WE'RE NOT IN KŪFA ANYMORE: THE CONSTRUCTION OF LATE ḤANAFISM IN THE EARLY MODERN OTTOMAN EMPIRE, 16TH – 19TH CENTURIES CE

by

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This study was borne out of my fascination with Zayn b. Ibrāhīm b. Muḥammad b. Nujaym's (d. 970/1562-3) legal scholarship. He was among the first generation of Egyptian Ottoman Ḥanafīs, whose opinions and works gain immense popularity and authoritativeness that lasted until the codification of Ḥanafī jurisprudence in the late 19th century. My study of Ibn Nujaym introduced me to the development of late Ḥanafism in the early modern Ottoman Empire.

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DEDICATION

To My Late Parents
Abdallah Taha Ayoub and Labiba Sulayman al-Mahallawi
With Gratitude and Love

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ABSTRACT

At the intersection of religion, law, and the state lies the opportunity to explore the impact of the state on the legal order. This study investigates such an impact through an examination of authoritative Ḥanafī legal works from the 16th – 19th centuries CE, casting new light on the understudied late Ḥanafī jurists (*al-mutaʾakhkhirūn*) in the early modern period. This dissertation argues that jurists secure the authority of the late Ḥanafī school (*madhhab*) through engagement with legal texts from previous generations of Ḥanafīs, disclosure of the reasoning that underlies late Ḥanafī legal opinions, and invocation of principles, authorities, and juridical formulas that construct late Ḥanafism in the early modern period in particular ways. I demonstrate how late Ḥanafī jurists develop their own identities, opinions, and consensus in relation to earlier Ḥanafī opinions. For late Ḥanafīs, the past authorities, texts, and opinions were never irrelevant: the past constituted a point of reference and continuity for their scholarship. The division of Ḥanafīs into late and early is not simply a matter of time, although it is true that the late Ḥanafīs produce legal works chronologically later than the early Ḥanafīs did. The distinction is more important for identifying that there is a tradition which characterizes the group of scholars identified as being chronologically "late" that develops in the Mamluk and Ottoman periods.

By taking the *madhhab* and its juristic discourse as the central focus, this study demonstrates how late Ḥanafī jurists assign probative value and authority to Ottoman state orders and edicts. This is reflected in the state's ability to settle juristic disputes, to order specific opinions to be adopted in *fatāwā*, and to establish its orders as authoritative and final reference points. The incorporation of state orders within authoritative Ḥanafī legal commentaries, treatises, and *fatāwā* collections is made possible by a turn in Ḥanafī legal culture that embraced

the indispensible nature of the state in the law-making process. Current scholarship in the field of Ottoman Studies that focuses on "structural" interventions by the state (appointing *muftī*s and judges, developing an Ottoman learned hierarchy) does not fully capture the influence of the state on the substance of the legal discourse. This project explores late Ḥanafī responses to Ottoman state interventions in the process of law-making, and the ways in which late Ḥanafī jurists talk to and about political power.

The dissertation concludes by offering two proposals. The first is that late Ḥanafī legal scholarship in the early modern period secures a limited space for the political authority in the process of law-making. This proposal finds that the argument for the epistemic divorce between the domain of Islamic law and the authority of the state in current Islamic Studies scholarship is untenable. The second proposal is that the late articulation of the Ḥanafī legal tradition is not only integral to understanding modern movements to codify Islamic jurisprudence, and the role of the state in these transformations, but also to tracing many legal norms that were incorporated in modern civil codes in majority Muslim countries. By introducing "late Ḥanafism" as a category of analysis, and situating the *madhhab* as the locus of the investigation, this dissertation fills in a gap in the fields of Islamic legal studies and Ottoman studies. This study draws the focus from Ottoman court archives to the Ḥanafī juristic discourse itself for understanding how Islamic law was developed and applied, offering a new perspective on the internal legal discourse of late Ḥanafīs and their responses to state power.

INTRODUCTION

"The kings are the rulers of the people; the scholars are the rulers of the kings; and the law is the ruler of everyone." Arabic proverb[1]

At the intersection of religion, law, and the state lies the opportunity to explore the impact of the state on the legal order. This study investigates such an impact through an examination of authoritative Ḥanafī legal works from the Ottoman world of the 16th – 19th centuries CE, casting new light on the understudied late Ḥanafī jurists (*al-mutaʾakhkhirūn*) in the early modern period. This dissertation argues that jurists secure the authority of the late Ḥanafī school (*madhhab*) through (1) engagement with legal texts from previous generations of Ḥanafīs, (2) disclosure of the reasoning that underlies late Ḥanafī legal opinions, and (3) invocation of principles, authorities, and juridical formulas that construct late Ḥanafism in the early modern period in particular ways. I demonstrate how late Ḥanafī jurists develop their own identities, opinions, and consensus in relation to earlier Ḥanafī opinions. For late Ḥanafīs, the past was never irrelevant: the past constituted a point of reference and continuity for their scholarship.

By taking the *madhhab* and its juristic discourse as the central focus, this study demonstrates how late Ḥanafī jurists assign probative value and authority to Ottoman state orders and edicts. This is reflected in the state's ability to settle juristic disputes, to order specific opinions to be adopted in *fatāwā*, and to establish its orders as authoritative and final reference points. The incorporation of state orders within authoritative Ḥanafī legal commentaries, treatises, and *fatāwā* collections is made possible by a turn in Ḥanafī legal culture that embraced the indispensible nature of the state in the law-making process. Current scholarship in the field of

[1] Recep Şentürk, "Between Traditional and New Forms of Authority in Modern Islam" in *Tradition and Modernity: Christian and Muslim Perspectives* (Washington D.C.: Georgetown University Press, 2013), 45. This statement is attributed, without the last part "the law is the ruler of everyone," to Abū al-Aswad al-Duʾalī (d. 689). See Ibn Qutayba al-Dīnawārī, *ʿUyūn al-Akhbār* (Beirut: al-Maktab al-Islāmī, 2008), 1:185; Abū Ḥāmid al-Ghazālī, *Iḥyāʾ ʿŪlūm al-Dīn* (Cairo: Muʾassasat al-Ḥalabī, 1967), 1:47.

Ottoman Studies that focuses on "structural" interventions by the state (appointing *muftī*s and judges, developing an Ottoman learned hierarchy) does not fully capture the influence of the state on the substance of the legal discourse. This project explores late Ḥanafī responses to Ottoman state interventions in the process of law-making, and the ways in which late Ḥanafī jurists talk to and about political power. I use the term "Ottoman state" to refer to the political authority within the Ottoman Empire. The sulṭān's legal authority is a reflection of his political power and his ability to enforce order. Late Ḥanafī jurists use the terms sulṭān, *al-dawla al-ʿaliyya* (Ottoman state), *al-salṭana al-ʿaliyya*, *al-dawla al-turkiyya, al-dawla al-ʿuthmāniyya* to acknowledge the value and authority of the Ottoman state in their legal scheme.[2]

PRINCIPAL QUESTIONS

Why Positive Legal Works?

