pleasure-granting activity (Dhakhīra); and finally, that the divorce does not occur if he was coerced to drink or drank out of necessity, since his actions resulting from his loss of reason were not of his own wilful choice (Qāḍīkhān, Mukhtarāt al-nawāzīl, and — after the rule-review — the choice of Ibn Quṭlūḥughā).

10. Consequences [27]: Consequences is that category of comment in which the commentator delineates the ramifications of the rule provided by the author in the matn.

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34Ibid., 225.
35Ibid., 341.
4.2. The functional relationships of commentary

[Case 23] In the chapter treating the division of inheritance (farā‘īd), Qudūrī states that if a man dies leaving behind him an unborn child, his assets are to be frozen until his wife delivers the child, according to the opinion of Abū Ḥanīfa. Ibn Qurṭubughā comments that the concomitant of this rule is that if the other inheritors demand their shares of the inheritance, they are only given that which they would have been certain to receive regardless of the birth of a new child; access to the difference is blocked until it is known whether the child will be born safely or not.\(^\text{36}\)

11. **Scope** [21]: Scope indicates that the commentator agrees with the rule posited by the original author, but introduces discussion as to the scope of the rule: unto what particulars or categories does it apply. The difference between this and the scope of the classification ‘Disagree’ is that in the earlier classification, the scope mentioned by the original author is disagreed with such that it negates the original scope and replaces it with another, while in this category, the scope is discussed, and either left unmodified or expanded in a way that does not negate the original.

[Case 24] In the chapter treating indemnity (diya), Qudūrī relates Muḥammad’s opinion that the assailant must cover the medical charges of the physician incurred by the defendant due to the injury. In the commentary, the Hidāya is cited as expanding the scope to include the medicinal costs incurred as well.\(^\text{37}\)

12. **Definition** [19]: A definition is a comment in which a term that was left undetermined or general in the matn is now defined.

[Case 25] In the chapter treating prayer, Qudūrī states that it is preferable to postpone performance of the mid-afternoon prayer until immediately before the sun ‘changes’. Ibn Qurṭubughā defines ‘taghayyur’ as denoting changes to the diffraction of light around the sun, such that one's eyes are no longer affected by looking directly at the sun.\(^\text{38}\)

13. **Disambiguation** [14]: Disambiguation is when the author of the primary text (mātin) uses a word with two or more possible denotations, and the commentator explains which of them is intended in the present usage of the term.

[Case 26] In the section treating imperfect sales (al-bay‘ al-fāṣid) in the chapter of sales (buyū‘), Qudūrī states that if one or both of the objects of exchange are illegal objects of trade, the sale is rendered imperfect (fāṣid). In the commentary, the Hidāya is cited as stating that, in fact, the sale of or payment in carrion, blood, or a free man is invalid (bāṭil);

\(^{36}\)Ibid., 471.

\(^{37}\)Ibid., 391.

\(^{38}\)Ibid., 157.
and while payment in wine or swine is imperfect (fāsid), their sale in payment for dirhams or dinars is invalid (bātīl).\textsuperscript{39}

14. **Delineation of cases** [12]: Delineation of cases indicates that the author has listed, in quick succession, a number of cases all related to the case in the primary text (matn) or in the commentary, with each case giving a different result depending on the slight change of circumstances or conditions which they include. The format is often ‘if A...then X; if B, then Y; if C, then Z’.

[Case 27] In the chapter on lease (ijāra), Qudūrī states that if someone forcefully usurps a property that is being leased, the lessee is not obliged to pay the fee of the lease to the lessor. In the commentary, Ibn Qutlūbughā continues that if the usurper then leases out the property he has usurped, after which the rightful owner validates the new lease, there are a number of cases which may be delineated: if the validation occurs before the fee has been paid, the lease is deemed valid, and the fee goes to the rightful owner and not the usurper; if the validation occurs after the fee has been paid, the lease is not valid and the fee is the property of the usurper; if the validation occurs after the lease has elapsed, Abū Yūsuf held that the fee was to go to the rightful owner, while Muḥammad al-Shaybānī held that the usurper received the portion of the fee that was in return for the time that had elapsed, while the rightful owner was to receive what remained. Ibn Qutlūbughā then pronounces that the fatwa-position is that of Shaybānī.\textsuperscript{40}

15. **Exception** [12]: An exception is when the commentator affirms the general applicability of a rule, but excludes an individual or class of items therefrom.

[Case 28] In the section treating the option of return due to a defect (khiyār al-‘ayb) in the chapter of sales (buyū‘), Qudūrī states that a person who purchases food and then eats it has no right to cancel the sale due to a defect in the food, according to the opinion of Abū Ḥanīfa. In the commentary, Ibn Qutlūbughā provides the case of someone who had only eaten part of the food: Abū Ḥanīfa held that likewise, as in the case presented in the *matn*, the buyer possessed no option to return and claim reimbursement. However, Qāḍīkhān is then cited as providing an exception to this position, stating that if he had purchased the food in two separate containers, and consumed or resold only what is in one container, after which he became aware of a defect that had existed at the time of sale, he possessed the right to return the remainder and to be reimbursed proportionately.\textsuperscript{41}

\textsuperscript{39}Ibid., 288.

\textsuperscript{40}Ibid., 260.

\textsuperscript{41}Ibid., 227.
16. **Argument against others** [11]: *Argument against others* is used when: (a) the commentator himself is using his comment to argue against an alternative reading of the text (such as in another commentary on Mukhtasar al-Qudūrī) or an alternative position on the case at hand; (b) the commentator is citing another author and explaining that the author's intent was to argue against (*iḥtirāz ‘an, yaḥtarīz ‘an, lit. ‘to guard against’*) the position or understanding of another jurist.

**[Case 29]** In the chapter treating financial support (*nafaqāt*), Qudūrī states that the amount of financial support due from the husband to the wife is in accordance with the financial status of both the husband and wife (at the time they married), regardless of whether the man himself is affluent or poor (meaning, if she is from a wealthy background while he from a modest one, she is to receive the support of a woman of means). Qudūrī’s position that the husband’s personal financial status was of no consideration on its own was greatly disputed by other jurists of *tarjīḥ* and *tašēḥ*. Khaṣṣāf, an early jurist of the formative period, is cited as holding the position advocated by Qudūrī, which was supported by Maḥbūbī, Nasafī, Isbījābī, and Niẓām al-Dīn al-Marghīnānī. Karkhī, on the other hand, held that the financial status of the husband was indeed of consideration, a position described as being that of the zāḥir al-riwāya, and supported in *al-Muḥīṭ al-Burhānī, al-Kāfī, al-Yanābī*, *Tuḥfat al-fuqahā’,* and in the Koranic exegesis, *al-Ḥaṣr al-muḥīṭ*, of Zamakhshārī. A third position is that the financial states of both the husband and wife are to be considered: if they are both affluent, then he must provide her with a suitable amount; if both are poor, then according to the norms of the poor; if he is wealthy, but she poor, then he is to provide her with an intermediate amount; but if he is poor, while she comes from a wealthy background, then his financial state takes prominence, since it is he who must provide the support: as such, she has a right only to the modest amounts that he can offer. This position is supported by Burhān al-Dīn al-Marghīnānī in *Mukhtārāt al-nawāsil*, though he himself had supported the previous position of Khaṣṣāf in *al-Hidāya*. Ibn Qutlūbūghā himself supports this position, stating that it is the most authoritative position in regards to its transmission (*al-aẓhar riwāyatān*), and the most probative in its legal reasoning (*dirāyata*). At this point, Ibn Qutlūbūghā provides a detailed critique of Marghīnānī’s *tarjīḥ* in the *Hidāya*, stating that Khaṣṣāf’s position negates, without an overriding justification, the stronger transmission of opinion (*udāl ‘an al-ẓāhir bi-lā mājīb*), and also negates the impetus of the Divine statement: ‘Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him’ (Koran 67:7). He then critiques the *Hidāya*’s use of Prophetic Tradition, stating that the Prophet’s permitting Hind bint ‘Utba to take from
the wealth of her husband Abū Sufyān that which suffices her and her child in accordance with the norm (bi-al-maʿrūf) does not support Khaṣṣāf’s position at all, but rather that of the zāhir al-riwāya: the Prophet had knowledge of Abū Sufyān’s affluence, and Hind had testified that what he provided her was not sufficient, nor in accordance with what he was capable of providing fairly, as a result of which the Prophet permitted her to take a greater amount as would suffice her. 42 In short, Ibn Ḥulbughā’s commentary offers him a means by which to engage with the rule-determinations of a number of prominent jurists, to deconstruct their arguments, and to instead argue for an alternative position which he deemed to be the most probative and most deserving to be the legal rule of the madhhab.

17. Providing the ḥukm category [10]: Providing the ḥukm category, in the context of further expansion upon the primary text, occurs when the author posits the legal modal (ḥukm) category of the action in question, which the maṯn had not provided. This differs from ‘ḥukm category’ in the classification ‘Disagreement’ above, in which the commentator faulted the ḥukm assigned to the action by the author of the maṯn.

[Case 30] In the chapter treating the Hajj-pilgrimage, Qudūrī simply states that moving between the two hills of Ṣafā and Marwā (ṣaʿī) is part of the Hajj. Ibn Ḥulbughā simply adds that the performance of this ritual is an obligatory (wājib) part of the pilgrimage, thus assigning it its legal category. 43

V. To identify an editorial problem in the passage itself [26]

1. Conflict of editions [21]: A conflict of editions exists when different copies of the Mukhtaṣar al-Qudūrī provide variants as to a word or passage. The commentator here takes on the role of the critical editor, establishing which reading he holds to be the closest to the original text of Qudūrī, in accordance with the paths of the work’s transmission and contextual evidence.

[Case 31] In the chapter treating pre-emption of sale on a neighbouring property (shuf’a), Qudūrī states that a neighbour has no right to invoke a right of pre-emption on a building or date-palms that are sold without the surrounding vacant land. In the commentary, the Hidāya is quoted as saying that this position is a variant found only in certain recensions of Qudūrī’s text; nonetheless, the position itself is valid, as it is mentioned in Shaybānī’s al-Asl. 44

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42Ibid., 363–6.
43Ibid., 209.
44Ibid., 263–4.
4.2. The functional relationships of commentary

[Case 32] A second example of this purpose of commentary, in which the variants are more meaningful (and more confusing to the novice jurist reading the work), is found in the chapter treating claims and evidence (al-da‘wá wa-al-bayyíná). Qudúrì’s text reads: ‘If the claimant states, “I sold the object to X,” and the person in whose possession the object is replies, ‘Rather, X placed it in safekeeping with me (wadí‘a),” the case is dropped if no evidence is provided.’ The commentary quotes Záhidi as stating that in some recensions of the Mukhtašar, the phrase reads that the case is dropped (‘asqatá al-khusúma bi-ghayr bayyina’), while in others it actually reads the opposite (‘lam tasqat al-khusúma bi-ghayr bayyina’). Záhidi resolves this apparent contradiction by stating that if the person ‘X’ mentioned by the defendant is a different person than the person ‘X’ to whom the claimant states he sold the object, then the second recension (that the case is not dropped) is in agreement with what is found in the opinions transmitted from the madhhab’s primary works (fa-huwa muwáfiq li-riwáyah al-usúl); if, however, that was not what was intended, then this contradicts the opinions transmitted in the Jami‘ al-kabír and the Jami‘ al-saghir, in both works of which Shaybání explicitly states that the case is dropped if no evidence is provided.\footnote{Ibid., 431–2.}

2. Reading of the matn [5]: The commentator must establish a reading of the matn, i.e. of the primary text, where the Arabic language permits for various declensions and multiple grammatical readings. The commentator here plays the role of linguistic interpreter in order to establish, on the basis of the grammar, what the primary text author intended thereby.

[Case 33] In the chapter on indentured slaves (mukátab) — i.e. a slave whose master has permitted him to trade, and agreed to free him upon paying the master an agreed-upon amount of wealth — Qudúrì states that if a Muslim contracts his slave to purchase his freedom in return for wine, swine, or the cash equivalent of his value, then the release–for–money contract (mukátaba) is deemed imperfect (fásida); however, if he conveys to his master the agreed-upon wine, he is considered free. Qudúrì’s text then continues, ‘and he is obliged to work towards paying the master the value (of that wine), such that the value of the amount owed cannot be less than that which had been previously specified, but may exceed it’ (fa-in addá al-khamr ‘atíq hā-dhā huwa żähir al-riwáyah wa-lazimahu an yas’á fi qimáthi wa-la yanguṣ min al-musammá wa-yuzád ‘alayh). In the commentary, Záhidi’s commentary on the Mukhtašar is quoted, in which he states his perplexity at this sentence: in what scenario could the value be exceeded but not gone below in relation to a release–for–money contract in relation to this slave’s market value, or in relation to wine or swine? The
4.3. Employed legal rhetorical reasoning

The second taxonomy presents the arguments and justifications used to support formulation or emendations of rules. It provides a categorisation of the legal, logical, and other justifications employed by jurists to support the rules which they have formulated, or their arguments against a particular formulation. It should be remembered that a single instance of rule-formulation may be supported by a multiple number of arguments or justifications (or by none at all); as such, the below categories, organised into ten classes, are not mutually exclusive. In the following, I have provided a working definition of the category where I believe it might be useful, along with an illustrative case example; in others, where I believe the category title is self-explanatory, I simply provide an example.

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46 Ibid., 377.
Arguments of juristic evidence (dalīl)

Arguments of juristic evidence (dalīl) are those in which the jurist tries to establish the preponderance of an opinion based on the perceived probative strength or weakness of evidence marshalled by the jurists in their opinion- or rule-formulation.

1. Arguing against weak or insufficient use of juristic evidence: In the case of arguing against weak or insufficient use juristic evidence, the jurist claims that the evidence marshalled in support of his opponent’s use of evidence is irrelevant to the case at hand, insufficiently supports the case being made, or is completely lacking. At times, the author shows why the evidence does not support the argument being made; at others times, he merely dismissed it as insufficient, or cites previous authorities as having so dismissed it (in which case, of course, the argument also contains something of an appeal to authority). By ‘evidence’ (dalīl), here, what is meant is all forms of support for an opinion, be it scriptural, rational, factual, or otherwise.

   We have already seen in Case 29\(^{47}\) an example in which Ibn Qurṭlūbughā claims that the evidence used by the Hidāya to establish Khaṣṣāf’s position as the rule instead supports the zāhir al-riwāya argument that the husband’s financial status is in fact taken into consideration.

   [Case 34] In another case, Ibn Qurṭlūbughā dismisses the position of Abū Sulaymān al-Jūzajānī (and the tarjīh thereof by ‘Attābī and the Hidāya) that a ‘large pool’ (i.e. a body of water in which an impure object no longer defiles the pool for purposes of ritual purification) is one which measures ten cubic by ten, stating ‘this position is not supported by any evidence’.\(^{48}\)

2. Appeal to fact: In the case presented in the Taṣḥīḥ, it is an argument based upon medical information. In general, it could be understood as an appeal to factual knowledge (as opposed to the standard sources of scripture or legal syllogistic reasoning).

   [Case 35] Qudūrī relates that, according to Abū Ḥanīfa, a man’s placing drops into his urethral tract does not break his act of fasting, while according to the Two Fellows it does. In his commentary, Ibn Qurṭlūbughā cites the Ikhtiyār of Abū al-Faḍl al-Mawsīlī, who explains that the position of Abū Yūsuf and Muḥammad was based upon an understanding that there existed a passage between the urethra and the alimentary canal (lit.’cavity’

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\(^{47}\)See p. 147.

\(^{48}\)Ibid., 141.
(jawf)) by which the liquid could pass, 'but the more correct position (al-aṣaḥḥ) is that no such passage exists', a point of medical fact and not of fiqh.⁴⁹

3. Rule-determination on the basis of the authority of the argument (dalîl): This means of granting preponderance lies at the heart of the so-called tarjîh al-dalîl discussed previously in Chapter 3. Mujtahid jurists' opinions are weighed in light of their authority, and given preponderance according to the totality of the argument that they marshal in support of their opinion. On the whole, Ibn Quṭlûbughâ does not delve into analysis of the mujtahids' supporting evidence in his own determining of rules; however, when citing the rule-formulations of previous generations of jurists, he will often cite their assessments of the early mujtahids' opinions and evidence, along with the verdicts of the aṣhâb al-tarjîh regarding them. It is in this context that we see repeated dozens of times the phrases, ‘rajaja qaωlahu wa-dalîlahu’, ‘rujjîha dalîluhu’, etc. However, as Ibn Quṭlûbughâ argues in one case,⁵⁰ the role of the jurist practising tarjîh is not to pass judgement on the soundness of the mujtahid’s use of evidence, or to grant preponderance between mujtahids such as Abû Ḥanîfa and his fellows based thereupon; to do so would be to arrogate to oneself the role of adjudicator between mujtahids. Rather, it is to establish the most correct opinion according to the procedures of tarjîh, and — once established — to assess whether another opinion might have superseded it due to external or temporal causes, of which more will be said below. In other words, a statement of tarjîh al-dalîl is to say that, in this case, the rasm al-muftî has been followed.