A plethora of studies on the Ottoman *ʿulamāʾ*, court records, and registers attempt to reconstruct the social and economic history of various regions of the Ottoman Empire.[3] These studies enrich our understanding of the interrelation of gender, the nature of the state and local forces, non-Muslims communities under the Ottoman rule, and land tax and rent. However, I observe that, in these studies, the Ḥanafī legal discourse is relevant only in so far as it serves a

[2] Muḥammad Amīn ʿĀbidīn, *Radd al-Muḥtār ʿalā al-Durr al-Mukhtār* (Beirut: Dār al-Fikr, 1992), 4:180; Zayn Ibn Nujaym, *al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq* (Cairo: Dār al-Kitāb al-Islāmī, n.d.), 5:76; ʿAbd al-Raḥmān b. Muḥammad Shaykh-Zāda, *Majmaʿ al-Anhur fī Sharḥ Multaqā al-Abḥur* (Beirut: Dār Iḥyāʿ al-Turāth al-ʿArabī, n.d.), 2: 425.

[3] Haim Gerber, "*Shari'a, Kanun,* and Custom in the Ottoman Law: The Court Records of seventeenth-century Bursa," *International Journal of Turkish Studies* 2 (1981): 138; Uriel Heyd, *Studies in Old Ottoman Criminal Law* (Oxford, 1973); Galal EI-Nahal, *Judicial Administration of Ottoman Egypt in the Seventeenth Century* (Minneapolis, 1979); Jon E. Mandeville, "Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire," *International Tournal of Middle East Studies* 10 (1979): 289-308; Halil Inalcik, "Suleiman the Lawgiver and Ottoman Law" *Archivium Ottomanicum* 1 (1969): 105. John Voll, "Old ʿUlamaʾ Families and Ottoman Influence in Eighteenth- Century Damascus," *American Jaurnal of Arabic Studies,* 3 (1975): 48-59. Judith E. Tucker, *In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Los Angeles: University of Californian Press, 1998).

larger narrative within the political and social history of the Ottoman Empire. Therefore, these studies provide little systematic analysis of the Ḥanafī jurisprudential tradition as a sustained discourse indispensible to understanding the legal developments within the Ottoman state.

This study focuses on positive legal works because they are the loci for exploring the central aspects of Ḥanafī legal discourse and its judicial practices. In Islamic law, legal manuals (*mutūn*) and commentaries (*shurūḥ*) have influence over all other forms of legal discourses such as *fatāwā*, legal treatises, and judicial reasoning.[4] Additionally, the goal of this study is to examine the legal discourse of late Ḥanafī jurists in the early modern period as part of a sustained trajectory within the Ḥanafī school. This study focuses on Ḥanafī jurists in the core Arab provinces of the Ottoman Empire because it is not sufficient to study the works of a single jurist in a specific historical moment in order to pass definitive judgment on developments in the Ḥanafī *madhhab* and the *madhhab*'s relationship to the Ottoman state. It is important to stress that the law in Islam is found within a juristic body of writings recorded in the authoritative legal works (*mutūn*, *shurūḥ*, and *fatāwā*), which are written by Muslim jurists in various legal schools.[5] Thus, in Islamic law, the decisions of judges were not treated in the manner practiced by modern courts.[6] Instead, the legal manuals, commentaries, and *fatāwā* – not the court decisions – were combined and published as authoritative sources for determining the law.[7] It is

[4] Late Ḥanafīs in the early modern period consistently position *mutūn* and *shurūḥ* as the prime sources for their juristic discourse. They situate them in higher authoritative status than *fatāwā* and juridical decisions. See Muḥammad Amīn ʿĀbidīn, *Radd al-Muḥtār ʿalā al-Durr al-Mukhtār* (Beirut: Dār al-Fikr, 1992), 72; Zayn Ibn Nujaym, *al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq* (Cairo: Dār al-Kitāb al-Islāmī, n.d.), 247.

[5] Hallaq suggests that Islamic law is found in "a juristic body of writings that originated mostly in the answers given by *muftīs*." See Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 10. Late Ḥanafīs in the early modern period situate the *fatāwā* in a lower position in terms of its authoritativeness in relation to *mutūn* (legal manuals) and *shurūḥ* (legal commentaries). See Ibn ʿĀbidīn, *Radd al-Muḥtār ʿalā al-Durr al-Mukhtār*, vol. 1: 121, 153, 216.

[6] Hallaq, *Introduction*, 10.

[7] Ibid. A clear indication of this understanding can be observed by the publishing of key Ḥanafī *fatāwā* works as legal codes in colonial India. See Nawab Abdur Rahman A. F. M., *Institutes of Mussalman law, a treatise on personal law according to the Hanafite school, with references to original Arabic sources and decided cases from 1795 to 1906* (Calcutta: Thacker, Spink and co., 1907): 1-5.

crucial to note that, "law in action is most clearly seen in the legal process and the juristic act."[8] To put it differently, legal norms are created, developed, and sustained within the context of legal schools (*madhāhib*), where a community of jurists vetted such norms. Ḥanafīs insisted that judicial reasoning should be practiced within the context of judges' *madhāhib*; otherwise, judicial decisions will be based purely on personal discretion.[9]

Who are the Mutaʾakhkhirūn*?*

In Ḥanafī legal scholarship, there are no specific criteria to strictly define early versus late Ḥanafīs. The terms are rather relative. We are told that the early Ḥanafī jurists are those who saw or met Abū Ḥanīfa (d. 150/767), Abū Yūsuf (d. 182/798), Muḥammad al-Shaybānī (d. 189/805), Zufar b. al-Hudhayl (d. 158/775), and Ḥasan b. Ziyād al-Luʾluʾī (d. 204/819).[10] By contrast, the late Ḥanafīs are simply those who did not study with these authoritative figures. We are also told that the third century AH (10th century CE) is the fault line between the early and the late Ḥanafīs. This idea is further confirmed by the claim that late Ḥanafīs are those who came after Shams al-Aʾimma al-Ḥalwānī (al-Ḥulwānī, al-Ḥalwāʾī) (d. 456/1063)[11].

ʿAbd al-Ḥayy al-Luknawī al-Hindī (d. 1886), a key later Ḥanafī authority, informs us that *al-mutaʾakhkhirūn* are considered to be those Ḥanafī scholars who lived after Ḥalwānī, who is himself considered the "landmark" between *al-mutaqaddimūn* (early) and *al-mutaʾakhkhirūn* (late).[12] In Western scholarship, Baber Johansen suggests that late Ḥanafism starts in the 11th century. He argues: "From the beginning in the eleventh century and continuing until the period

[8] Alan Watson, *The Nature of Law* (Edinburgh: Edinburgh University Press, 1979), 8.
[9] Muḥammad b. ʿAbd Allāh al-Timurtāshī, *Masʿafat al-Ḥukkām ʿalā al-Aḥkām*, ed. Ṣāliḥ al-Zayid (Riyadh, Maktabat al-Maʿārif, 1996), 2:627-9.
[10] ʿAbd al-Ḥayy al-Luknawī, *ʿUmdat al-Riʿāya ʿalā sharḥ al-Wiqāya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2009), 15-16; Al-Luknawī, *al-Fawāʾid al-Bahiyya*, 241.
[11] Al-Luknawī refers to these options of the name. He elaborates that al-Ḥulwānī is a *nisba* to Ḥulwān, name of a small town. Sometimes he is known as al-Ḥalwāʾī, a name used by those who sell *ḥalwā* (dessert).
[12] Ibid.

of the Tanzimat (1839-76), the Ḥanafī jurists were aware of differences in conceptions and doctrines that separated the Hanafite doctrine of the 'modern jurists' (*al-mutaʾakhkhirūn*) from that of the 'classical jurists' (*al-mutaqaddimūn*)."[13] Johansen stresses that 'modern' Ḥanafī jurists repeatedly inform their readers that "they follow a legal doctrine that was developed by the 'modern jurists'."[14]

This dissertation does not attempt to define when late Ḥanafism emerged. Rather, I propose to understand the late Ḥanafī jurists in the early modern period in terms of their self-identification and the legal patterns, opinions, and norms in their legal scholarship. For instance, the identification of "late Ḥanafīs" appears in the title of a biographical dictionary (*ṭabaqāt*) by Shams al-Dīn Muḥammad b. ʿAlī b. Aḥmad Ibn Ṭulūn al-Sāliḥī al-Dimashqī (d. 953/1546). This work is titled *al-Ghuraf al-ʿAliyya fi Tarājim Mutaʾakhkhirī al-Ḥanafīyya* (figure I.1).[15] It is still in manuscript form, and it was written during the Ottoman period. Ibn Ṭulūn starts his work with the biographical information of the eponyms of the school: Abū Ḥanīfa, Abū Yūsuf, and Muḥammad al-Shaybānī. The author then embarks on discussing the biographical information of Ibrāhīm b. Aḥmad b. Khiḍr al-Ṣāliḥī al-Ḥanafī (d. 816/1413). Overall, this work is primarily concerned with Ḥanafī jurists from the 13th to 16th century[16], which is the time frame Ibn Ṭulūn adopts for his identification of late Ḥanafīs.

[13] Ibid.
[14] Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (London, 1988), 98.
[15] Muḥammad b. ʿAlī b. Aḥmad b. Ṭulūn al-Sāliḥī al-Dimashqī, *al-Ghuraf al-ʿAliyya fī Trājim Mutaʿakhkhitī al-Ḥanafīyya* (Istanbul: Suleymaniye library, Şehit ʿAlī Paşa, 001925 fols., 2a. [368 fols.])
[16] Ibid.

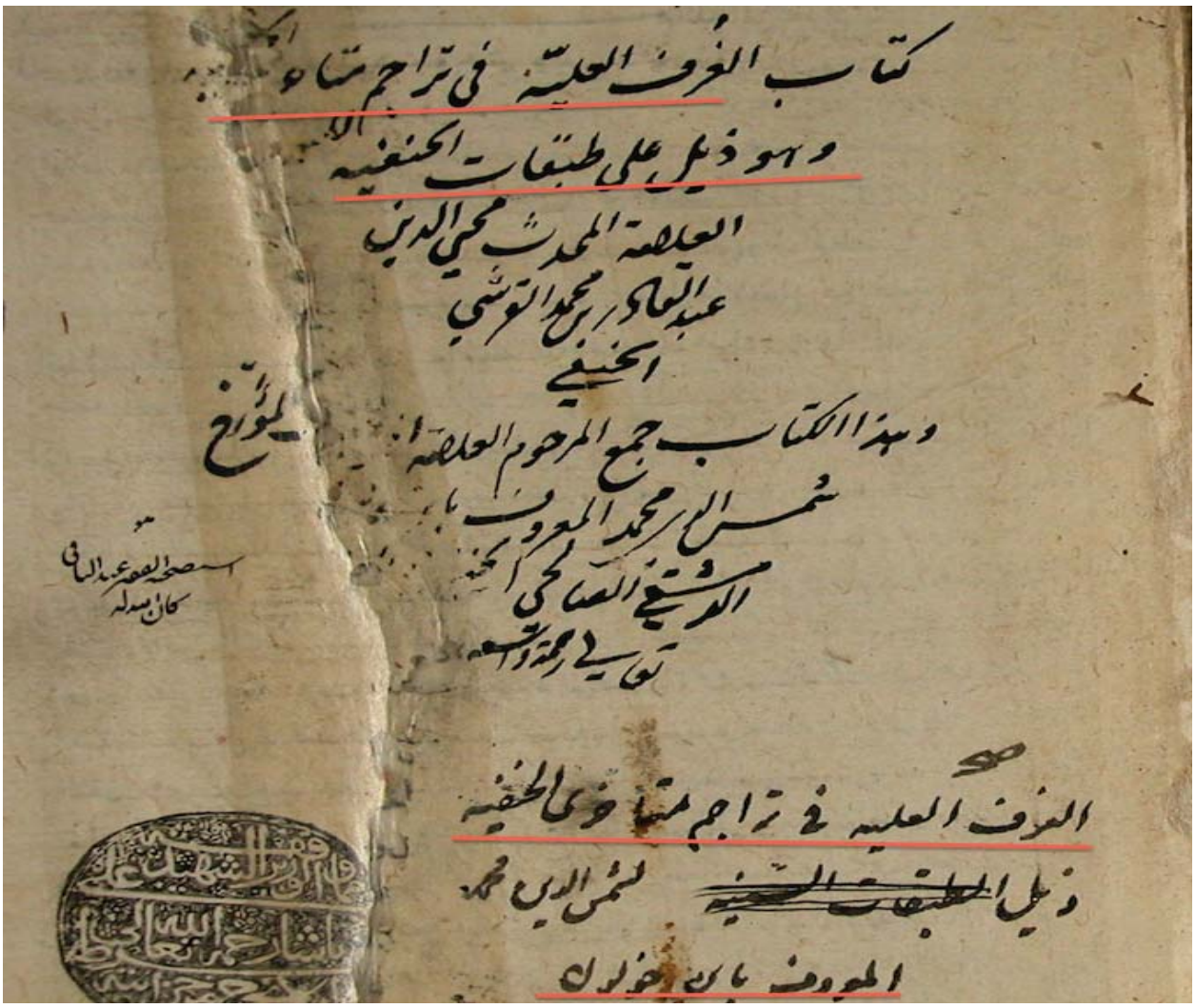

Figure I.1: Ibn Ṭulūn al-Dimashqī, *al-Ghuraf al-ʿAliyya*, fols., 1a.