[Case 36] A simple and common form of this category is an example drawn from the chapter treating ritual purification (ṭahâra). Regarding a well in which a dead, bloated animal has been found (the bloating indicating that it had been in there for some time), Qudürî provides Abû Ḥanîfa’s opinion that if people had used the water, they were to repeat three days’ and three nights’ worth of prayers; while according to Abû Yûsuf and Muḥammad, they were not obliged to repeat any of the prayers until they ascertained when the animal fell in. In the commentary, Ibn Quṭlûbughâ relates ‘Attâbî’s tarjîh of the opinion of the Two Fellows, to which he responds ‘[Attâbî] has found no support [from other jurists] for his formulation: rather, it is the opinion of Abû Ḥanîfa that has been confirmed by Burhân al-Shari‘a al-Maḥbûbî, Nasâfî, Mawṣûlî, Ṣadr al-Shahîd. Furthermore, Abû Ḥanîfa’s argument was given preponderance (rujjîha dalîluhu) in all of the primary works [i.e. of the madhhab] (muṣannafât); and Kâsâñî, in his Badâ‘i‘ al-ṣanâ‘î‘, explicitly

⁴⁹Ibid., 205–6.

⁵⁰Ibid., 172–3; discussed in this thesis in Section 4.4, p. 176.
stated that the position of the Two Fellows is the *qiyyās*-position (arrived at through standard legal syllogistic reasoning), while the Abū Ḥanīfa’s *istiḥsān*-position (supra-syllogistic).\(^{51}\)

**Arguments of transmission (*riwāya*)**

1. **Arguing from the surety of a transmission (*thabāt al-riwāya*)**

   [Case 37] Case 28\(^{52}\) presented the case of food purchased, partly eaten, and then realised to be defective: could the purchaser return what remained, and be reimbursed? Abū Ḥanīfa holds that no reimbursement was due, while the Two Fellows posit that he possesses the option to be reimbursed: Abū Yūsuf stating that he was to be reimbursed for the entirety of what he purchased without having to return what remained, while Muḥammad al-Shaybānī stated that he was to be reimbursed for the defective part that was consumed, and to return what remained. Qādīkhān and the *Khulāṣa* are both cited as having given preponderance to the position of Shaybānī. Ibn Qutlūbughā then criticises this *tarjīḥ*, but he does not dismiss it out of hand: instead, he brings in a nuance to his rule-determination: ‘The *mashāyikh* are not in agreement that the position of the Two Companions is to be chosen. Rather, those whose concern is the surety of the opinion’s transmission (*thabāt al-riwāya*) and the authority of the evidence (*qawwat al-dalīl*) will select the position of Abū Ḥanīfa; while those whose concern is finding lenient solutions for people (*al-rifq bi-al-nās*) will select the opinion of Muḥammad.\(^{53}\)

   This example furnishes further evidence for what we mentioned in our discussion of the category ‘Argument from the authority of the evidence (*dalīl*)’: the purpose of the standard procedure imbibed in the *rasm al-muftī* is to determine the scholarly conclusion as to the *rājīḥ* position; this involved both surety of transmission as well as the authority of the jurist supplying the argument. However, external, ‘non-academic’ considerations were often invoked, and accepted, as bases for preferring an alternative mujtahid’s opinion.

2. **Arguing against a transmission (*riwāya*)**: Another category involves arguing against the reliability of an opinion’s transmission, by arguing that the transmission is not clearly established or sufficiently confirmed to be that of the jurist whose opinion it is purportedly relating.

   [Case 38] In the chapter treating prayer, Qudūrī related the disagreement between Abū Ḥanīfa and his Two Fellows regarding the end of the sunset (*maghrib*) prayer: the

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\(^{51}\)Ibid., 143–4.

\(^{52}\)See p. 146.

\(^{53}\)Ibid., 227.
master held that it ended with the disappearance of the white twilight, while Abū Yūsuf and Shaybānī held that it concluded with the disappearance of redness from the horizon. In the commentary, Abū al-Mafākhir al-Zawzání’s Sharḥ al-Manzūma is cited as related from the Jamʿ al-tafāriq of Abū al-Faḍl al-Baqqālī al-Khwārizmi, that Abū Ḥanifa later rescinded his opinion, and adopted that of the Two Fellows that sunset ends with the disappearance of redness; he was apparently later convinced that the majority of the Prophet’s Companions deemed the disappearance of redness to mark the end of the prayer’s time. As a result, Zawzání determined that this opinion should be deemed the school’s rule (‘alayhi al-fatwā).

However, in his review, Ibn Quṭlūbughā criticises this rule-formulation on the basis that the report of Abū Ḥanifa’s change is irregular and unconfirmed (shādhdh lam yathbut); rather, ‘multitudes have transmitted from multitudes’, reaching all the way back to the three muṭjahids, that they held distinct opinions.54

3. Arguing for the superiority of the ḵāhir al-riwāya transmission: We have already seen in Case 34 that Ibn Quṭlūbughā argued against Jūzajānī’s position that a ‘large pool’ should be measured ten cubits by ten, stating that the ḵāhir al-riwāya position’s transmission is stronger.55

Another example will further illustrate the point. In Case 35, which treated the consequences of medicinal or other drops into the urethral tract, Qudūrī had pitted Abū Ḥanifa (the drops do not break the fast) against the Two Fellows (the fast is broken thereby). In the commentary, Ibn Quṭlūbughā cites ‘Alā’ al-Dīn al-Samarqandi’s Tuhfat al-fuqahā’ as stating that al-Ḥasan ibn Ziyād al-Lu’lu’i transmitted from Abū Ḥanifa that he held the same opinion as Abū Yūsuf. However, Burḥān al-Dīn al-Maḥbūbī, Nasafī, Ṣadr al-Shariʿa, and Mawṣūlī all gave preponderance to the first position related from Abū Ḥanifa (that it does not break the fast). Ibn Quṭlūbughā then continues to reinforce this rule-determination by citing Qudūrī’s own Taqrīb’s statement that, in fact, Muḥammad al-Shaybānī did not hold the same position as Abū Yūsuf, such that the opinion of Abū Yūsuf is left, ‘alone’, to oppose the ḵāhir al-riwāya transmission of Abū Ḥanifa.56 By this, Ibn Quṭlūbughā implies that since it is not, in fact, Abū Ḥanifa against the Two Fellows, but rather only a reliably-transmitted opinion of Abū Ḥanifa against an (equally reliably-transmitted) opinion of Abū Yūsuf, the rasm al-muʿāfī would result in the preponderance of Abū Ḥanifa’s opinion, as in fact determined by the four mentioned aṣḥāb al-taṣḥīḥ.

54Ibid., 155.
55See p. 151.
56Ibid., 206–7.
Arguments of language and logic

1. **A fortiori**: In Arabic, the term ‘bi-al-awlā’ indicates the well-known rhetorical argument that conclusion X must be true since there exists even stronger evidence for it than for conclusion Y, which has previously been accepted; or because acceptance of conclusion Y logically necessitates conclusion X, as it supersedes it.

   [Case 39]: In the chapter treating prayer, Qudūrī states a person too ill or weak to stand may perform the prayer sitting, by simply making motions with his head in place of the regular movements of the prayer. The Badā‘ī is then cited, posing the question: if he were to sit or recline, and only motion, in which position should he sit? The author, Kāsānī, proceeds to relate that in the stage of tashahhud, he should sit as he would regularly sit for that part of the prayer if able. However, during the parts of the prayer in which he recites from the Koran, or in bowing (rukū‘), he relates a number of positions from Abū Ḥanīfa, Abū Yūsuf, and Zafar, before concluding that the correct position is that which was related of Abū Ḥanīfa, that he may sit however he likes, without such a posture being deemed reprehensible or undesirable (karāha). ‘For if one is sitting out of necessity, and as such the prayer’s condition of standing is foregone,’ argues Kāsānī, ‘then a fortiori a sunna act is also foregone’ (i.e. that of sitting in a particular posture).^57

2. **Justification by case analogy**: A justification by case analogy is one in which a jurist seeks to explain the reasoning behind a certain ruling, by drawing upon an analogy with a case from a different aspect of law that shares the same reasoning.

   [Case 40]: In the case of a person who is incapacitated such he is unable to motion with his eyes, despite being conscious, the jurists hold that he is not obliged to perform the ritual prayer ‘in his heart’. If, however, he recovers from his malady such that he is able to perform the ritual prayer, the jurists are divided: all agree that if he only missed one day’s and night’s worth or less, it is mandatory that he make up those prayers. If, however, the missed prayers exceed those of a day and a night: some of the jurists held that he is obliged to make them up, as he was of sound mind and intellect at the time of his incapacity, and as such was capable of understanding the command to pray, but was merely physically incapable of responding to the Divine command (this is meant to distinguish it from the case of someone who was unconscious, such as those in a coma, and as such at the time of prayer was not morally responsible to heed the Divine command). However, Ibn Qutlūbughā states, the correct position is that he is not obliged to make them up, because the number of missed prayers are so many that he would have to make up...
numerous instances of the same particular prayer (‘dakhalat fi ḥadd al-takrār’, e.g. several
days’ worth of the noon prayer, etc.), which would be a great burden (ḥaraj) due to no fault
of his own; as such, the obligation is dropped. The analogy that Ibn Ḫulūbīghā makes to
help rationalise this position is as follows: a person so incapacitated that he cannot perform
the prayer is like a woman on her menses: both are aware of the Divine command to pray,
but are prevented therefrom due to no fault of their own; thus, just as the woman is excused
from having to make up those prayers as it would prove to be a burden not caused by her
own negligence, likewise a person so incapacitated is excused, and need not make them
up.58

3. Linguistic inference: A linguistic inference is a rule (ḥukm) that is inferable from the lan-
guage and word-choice of the matn, though not stated explicitly therein. To be clear, this is
not to say that it is a new first-order opinion thereby; rather, the commentator is bringing
to the fore a rule that already exists in the tradition, but is only implicit in the phrasing of
the matn, as indicated through implicit indication (ishāra).

[Case 41] In the chapter treating the Hajj-pilgrimage, Qudūrī states that the pilgrimage
becomes obligatory upon a person once he is capable of financially affording the provi-
sions and means of transportation necessary to make the journey. In the commentary, Ibn
Ḥulūbīghā states that therein lies an indication (ishāra) that the obligation is immediate
(meaning, his possessing these means at the time of a pilgrimage obligates him to go that
year) and not one which he may delay. Citing the Hidāya, he then attributes this opinion
to Abū Yūṣuf and an opinion transmitted from Abū Ḡanīfa, while Muḥammad al-Shaybānī
held that the person became thereby obliged, but could delay it and perform it in a later
year. The preponderant position, Ibn Ḫulūbīghā then clarifies, is that of the immediate
obligation, as confirmed by Maḥbūbī and Nasāfī.59

Arguments from revelation and the early Muslim community

In the process of arguing for an opinion to be deemed the madhhab’s rule, Ibn Ḫulūbīghā and
the jurists he references often cite from the scriptural sources and early Muslim tradition. As
we shall discuss in the next section,60 Ibn Ḫulūbīghā attacked the notion that the practice of
tarjīḥ involved critiquing the use of scriptural or other evidence by the foundational jurists’ in
their development of legal opinions. What one discovers is that the relatively infrequent recourse

58Ibid., 177.
59Ibid., 208.
60See Section 3, p. 176.
4.3. Employed legal rhetorical reasoning

...to revelation and the early generations of Muslims is presented in the context of defending one mujtahid’s opinion from critique, through burnishing it with scriptural evidence or tradition of the early Muslim community. It is notably not done by way of establishing why one position should be granted tarjih over another, for this would contravene the very notion of the madhhab-law tradition’s acceptance of the plurality of mujtahids and multiplicity of legal opinions, even within a school, while accepting the necessity of establishing a singular rule for the purpose of the practice of law in life. In this, the works of intra-madhhab dispute (khilaf) such as the Taṣḥīḥ differ significantly from inter-madhhab works of khilaf: in the latter, the point is to defend the primary legal evidence and reasoning employed by the school against attack from other schools; the supreme way to do this is to reflect how rooted indeed one’s madhhab is in revelation, early Muslim tradition, and sound legal reasoning more broadly. In intra-madhhab works treating disputed points, there is no question as to the madhhab’s authenticity or rootedness in the broad vision of scripture: instead, the authenticity of particular legal opinions, and establishing which of the resulting authentic opinions is the most viable in producing solutions to legal problemata, is what is rather at stake. All of this is not to say that jurists practising rule-determination did not have recourse to these scriptural sources as a means of substantiating their positions; this did occur, as we shall see in the examples below. Rather, contrary to what one finds in classical works of inter-madhhab khilaf (or modern works of ‘comparative madhhab-law’ (fiqh muqāran)), it is not of primary consideration: authority, transmission, and other legal considerations (i.e. the other categories studied in this section) far outweigh recourse to scripture. The following examples from the four types of arguments from revelation serve to illustrate this point.

1. Appeal to Koran (See next category.)

2. Appeal to hadith

Case 29\(^{61}\) presented Ibn Qūṭlūbughā’s argument for the position of Karkhī over that of Khaṣṣāf, regarding the effect of the husband’s financial state when determining the level of financial support he is legally obliged to provide to his wife. After arguing that the strongest transmission of madhhab opinion supported Karkhī’s position, he continues on to cite Koran 67:7, as well as Koran 2:233, both of which treat the topic of a man’s financial support of his dependants, and contain a clause signifying that God puts no burden on any person that is beyond his means. In this occasion, the verses are cited not to disprove an alternative jurist’s opinion, but to clarify the hermeneutical relationship between the scriptural verses and the chosen legal position (namely, that the financial status of the husband is of consideration). Likewise the role of hadith therein: the Hidāya had cited as

\(^{61}\)See p. 147.
the basis of Khaṣṣāf’s position the hadith of the Prophet’s dispensation to Hind bint ‘Utba to take what she needed; while Marghīnānī saw therein support for Khaṣṣāf’s position that the Prophet asked only of her needs and not of the financial status of her husband, Abū Sufyān, Ibn Quṭlūbughā reinforces Karkhi’s position by interpreting the same hadith to mean that the Prophet was well-aware that Abū Sufyān could afford more, and commanded her to take for herself and her child’s needs beyond what her husband had given, in accordance with what was fair. The tone of Ibn Quṭlūbughā’s citation of scripture in the practice of his ṭarjiḥ, then, is not so much one of arguing from scripture, but of justifying by means of thereof: of proving that the position of Karkhi is at least no less, and (in his estimation) even better, served by the scriptural evidence. In this instance, it is as if he is merely correcting a misinterpretation of the hadith. The concluding ‘and God knows best’ gently indicates that the ḵiṭḥād behind both positions is probabilistic: the ṭarjiḥ thus respects the sum of all evidence already furnished by early jurists in their opinion-making, and later jurists in their rule-formulations, and utilises them to prove the likely preponderance of one position over another.

3. Appeal to Companions (ṣaḥāba) (See next category.)

4. Appeal to the Followers (ṭābiʿīn)

Just as in the previous example, where Ibn Quṭlūbughā’s recourse to Koran and hadith could be deemed almost ‘corrective’, we see a similar approach of his correcting the opposing party’s use of scriptural sources in Case 3862 above. In order to disprove the general statement of Zawzānī that the majority of the Companions held that the end of sunset is marked by the disappearance of redness in the sky (and thus to argue against his ṭarjiḥ of that position), Ibn Quṭlūbughā marshals contrary positions by Companions such as Abū Bakr, Muʿādh ibn Jabal, Abū Hurayra, and ʿĀʾisha, as well as from ‘Umar ibn ‘Abd al-ʿAzīz (counted as amongst the Followers (ṭābiʿīn)), and states that Bayhaqī only relates the position of redness from a single Companion, namely ‘Abd-Allāh Ibn ‘Umar. He continues: ‘[Zawzānī] misunderstood, thinking that Abū Ḥanīfa’s only support for his position was linguistic, which is not the case at all. Rather, Abū Ḥanīfa’s argument (ḥujja) is the authentic hadith, and the explication of the hadith through [the position of] the Companions, in addition to his opinion being sound in deductive approach (uṣūl al-naẓar).... As such, Zawzānī’s selection (iḥtiyār) flies in the face of that which is most correct both in opinion-transmission (riwāyatāt) and as to the significance of the supporting evidence

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4.3. Employed legal rhetorical reasoning

(dirāyatan).63

Arguments from scholarship

1. Appeal to Koranic exegesis (tafsir)

[Case 42] In the chapter treating the marriage contract (nikāh), Qudūrī states that it is recommended that a financial provision (mut'a) be given to a woman being divorced, except in the case of a woman divorced before consummation, and for whom the marriage dowry had been specified. In the commentary, Ibn Qutlūbughā discusses the recensions of Qudūrī’s work as to this passage, for what is mentioned here seems to contradict the general understanding that it was quite the opposite: the financial requital is given to a divorcée for whom a marriage dowry had not been specified. Ibn Qutlūbughā cites Abū al-Rajā’ al-Zāhīdī as establishing that what is written in this recension is incorrect, and that the correct position is rather that it is given to the divorcée for whom a marriage dowry had not been specified. As support for this, he cites the exegetical (tafsir) works of Zamakhsharī (al-Kashshāf) and of al-Ḥākim (assumedly al-Jushamī) who establish that this is the proper understanding of the Koranic verse treating the provision,64 in addition to what has been mentioned in al-ʿAṣl and other works of the madhhab.65

2. Justification from mujtahid’s change of position: All four examples of an argument that the mujtahid changed his opinion come from chapters treating worship — three from the chapter treating ritual purity (tahāra), and one from the chapter treating ritual prayer (ṣalāt). As we have already seen in Case 38, Zawzanī claimed that Abū Ḥanīfa had changes his opinion, only for Ibn Qutlūbughā to negate this on the basis that the transmission establishing this change is irregular and unconfirmed (shādhīh lam yathbut).