Moreover, the identification of "late Ḥanafīs" is further employed in the early modern period in relation to the authority of responding to legal questions. Al-Shaykh Jamāl al-Dīn al-Ḥānūtī (d. 1601), for example, authored a work titled*: Ijābat al-Sāʾilīn bi Fatwā al-Mutaʾakhkhirīn* (*Answering the Questioners Based on the* Fatwā *of the Late Ḥanafīs*) (figure I.2). This work was collected and arranged by ʿAbd Allāh b. Ḥasan al-Kāzrūnī (d. 1690?). In the introduction to this work, al-Kāzrūnī states that he primarily engaged the *fatāwā* of the late Ḥanafīs.[17] He informs us that he thematically arranged al-Ḥānūtī's *fatāwā* based on the

[17] Muḥammad b. ʿUmar al-Ḥānūtī, *Ijābat al-Sāʾilīn bi Fatwā al-Mutaʾakhkhirīn* (Riyadh: King Saud University, J 3018, fols., 2b. [204 + 106 fols., copied c. 1118/1706]).

arrangement of the books of jurisprudence. After each chapter, he dedicates a special section to a list of the late Ḥanafī legal opinions (*fatāwā*) on that topic.[18] However, the most significant aspect of this work is its sources. The author incorporates and identifies a body of *fatāwā* literature that represents what he identifies as "the late Ḥanafī opinions".[19] He includes the *fatāwā* works of Sirāj al-Dīn ʿUmar b. ʿAlī b. Fāris al-Kinānī al-Ḥanafī known as Qāriʾ al-Hidāya (d. 829/1426)[20], and Zayn al-Dīn b. Ibrāhīm b. Nujaym (d. 970/1564).[21] It is important to note that these two scholars are Egyptians, and that their scholarship has a lasting influence on late Ḥanafism in the early modern period. In fact, Ḥanafī networks in Egypt (as well as in Syria) provided the logistical training and scholarship for the emerging Ottoman Anatolian Ḥanafī jurists.[22]

[18] Ibid.
[19] Ibid.
[20] The formal legal opinions of Qāriʾ al-Hidāya were collected by his disciple Kamāl al-Dīn Ibn Humām al-Ḥanafī (d. 861/1457). The collection contains juridical questions by a judge and the answers by Qāriʾ al-Hidāya. This work was also collected and arranged by Muḥammad al-Ghazzī al-Timurtāshī (d. 1596).
[21] Muḥammad al-Timurtāshī also collected and arranged Ibn Nujaym's *fatāwā*. It is important to note that al-Timurtāshī's legal scholarship gains immense authority among Ḥanafīs from the 16th through 19th century.
[22] Several of the Anatolian Ottoman Ḥanafīs travelled to Egypt and Syria for legal scholarship. A few examples in this regard are: Dāwūd al-Qayṣarī al-Kurāmānī (d. 751/1350), Muḥammad b. Isrāʾil b. Qāḍī Samawānih (d. 823/1420), and Shams al-Dīn al-Fannārī (d. 834/1431). See Aḥmad b. Muṣṭafā Ṭaşköprüzāde, *al-Shaqāʾiq al-Nuʿmāniyyah fī ʻUlamāʾ al-Dawla al-ʻUthmāniyyah* (Beirut: Dār al-Kitāb al-ʿArabī, 1975), 8, 12, 16. The centrality of the Egyptian Ḥanafī tradition is also affirmed by sources of the Damascene Ḥanafī jurist Muḥammad Amīn ʿĀbidīn's (d. 1252/1836) legal commentary. In his introduction to his famous commentary *Radd al-Muḥtār*, Ibn ʿĀbidīn enumerates the important authorities among the late Ḥanafīs who shaped the backbone of his legal commentary. The Egyptian Ḥanafīs: Ibn al-Humām al-Ḥanafī (d. 1457) and his students, Ibn Amīr Ḥājj (d. 1474), and Qāsim Ibn Quṭlūbughā's (d. 879/1474), and Ibn Nujaym are central to late Ḥanafism in the early modern period.

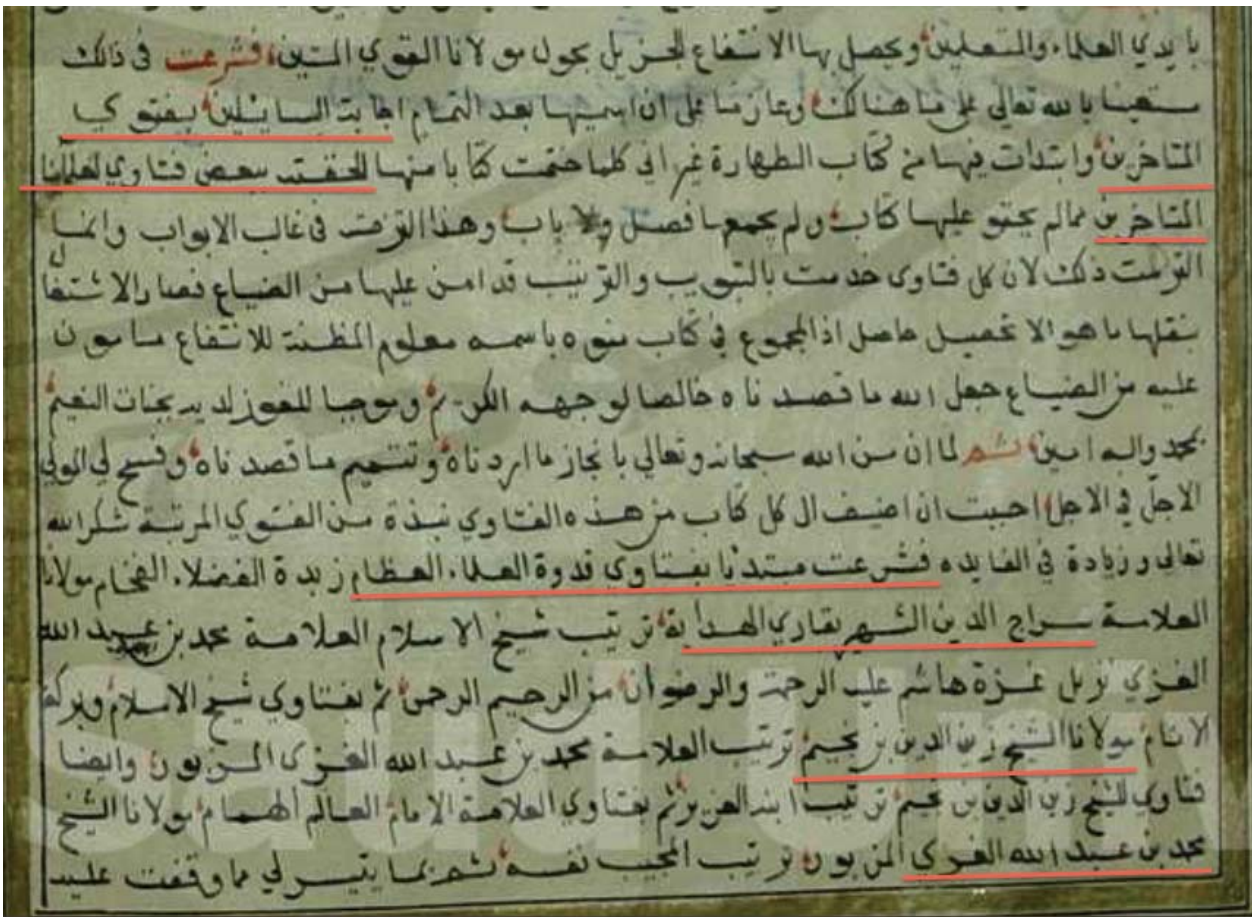

Figure I.2: Al-Ḥānūtī, *Ijābat al-Sāʾilīn bi Fatwā al-Mutaʾakhkhirīn*, fols., 2b.

Furthermore in this study, I find that Ḥanafī jurists from Ibn Nujaym until Ibn ʿĀbidīn employ the following phrases to show the fully developed nature of their identities, opinions, and consensus in relation to early Ḥanafīs: *ajmaʿ al-mutaʾakhkhirūn* (the late Ḥanafīs agreed upon), *ikhtalaf al-mutaʾakhkhirūn* (the late Ḥanafīs disputed), *ṭāʾifa min al-mutaʾakhkhirīn* (a group of the late Ḥanafīs), *ʿāmmat al-mutaʾakhkhirīn* (the majority of late Ḥanafīs), *baʿḍ al-mutaʾakhkhirīn* (some/one of the late Ḥanafīs), *kathīr min mashāyikhinā al-mutaʾakhkhirīn* (many of our master scholars of the late Ḥanafīs), *jamāʿa min al-mutaʾakhkhirīn* (many of the late Ḥanafīs), *ikhtiyār al-mutaʾakhkhirīn* (the preference of the late Ḥanafīs), *al-mukhtār ʿinda al-mutaʾakhkhirīn* (the preferred opinion among the late Ḥanafīs), *shawādh baʿḍ al-mutaʾakhkhirīn* (legal opinions among the late Ḥanafīs that fall beyond the accepted boundaries

of the school), *akthar al-mutaʾakhkhirīn* (most of the late Ḥanafīs), *al-madhhab ʿinda al-mutaʾakhkhirīn* (the authentic opinion of the late Ḥanafīs), *qawl al-mutaʾakhkhirīn* (the opinion of the late Ḥanafīs), *ahl madhhab al-mutaʿakhkhirīn* (the late Ḥanafī members of the school).[23]

Late Ḥanafīs in the early modern period primarily rely upon five key legal texts (*mutūn*) in their commentaries: *Kanz al-Daqāʾiq*, *Wiqāyat al-Riwāya* (a commentary on *al-Hidāya* by Burhān al-Dīn al-Marghinānī), *Mukhtaṣar al-Qudūrī*, *al-Mukhtār li al-Fatwā*, and *Majmaʿ al-Baḥrayn*.[24] For instance, Burhān al-Dīn Ibrāhīm b. Muḥammad b. Ibrāhīm al-Ḥalabī (d. 1549) states that he was asked to author a legal work based on the key authoritative manuals (*mutūn*) of late Ḥanafīs. He stresses in his introduction to *Multaqā al-Abḥur*: "The reason for the composition of this work is that I was asked to put together a treatise that comprises the legal cases of *al-Qudūrī*, *al-Mukhtār*, *al-Kanz*, and *al-Wiqāya* in clear language. I met this demand and I added to my work some cases from *Majmaʿ al-Baḥrayn* and *al-Hidāya*."[25] This work was completed in 923/1517. It met with immediate success, and acquired numerous commentaries. The two most popular commentaries on this work are: *Majmaʿ al-Anhur* of Shaykh-Zāda (d. 1078/1667), and the *Durr al-Muntaqā* of al-Ḥaṣkafī (d. 1088/1677). Al-Ḥalabī's *Multaqā al-Abḥur* was translated into Turkish and commented upon by Muḥammad Mawqūfātī around 1050/1640. This work became the authoritative handbook of the Ḥanafī school in the Ottoman Empire.[26]

[23] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 2:9,151,167,210,272; vol. 3:12,119,165,293,309;vol. 4:158.
[24] The Authors of these texts are: Abū al-Barakāt ʿAbd Allāh b. Aḥmad al-Nasafī (d. 710/1310), ʿUbayd Allāh b. Masʿūd al- Maḥbūbī (d. 474/1346), Aḥmad b. Muḥammad al-Qudūrī (d. 428/1037), ʿAbd Allāh b. Maḥmūd b. Mawdūd al-Ḥanafī (d. 683/ 1284), Aḥmad b. ʿAlī b. Taghlab, know as Ibn al-Saʿātī (d. 694/1295).
[25] Ibrāhīm al-Ḥalabī, *Multaqā al-Abḥur*, vol. 1:13.
[26] J. Schacht, "al-Ḥalabī." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs. Brill Online, 2014. University of Arizona. 08 February 2014 <http://referenceworks.brillonline.com.ezproxy1.library.arizona.edu/entries/encyclopaedia-of-islam-2/al-halabi-SIM_2642>First appeared online: 2012.