[Case 43] In the chapter of ritual purity (tahāra), the section treating menses (ḥayd), Qudūrī delivers the rule that if, in between two instances of menstrual bleeding, there comes an instance of non-bleeding (ṭahār), all of which occurs during the woman’s regular menstrual period, the instance of non-bleeding is counted as if it were continuous menstrual flow. In the commentary, the Hidāya is cited as relating that this is one of a number of transmissions from Abū Ḥanīfa regarding the issue.66 He continues to relate that Abū Yūsuf

63Ibid., 155–6.
64Koran 33:49: ‘O believers, when you marry believing women and then divorce them before you touch them, you have no period to reckon against them; so make provision for them, and set them free with kindliness’.
65Ibid., 328–9.
66Kasānī, in Badā’i’ al-ṣanā’i’, 1:162, mentions four different opinions transmitted from Abū Ḥanīfa.
also narrated from Abū Ḥanīfa — and it is said that this transmission was the Imam’s final position — that any interval of non-bleeding (*tuhr*) the duration of which is less than fifteen days does not act as a divider (*lā yafṣil*) between two separate menstrual periods. Rather, it is counted as one continuous period of bleeding, with the instance of non-bleeding being considered an ‘invalid interval of ritual purity (*tuhr fāṣid*)’; as such, it is to be counted as part of the menstrual period. This position, Marghinānī states, is to be relied upon, as it is easier for people.\(^{67}\) In this instance, the relating of an alternate opinion by the same mujtahid is meant to contradict the position provided by the author of the *matn*: in the opinion provided by Qudūrī, the period of non-bleeding mentioned is limited to that which comes during the ten days of menstrual bleeding that the Ḥanafi madhhab holds is the maximum duration of one menstrual period; while the alternative opinion of Abū Ḥanīfa transmitted by Abū Yūsuf allows for that whole cycle — of bleeding, followed by non-bleeding, following by bleeding — to occur over a much longer duration, of which only ten days are counted as regular menstrual bleeding, and the rest are deemed irregular bleeding (during which time the woman is to perform her regular acts of worship, etc.). Thus, the two different opinions result in different consequences as to ritual purity and ritual impurity for a woman with this condition.

3. **Rejection of a rule-formulation due to the jurist being unknown**

    [Case 43]: In the chapter treating leases (*ijāra*), Qudūrī states that it is invalid to lease a jointly-owned property except to one of the partners according to Abū Ḥanīfa, while the Two Fellows hold that leasing such a property to a third party is perfectly valid. In the commentary, after relating numerous authorities who gave preponderance to the position of Abū Ḥanīfa on this point, Ibn Qutilūbghā quotes Zayla‘ī’s *Kanz al-daqa‘īq* as citing a work entitled *al-Mughnī* which stated that the fatwa-position on this issue is according to the position of the Two Fellows. However, Ibn Qutilūbghā dismissed this position, on the basis that it is irregular (*shādh*), the jurist holding it being an unknown, and as such cannot be used to contradict the position that we have established.\(^{68}\)

### Justifications from juristic considerations

1. **Istīḥsān over qiyyās**: *Istīḥsān* (lit. ‘seeking out that which is of greater good’) in the context of *tarjīḥ* involves choosing one mujtahid’s opinion over than of another on the basis that — though the defeated opinion was arrived at through sound juristic method, and would

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\(^{67}\)Taqī, 147–8.

\(^{68}\)Ibid., 258–9.
be chosen in accordance with default procedures of *rasm al-muftī* — the alternative opinion was chosen provided a greater good that standard juristic syllogistic reasoning (*qiyyās*) would have failed to achieve. To be clear, what is intended here is not *istiḥsān* as a source of opinion-making (i.e. a form of recourse to deriving legal opinions from the primary sources of Islamic law), but the consideration of arriving at what might be deemed a ‘hidden’ good (obfuscated by normal syllogistic reasoning) during the process of rule-determination.⁶⁹

In numerous instances throughout the *Taṣḥih*, Ibn ʿUthmān al-Baghdādī or one of his cited jurists simply gives preponderance by the brief statement, ‘X’s position is *istiḥsān* while that of Y is *qiyyās*.⁷⁰

In Case 36, which had treated a well in which a dead, bloated animal has been found,⁷¹ Ibn ʿUthmān al-Baghdādī cites *Badāʾiʿ al-ṣanāʿīʿ* as stating that the opinion of the Two Fellows (that, in the case that the polluted well’s water was used to make ablutions, the prayers made therewith need not be repeated) is sound legal reasoning (*qiyyās*), but Abū Ḥanīfa’s opinion (that three days worth of prayers should be repeated) is the *istiḥsān*-position.⁷² The Two Companions’ position is consistent with the juristic principle, developed as a maxim by later jurists, that certainty is not abandoned for that in which there is doubt; this being the default position from which a syllogism, in the case of the animal, would conclude that the prayers need not be made up. However, as Kāṣānī is quoted as saying at the end of the passage, ‘in matters of worship, *istiḥsān* is the more precautionary position’, and this consideration thus overrides the position arrived at through normal legal reasoning.

[Case 44] In another case, found in the chapter of sharecropping, we are presented with a scenario in which one of the two partners of the sharecropping contract has died: how is the surviving party to proceed? The *qiyyās* position, presented in Qudūrī’s *matm*, is that the contract is thereby invalidated; however, Ibn ʿUthmān al-Baghdādī continues, in the case that plants had begun to sprout, the position arrived at through *istiḥsān* is that a contract of hire (*ʿaqd iṭāra*) remains in place until the crop of those particular plants is harvested, only after

⁶⁹ On the meaning, nature, and scope of *istiḥsān* as a principle of first-order opinion-making (*ijtihād*), see John M. Mokdisi, ‘Legal Logic and Equity in Islamic Law’, *The American Journal of Comparative Law* 33/1 (1985), 63–92; and, closer to the object of this category: id., ‘A Reality Check on *istiḥsān* as a Method of Islamic Legal Reasoning’, *UCLA Journal of Islamic and Near Eastern Law* 2 (2003), 99–127.


⁷¹ See p. 152.

⁷² *Taṣḥih*, 144.
which the sharecropping contract is invalidated as regards the rest. This, then, allows for the greater good of the crops, along with the effort that the partner had exerted in raising those crops, not having gone to waste, which the qiyyās position would have entailed.

2. Appeal to that which is in greater accordance to standard legal procedure of the madhhab (aqyās): This category argues for a rule based on its greater accordance to standard legal procedure (qiyyās, as discussed in the previous category). In other words, in weighing vying legal positions, one is given preponderance over the others because it more perfectly aligns with standard legal procedures — which I understand to be those of the rasm al-muftī — while the alternatives appeal to other justifications which the jurist does not feel are relevant to the case at hand or of sufficient consideration to overrule the default procedure. As such, this category is the contrary of that which preceded it, in which secondary considerations overrode the standard qiyyās-position.

Case 45] Qudūrī states in his text that a person performing a prayer in which an imam would normally recite aloud is given a choice: he may recite aloud such that he hears his own enunciation (asma’ nafsahu), and if he wishes he may recite quietly (khāfat). Ibn Qutlūbughā then relates a dispute between jurists of the third and fourth periods, pitting Abū al-Ḥasan al-Karkhī and Abū Bakr al-Balkhī al-A’maš on one side, holding that a ‘quiet recitation’ is fulfilled by merely moving the tongue and lips silently such that the letters are formed thereby; while Abū al-Qāsim al-Ṣaffār, Abū Ja’far al-Hinduwānī, Ibn al-Faḍl al-Bukhārī, and Shams al-A’imma al-Ḥalwānī stipulating that he should be able to hear himself in normal conditions in which there is no preventative thereto. At this point, the Badā’ī’ al-ṣanā‘ī’ is quoted: ‘What Karkhī stated is in greater accordance with standard legal procedure (aqyās) and is more correct (āṣahh),’ after which he goes on to quote from Shaybānī’s Kitāb al-ṣalāt in support of this position. He then continues, ‘As for custom (‘urf), it is of no consideration in this subject (i.e. prayer), because prayer is a matter between a person and God Most High, and as such people’s custom is of no consideration’. Thus, Kāsānī establishes as the rule that position which accords more with the madhhab’s procedures of determining the rule (as witnessed in his citation of a canonical work by Shaybānī), and negates the ulterior consideration of custom (‘urf) as irrelevant in this context.

Case 46] In the chapter treating sales (buyū‘), Qudūrī posits the invalidity of a contract of sale in which a quantity of produce (thamar) is sold, minus specified amounts (artāl ma’lūma) that are excepted therefrom. The commentary then discusses this and a dissenting

73Ibid., 316.
74Ibid., 164–5.
opinion arguing for the contracts validity. Thereafter, Ibn Kamāl’s Ẕaṭ ʼal-Qadīr is cited in support of Qudūrī’s position, arguing:

the position that such a contract is invalid is in of greater accordance with the doctrinal position of Abū Ḥanīfa (aṣṣā bi-madhhab Abī Ḥanīfa) on the issue of selling a lump sum of food, in which each qaṣīz is sold for one dirham: for in that case, the indeterminateness (jahāla) as to the final amount to be sold caused the contract to be deemed invalid at the time of sale. And this holds equally true in this case.\[75\]

Again, in this example, one position was chosen as the rule over another on the basis of one’s being closer to a standard procedure of the madhhab, as established in a previous case or text of the legal tradition.

3. **Discretion:** The limitation of lower-level jurists serving as muftis and scholars is one of the purposes of the system rule-determination: to ensure that those not sufficiently trained had recourse to a method of discovering the proper rule for the case at hand.\[76\] While we will treat this topic more closely at the conclusion of this chapter, the following is an illustration of of judicial-discretion being admitted despite the occurrence of precedent-establishment by jurists of ṭarīqah:

[Case 47] In the chapter treating claims made in court (daʿwā), Qudūrī relates Abū Ḥaṇīfa’s opinion that if a claim is made in court that a marriage was contracted, the defending party is not obliged to swear an oath negating the claim, while the Two Fellows held that the defendant is obliged to so swear an oath denying the occurrence of a marriage contract. An extensive number of sources are cited, arriving at what seems to be a consensus that the preponderance is given to the opinion of the Two Companions. However, in the final instance, Ibn Ḥuṭlūbūḥā states that the choice of the late jurists of the school (al-mutaʿakhkhirin min mashāyikhinā) was that the judge possesses discretion in such a case: if he finds the defendant being unreasonable and obstinate, he forces him to swear an oath, in accordance with the position of the Two Fellows; if, however, he finds that the defendant is being unjustly treated and wronged by means of this case, he need not ask him to swear an oath, in accordance with the position of Abū Ḥanīfa.\[77\]

4. **Equity (aʿdal):** This argument proceeds to give precedence to one opinion over another on the basis of which of them would lead to a more reasonably fair, or equitable, outcome.

\[75\]Ibid., 221.

\[76\]See Chapter 3 above, especially pp. 107-109.

\[77\]Ibid., 428–9.
4.3. *Employed legal rhetorical reasoning*

[Case 48] In the chapter treating the alms-tax (zakā), Qudūrī states that the alms due from a flock of cattle, forty to sixty strong, the owner is to give a percentage of his flock in alms, this percentage increasing in proportion to the number of cattle he owns (forty being the least, and sixty being the most). In the commentary, Ibn Qutlūbughā relates that Asad ibn ‘Amr transmitted from Abū Ḥanīfa an opinion that matched that of the Two Fellows: namely, that no alms are due for the excess above forty until the size of the flock reaches a size of sixty, in which case one simply pays an extra amount. He then cites *Tuhfat al-fuqahā*’ and Isbjābī both stating ‘that this transmission is more equitable (a’dal).’

5. **Precuation (ḥawat)**

When reviewing Case 36, we have already seen an instance of a jurist invoking ‘precaution’ as a deciding factor in *tarjīh*. In that instance, Kāsānī argued that the position arrived at by *istiḥsān* was more precautionary, and thus the safer position in sections of fiqh treating acts of worship. The same principle also holds in cases drawn from the chapter treating the alms-tax, the law of marriage, the prohibitions of marriage established through wet-nursing, of personal conduct, and from the chapter treating the procedures for claims lodged in court. The following is one further example:

[Case 49] In a section of the chapter treating prayer, regarding the obligation to cease trading upon the call to the Friday congregational prayer, the *Hidāya* established that the most considered opinion is that which states that individual must cease their trading with the commencement of the first call to prayer (*adḥān*). Zāhidi is then cited to confirm this rule-formulation, on the basis that it is the more precautionary position.

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78 Ibid., p. 193. Incidentally, Ibn Qutlūbughā ends his commentary on the question by deconstructing the hadith-evidence for this position, thereby implicitly giving his support to the first opinion, as chosen by Marghinānī in the *Hidāya*, and confirmed by Nasafi and Maḥbūbī.

79 Pages 152 and 161.

80 Ibid., 200.

81 Ibid., 321.

82 Ibid., 337

83 Ibid., 411, regarding at what stage of grape juice that is boiled or fermented should no longer be drunk, out of precaution of it having become wine.

84 Ibid., 427.

85 Ibid., 185.
Justifications from context

1. **Customary practice (‘urf):** This category justifies a practice on the basis that it has a long-standing history of acceptance with a people, often from time immemorial. It shares many of the underlying considerations of the suspension of regular fiqh considerations in light of these customs with the previous category of common practice.

   [Case 50] Consideration of customary practice is operative in the question as to whether an agent appointed as one party’s representative in a litigation also ipso facto possesses the agency to take receipt of what his claimant is due as a result of the court case. In this case, Qudūri simply provides the position of Abū Ḥanīfa, Abū Yūsuf, and Shaybānī that the agent does in fact ipso facto possess the power to take receipt of the settlement for his client. The commentary then cites the *Hidāya*, which posits that, in fact, the public position of the madhhab (*fatwā*) today should rather be in accordance with the opinion of Zufer, who states that the latter does not follow from the former, due to the untrustworthiness of people in that age. However, Ibn Qutlūbughā, after citing a long list of jurists who support Zufer’s position, ends the comment by citing Qādīkhān, who who instead argues that the relied-upon position (*mu'tamad*) should be context-specific: it should be dependant upon the customs and practices of the people of that locale (see next maxim), and should also consider the sum of money involved, whether great (such that a third party might not normally be entrusted with such a sum) or small (and thus unlikely to lead to further problems). It should be noted that, in this case, consideration of custom overrode the explicit *tarjiḥ* of the latter-day *mashāyiḥ* of Balkh, who gave preponderance to the position of Zufer unequivocally; the rule-review (*tāshīḥ*) took circumstantial considerations into account when over-riding what was a validly arrived at *tarjiḥ*.86

2. **Differences in individuals’ circumstances:** This category represents scenarios in which a judge is to look into the particular circumstances of the litigant in front of him, and vary his judgement in accordance with that person’s state.

   [Case 51] In the chapter treating settlement of litigation (*iqrār*), Qudūri presents a case in which a litigant admits to owning ‘a great sum of money’ to another person: according to Qudūri’s rule, no less than 200 dirhams are to be accepted from him, the implication being that anything less is not considered a ‘great sum’. However, Marghinānī, Isbijābī, and ‘Alā’ al-Dīn al-Samargandi are all cited by Ibn Qutlūbughā as arguing that the judge should take into consideration the financial status of the person admitting the debt: if he is

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86Ibid., 276–7.
wealthy, then an amount that the wealthy consider to be a great sum should be extracted from him; if he is poor, then that amount commensurate with his poverty.  

3. **Common practice (ta‘āmul al-nāṣ):** A practice so common that the normal fiqīh considerations (qiyyās) are suspended, and the practice deemed acceptable. All of the examples of this category found in Ibn Qutilūhughā’s work revolve around practices that are ethically neutral in and of themselves (primarily particular forms of financial transactions and contracts), but often lead to dispute, loss on behalf of one party, or some other harmful end. As such, when those fears are mitigated or negated by widespread knowledge and application, the practice is then accepted.