One of the most important aspects of late Ḥanafī legal commentaries is their authors' insistence that they primarily incorporate the preponderant opinions of the school, and that they identify the less authoritative opinions. Also, these authors inform us that a key feature of late Ḥanafī jurists is that they point to the most sound (*al-aṣaḥḥ*) opinions and the most authoritative (*al-aqwā*) rulings in their legal reasoning.[27] Al-Ḥalabī sustains this narrative of the late Ḥanafīs in his work by emphasizing that he includes the differences of opinion among the *muta'akhkhirūn* and the opinions in the books upon which they rely.[28]

For the purposes of this dissertation, I use the label "late Ḥanafīs of the early modern period," to be faithful methodologically to how Ḥanafīs refer to themselves and conceive of the *madhhab* at this point historically, and at the same time I try to capture the chronological development and the time period I am working on. I identify three features of the late Ḥanafīs in early modern period (*muta'akhkhirī al-ḥanafiyya*): (1) the manuals of jurisprudence and *fatāwā* collections that they rely upon in their legal scholarship; (2) their regional networks and learning centers[29]; and (3) their relationship with the Ottoman state. I contend that the Egyptian Ḥanafī legal scholarship, in the Mamluk and Ottoman periods, forms most of the basis for articulating and formulating a fully developed late Ḥanafī tradition in the early modern period. For instance, the works, opinions, and *fatāwā* of Ibn Nujaym al-Ḥanafī al-Miṣrī (d. 970/1562-3) define the discussions of Ḥanafī legal development over the 17th - 19th centuries. This study focuses on the time period following the Ottoman conquest of the Arab provinces.

[27] Ibrāhīm al-Ḥalabī, *Multaqā al-Abḥur*, vol. 1:14.
[28] Ibid.
[29] Egypt, Syria (Aleppo), and Anatolia formed the centers for Ḥanafī scholarship and training in the early modern period.

ʿAbd al-Ḥayy al-Luknawī: A Late Perspective on the History of the Ḥanafī School

In his *al-Nāfiʿ al-Kabīr li Man Yuṭāliʿ al-Jāmiʿ al-Ṣaghīr*, ʿAbd al-Ḥayy al-Luknawī offers an important perspective on the development of the Ḥanafī school. He also provides criticism for some of the narratives of the school's history. Al-Luknawī explains that the classification of the Ḥanafī school into "early" and "late" is primarily determined by categorizing the jurists and their legal works on the basis of their authority in the *madhhab*.[30] Al-Luknawī uses the terms *al-mutaqaddimūn* and *al-mutaʾakhkhirūn* to describe different hierarchies of jurists within the school. He relates the following anecdote from Maḥmūd b. Sulaymān al-Kafawī's (d. 990/1582) *Aʿlām al-Akhyār*[31]:

> The knowledge of our eponym, Abū Ḥanīfa, was transmitted through his disciples to a vast number of countries. In fact, the school's jurists are dispersed throughout a vast number of cities. For example, our colleagues from among the early Ḥanafīs (*aṣḥābunā al-mutaqaddimūn*) were dispersed in Iraq, *mashāyikh* Balkh, *mashāyikh* Khurasān, *mashāyikh* Samarqand, *mashāyikh* Bukhāra, and other *mashāyikh* from Iṣbahān, Shirāz, Ṭūs, Zinjān, Hamadān, Istarabād, Basṭām, Marghinān, Farghānā, Damaghān, and other provinces within the lands beyond the Oxus River (*sic*) such as Khurasān, Azarbayjān, Khwārazm, Ghazna, Karmān. Also, the school was spread in the lands of the Hind, and different provinces in Arab and non-Arab lands. All of these scholars spread the knowledge of Abū Ḥanīfa by dictating to students, memorization, and writing in the *madhhab*. Those Ḥanafīs were engaging in learning *fiqh*, *ijtihad* (legal reasoning), spreading the benefits of their knowledge, and writing. This system of transmitting knowledge remained this way over years and centuries. Then, God destined the coming of Chingis Khan (d. 1227) who chose war and murdered people, destroyed knowledge and countries. His children followed him on the same path. This resulted in the immigration of Ḥanafī jurists and their families, who survived this injustice, to Damascus, Aleppo, Egypt, and Anatolia. This led to the flourishing of Ḥanafī knowledge in these provinces.[32]

Al-Luknawī divides Ḥanafī jurists into five classes. The criterion he employs is primarily focused on the hierarchy of authority and seniority of Ḥanafī jurists and their legal production in the school. The first class is made up of the early Ḥanafīs (*ṭabaqat al-mutaqaddimīn min aṣḥābinā*). This comprises the disciples of Abū Ḥanīfa: Abū Yūsuf, Muḥammad, Zufar, and others. Al-Luknawī insists that they are *mujtahids* in the *madhhab* and they are able to extract

[30] ʿAbd al-Ḥayy al-Luknawī, *al-Nāfiʿ al-Kabīr li Man Yuṭāliʿ al-Jāmiʿ al-Ṣaghīr* (Beirut: ʿĀlam al-Kutub, 1986), 23.
[31] Al-Luknawī, *al-Nāfiʿ al-Kabīr*, 8.
[32] Ibid.

legal rulings from the four legal proofs (the Qurʾān, the Sunna, consensus, and analogy) based on the norms developed by their eponym. Despite the fact that they differed with him in some of the detailed legal issues (*furūʿ*), Al-Luknawī elaborates, they were committed to Abū Ḥanīfa's fundamental legal norms (*uṣūl*).[33]

The second class is comprised of the masters from among the senior late Ḥanafīs (*tabaqat akābir al-mutaʾakhkhirīn*): Abū Bakr al-Khaṣṣāf (d. 261/874), Abū Jaʿfar al-Ṭaḥāwī (d. 321/933), Abū al-Ḥasan al-Karkhī (d. 340/951), al-Ḥalwānī, Shams al-Aʾimma al-Sarakhsī (d. 483/1090), Fakhr al-Islām al-Bazdawī (d. 482/1089), Qāḍī Khān (d. 593/1196), Ṣāḥib *al-Dhakhīra* and Ṣāḥib *al-Muḥīṭ al-Burhānī* (i.e. Ibn Māza, d. 616/1219), and al-Shaykh Ṭāhir Aḥmad (d. 541/1147) the author of *al-Niṣāb* and *Khulāṣat al-Fatāwā*.[34] Al-Luknawī describes this class as capable of engaging in *ijtihād* in the issues that were not addressed by the eponym and early authorities of the school. Al-Luknawī states, "This class cannot disagree with the eponym (*ṣāḥib al-madhhab*), neither in the *furūʿ* nor in the *uṣūl* of the school."[35] The third class is made up of those who are capable of discerning the *uṣūl* and norms of the school so that they can generate new opinions (*tabaqat aṣḥāb al-takhrīj*). Al-Luknawī gives us the example of Abū Bakr al-Rāzī al-Jaṣṣāṣ (d. 370/980) and asserts that these jurists cannot perform *ijtihād* at all; however, because they are fully aware of the *uṣūl* of the school, they are able to explain a general statement that could produce two different rulings, and an ambiguous ruling that could produce two different opinions narrated from Abū Ḥanīfa and his disciples.[36]