   [Case 52] The common example of bespoke orders (istiṣnā‘), in which a person buys cloth (for example) on the basis that it be sewn into a particular style of garment, is one illustration of this category. According to the regular considerations of fiqīh (qiyyās), the *Hidāya* is cited as saying, this type of contract should not be valid, as it involves an unknown result which may lead to dispute. However, according to supra-syllogistic considerations (istiḥsān) — namely, the fact that it is common practice and widely accepted by people in many lands — it is an acceptable form of transaction, just like the dying of clothes.  

**Justifications from exigencies of change and necessity**

In effect, this section could be divided into two: one for change, and one for necessity. However, as will readily become clear, the two are often intimately liked, and as such the justifications have been listed together.

1. **Changes in circumstances, from similarity to disparity:** A change of circumstance, from similarity to disparity entails that a context in which a previous rule functioned (be it economic, social, or otherwise) has now changed, such that things that were once constant and similar, had now become disparate and different. As a result, the original rule no longer sufficiently suits the end for which it was originally meant to serve.

   [Case 53] In the chapter of sales, the section treating the option to cancel upon sight (*khiyār al-ru‘ya*), Qudūrī states that a home buyer loses this option upon seeing the house’s courtyard, even if he has not seen any of the rooms. The *Hidāya* then establishes that the more correct opinion in later times is that of Zuraf: one must enter into the house and see the rooms. At the time of the original ruling, the disparity between houses was not great;

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87Ibid., 246–8.

88Ibid., 229. Other examples imbibing similar considerations are found on pp. 315, 317, 318, 350, 422, and 424.
but with the changes in how houses were built, there is great disparity between then, and
the courtyard no longer reflects anything as to the interior of the house.89

2. **Change of times**: The previous category of ‘changes of circumstances’ did not contain any
moral judgement as to the change which had occurred: it simply reflected that where there
had not been difference and disparity between objects or contexts, there now was. The
category *change of times*, however, reflects a more pessimistic change: where once a rule
was based on high social or moral standards, this is no longer the case, and as such the
rule no longer achieves the end for which it was intended. In order to ensure justice or
some other end of the moral and judicial system which fiqh informs, jurists had to modify
or adopt a new opinion as the rule.

[Case 54] In the chapter treating settlement of litigation (*iqrār*), Qudūrī states that if a
person admits to owing an unborn child a thousand dinars, he is to be questioned as to the
basis of this debt: if he states that someone left it to the child as a bequest, or the child’s
father had died and the money is the child’s inheritance, he is to be believed; if however
he provides no clear or convincing reason, the admission is rejected, according to Abū
Ḥanīfa. After correcting the Qudūrī’s *matn*, by attributing the opinion to Abū Yūṣuf in the
first instance, Ibn Qutlūbghā goes on to relate that this rule-formulation was confirmed
by Būrān al-Dīn al-Mahbūbī, Naṣafī, Mawṣili, and others. Ibn Qutlūbghā then states:
‘Let this point be well-learnt, for in our age, many admissions are made that are absolutely
impossible to imagine that they have a valid, godly cause (*lā yutasawwar an yakīn lahā
sabab saḥīh sharʿan*); and God knows best’. The lamenting at general moral decline that
would cause the widespread manipulation of the law for unethical ends is palpable, as it is
in a number of other cases throughout the work.90

3. **Affliction (balwā)**: A justification from affliction posits that some negative thing is so
widespread, that it is not reasonable to expect that people will be able to avoid it, or that
they will have known better than to have avoided it.

[Case 55] In the chapter treating the marriage contract, a case similar to that of Case
4791 is mentioned. A man claims in court that a marriage contract was proposed, and
that the woman at the time of the offer remained silent and did not refuse it (in a context
in which the silence was deemed to be a sign of acceptance); the purported wife rebuts
this claim, saying she explicitly rebuked the offer. Qudūrī states that her word is to be

89Ibid., 223–4. See a similar case on ibid., p. 195.
91See p. 163.
4.3. Employed legal rhetorical reasoning

taken over his, and she is not obliged to swear an oath, as according to Abû Hanîfa oaths are not required in resolving contracts of marriage; the Two Fellows, on the other hand, require her to swear an oath. In the commentary, the Haqâ‘îq al-manzûma is cited as stating that the madhâhb’s rule is based upon the opinion of the Two Fellows, due to ‘widespread affliction’, i.e. of people’s using the courts to arrive at illegal gain.92

4. Corruption of present age: We have already seen an example in Case 53,93 in which the untrustworthiness of people in the jurist’s age was cited as a cause to accept the opinion of Zufar over that of the other foundation jurists.

5. Public interest (maṣlaḥa): Justifications from public interest (maṣlaḥa) are based upon considerations of maintaining the needs of society. This is done by adopting an alternative rule which more perfectly considers these needs than the default rule would have done.

[Case 56] Qudûrî relates, in the chapter on lease, that it is impermissible to hire a person to perform the call to prayer (adâhân). Ibn Qâṭîbughâ comments that this is the position of the early jurists (al-mutaqaddîmîn); the latter-day jurists (al-muta‘akkhîrîn) made provisions for it and other such acts (including the teaching of Koran, the teaching of Islamic law, leading congregational prayers, performing the Hajj-pilgrimage for someone unable, etc.), which are normally deemed acts of piety. The basis of this change is in order to achieve a higher good (istiḥsân), states the Hidâya, namely, ‘to fulfil the needs of society, of which the people themselves have become negligent in fulfilling’, as stated by Burhân al-Dîn Ibn Mâzâ. Further, al-Ṣadr al-Shahîd’s al-Fâtâwâ al-kubrâ is quoted as permitting taking payment for ‘the teaching of inheritance law, the division of bequests, and other similar matters, as has been related from Nuṣayr ibn Yahyâ’.94 Thus, the wider interest of the general public — to ensure the transmission of knowledge and the fulfilment of public functions — is used to justify the change of rule from impermissibility to permissibility in regards to hiring people to perform what are otherwise acts of piety.

6. Necessity (darûra): Arguments of necessity — that there is no reasonable alternative — are most often interlinked with those of ‘affliction (balwâ)’. They argue that, due to a matter that has become so widespread as to be effectively unavoidable, it has become necessary to adopt an alternative opinion as the rule for the case at hand.

[Case 56] In a phrase that appears even in the introduction to the Taṣhîh, it is stated that in matters of sharecropping (muṣâra‘a’), financial transactions (mu‘āmala), and endowed

92Ibid., 321–2.
93See p. 166.
94Ibid., 257–8. On Nuṣayr ibn Yahyâ, see p. 44.
foundations (waqf), the madhhab’s rule in in accordance with the opinion of Abū Yūsuf and Muḥammad al-Shaybānī, due to the existence of necessity (darūra) and affliction (balwā).  

7. **Public need (ḥājat al-nās)** Similarly is the concept that a certain rule more perfectly fulfills the needs of people, indicating that a competing rule would effectively harm, inconvenience, or otherwise disadvantage them in matters which revolve around common practice, and are not forbidden for reasons intrinsic to the action itself.

This argument is likewise used to support the position of the Two Fellows regarding the legitimacy of sharecropping.  

**Justifications of lifting difficulty and facilitating ease**

Closely and naturally correlated to the previous two classes of justifications are those arguments built upon the lifting of difficulties and the facilitating of ease for people.

1. **Justification of ease (aysar)**

   Case 28\(^97\) presented the problem of whether a purchaser possessed the option of return to due to defect if the item purchased had been sold in two separate containers, and only one of the two had been partly consumed. One of the justifications marshalled in support of the position that the purchaser did in fact retain the option was that this opinion was easier upon people.

2. **Justification of greater leniency (arfaq)**

   [Case 57] In the chapter on currency exchange (ṣafar), Qudūrī states that if an object is bought using a particular form of currency, which — before payment had been completed — is then depreciated and abandoned, the sale is deemed invalid ab initio (bātil) according to Abū Ḥanīfa, while Abū Yūsuf held that he must deliver an equivalent in value at the time of the sale, and Muḥammad stated that he owes its equivalent value at the final moment that the currency was still in use. In a long commentary upon this disputed point, in which no less than nine different jurist’s rule-formulations are assessed and debated, in the final instance the Dhakīra is cited as relating that a multitude of jurists all adopted the opinion of Muḥammad in their rule-formulations, as it was more lenient upon people, and that this was the rule according to which al-Ṣadr al-Shahīd used to issue his own responses.  

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\(^{95}\)Ibid., 259, 315; also in Ibn Ḥaštāb’s introduction and reproduction of Qāḍīkhān’s *Rasm al-muṣṭi*, 125–6.

\(^{96}\)Ibid., 315.

\(^{97}\)See p. 146.

\(^{98}\)Ibid., 235–7.
3. **Justification of greater benefit (anfa’)**

[Case 58]Qudūrī states that, for the purposes of paying the alms-tax (zakā), objects of trade should be evaluated according to whichever of the market value of gold or silver is higher. In the commentary, Ibn Qutlubughā adds that, according to Abū Ḥanīfa, the value of one’s gold should be added to the value of one’s silver, such that their total value will surpass the minimal amount taxable (nīṣāb). Isbjābī and Zawzanī are both cited as having given preponderance to this opinion, as confirmed by Nasafi, Burhān al-Sharīʿa al-Maḥbubī and Șadr al-Sharīʿa. The passage is ended by citing Samarqandi’s *Tuḥfat al-fuqahā*, which states: ‘for Abū Ḥanīfa’s opinion is of greater benefit (anfa’) to the poor, and is the more precautionary position in this matter of worship’.99

4. **Justification of prevention of harm**

[Case 59] In treating the case of someone whose deposit has been returned to him, and spends that money, only to then realise that the coins returned to him were counterfeit (zuyūf) and thus were not of the same value as those which he had deposited, Qudūrī relates Abū Ḥanīfa’s position that he has lost his right to demand an exchange, while the Two Fellows hold that he may return coins of the same value as those which he had fraudulently been given, and demand that he be given in exchange quality coins whose value are like those which he had deposited. The commentary corrects the attribution of Muḥammad al-Shaybānī to this latter position, citing Isbjābī who corrects it and states that rather Shaybānī held the same position as Abū Ḥanīfa. And though Abū Ḥanīfa and Shaybānī’s position is confirmed by Nasafi, Fakhr al-Islām al-Bazdawi is then cited as saying that their position is the default (qiyyās) position arrived at by regular juristic reasoning, while that of Abū Yūsuf’s is the istiḥsān-position. ‘Abū Yūsuf’s position,’ the ‘Awn states in support of Qāḍīkhān’s *tarjih*, ‘is sound and a greater preventative of harm (adfa’ li-al-ḍarar), which is why we have chosen it as the rule.’100

5. **Justification of prevention of hardship:** Case 39101 presented the case of someone so incapacitated that they are unable to even move their eyes in order to perform the ritual prayer thereby. In such a case, the chosen position was that he is not to perform the prayer, and — if this state lasts for greater than a day and a night — he is not obliged to make up

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99Ibid. 199–201.

100Ibid., 239–40. In the final note, Sarakhsi’s *Mabsūt* is quoted as saying that this was also Shaybānī’s final position, thus possibly explaining Qudūrī’s aligning him with Abū Yūsuf.

101See p. 155.
those prayers, as it was of no fault of his own that he was unable to perform the prayers. The chosen position thus prevents what is deemed an unnecessary hardship.

Justifications of preceding juristic authority

I have left this class of categories until last, since in many ways it is the most central to this thesis’ argument regarding the relationship between commentary and precedent in Ibn Qūṭlūbughā’s work.

1. Appeal to formative authoritative works: This form of justification occurs when the argument for the rule-determination of a particular position is primarily argued on the basis of it being found in an early, authoritative work of the madhab. In many cases, the work in question is one of those of Muḥammad al-Shaybānī, while at other moments it refers to works of our second and third periods as well. (In one instance, for example, an argument is shored up by appealing to the fact that it is found in the Mukhtāṣar of Abū al-Ḥasan al-Karkhī.)102 There are also a number of references to ‘al-ʿuşūl’, a general term to refer to the same set of juristic works.103

[Case 60] In relation to the question of whether the feet were deemed part of the woman’s body which must be covered in prayer and in front of non-relatives (ʿawra), Qudūrī states that the entirety of the woman’s body is so deemed, except for the face and hands. In the commentary, the Ḥidāya is cited as giving preponderance to the dissenting position that the feet need not be covered, while the Jawāḥir al-fiqh of his son Niẓām al-Din, and the Ikhṭiyār of Mawsūlī, both accept the Ḥidāya’s rule-formulation, and only qualify it by stating that what is meant is at the time of prayer, while they must be covered in relation to male non-relatives. Ibn Qūṭlūbughā, however, defends the rule posited by Qudūrī, and argues that Qudūrī’s explicit statement (танṣīṣ) in the Mukhtāṣar is more worthy of being deemed the correct position, as it is supported by the the position of Muḥammad al-Shaybānī related in the latter’s ‘Kitāb al-Iṣṭiḥṣān’ that ‘all else is to be deemed ʿawra’.104

2. Appeal to consensus of Ḥanafi jurists: This is usually invoked to indicate that, despite a previously related dispute amongst later jurists, they are in agreement as to some related point. It should be noted that in the context of Hanafi works of tarjīḥ, the term ‘ijmā’ refers

102Ibid., 178.

103See, for example, Ibid., 181 (‘riwāyat al-ʿuşūl’), 182, 328, 392 (where the term may indicate not formative-era works, but rather ‘musannafāt’, on which see p. 173 below), and 432. See also our previous discussion of the term on p. 126, n. 42.

104Ibid., 158–9.
to the consensus of the jurists of the madhhab, and not of all Muslim jurists, as is apparent from the examples of the term in Ibn Ḥṣabūghā’s commentary.\textsuperscript{105}

[Case 61] In the chapter on partnerships (\textit{sharīka}), Qudūrī states that if one partner has paid the alms-tax (\textit{ṣakā}) due on the wealth of the partnership, and the other then pays it, the latter is liable and must reimburse the amount, regardless of whether he was aware or unaware that his partner had already paid. In the commentary, Ibn Ḥṣabūghā attributes this opinion to Abū Ḥanīfa, and provides the alternate opinion of the Two Fellows that he is not liable if he was unaware. The ‘\textit{Awn} is then cited to state what was agreed upon, namely, that if the agent paying the tax was indeed aware that the other party had already paid the alms-tax, that he was liable; and this was agreed upon.\textsuperscript{106}

3. \textbf{Appeal to majority view}: This is denoted by terms such as ‘\textit{al-akhtar}’, ‘\textit{āmmat al-mashāyikh}’, ‘\textit{akhtar al-mashāyikh}’, etc. The term ‘\textit{mashāyikh}’ itself is repeated frequently throughout the text (more than forty times according to my count), and, even when not preceded by a preceding \textit{idāfa}-term denoting majority, is often used to denote on its own to support an argument on the basis that many or most jurists of the school, or of a particular geographical locale, gave preponderance to one position over others.

[Case 62] In making the case that pronouncing the \textit{basmala} and that washing the hands are both to counted as \textit{sunna} before and after cleaning one’s private parts, Ibn Ḥṣabūghā appeals to the fact that ‘the majority hold [this view]’.\textsuperscript{107}

[Case 63] Similarly, in arguing for the position of Muḥammad al-Shaybānī that, contrary to the position of \textit{Mukhtasār al-Qudūrī}, moveable items and other objects of that have repeated use and benefit (‘\textit{mā ġī hi ta’āmul ẓāhir}’), objects such as copies of the Koran, funeral biers, drinking cups, etc.) may be put into trust for use of the general public, the \textit{Hidāya} is cited as stating: ‘the majority of the jurists throughout the lands have adopted the opinion of Muḥammad’, and the \textit{Khulāṣat al-dalā’īl}: ‘this is the position accepted by the generality of the mashāyikh, including Sarakhṣī’.\textsuperscript{108}

4. \textbf{Appeal to preceding practitioners of rule-review (\textit{muṣaḥḥihūn})}: The beginning of this chapter demonstrated, through a word-analysis of the terms of rule-determination used in the \textit{Taṣḥīḥ}, that the primary activity therein is that of rule-review (\textit{taṣḥīḥ}). And as we have

\textsuperscript{105} In addition to the case example which follows, see also \textit{Taṣḥīḥ}, 169, 209, and 472, in the last case of which the phrase explicitly states ‘\textit{bi-al-ijmā’ bayn aṣḥābinā}’.

\textsuperscript{106} Ibid., 269.

\textsuperscript{107} Ibid., 137.

\textsuperscript{108} Ibid., 291.
already seen in our periodisation in Chapter 2 (as well as hundreds of instances in the case studies which have proceeded in this chapter), there are hundreds of instances in which the rule-confirmation of jurists such Burhān al-Dīn al-Maḥbūbī, Nasafi, Mawṣili, and others of the fifth period are cited to finalise Ibn Qutlūbughā’s review. However, in numerous instances the commentator establishes the taṣḥīḥ of a position by mentioning them as a group, the most common phrases being ‘as confirmed by the jurists of taṣḥīḥ’ (‘i’tamadahu al-muṣaḥḥīhūn’), ‘as accepted by the jurists of taṣḥīḥ’ (mashā ‘alayhi al-muṣaḥḥīhūn), and ‘as followed therein by...’ (tabī’ah); or some other derivates of those words’ roots.109

5. **Appeal to primary texts of the madhhab (muṣannafāt):** In distinction to the previously mentioned ‘authoritative works’ of from the first three periods, the term ‘muṣannafāt’ refers to those primary texts (the so-called ‘mutūn’) which were relied-upon for purposes of tarijīh and taṣḥīḥ by later authors.110

In Case 36,111 we have already come across an instance in which the tarijīh of ‘Attābī was overturned by Ibn Qutlūbughā on the basis that the alternative position which ‘Attābī had rejected was actually the position adopted by the muṣaḥḥīhūn, and ‘the arguments of which were deemed preponderant in all of the primary works [i.e. of the madhhab] (ru{jīha dalīluhu fi jam′i al-muṣannafāt)’.112

6. **Appeal to latter-day jurists (muta’akkhiriūn):** In Chapter 2, we assessed the use of the term ‘muta’akkhiriūn’ by Ibn Qutlūbughā and other Ḥanafī jurists, concluding that it was a relative category of jurists, who, in the context of rule-determination, largely (though not consistently) lived in the post-formative periods of the school.113 In any case, these latter-day scholars are often called upon to substantiate the rule-formulation or -review presented in the Taṣḥīḥ. Most frequently, they are called upon to explain a change from a previously accepted rule to another, due to many of the arguments and justifications of

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109See, for example, Ibid., 150 and 196; but especially towards the end of the work, where Ibn Qutlubughā seems to be accelerating the rate of his reviews by simply referring to them en masse: 424, 431, 433, 438, 441, 453, 454, 464, 465, 466, 467. It should be noted that the phrase tabī‘ah further confirms our conclusions in Chapter 3 (p. 119 above) that taṣḥīḥ is a stage separate from tarijīh (here meaning rule-formulation proper), as it involves a group of jurists ‘following’ another group’s tarijīh-decisions, by having reviewed and confirmed them.

110See p. 66 above for later discussions as to which works in particular were deemed the primary mutūn of the madhhab for these purposes.

111See p. 152.

112Ibid., 143–4.

113See p. 70.
change and necessity outlined above. See, for example, Case 47 (page 163) and Case 56 (page 168) above, in which contextual considerations are invoked by latter-day jurists to justify a move away from the previously established rule.\footnote{Other examples of the mention of the latter-day jurists may be seen in \textit{Tashih}, 161, 168, 245, 255, 276, 296, 323, 350, 409, and 414.}

7. \textit{Appeal to the commentaries (shuruh)}: This category is more commonly found in the stage of rule-review (\textit{tas\=ih}), when Ibn Qutl\=ubah or the author he is citing is working to resolve the multiplicity of rule-formulations (\textit{tarji\=ihat}) between the jurists of \textit{tarji\=ih}, in order to arrive at a single rule; or, alternatively, to make a correction to a previous formulated rule. In this context, the commentaries (which logically were only written after the authoritative works (\textit{us\=ul}) and primary texts (\textit{mut\=un}) of the madhab) and other expansums (\textit{mabs\=usat}), authored by \textit{tarji\=ih}-jurists, are called upon by \textit{tas\=ih}-jurists to demonstrate the preponderance of one jurist’s argument and evidence over that of another (\textit{tarji\=ih al-dalil}).

[Case 67] In the chapter treating pre-emption of sale (\textit{shuf’a}), Quduri states that if person X (who wishes to pre-empt the sale of the neighbouring property) and Y (who has agreed to purchase it from its owner, person A) disagree as to how much the property was sold for by A to Y, and X has no evidence to support his claim, then the word of Y is taken. If, however, they both have evidence, then the evidence of X is taken over that of Y according to the opinion of Ab\=u Hanifa and Mu\=ammad, while Ab\=u Yusuf held the opposite. In the commentary, Ibn Qutl\=ubah simply relates that the commentaries (\textit{shuruh}) granted preponderance of argument (\textit{tarji\=ih al-dalil}) to the opinion of Ab\=u Hanifa, and this rule-formulation was consequently confirmed by Ma\=b\=ubi, Nasafi, Maw\=silli, and \c{S}adr al-Shari’\=a.\footnote{\textit{Ibid.}, 265. Other examples may be reviewed at \textit{Ibid.}, 170, 184, 190, 217, 308, and 328.}

\section*{4.4 Operative principles of rule-determination}

The second of our taxonomies surveyed the types of arguments and justifications employed by jurists as a means of supporting their formulation of a new legal rule, or their modification of an existing one. Another means by which jurists did so was to utilise general principles of rule-determination. In Chapter 3, we examined Ibn Qutl\=ubah’s introduction, where he provides an argument for the binding nature of precedent, a description of the procedure for rule-formulation according to Q\=adikh\=an, and Ibn Qutl\=ubah’s additions regarding rule-discovery by a then-contemporary jurist. Many of these latter procedures are put into the form of general principles: ‘If Ab\=u Hanifa (may Allah Most High have mercy upon him) is supported in his opin-
4.4. Operative principles of rule-determination

ion by one of his Two Fellows (ṣāḥibayn), then their [joint] opinion is chosen [as the established position]; ‘In matters regarding sharecropping (muzāra‘a), transactions (mu‘āmalah), and other similar matters, it is the position of the Two Fellows that is to be chosen, as is agreed upon by the latter-day scholars (muta‘akhkhirin); etc.¹¹⁶

However, a close reading of the commentary will supply a further number of principles of tarjīḥ and tašīḥ. While none of them are so demarcated (Ibn Qutilubah does not call them ‘qawā‘id’ or ‘uṣūl’ or any such thing), some are explicitly stated in the form of principles, while others are deducible from the justifications he provides for the position taken. I have been able to identify eighteen (18) such general principles. I will present each one with a brief treatment of the case from whence it was deduced, which will simultaneously serve as its illustration. The principle is first given in bold, followed in square brackets by either the term ‘deduced’ or ‘stated’, indicating whether the principle was deduced from the legal argument provided, and is thus my wording; or whether it was was explicitly stated in Ibn Qutilubah’s text.

1. An opinion backed by an explicitly statment (naṣṣ) from a primary text of the madhhab (matn) is given more weight than an opinion which is not. [Deduced.]

   [Case 68] In the discussion as to whether the foot of a woman is considered part of her nakedness (‘awra), Ibn Qutilubah presents the opinion of the Hidāya, which argues that Qudūrī’s statement (that the entirety of the body is ‘awra save the face and hands) is an explicit declaration that the foot is ‘awra. After recounting dissenting opinions, Ibn Qutilubah supports the position of the Hidāya by stating, ‘It is more appropriate to consider the explicit statement of the Kitāb (of Qudūrī) the correct position, due to the statement of Muhammad al-Shaybāni in Kitāb al-Iṣtihsān that ‘all else is deemed ‘awra.”¹¹⁷

2. Tarjīḥ is given to an opinion found explicitly in the works of Muḥammad al-Shaybāni over the opinions of other jurists, even if this will lead to disregarding the principle of istihsān that in matters of worship (‘ibādāt) the more precautionary position is to be adopted.¹¹⁸ [Deduced.]

   Case 45 above (page 162) treated the difference between reciting ‘aloud’ versus reciting ‘quietly’ during the ritual prayer. Muhammad al-Shaybāni is quoted from his Kitāb al-ṣalāt: ‘If he wishes, he may recite within himself (qara‘a fi nafsīhi), and if he wishes he may recite aloud, and (recite such that) he hear his own recitation’, and Kāsānī continues to argue that Qudūrī’s statement would be meaningless if ‘quiet reading’ effectively were the

¹¹⁶Both of these principles were treated in Section 3.1 above.

¹¹⁷Tašīḥ 158–9.

¹¹⁸On this principle, see Rule 4 below.
same as the minimum of reciting aloud. The passage continues on to cite from Shaybānī’s al-Āthār, where he is reported to have written, ‘the opening supplication to the prayer is valid if he moves his lips while reciting it, which is the opinion of Abū Ḥanīfa’, after which Shaybānī is quoted to have said, ‘and this suffices him even if he does not raise his voice’.119

3. **Tarjiḥ is not practised through critiquing of a mujtahid jurist’s use of scriptural evidence (dalīl) in delivering his opinion.** [Deduced.]

[Case 69] Qudūrī provides Abū Ḥanīfa’s opinion that supererogatory night prayers may be prayed in groups of eight rak‘as, while Abu Yūsuf and Muḥammad hold that they should not exceed two. Ibn Quṭlūbughā then recounts a ‘tarjiḥ’ from al-‘Awn of ‘Alā’ al-Dīn al-Ḥārithī, in which he gives preponderance to the opinion of the Two Fellows over that of Abū Ḥanīfa, on the basis of their position ‘being pursuant to the [relevant] hadith’. Ibn Quṭlūbughā immediately takes Ḥārithī to task on this, rhetorically stating: ‘If this is how tarjiḥ is to be performed, then…’, which he follows with a salvo of hadiths and legal deductions therefrom, attesting to the textual as well as rational evidence of Abū Ḥanīfa for his position. Finally, he ends by confirming that Abū Ḥanīfa’s stance was granted preponderance by the likes of al-Burhānī (Burḥān al-Shari‘a al-Maḥbūbī), Nasafī, Ṣadr al-Shari‘a, and others.120 As discussed previously,121 for Ibn Quṭlūbughā, the point of tarjiḥ is not to validate or invalidate the mujtahid’s use of evidence, but to grant preponderance to that set of evidence and reasoning, embodied in an opinion, that is most suitable for the case at hand. This might involve following the standard rasm al-muṣṭī procedures, or overruling it due to exigencies.

4. **In matters of worship, the position of the Two Fellows is more precautionary [than that of Abū Ḥanīfa, and is thus to be given preponderance].** [Stated.]

[Case 70] In the matn, it is stated that Abū Ḥanīfa held that the chants of the Eid al-Adḥā were to end with their performance following the mid-afternoon (‘aṣr) prayers on the tenth of Dhū al-Ḥijja, while the Two Fellows held that they were to continue on until the end of the fourteenth of the month. Ibn Quṭlūbughā cited Marghinānī’s Mukhtārāt al-nawāzīl as stating the above principle, and as such establishing the madhhab’s doctrinal answer (fatwā) according to their position.122

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119 Ibid., 164–5.
120 Ibid., 172–3.
121 See p. 152.
122 Ibid., 186–7.
5. **Facts (medical, etc.) may be a basis for tarjih between opposing legal positions which are based upon points of fact.** [Deduced.]

We have seen in Case 35 above (p. 151) how the author of the Ikhtiyār gave tarjih to Muḥammad’s position and against Abū Yūsuf’s, on the basis that Abū Yūsuf believed that there was a passage between the urethra and the alimentary canal, which in fact is incorrect.

6. **An explicit statement by a jurist of tarjih is of greater probative value than an inference (al-taṣrīḥ aqwā min al-iltizām).** [Stated.]

[Case 71] Regarding whether a foolish adult may be declared legally incompetent, and thus the court may freeze his estate and manage them for him, Abū Ḥanīfa held that there was no basis for such court intervention, while the Two Fellows held that there was. Despite the fact that the aṣḥāb al-taṣrīḥ regularly cited by Ibn Qutlūbghā (Maḥbūbī, Ṣadr al-Sharī‘a, Nasafi, etc.) gave preponderance to the position of Abū Ḥanīfa, Ibn Qutlūbghā cites Qāḍīkhān, one of the most important aṣḥāb al-tarjih, stating that ‘the doctrinal position (al-fatwā) is in accordance with the opinion of the Two Fellows’. Ibn Qutlūbghā then states, ‘This is an explicit statement (taṣrīḥ), and such a statement is of greater probative value than an inference (iltizām). And God knows best’. In other words, Qāḍīkhān’s explicit confirmation that ‘this is the fatwa-position’ is stronger than inferring from the language used, or from the syntactical structure of a jurist’s analysis of precedent, which opinion is stronger: to state that this is the doctrinal position is an explicit formulation of the legal rule. In Ibn Qutlūbghā’s confirmation of this, we have an example of one practitioner of taṣrīḥ (Ibn Qutlūbghā) rejecting the rule-review of his colleagues (Maḥbūbī et al.), on the basis of this principle of taṣrīḥ.123

7. **A jurist performing tarjih must have the perspicacity to consider the ability of people to understand and implement the rule.** [Deduced.]

[Case 72] In the case of X who admits to being in debt to Y, and owing him, in his word, ‘a great amount’, how is this amount to be determined? The jurists of the fourth and fifth periods differed as to whether the specification was definite (200 dirhams, for example, as Qudūrī held, or 10 dirhams; as this amount is large enough to be deemed sufficient for a dowry) or relative (in accordance to whether he was wealthy or poor). After a lengthy discussion of the various viewpoints. Ibn Qutlūbghā writes, ‘I say: that what Isbījābī considered to be the correct position [i.e. namely, that it is relative to what the debtor considers to be a large amount] is, in my view, the most perspicacious position; for many

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123Ibid., 242–3.
people do not even know what the minimal amount for a dowry should be, in order for them to deem it a “significant amount”.\footnote{Ibid., 247–8.}

8. In a case in which a mujtahid other than Abū Ḥanīfa is said to dissent from the position of the majority, but there exists a transmission (riwāya) from that dissenting mujtahid in which he agrees with the position of the majority, this riwāya acts as confirmation for the tarjīḥ of the majority position by the later jurists of rule-determination. [Deduced.]

[Case 73] For example, in the case in which a person admits to being in debt to another, but says ‘I owe so-and-so X amount, minus Y amount’: Abū Yūsuf alone held that the exception only held if the amount excepted was not the greater part of the amount admitted to. However, in another transmission of his opinion on the case, he is said to have held the same position as Abū Ḥanīfa and Shaybānī, namely, that the exception is valid either way. ‘This is why,’ Ibn Qutlūbughā states, ‘the position given in the Kitāb (of Qudūrī) has been adopted by all [i.e. of the later jurists of tarjīḥ and tašīḥ].’\footnote{Ibid., 248.}

9. The tarjīḥ of an unknown jurist (majhūl, i.e. unknown as to his person or his character or standing as jurist), even if cited by a known author, is of no consideration and is deemed shādhīḥ (anomalous, non-canonical). [Stated.]

[Case 74] Regarding the leasing of jointly-owned property, Zayla’ī in Tabyīn al-ḥaqā’iq sharḥ Kanz al-daqa‘īq cites in support of the opinion of the Two Fellows one Muḥnī, a work whose author was unknown to Ibn Qutlūbughā and, from his comment, apparently to others. ‘An anomalous work (shādhīḥ), and the holder of this position is an unknown, and as such the position holds no weight in the face of what we have mentioned [i.e. of evidence and reasoning which supports the position of Abū Ḥanīfa] (shādhīḥ, majhūl al-qā’il, fa-lā yu‘ārid mā dhakarnā).\footnote{Ibid., 259.}

10. A position arrived at through opinion-assessment (tarjīḥ al-aqwāl) may be suspended (while remaining valid in itself), according to circumstance and the discretion of the judge. [Deduced.]

[Case 75] In the case of appointing an agent to represent one of the two parties to a dispute, the process of opinion-assessment (tarjīḥ al-aqwāl) \footnote{On the definition of opinion-assessment, see p. 105.} and rule-review (tašīḥ) lead to the adoption of Abū Ḥanīfa’s position as the madhhāb’s doctrine: namely, that an
appointment of an agent in a legal dispute can only occur if the two litigating parties accept his appointment. However, Shams al-A’imma al-Sarakhsi is then cited as saying:

In my estimation, the correct position is that the judge should accept the appointment of an agent if he is certain that the claimant is only being difficult in his refusal of the defendant’s agent; if, on the other hand, he is certain that the apointer of the agent is only trying to bring harm to the claimant — insofar as the proposed agent is known for stratagems, false claims, and trickery — then he may refuse the appointment.

Sarakhsi’s position is confirmed by similar statements by Halwānī, who likewise leaves the matter to the discretion of the judge, Üzjandī, and Marghinānī’s Mukhtārūt al-nawāzīl.¹²⁸

The same consideration is in play in Case 53 (p. 166), where regular limitations to the role of an agent in respect of the litigant whom he represents are suspended in favour of local custom when such a custom exists, and are not so suspended if in that locale no such custom exists.¹²⁹

11. Custom is an arbiter between tarjiḥ-positions that have been established through normal procedure (al-’urf qāḍīn ‘alā al-wad’). [Stated.]

[Case 76] This principle, the formulation of which is that of the Hidāya,¹³⁰ is provided during the discussion of the previous case regarding the scope of agency, in order to establish why the tarjiḥ should be of the opinion of Zufar, and not — as posited by Qudūrī in the matn — of Abū Ḥanīfa and the Two Fellows.