The fourth class is made up of those jurists who are capable of identifying the preponderant opinions from among the followers of the school (*ṭabaqat aṣḥāb al-tarjīḥ min al-*

[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.

muqallidīn). This generation includes Abū al-Ḥasan al-Qudūrī (d. 428/1037), Shaykh al-Islām Burhān al-Dīn al-Marghinānī (d. 593/1197), the author of *al-Hidāya*, and others like them. Al-Luknawī explains that scholars from this generation have the ability to distinguish among different narrations by identifying the most preferred, the most authentic in narration, the most lucid in terms of meaning and understanding (*dirāya*), and the most suitable for people's affairs.[37]

The fifth class is the followers of the school's opinions (*tabaqat al-muqallidīn*) who are able to distinguish among the most authentic and reliable (*al-aqwā*), the authentic and reliable (*al-qawī*), and the weak (*al-ḍaʾīf*) opinions, as well as between *ẓāhir al-riwāya* (authentic narrations) and *riwāya nādira* (Ḥanafī opinions that were not transmitted by Muḥammad al-Shaybānī). Shams al-Aʾimma Muḥammad al-Kardarī (d. 562/1166), Jamāl al-Dīn al-Ḥaṣīrī (d. 636/1238), and Ḥāfiz al-Dīn al-Nasafī (d. 710/1310) are examples of Ḥanafī jurists of this generation. This class also includes the authors of legal manuals from among the late Ḥanafīs (*aṣḥāb al-mutūn al-muʿtabara min al-mutaʾakhkhirīn*), such as the author of *al-Mukhtār* (ʿAbd Allāh b. Mawdūd al-Mawṣilī, d. 683/1284), the author of *al-Wiqāya* (Burhān al-Sharīʿa, d. 673/1274) and the author of *al-Majmaʿ* (Ibn al-Sāʿātī al-Ḥanafī, d. 694/1294). Al-Luknawī emphasizes that they do not incorporate any rejected statements or weak narrations in their legal literature. For him, this class (*tabaqa*) is the lowest in the classes of the Ḥanafī jurists. He asserts, "Those who are lower than this *tabaqa* are laymen and they should follow the scholars of their time. It is not allowed for them to issue *fatāwā* unless they are narrating from other scholars."[38]

The division of Ḥanafīs into late and early is not simply a matter of time, although it is true that the late Ḥanafīs produce legal works chronologically later than the early Ḥanafīs did.

[37] Ibid.
[38] Al-Luknawī, *al-Nāfiʿ al-Kabīr*, 9.

The distinction is more important for identifying that there is a tradition which characterizes the group of scholars identified as being chronologically "late" that develops in the Mamluk and Ottoman periods. Al-Luknawī identifies the late Ḥānafī group as starting in the 9th century. This dissertation shows that the late Ḥanafīs of the early modern period are a group distinct in their relationship with the political authority and in their jurisprudential production from the late Ḥanafīs that precede them chronologically. In his *al-Fawāʾid al-Bahiyya*, al-Luknawī gives us more insights into this Ḥanafī terminology. He explains that the term *al-khalaf* (successors) in the jargon of Ḥanafī jurists applies to scholars in the generations following Muḥammad b. al-Ḥasan al-Shaybānī until Shams al-Aʾimma al-Ḥalwānī. Yet, the term *salaf* (predecessors) refers to Abū Ḥanīfa, Abū Yūsuf, and Muḥammad al-Shaybānī. For the purposes of this dissertation, it is useful to bear in mind that al-Luknawī defines the *al-mutaʾakhkhirūn* as the generations spanning from Shams al-Aʾimma al-Ḥalwānī to Ḥāfiz al-Dīn al-Nasafī.[39]

Islamic Law and Qānūn

The *qānūn* is the Ottoman dynastic law, which is also known in the Ḥanafī legal literature as *al-qawānīn al-ʿuthmāniyya*.[40] It is a set of edicts, regulations, and practices, parts of which were written down, codified, and promulgated in the form of codes (*ḳānūnnāmes*).[41] The Ottoman dynastic law was a product of a negotiated endeavor among *sharīʿa, qānūn,* and custom.[42] Haim Gerber argues that the Ottoman *qānūn* was not intended to keep the *sharīʿa* on the sidelines. Instead, he argues that the *qānūn* was designed to prescribe fines or discretionary

[39] Al-Luknawī, *al-Fawāʾid al-Bahiyya*, 241.
[40] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 5: 420
[41] Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994): 62.
[42] Ibid.

punishments.[43]

Wael Hallaq argues that the *sharīʿa* and the *qānūn* have more similarities than differences. Ḥanafī jurists see the *qānūn* as "an integral part of the legal culture, and as an extra-judicial element that was required by the *siyāsa sharʿiyya* itself."[44] Hallaq explains: "Just as the *sharīʿa* insisted on local custom as a guiding principle in the application of the law, the *qānūn*, in its various compilations, catered to the needs of particular towns, districts and provinces."[45] He maintains that the *sharīʿa* and the *qānūn* developed "structural mechanisms to accommodate change and to respond to diachronic and synchronic geographical variations."[46] Both systems viewed their own laws as a "statement of the limits of the tolerable rather than a set of inflexible rules to be imposed regardless of circumstances."[47] It is important to emphasize that Ottomans distinguish between *sharīʿa* and *qānūn*[48], not necessarily in terms of the dichotomy of secular and sacred, but in terms of the ways these types of law were produced and legitimated.[49]

The *qānūn* of Sulaymān the Lawgiver (r. 1520–66), states that the "executive officials shall not imprison nor injure any person without the cognizance of the [*sharīʿa*] judge. And they shall collect a fine according to [the nature of] a person's offense and they shall take no more [than is due]. If they do, the judge shall rule on the amount of the excess and restore it [to the