12. Once a court has issued judgement on a case in which there is juristic dispute, the dispute in regards to that case is deemed settled. (al-mukhtalaf fi-hi yaṣīr mutaffaq ‘alayhi bi-ittiṣāl al-qāḍā’ bi-hi). [Stated.]

[Case 77] This principle states that even if one mujtahid’s opinion is deemed to be the doctrine position of the school (al-fanwā), but the court issues judgement according to the minority position, the court’s judgement is sound, and the consequent actions of the involved parties are valid. The case in which this principle appears is that of establishing an endowment (waqf). Qudūrī mentions that a property under joint ownership may validly be put into trust as a waqf, while Shaybānī held that such property may not be so made. Ibn Qutlūbughā then cites the Wāqī’āt of al-Ṣadr al-Shahīd who establishes the doctrinal position to be the opinion of Shaybānī, but then states ‘if, however, the matter is raised to a

¹²⁸Ibid., 272–3.
¹²⁹Ibid., 276–7.
¹³⁰Ibid., 276.
judge who judges that it is valid, the *waqf* is deemed validly established thereby in respect to the rights of all parties involved’, after which the principle is stated.\(^{131}\)

13. **In presenting their legal opinions, mujtahids may furnish case examples, not in order to limit their legal opinions to those cases, but rather in order to provide concrete examples of the legal formulations underlying them.** \(^{Deduced.}\)

[Case 78] Early Ḥanafis disputed the validity of placing moveable goods into trust (*waqf*), while Shaybānī’s position — consequently chosen by the majority of jurists including Sarakhsī to be the dominant position of the school — held that all goods, whatever their description and regular use, may be placed into trust. Qudūrī then lists a number of items in the *matn* which Abū Yūsuf and Shaybānī had listed as being valid: a farm with all the animals, consumables, and slaves which it contains; as well as horses and weapons. In order to apprise readers of not reading this literally, Ibn Qutbūbughā quotes the *Jawāhir al-fiqh* of Niẓām al-Dīn al-Marghīnānī, who explains:

> [The primary text’s mention of] Abū Yūsuf’s specifying farm items, and Muḥammad’s specifying horses, is only a result of the phrasing (*naṣṣ*) of the transmission (*riwāya*) from Abū Yūsuf that has reached us treating [a case of] a farm with all of its animals; likewise, the transmission from Muḥammad had been phrased regarding horses. It should not be understood that what Abū Yūsuf permitted to be placed into trust was different to that which was permitted by Shaybānī, or vice versa.\(^{132}\)

14. **A mujtahid’s specification as to quantity or duration may have been provided as illustration as to the underlying legal formulations, and not in order to limit the discretion of judges in any given context.** \(^{Deduced.}\)

[Case 79] Two cases illustrate this principle. The first is that of the duration in which a lost-and-found item must be advertised before the person holding it can assume it will no longer be asked after. In this case, Qudūrī had established that it must be advertised for a year, based upon a transmission from Abū Ḥanīfa and the opinion of Shaybānī. According to the *Hidāya*, a minority opinion holds that the specification of a year is not binding; instead, the exact duration is left to the discretion of the person in whose safekeeping it remains. He must advertise it for a duration long enough for the rightful owner to have reasonably enquired after it. This position was chosen by Sarakhsī, and confirmed by a host of consequent jurists.\(^{133}\)

\(^{131}\)Ibid., 289–90.

\(^{132}\)Ibid., 291.

\(^{133}\)Ibid., 305.
[Case 80] The second is regarding the duration of time that must pass before a missing person is to be assumed dead. According to the al-Hasan ibn Ziyād’s transmission of the opinion of Abū Ḥanīfa, the judge cannot pronounce the legal death of a person before 120 years have passed since his date of birth. After recalling a number of dissenting opinions which provide different criteria to establish the legal date of death, Ibn Qutlūbughā cites the Hidāya, which states that the more reasonable (aqyās) position is that no exact duration is to be specified,’ after which a number of durations far lower than 120 are provided as alternatives. Again, here Marghīnānī’s statement implies that the duration of 120 years related from Abū Ḥanīfa is not an explicit, binding statement upon associates of the Ḥanafī guild, but was rather a working number provided for the context in which he issued his opinion.\footnote{Ibid., 308–9.}

15. A position based on syllogistic reasoning is dropped in favour of another based on common practice (taʿāmul al-nās), necessity (darūra), or widespread need (balwā). \[Stated.\]

[Case 81] We have already seen, in our study of Ibn Qutlūbughā’s introduction to the Taṣḥīḥ, that Qāḍīkhān instructed the mufti in search of the madhhab’s legal rule to look towards the Two Fellows on matters regarding sharecropping (muzāra‘a), personal transactions (muʿāmla), and other similar matters, a point agreed upon by the latter-day scholars (mota‘akhkhirīn).\footnote{See p. 90 above.} In the chapter on sharecropping, the legal reasoning behind their position is presented.\footnote{Ibid., 315.} Ibn Qutlūbughā, through his weaving of quotations and citations of preceding jurists, states that despite Abū Ḥanīfa’s deeming it an invalid form of contract based on syllogistic reasoning (qiyyās), the opinion of the Two Fellows is chosen due to the common practice of this form of partnership amongst people, or — amounting to the same argument — due to necessity and widespread need. ‘For syllogistic reasoning,’ as stated in the Hidāya, ‘is dropped in favour of common practice (al-qiyyās yutrak bi-al-taʿāmul).’\footnote{Ibid., 315–16.}

16. An implicit indication (ishāra) from a primary work of the madhhab (matn) is grounds for preferring the rule-formulation of one jurist over that of others during rule-review (taṣḥīḥ). \[Deduced.\]

[Case 82] A condition of the marriage contract, according to the Ḥanafī school, is the
provision of a dowry consisting of tangible goods or money that meets a minimal value. In the case that no such dowry is stated at the time of the marriage contract, and the couple divorce before consummating the marriage, Qudūrī states that the husband is obliged to provide his ex-wife with a compensation of three garments which would be worn by her peers. In the commentary, some of the referenced jurists — including Ibn Ramadhān al-Rumî in his al-Yanābī’ — take this to be an indication that it is the wife’s socio-economic status that is taken into consideration in the specification of this compensatory gift, while others hold that the financial status of the husband must be considered, and yet others hold that both of their financial statuses must be taken into consideration when determining the gift’s minimal value. In reviewing the formulated rules, Ibn Qutlūbughā states that the tašḥīḥ-position propounded in al-Yanābī’ is superior, due to the indication (išăra) of the Qudūrī in the Kitāb.\footnote{Ibid., 326.}

17. When an author of a canonical text (muṣannif) delays mention of a legal position to the final place in a list of such positions, this is an implicit endorsement of his granting it tarjiḥ or tašḥīḥ; because in disputation (munāṣara), the final position presented is deemed the most decisive, based upon the principle that silence is a clear indication as to the conclusion of a debate. [\textit{Stated.}] \footnote{\textit{Case 83}\textsuperscript{139} In the chapter on suckling, Qudūrī presents the case in which the breast milk of two women was admixed: a child who drinks therefrom, he rules, becomes prohibited to marry from the family of the woman whose milk predominated according to Abū Yūsuf, while Shaybānī holds that the child has become a relative through suckling to both women. Marghinānī, in the Hidāya, explains that Qudūrī’s delaying the mention of Shaybānī’s position and evidence until after that of Abū Yūsuf is an implicit endorsement of Shaybānī’s opinion, ‘for in disputation the final position presented is deemed the most decisive, on the basis that silence is a clear indication as to the conclusion of the debate’.\footnote{Ibid., 337.}}

18. The opinion of Muḥammad is more precautionary (\textit{ahwaf}) in matters proscribed (bāb al-ḫurumāt), and is to be given preponderance in such cases. [\textit{Stated.}] \footnote{\textit{Case 139}\textsuperscript{140} In the same case treated immediately above (regarding an infant who drinks the milk of wet-nurses which is admixed), Ibn Qutlūbughā grants preponderance to the position of Shaybānī over that of Abū Yūsuf, on the grounds that ‘the opinion of Muḥammad is more precautionary in matters proscribed’.}\footnote{Ibid., 337.}
4.5 The degree of congruence between theory and practice

The cases studies presented in the previous three sections provide us with a solidly representative sampling of the types of commentary involved in rule-determination. They represent 10% of the total number of comment-clusters developed by Ibn Ḥusayn al-Ḥasanī al-Baṣrī in his work, drawn from a range of the fiqh topics covered in Qudūrī’s Mukhtaṣar.¹⁴¹ This chapter has thus provided an analytic structure by which to understand the ‘four causes’ of the Taṣḥīḥ: the efficient cause (the functional, rhetorical, and legal categories presented); the material cause (preceding opinions and rules, as transmitted in the individual citations); and the formal cause (the commentary); all of which are in the service of the final cause of the jurists’ scholarly activity (rule-determination).

One benefit of the typologies and classifications presented in this chapter is that they reveal the Tarjīḥ to be a rich source of material for the confirmation, revision, and development of previous conclusions of scholarship regarding numerous functional aspects of Islamic law. The driving concern of rule-determination in such works leads the author to assemble a wide array of legal considerations and rhetorical techniques by which to establish his position, and to explicitly draw attention to the types of reasoning involved, as well as the juristic devices utilised by the jurists of the fourth and fifth periods. Indeed, the sample cases presented here, and the many more which were not, could and should be utilised for further research into a range of topics, from the import of the juristic syllogism to the nature of istiḥsān. In the scope of the present thesis, however, I wish to conclude this chapter by touching only upon a number of considerations as to what the classifications and case studies reveal as to the degree of congruence between the theory of rule-determination presented in Chapter 3 and the actual practice represented in the commentary.

At the heart of the theory of rule-determination was the rasm al-muṣṭa, as outlined by Qāḍīkhān and further developed by Ibn Ḥusayn al-Ḥasanī al-Baṣrī. To my count, there are at least ten instances in which the rasm al-muṣṭa is explicitly invoked in the commentary, by the phrase ‘in accordance with the procedure’ (kāmā huwa al-rasm).¹⁴² As worded, it is meant to explain and confirm: the conclusion reached is in accordance with the procedure prescribed in Ibn Ḥusayn al-Ḥasanī al-Baṣrī’s introduction. As such, these examples at least affirm that not only was the procedure often followed, but that it was invoked (usually at the end of the comment-cluster) as a way of confirming the conclusions reached by the jurists involved, as a final imprimatur. The specifying of the ten instances of the phrase kāmā huwa al-rasm also does not entail, of course, that they were the only instances in

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¹⁴¹ Qudūrī’s Mukhtaṣar contains sixty-nine chapters (kitāb), in which each chapter represents a major topic of Islamic law. Ibn Ḥusayn al-Ḥasanī al-Baṣrī comments upon 632 passages from Qudūrī’s Mukhtaṣar in 839 comment-clusters (these clusters being composed of a total 2,534 comments).

which the rasm was followed: there are numerous cases in which the opinion of Abū Ḥanīfa, for example, is merely affirmed against that of Abū Yūsuf and Muḥammad, as was to be expected; or in the chapters of sharecropping and financial transactions that, as was prescribed, the positions of the Two Fellows were affirmed. However, the use of the phrase in this fashion also tacitly affirms the opposite: that, in relation to the legal concept being discussed through the commentary, there were no external considerations or contingencies to overrule this procedure and the default rule-determination that would have resulted therefrom. The implication is that there are a great number of instances in which the default rasm-procedure was not followed.

The analytic categories presented in the previous two sections, as well as the detailed cases they comprise, thus unsurprisingly confirm the existence of both activities: the following of the default rasm al-muftī, as well as the contravention of this procedure due to external considerations. What the categories do provide, however, are a number of important points. In regards to tarjih, the primary activity of our period four, the key benefit of Section 4.3 is that it reveals the types of considerations that went into contradicting the standard procedure. The justifications from context, from external considerations, of change and necessity, and of facilitating ease, all provide case after case in which the opinion granted preponderance would not have been selected according to the standard procedures of the rasm al-muftī.

Secondly, in regards to taṣḥīḥ, the primary activity of our fifth period, the central lesson of Section 4.2 is that much later jurists, such as Ibn Qūṭlūbūghā and the jurists of period five whom he cites, often did disagree with the rule-formulations of their predecessors, such as Qudūrī. In relation to the Mukhtasar, we have counted 190 instances of explicit affirmation of Qudūrī’s position, but also 62 instances of explicit disagreement, either as to the rule or to some aspect of it as presented by the matn. If we include, from the class ‘Further information’, the categories of ‘Scope’ and ‘Stipulation’, the number increases by another 123 instances of further modifications to the substance or accident of the rule.

Furthermore, many of the categories of Section 4.3 treating contextual or external considerations were employed not just by the jurists of tarjih, but those of the later taṣḥīḥ. In fact, in instances such as that of Case 37 we even have instances in which the validity of two contrary rule-formulations are both affirmed, on the basis that one set of tarjih considerations would grant preponderance to one rule, while another set of equally valid juristic considerations would grant preponderance to the other.\(^\text{143}\) This establishes that the process of rule-review (taṣḥīḥ) — that process by which pluralism of opinions was to finally be resolved into a singular doctrinal rule — could actually admit and accept a range (now limited by the process of tarjih followed by taṣḥīḥ) of valid considerations, which, in the final instance, left the decision to the jurist.

\(^{143}\)Page 153 above.
4.5. *The degree of congruence between theory and practice*

As for the operative principles that have been extracted from the body of the text and presented in Section 4.4, they are concerned with a heuristic that differs in its focal point from that of the theory provided in the *rasm al-mufti*. The starting points of Qāḍīkhān’s heuristic procedure are transmitted opinions; the concern is assessment of surety of transmission and strength of issuing authority. In these principles extracted from Ibn Qutlūbughā’s practice of commentary, we have instead principles, many of which remained implicit, which guide the reader of works of fiqh to understanding the bases upon which a rule was formulated, and — when review by later practitioners of *tašhih* — if disputed, on what basis emendations to rule-formulations were made by respected jurists, or for what circumstantial reasons they were overruled.

When these principles are extracted as we have here, however, another layer of benefit of the *Tašhih* becomes apparent: namely, providing the lower-ranking jurist with enough hermeneutical tools to *interpret* not the primary sources of law (the purview of *uṣūl al-fiqh*), but instead to interpret the works of fiqh themselves. In this, we shift from rule-*determination* (i.e. *tarjīh* and *tašhih*) to rule-*discovery*: aiding the practitioner in law in knowing how to read fiqh works in order to find the rule that should be applied in his court judgement or fatwa.

This is a shift of heuristic scope: we are no longer discovering rules from well-known and available primary sources, but now discovering rules from an increasingly complicated tradition of commentary with multiple levels of arguments for rules and emendations. The form of the *Tašhih* is descriptive, purportedly (and in fact) presenting Ibn Qutlūbughā’s arguments for his own *tašhihāt* as a high-ranking jurist of his day and within the tradition; but the perceptive reader can extract prescriptions as to the practice of *tašhih*, or, at minimum, learn something about how to read and navigate the books of fiqh.¹⁴⁴

What we have seen, in conclusion, is that reasoning invoked by Ibn Qutlūbughā and the jurists he cites was more justificatory than prescriptive: it explained what a regular, default process of selecting a legal rule out of a morass of preceding opinions should be like (where by ‘should’ is meant that it reflects the honour and respect that the tradition developed for the legal opinions of its earliest foundational jurists. The theory embodied in, say, the *rasm al-mufti* did in many instances match the outcomes of instances of rule-determination; but in many others, the jurists’ conclusions did not match what should have been the default position, and could not be justified using the standard theory. The theory, as is the case with most jurisprudential theories, reflected

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¹⁴⁴This form of legal education is more fully (and with a greater degree of awareness) addressed by the later Ibn ‘Abidin in his *Sharḥ ‘uṣūd rasm al-mufti*, work on which was begun by Norman Calder in his article, ‘The “Uqūd rasm al-mufti” of Ibn ‘Abidin’, which treats the primary text (*matn*) of the work. However, only a closer analysis of the commentary can provide an expanded treatment of the complications inherent in reading the tradition during the late pre-modern era.
the general ethos of the tradition, but could not always be marshalled to provide solutions to legal problemata facing the jurist. That is not to say that the steps outlined in *rasm al-mufti* could not be (and were not) employed, even by lower-level muftis. Indeed, as we shall see, the ‘rasm’ was often invoked in establishing a rule; however, even here, the language used often has the feel of justification than explanation. In any case, once the theory had become established abstractly in a respected work such as Qāḍīkhān’s, succeeding jurists would need to justify, in their legal writing, their own or preceding jurists’ deviations from this norm in their own formulations and reviews of rules. And they did so by appeal to precedent, reasoning, and imperatives of real-world necessity and practice.
Conclusion

The beginning of the fifth/eleventh century witnessed the rise of tarjih as the primary function of high-level jurists in the madhhab-law tradition. Jurist-authors such as Qudūrī began to devote them to the analysis of the madhhab’s heritage of legal opinions (primarily through the genres of commentary and intra-madhhab iktilāf-works), and the formulation of a discrete body of positive legal rules (which they encapsulated in their mukhtasars). Within the next two centuries, emphasis then shifted to a sub-species of this activity: tashih, or the review of precedent established by preceding tarjih-jurists. The final product of these twin exercises of rule-formulation (tarjih) and rule-review (tashih) was the determination of legal rules. The totality of this process of rule-determination served four purposes.

First was its doctrinal, scholarly function. The practice of tarjih was meant to determine (a) which of the plurality of legal opinions attributed to the earliest jurists of the madhhab were considered to have been reliably transmitted and thus authentic; and (b) which of these opinions were deemed more definitive, according to the relative authoritativeness of the jurist who had delivered the opinion. These were, respectively, the twin activities of tarjih al-riwāya and tarjih al-dalil (or, alternatively, tarjih al-dirāya), which formed the basis of Qādīkhān’s formulation of a madhhab-heuristic, the ‘rasm al-mufti’.

Second, rule-determination served to form an institutional hierarchy of the tradition’s jurists. In order to ensure that only the most qualified jurists could formulate the madhhab’s doctrine, the various roles of a jurist were clearly differentiated, distinguishing between a jurist’s epistemic standing (what does he know as a scholar in the madhhab-as-doctrinal school), his institutional standing (what is his ranking in the madhhab-as-guild), and his social function (what is his role as a public legal functionary, to which he was appointed through his madhhab-as-jurisdiction). A jurist could thus be a high-ranking judge, but not be permitted to weigh in on a matter of tarjih (with those ‘incapable of distinguishing these matters’ being required to ‘have recourse to those who are so capable’.) Alternatively, a jurist could be respected as one of the most learned of

145See p. 93 above.
his era, and not hold any significant public positions as judge or college lecturer of law (as was the case with Ibn Qutilughah himself). In the Tashih’s theoretical introduction, one can discern at least three ranks: that of epistemic master (muftahid), that of a fellow possessing discretion and the ability and power to formulate rules; and that of a mere associate of the madhhab-as-guild who, despite his public legal office, is insufficiently learned and thus bound by established precedent (muqallid). That we see the development of the first formal ‘ranking’ of jurists in the century following that of Ibn Qutilughah (namely, Ibn Kamal’s ‘tabaqat al-muftahidin’) should thus not be surprising. As we learned from the periodisation that emerged out of our historical survey of Ibn Qutilughah’s sources, these rankings largely (though not exclusively) mirrored the movement of history through successive generations.

Following from this second purpose, the method of rule-determination (tarjih in its wider sense) instituted by Qadikhan and Ibn Qutilughah established in its wake the bindingness of present upon the legal tradition’s associates, and interdicted tal’if, the composing of rules from the distinct doctrines (whether from opinions of within a single madhhab, or from rules of different madhhabas). These are the two basic components of the system of taqlid. This was explicitly addressed by Ibn Qutilughah, who perceived in taqlid a means of safeguarding both the scholarly and social-functional dimensions of the madhhab: for the madhhab-as-guild, to ensure that only the most capable jurists as scholars could ‘weigh in’ on the madhhab’s legal doctrines, while still providing lesser jurists a means of knowing the rules; and, for the madhhab-as-court jurisdiction, to achieve consistency in application, predictability of rules, and accountability to society.

Fourth, rule-determination, especially in its aspect of rule-review (tashih), continued to give creative scope to the jurists to establish new rules in their own eras. Islamic law being an extreme case of a “jurists’ law”\(^ {146} \), the jurists’ activity of rule-review was effectively an unending activity, as considerations external to the scholarly (those mentioned in the first doctrinal, scholarly function of tarjih, above) were permitted to affect the choice of which legal opinions were to be deemed the rule, or — if rules had been formed — to modify, emend, or otherwise make changes to them (again, safeguarded by the second and third functions of tashih mentioned above). As documented in our categories of justifications and arguments, this provided highly-ranking jurists such as Ibn Qutilughah a significant degree of discretion, but even permitted lower-ranking officials a controlled amount of discretion (the controls being those determined by higher-ranking jurists) in accordance with the case at hand. As such, the ‘stage’ of rule-review was, as it were, never-ending, as in each time and place, the jurist’s role was to ensure that the madhhab was capable of providing suitable fiqh solutions to legal disputes and other questions as to how the individual should act in any given situation.

\(^ {146} \)Schacht, Introduction to Islamic Law, 209.
Ultimately, Ibn Qutilughā’s primary contribution lays in his establishing the position and function of precedent in the nature of the madhhab-law tradition. His introduction makes clear that many jurists of his generation struggled with the very problem of how to make sense of the plurality of legal legal positions that the madhhab preserved and transmitted, with some jurists arguing that all preceding opinions shared the same utility for legal functionaries such as judges and muftis. The problem was particularly acute in the environment of the late Mamluk judicial system, in which the multiplicity of madhhab-based jurisdictions within one society meant that the slightest degree of inconsistency in the basis of legal pronouncements could lead to charges of cronyism, governmental manipulation, or at least a degree of inconsistency that could destroy the public’s trust in the courts and the legal system upon which it they are based. Thus, jurist-scholars like Ibn Qutilughā, and his colleagues across the madhhab, were forced to develop measures to ensure consistency, predictability, and accountability of the juristic system upon which the judicial apparatus was based. This was Ibn Qutilughā’s declared end, and the historical context of his authoring *al-Taṣḥīḥ wa-al-tarīḥ*.

This thesis’ research into the history and periodisation of the Ḥanafi madḥhab, and especially of the periods that lie between Qudūrī and Ibn Qutilughā, thus sheds new light on the long-standing debate as to the ‘closure of the gate of ijtihād’. Noted first by Joseph Schacht, furthered by Noel J. Coulson, modified by Ya’akov Meron, and questioned by Wael Hallaq, the extinguishing of Islamic law’s vitality was often predicated on the rise of taqlīd and its concomitant culture of handbooks and ‘slavish’ commentators, against the earlier innovation and free-thinking of the period of ijtihād. Schacht, followed by Coulson, claimed the year 900 AD to be the dividing line between the age of ijtihād and that of taqlīd. Meron, instead, divides the history of the Ḥanafi madhhab into an ‘ancient’ stage (until the end of the fourth/tenth, whose last great representative was Abū al-Layth al-Samarqandi), a ‘classical’ stage (beginning with Qudūrī in the early fifth/tenth century), and a ‘post-classical stage’ (beginning with Burhān al-Dīn Marghinānī in the late sixth/eleventh century onwords). Meron argues that the decline occurred only with the onset of the third. Marghinānī’s work is said to be symptomatic of this decline: his arrangements

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of fiqh display nothing of the legal reconstruction and vitality so apparent in the works of 'Alā’ al-Dīn al-Samarqandi and his student Kāsānī. Instead, jurists of the final period become occupied by abstract questions from usūl al-fiqh that relate little to authentic juridical questions. Hallaq famously questioned the entire premise, arguing that ītiḥād by definition was something which continued to be claimed and practised until the tenth/sixteenth century. No consensus as to such a closure ever existed, which is proof itself that ītiḥād continued unabated.

In relation to this debate, our analysis of Ibn Qūṭlūbughā’s work provides both affirmations and modifications to these arguments. It confirms that the beginnings of both the fourth/tenth and fifth/eleventh centuries are indeed turning points, but imbues them with different meaning. It corroborates Christopher Melchert’s findings that the year 300 AH marks the beginning of the classical stage of the madhhab, through its consolidation as a formal doctrinal school epistemically, and as a guild socially; and as signalled by the development of the new literary formats of mukhtāsars, manāqib works, and treatises of usūl al-fiqh.

As Meron rightly pointed out, the year 400 AH also signals a change, and indeed is best exemplified by Qudūrī and his activity. What this thesis has highlighted, however, is the development of rule-determination (tarjīh) as the dominant indicator of change in this period, as epitomised in the genres of mukhtāsar and commentary. Facile categorisations of ‘rise’ and ‘decline’, ‘change’ or ‘stagnancy’, fall away in the face of the actual activity of rule-determination, and in the institutional logic which powered this development. The nearly direct correlation between the stages of our periodisation and those of the typology of generational juristic concerns developed by Ibn Kamāl demonstrates that the changes which occurred were natural to a precedent-based legal system, such as that of the madhhab-law tradition. The act of commentary, as we have seen in our categorisations of its functional and rhetorical dimensions, takes care to both conserve and transmit the heritage left by earlier generations, while facilitating changes and modifications both to method and conclusions. The creative dimensions and opportunities of rule-formulation and -review are thus intimately tied to the system of binding precedent (taqlīd), and not opposed to it. If any gates have been closed, they are not of change and creativity in the fiqh, nor even in its considerations of social realities. Rather, by the closure of ītiḥād, what is

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149Meron, ‘Development of Legal Thought’, 78.
150To be clear, this thesis is not arguing that a lack of creativity or legal vibrancy never occurred in various times and places of the Muslim world and its legal history. That would be an unjustifiable, and a-historical, claim. Rather, it is stating that this is not what is to be necessarily understood by the changes occurring in the time period under consideration herein, and is not a logical, necessary concomitant of the taqlīd-based madhhab-law system.
meant is the end of a logical, historical stage of a legal tradition's maturation in a legal system, in which its principal values and its mechanisms for both continuity, change, and application in society have been developed and established. From this perspective, it is no different than our contemporary legal systems, such as the common-law or civil-law system: what is meant by the 'closure of ijtihād' is these systems' crystallisation. Doctrinal, procedural, and institutional changes — sometimes major — continued to occur, but the functional mechanisms of the systems were in place. In the case of the madhhab-law tradition, the defining mechanism, which permitted both conservation and development, was tarjīh.

In this view, then, tarjīh was not intrinsically a cause of 'stagnation'. As witnessed in our numerous case examples of Ibn Quṭlubughā’s own engagement with precedent, legal rules remained in a constant state of rule-review (tasfiḥ), subject to modification as well as confirmation, change as well as continuity. For lower-level ‘associates’ of the tradition — incapable of first-order ijtihād, derivative opinion-making (takhrij), or rule-determination (tarjih) — the binding nature of precedent was a safe-guard, protecting them from unwittingly causing havoc to the entirety of the system. On one level, Ibn Quṭlubughā’s commentary was ostensibly to demonstrate to less-qualified jurists why they should ‘follow the most preponderant positions and to act in accordance with them, just as if they had directly issued us these edicts during their own lifetimes’. However, the actual content of his comments upon Qudūrī’s positions makes it clear that jurists of his rank were to respect, but not necessarily concede to, preceding rule-formulations. For a master jurist like Ibn Quṭlubughā, precedent was the material upon which he practised his craft, and commentary his tool. It was the means by which to creatively interact with preceding juristic positions, and to engage in argumentation with legal scholars. As such, the rule-formulation of any given jurist may be seen a proposal which he submits for the consideration of his colleagues. This last point must be emphasised: to a fellow jurist of sufficient rank (which Ibn Quṭlubughā, by fact of his engagement, deemed himself to have been), no conclusion was irreproachable, and no pronouncement (ḥukm) free from review: he took aim not only at positions of jurists of the rank of Marghinānī, but even at the arguments of the likes of Khaṣṣāf. This is not to say that he deemed rival position necessarily wrong (though, as we saw with his treatment of a rule-formulation submitted by Ḥārithi’s al-‘Awn, he was not shy of dismissing a poor execution of tarjīh). Rather, the respect of precedent entailed admitting to the plurality of opinions and positions of the madhhab’s heritage, while engaging, modifying, and recontextualising them by the act of juristic commentary.

151 See p. 93 above.
152 See Case 29 on p. 147 above.
153 See p. 176 above.
Conclusion

In his entry on Ibn Qutilubah for the *Encyclopaedia of Islam*, Second Edition, Franz Rosenthal states that it is ‘not yet possible to say whether any of his works possesses originality and independent value’, after mentioning that the jurist had authored ‘the usual commentaries on legal school texts, compilations of traditions, glosses,’ etc.\textsuperscript{154} This thesis has partially served to answer this valid question, demonstrating that Ibn Qutilubah did indeed author a number of ‘original’ works, of which his *Mujabāt al-ahkām* stands out for the uniqueness of its approach to the challenges of the pluralistic madhab-law system of the late Mamluk era. However, the assumption that ‘originality’ cannot take place in ‘the usual commentaries’ may blind us to subtler, but just as interesting, changes happening in and through works such as *al-Tašhīḥ*. Our close analysis of Ibn Qutilubah’s commentary teaches us that where one looks for ‘originality’ will in turn determine what one is able to perceive.

The writings of Norman Calder have already demonstrated this point most convincingly and eloquently. In a series of writings in the 1990s,\textsuperscript{155} and of pieces that were only published posthumously,\textsuperscript{156} Calder has repeatedly argued that ‘[t]he layered writing (commentaries on commentaries) is not a sign of failure of intellect or endeavour, but of commitment to tradition’.\textsuperscript{157} Having reviewed some of the ways that juristic creativity continued through the practice of commentary,\textsuperscript{158} this thesis serves to confirm Calder’s argument: it is clear that writings of this genre may contain much originality and legal value, and should not be dismissed due to an assumed lack of an ‘independence’ (the definition of which is questionable, in any case, in a tradition such as that of madhab-law) that is unnecessarily viewed as the *sine qua non* of creative originality.

Thus, we have seen how the genre of legal commentary in the age of *tarjih* served two functions: it ‘bound’, through the establishment of precedent, those unqualified to formulate rules;

\textsuperscript{154} *EI2*, s.v. ‘Ibn Qutilubah’ by F. Rosenthal.


\textsuperscript{157} Id., ‘The “Uqūd rasm al-mufti” of Ibn ‘Ābidin’, 217.

\textsuperscript{158} To say nothing of other genres in which an author such as Ibn Qutilubah contributed, whether in epistles, such as the *Ijārat al-ḥaqqā*; or others such as the unassuming judicial handbook, such as the *Mujabāt al-ahkām wa-wāqi‘at al-ayyām*. 
while it simultaneously provided those who were capable with an instrument for their own juristic creativity. However, as this study has shown, there is a third dimension to Ibn Qutlūbughā’s practice of legal commentary, which — from the perspective of the historical progression of fiqh as a discipline, and the madhhāb as the institution which regulates it — is no less interesting or important. This is the pedagogic dimension of commentary. In its showing and explaining the methodology of rule-formulation, the Ṭasḥīḥ acts as a tool for training jurists into higher levels of juristic activity. Unlike the digest (mukhasṣar), which provides little to no rationale for its positions, the genre of commentary in the hands of a jurist like Ibn Qutlūbughā becomes a veritable school as to the purposes, logic, and craft of rule-determination. However, what is intended by this is not to make the reader one of the aṣḥāb al-tarjiḥ. Rather, the veritable tour through seven-hundred years’ worth of the madhhāb’s juristic literature serves a more subtle purpose — one that reflects an important historical change. As discussed in Chapter 2, Qāḍīkhān’s mapping of the rasm al-muṣṭi was meant to explain the procedure of formulating rules out of the raw material that is the madhhāb’s store of opinions. With Ibn Qutlūbughā, the ‘rasm’ had changed: the raw material is now the secondary literature of the madhhāb: the innumerable digests, commentaries, khilāf-works, and ta’liqas that debated, contradicted, and engaged one another. The heuristic has changed from assessment of first-order opinions and their transmission through the tradition’s primary works, to that of rules and the school’s secondary literature in which they are found. Thus, Ibn Qutlūbughā’s emphasis on key works such as those of Burhān al-Dīn al-Mahbūbī, Nasafi, and Zāhīdī, while pointing out the occasional faults of Ḥarīthī and others, trains the reader into how to ‘read’ and navigate the tradition, literally as well as conceptually.

This development is intimately linked to another which we have attempted to address in this thesis, namely, the historical shift in the meaning of ‘madhhāb’: from doctrinal school, to guild, to something approaching a jurisdiction. This madhhāb-jurisdiction entailed procedures that had to be respected by all who held its judicial office, regardless of personal intellectual merit. In turn, these public officials of the law were now required to be able to navigate the madhhāb to which their jurisdiction was bound. For those judges or muftis insufficiently qualified as scholars, even this might prove too difficult a challenge. As we noted in our biography of Ibn Qutlūbughā in Chapter 1, it is this problem that our author wished to address through both the Ṭasḥīḥ as well as his handbook for the courtroom, Mūjabāt al-aḥkām wa-waqtīʿat al-ayyām.

Thus, returning to the outline of the stages of rule-determination which we had presented in our introduction, we are now in a position to add a fourth stage to jurists’ interactions with rules. Figure 4.3 adds the stage of ‘rule-discovery’ by legal practitioners. Judges and muftis could no longer be assumed to know how to read the tradition’s corpus of works, let alone to be able to formulate rules using Qāḍīkhān’s procedures. Thus, Ibn Qutlūbughā’s heuristic aimed to show
The activity of mujtahid jurists, delivered through transmitted opinions & compiled books.

The activity of ḥabīb ṭarjīḥ, delivered in khulāf-works, mukhtasars & commentaries; the process of formulating the default rule is first described in Qāḍīkhān’s Rasm al-muftī.

The activity of ḥabīb ṭarjīḥ, delivered in commentaries. The rule-formulations are either confirmed, amended in detail, or denied in favour of an alternative formulation. Discussed in works like Ibn Quṭlūbughā’s al-Taṣḥīḥ wa-al-ṭarjīḥ.

Instruction for legal practitioners (muftis, judges, etc) as to the method of finding (i.e. discovering) the determined rules for the purpose of application; discussed in manuals such as Ibn ʿAbīdīn’s Uqūd rasm al-muftī.

Figure 4.3: Stages of the determination and application of the legal rule

this new generation of functionaries how, at least, to find the official rule of the madhhāb for the purpose of their social responsibility, by cataloguing the ‘correct’ (ṣaḥīḥ) positions of the madhhāb in the fourth part of the Mūjabāt, and by explaining how they were arrived at through the Taṣḥīḥ. This concern was first raised and addressed by Ibn Quṭlūbughā, and later developed by jurists such as Ibn ʿAbīdīn in his own epistle on the rasm al-muftī.159 Note that while Qāḍīkhān and Ibn ʿAbīdīn both authored a treatise on the procedure to be followed by the mufti, the denotation of the word ‘mufti’ had utterly changed: in Qāḍīkhān’s time, it designated a jurist capable of

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159 As has already been noted in the introduction, both the positing of the term ‘rule-discovery’ as well as the significance of Ibn ʿAbīdīn’s work therein, has already been noted most ably by Norman Calder in his posthumously-published article, ‘The “Uqūd rasm al-muftī”. His piece only studies Ibn ʿAbīdīn’s mattr — the didactic poem ‘Uqūd rasm al-muftī — and not the commentary, thus leaving the door open for further study of the commentary, in which much of Ibn ʿAbīdīn’s instructions on how the jurist is to ‘read’ and interact with the tradition remain hidden treasures for the history of the madhhāb-law tradition in the later, Ottoman period. Nonetheless, any such work will be a footnote to the insightful, correct, and lucidly-explained treatment delivered by Calder.
formulating rules out of the wealth of mujtahids’ legal opinions; by Ibn ‘Abidin’s time, he was addressing legal functionaries who were associates of his madhhab-guild, but were unsure of how to navigate the literary resources of the juristic tradition in order to discover the legal rule for the case at hand. Like other societal changes, further professionalisation of jurists during the era of the Mamluks demanded creative responses from the scholars who were the inheritors and protectors of the scholarly tradition.

We have covered something of the history, theory, and practice of rule-determination in the Ḥanafi madhhab, from the vantage point of our late Mamluk author, Ibn Qutilubughā. As already mentioned, this thesis cannot and does not claim to provide a history of the madhhab, neither doctrinally nor institutionally; nor does this even suffice for a treatment of rule-determination in the Ḥanafi madhhab. For the latter task, much basic work on the elementary vocabulary and concepts of madhhab-law in the Ḥanafi guild-school (let alone of the other madhhabs) remains to be done, as our study of the term ṣāḥīr al-riwaʿa tellingly illustrates. Nonetheless, I believe that the study and conclusions that have been provided in these pages have enriched our understanding of the history and nature of the institution of the madhhab in general; contributed to our knowledge of the Ḥanafi madhhab’s history in particular; and established the existence of common juristic procedures and attitudes, shared by the four Sunni madhhabs that had survived the transition from doctrinal schools to guilds, which we may name the ‘madhhab-law tradition’.

We should also now have a clearer picture as to the intimate role that commentary has played in the transmission and development of both Islamic law and the institution of the madhhab, dispelling naive notions that commentary somehow signalled the death of intellectual vibrancy in Islamic law or in scholarly activity more generally. If anything, Ibn Qutilubughā’s al-Tāṣiḥ wa-al-tārīḥ shows that the respect of precedent — or, to say it differently, the impulse to conserve the knowledge production of past generations for utility — which is so clear in the madhhab-law tradition, was intrinsically neither an agent for, or against, change. Rather, the madhhab and the genre of commentary both reflect an underlying approach to tradition in Islamicate culture, for which further research — in Islamic law, other scholarly disciplines, and beyond — needs still to be pursued.
Appendices
A. Jurists cited by Ibn Quṭlūbughā, according to date of death
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<td>d. 606/1209–10</td>
<td>Merv</td>
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<tr>
<td>Abū ‘Abbād Allāh al-Farā‘īdī</td>
<td>d. pre-616/1219</td>
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<tr>
<td>Burhān al-Dīn Ibn Māza</td>
<td>d. 616/1219</td>
<td>Bukhara</td>
<td>Transoxiana</td>
<td>68</td>
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<tr>
<td>Ibn Ramaḍān al-Rūmī</td>
<td>d. post-616/1219</td>
<td>?</td>
<td>Anatolia</td>
<td>56</td>
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<tr>
<td>Zahir al-Dīn al-Bukhārī</td>
<td>d. 619/1222–3</td>
<td>Bukhara</td>
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<td>Bādī‘ al-Dīn al-Qazwīnī</td>
<td>fl. 620/1223</td>
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<tr>
<td>Jamal al-Īsām al-Maḥbūbī</td>
<td>d. 630/1233</td>
<td>Bukhara</td>
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<tr>
<td>Yūsuf ibn Abī Sa‘īd al-Sijistānī</td>
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<td>Siwās</td>
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<tr>
<td>Abū al-Fath ‘Imād al-Dīn</td>
<td>d. post-651/1253</td>
<td>Samarkand</td>
<td>Transoxiana</td>
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<td>d. 658/1259–60</td>
<td>Khwarazm</td>
<td>Iran</td>
<td>107</td>
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<td>Abū al-Maḥāmīd al-Lu‘lu‘i al-Bukhārī</td>
<td>d. 671/1272–3</td>
<td>Bukhara</td>
<td>Transoxiana</td>
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<td>Burhān al-Shāfi‘a al-Maḥbūbī</td>
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<td>Transoxiana</td>
<td>256</td>
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<td>Abū al-Faḍl al-Mawṣūlī</td>
<td>d. 683/1284</td>
<td>Mosul</td>
<td>al-Jazira</td>
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<td>Ibn al-Sā‘ātī</td>
<td>d. 694/1294–5</td>
<td>Baghdad</td>
<td>Iraq</td>
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<td>Abū al-Mafākhīr al-Zūzanī</td>
<td>d. post-695/1295</td>
<td>Nishapur</td>
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<td>Abū al-‘Abbās al-Sarūjī</td>
<td>d. 710/1310</td>
<td>Cairo</td>
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<td>Abū al-Barakāt al-Nasafī</td>
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<td>Sīghnāq?</td>
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<td>Dāwūd ibn Yūsuf al-Khaṭīb</td>
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<td>Jamāl al-Dīn al-Zayla‘ī</td>
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<td>d. 743/1343</td>
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<td>Egypt</td>
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<td>Birth/Death</td>
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<td>Region</td>
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<td>Şadr al-Shari‘a</td>
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<td>Bukhara</td>
<td>Transoxiana</td>
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<td>Qiwām al-Dīn al-Kākī</td>
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<td>Cairo</td>
<td>Egypt</td>
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<td>‘Ālam ibn al-‘Alā’ al-Ḥanafi</td>
<td>d. 786/1384–5</td>
<td>Delhi</td>
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<td>Ḥāfiẓ al-Dīn Ibn al-Bazzāz al-Kardarī</td>
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<td>Yūsuf al-Ṣūfī al-Bazzār al-Kādürī</td>
<td>d. 832/1428–9</td>
<td>Cairo?</td>
<td>Egypt?</td>
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<td>Ibn al-Humām</td>
<td>d. 861/1457</td>
<td>Cairo</td>
<td>Egypt</td>
<td>23</td>
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</tbody>
</table>
B. Works cited by Ibn Quṭlubughā, according to the frequency each work was referenced

1. al-Hidāya, Burhān al-Dīn al-Marghinānī [259]
2. Wiqāyat al-riwāya fi masā’il al-Hidāya, Burhān al-Shari‘a al-Maḥbūbī [179]
3. Fatāwā Qāḍīkhān, Fakhr al-Dīn Qāḍīkhān [133]
4. al-Muḥīṭ al-Burḥānī, Burhān al-Dīn Ibn Māza [88]
5. al-Yanābī‘ fi ma‘rifat al-usūl wa-al-tafārī‘, Ibn Ramaḍān al-Rūmī [56]
8. Tuhfāt al-fuqahā‘, ‘Alā’ al-Dīn al-Samarqandi [31]
9. al-Mūjaz, Jamāl al-Īslām As‘ad [29]
10. al-Ikhṭīyār, Abū al-Ḥaḍīr al-Mawṣilī [26]
11. Fath al-Qādir, Ibn al-Humām [23]
12. Zād al-fuqahā‘, Abū al-Ma‘ālī al-Isbijābī [22]
13. al-Dhakhīra, Burhān al-Dīn Ibn Māza [20]
17. al-Fatāwā al-ṣughrā, al-Ṣadr al-Shahīd [15]

   Multaqā al-bihār min muntaqā al-akhbār (sharḥ Manṣūmat al-Nasafi), Abū al-Mafākhir al-
   Zūzanī [3]
   Sharḥ Mukhtasār al-Qudārī, Rukn al-A’imma al-Ṣabbāghī [3]
   al-Idāh, Abū al-Faḍl al-Kirmānī [3]

   al-Fatāwā al-Ǧihāyātiyya, Dāwūd ibn Yūsuf al-Khaṭīb [2]
   Fatāwā al-Khāṣṣī, Jamāl al-A’imma al-Khāṣṣī [2]
   al-Mughni, undetermined author [2]
   Sharḥ al-Jāmi’ al-ṣaghīr, Fakhr al-Dīn Qāḍīkhān [2]
   al-Khulāṣa, Iftikhr al-Dīn Ṭāhir al-Bukhārī [2]
   al-Fuṣūl al-‘Imādiyya, Abū al-Fath ʿImād al-Dīn [2]

25. The following are all mentioned only once in the text:
   Adab al-qadāʾ (alt. title: Adab al-qāḏī), Abū Bakr al-Khaṣṣāf
   al-Aḏāhī, Abū ‘Abd-Allāh al-Za’farānī
   al-Bahīr al-Muḥīṭ, Badi’ al-Dīn al-Qazwīnī
   al-Farā’id al-Sīrājiyya, Sīrāj al-Dīn al-Sajawandī
   al-Fatāwā, Abū al-Layth al-Samarqandī
   al-Fatāwā al-Sīrājiyya, Sīrāj al-Dīn al-Ūshī
   al-Fatāwā al-Tāṭārkhānīyya, ʿĀlam ibn al-ʿAlā’ al-Ḥanāfī
   al-Fatāwā al-Bazzāṣiyya (alt. title: al-Wajīz), Ḥāfīẓ al-Dīn Ibln al-Bazzāz al-Kardārī
   al-Fatāwā al-Walwāliyya, Abū al-Fatḥ al-Walwālijī
   al-Fawā’id, undetermined author160
   al-Fiṣḥ al-nāfī’, Nāṣir al-Dīn al-Samarqandī
   al-Ghāya, Abū al-‘Abbās al-Sarūjī

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160The editor of the Taṣḥīḥ, Diyā’ Yūnus, believes that this is a copyist’s mistake, and that it should read al-Jawāhir. See Taṣḥīḥ, p. 151, n. 1.
Ikhtilāf al-fuqahā’, Abū Ja’far al-Ṭahāwi
al-Jāmi’, undetermined author (or, alternatively, an unspecified work by this title)
Jāmi’ al-Burhānī (Sharḥ al-Jāmi’ al-saghir), Burhān al-Dīn Ibn Māza
al-Jāmi’ al-kabīr, Abū al-Ma‘āli al-Isbijābī
Jāmi’ al-Ḥusāmī, al-Ṣadr al-Shahīd
Jāmi’ al-Mahbūbī (Sharḥ al-Jāmi’ al-saghir), Jamāl al- İslām al-Mahbūbī
Jam’ al-tafārīq, Zayn al-Mashāyikh al-Baqqālī
Kanz al-daqā‘iq, Abū al-Barakāt al-Nasafi
al-Kashshāf ‘an ḥaqq‘iḥ al-tanzil, Abū al-Qāsim al-Zamakhsharī
Kitāb al-qasma, Muḥammad ibn al-Ḥasan al-Shaybānī
Kitāb al-ṣalāt, Muḥammad ibn al-Ḥasan al-Shaybānī
Majma’ al-bahrayn, Ibn al-Sā‘āti
Mi‘rāj al-dirāya, Qiwām al-Dīn al-Kākī
al-Mujtabā, Abū al-Ra‘ja’ (Najm al-A‘immā) al-Zāhīdī
al-Mukhtār, Abū al-Faḍl al-Mawṣili
al-Mukhtasar al-Kāfī, al-Ḥākim al-Shahīd al-Marwazī
Mukhtasar al-Qudūrī, Abū al-Husayn al-Qudūrī
Multamas al-ikhwān, ‘Abd al-Rabb ibn Manṣūr al-Ghaznawī
Munyat al-muṣfīt, Yūsuf ibn Abī Ṣa‘īd al-Sijistānī
al-Muṣannaf, ‘Abd al-Razzāq al-Ṣā‘ānī
Mushkil al-ḥathār, Abū Ja’far al-Ṭahāwī
Naṣb al-rāya, Jamāl al-Dīn al-Zayla‘ī
al-Nawādir, Abū Yahyā Mu‘alla ibn Manṣūr al-Rāzī
al-Nihāya sharḥ al-Hidāyā, Sīghnāqi, Ḥūsām al-Dīn Ḥusayn ibn ‘Alī
Niṣāb al-fuqahā’, Abū al-Ma‘āli al-Isbijābī
al-Rawḍa, Abū al-‘Abbās al-Nāṭifī
Sharḥ Majma’ al-bahrayn, Ibn al-Sā‘āti
Sharḥ Mukhtasar al-Karkhī, Abū al-Ḥusayn al-Qudūrī
Sharḥ al-Ta‘wilāt, ‘Alī al-Dīn al-Samarqandi.\(^{\text{161}}\)

\(^{\text{161}}\)Ibn Qutlubughā does not provide the name of the author, and the editor of the Taṣliḥ states that he is unable to determine the author’s name. Al-Bağhādāǧī (Hadiyyat al-‘arifīn, 2:92), in his entry for Muḥammad ibn ‘Abd al-Ḥamīd ibn al-Ḥasan ibn Ḥamza al-Uṣmandī, ‘Alī al-Dīn Abū Bakr al-Samarqandi, says that he had authored a Sharḥ al-ta‘wilāt, a four-volume commentary on a work by the famous Samarqandi theologian, Abū Manṣūr al-Māturīdī (d. 333/944–5) (on whom, see the study of Ulrich Rudolph, al-Māturidī und die sunnitische Theologie in Samarkand (Leiden: Brill, 1997)). Confusingly, he attributes to this al-Samarqandi
al-Siyar al-Kabīr, Muḥammad ibn al-Ḥasan al-Shaybānī

*Tafsīr al-Ḥākim*, unspecified author\(^{162}\)

*al-Tajrīd*, Abū al-Ḥusayn al-Qudūrī

*al-Wāqi‘āt*, Abū al-ḤAbbās al-Naṣīfī

*al-Ziyādāt*, Aḥmad ibn ‘Umar al-‘Attabī

Ziyādāt al-ziyādāt, Muḥammad al-Shaybānī

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*Tuhfat al-fuqahā‘*, which is known to be attributed to another ‘Ālā‘ al-Dīn al-Samarqandī, namely Abū Maṣūr Muḥammad ibn Aḥmad ibn Abī Aḥmad al-Samarqandī (see Brockelmann, 1:374). A reference in *Bughayat al-ṭalāb fi tārikh Ḥalab* of Ibn al-‘Adim (10:4347) would indicate that it is, indeed, a work of this latter, more famous ‘Ālā‘ al-Dīn al-Samarqandī: in his entry for al-Samarqandī’s student and son-in-law, ‘Ālā‘ al-Dīn al-Kāsānī, he mentions that the latter read all of the former’s work at his hands, including a *Sharḥ al-Ta’wilāt*, a work of Koranic exegesis. This is confirmed by the fact that the context of Ibn Ḥuṭlūbghā’s citation of the work (*Taših*, p. 365) is, indeed, in the context of the exegesis of a Koranic verse treating the fiscal responsibilities of a poor husband towards a wife who is financially better off than he.

\(^{162}\)The editor of the *Taših* posits that it is most likely *al-Tahdhib*, a work of Koranic exegesis by al-Ḥākim al-Jushamī (d. 494/1100–1) (*Taših*, p. 329, n. 2).
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—— ‘Was the Gate of Ijīthad Closed?’, *International Journal of Middle East Studies*, 16/1 (1984), 3–41.


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