[43] Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994): 62. Richard Repp, "Qānūn and Sharīʾa in the Ottoman context," *in Islamic Law: Social and Historical Context*, ed. A. Al-Azmeh (London: Rutledge, 1988), 124-45; Gerber, "sharīʿa, kanun, and custom in the Ottoman law: the court records of the 17th century Bursa," *the International Journal of Turkish Studies*, no.1 (1981): 138. Ḥanafī jurists used the term "*siyāsa sharʿiyya*" to point to the discretionary powers of the political authority, the sulṭān, to pass judgments on new issues and inflict punishments beyond the stated limits in Islamic law. Ḥanafīs affirmed this authority and its formulations as long as it does not result in gross injustices prohibited by the *sharīʿa*.
[44] Hallaq, *Introduction*, 79.
[45] Ibid.
[46] Ibid.
[47] Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003), 122.
[48] Colin Imber, *Ebuʾs-Suʿud: The Islamic Legal Tradition* (Stanford: Stanford University Press, 1997), 50.
[49] Ruth Miller, "The Legal History of the Ottoman Empire," *History Campus* 6/1 (2008): 289-291.

victim].”[50] The *qānūn*, according to Hallaq, upheld the *sharīʿa* by enhancing and supplementing its position and provisions, while the *sharīʿa*, on the other hand, required the intervention of sulṭānic justice.[51]

In chapter four, I explore the ways in which the Ottoman state supervises the process of the codification of late Ḥanafī *fiqh* in the form of the *Mecelle*. Before the *Mecelle,* the Ottoman Empire enacted codes (*qawānīn*) such as the Commercial Code of 1850 and the Penal Code of 1858. Some other examples of legal codification by the Ottoman Empire are: the Penal Codes of 1840 and 1851; the Land Law of 1858; the *Mecelle,* which is the Ottoman Civil Code based on Ḥanafī *fiqh* enacted between 1868 and 1876; and, finally, the Family Law Code (*Ḥukuk-i ʿAile Kararnamesi*) of 1917. Rudolph Peters explains the Ottoman obsession with codification by arguing that, “The foundational bases for these ‘reforms’ was the Western notion that traditional law, as found in the various books of *fiqh*, in administrative practices and in custom was ‘chaotic and inaccessible’ and that ‘codification is civilization’.”[52]

However, this dissertation does not attempt to explore the details of Ottoman dynastic law. Rather, it is concerned with exploring how late Ḥanafīs in the early modern period respond in their legal discourse to the emergence of sulṭānic orders and edicts and their weight and authority in relation to juristic and judicial reasoning. The late Ḥanafī juristic discourse in the early modern period, due to a turn in its legal culture, opened up the legal doctrine to allow certain new legislative roles for the political authority. In the Ḥanafī legal literature, *siyāsa* meant that the sulṭān, alone, enjoys the authority to sanction and prevent what he deems to be for the public good of the Muslim community. *Siyāsa* in the Ḥanafī legal literature is primarily

[50] Peirce, *Morality Tales*, 119, 327.
[51] Hallaq, *Introduction*, 79.
[52] Rudolph Peters. “From Jurists’ Law to Statute Law or What Happens When the Shariʿa is Codified,” *Mediterranean Politics*, 3 (2002): 87.

discussed in the context of the ability of the sulṭān to execute criminal and discretionary punishments as well as for the enforcement of public order.[53] The areas where such authority is visible are highway robbery, theft, bodily injury, usury, taxation, land tenure, and categorically all disturbances of order and peace. As an example, late Ḥanafī jurists enforced the sulṭān's authority in ordering the torture of thieves and highway robbers so as to extract confessions, although this practice went beyond *sharīʿa* norms.[54] Ḥanafī jurists emphasized that the sulṭān's authority to issue such orders is legitimate as long as the orders do not contradict the central principles of Islamic law. The Ottoman *qānūn* merely "asserted the provisions of *sharīʿa* in an effort not only to place emphasis on such provisions but also to depict sulṭānic will as *sharīʿa*-minded."[55]

LITERATURE REVIEW

Several studies point to the role of the state in the development of Islamic law.[56] In the Ottoman context, the scholarship of Baber Johansen, Guy Burak, Colin Imber, and Rudolph Peters, draws our attention to the complex relationship between the Ottoman state and the Ḥanafī legal tradition.[57] This dissertation benefits from the interventions of these scholars and attempts

[53] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:18.

[54] Hallaq, *Introduction*, 78.
[55] Ibid.
[56] Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab Al-Din Al-Qarafi* (Leiden: Brill, 1997), 185–224; Mohammad Fadel, "Adjudication in the Maliki Madhhab: A Study of Legal process in Medieval Islamic Law," (PhD Dissertation, University of Chicago, 1995), 2–120; Melchert, *The Formation of the Sunni Schools of Law: 9th-10th Centuries C.E* (Leiden: Brill, 1997), 200.
[57] Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Ḥanafite Legal Literature of the Mamluk and Ottoman Periods* (London and New York: Croom Helm, 1988); Colin Imber, *Ebuʾs-Suʿud: The Islamic Legal Tradition* (Stanford: Stanford University Press, 1997); Rudolph Peters, "What Does It Mean to Be an Official Madhhab?," in *The Islamic School of Law: Evolution, Devolution, and Progress*, ed. Peri J. Bearman, Rudolph Peters, Frank E. Vogel (Cambridge, MA: Harvard University Press, 2006), 147–58.

to refine some of their conclusions in order to furnish the background against which I explore late Ḥanafī tradition in the early modern period.

Baber Johansen's study, *Islamic Law of Land Tax and Rent in Late Medieval Egypt,* demonstrates the effectiveness of *muftī*s and *fatāwā* in legal change. Johansen shows how Ibn Nujaym, the *muftī* of Egypt, composed a work on endowments (*awqāf*) by reevaluating and rewriting the Ḥanafī approach to land tax and rent for the benefit of the state and elite. Through this *fatwā*, Ibn Nujaym accomplished the legal and eventually social change that was desired. Johansen places the core responsibility and ability to effect legal change in the hands of the *muftīs*. Furthermore, Ibn Nujaym, as presented by Johansen, determines the authoritative doctrine that is then observed and practiced in his time. Although a *muftī's fatāwā* are non-binding, it is apparent that a *muftī*, in his position, as well as his *fatāwā*, do have the authority to enable significant legal and social change.

Johansen is alone, to my knowledge, in observing not only the change of the legal doctrine of land ownership, but also the existence of a late Ḥanafī tradition where such new opinions, figures, and consensus are being created and sustained. This dissertation suggests that these central changes in legal doctrine during the Ottoman Empire should be understood within the trajectory of late Ḥanafism in the early modern period, not through selective isolated individuals. The internal Ḥanafī debates broadly attribute the agency to affect such a legal change to the late Ḥanafī jurists of the early modern period (*al-mutaʾakhkhirūn*).

Guy Burak, in his dissertation, "The Abū Ḥanīfa of His Time: Islamic Law, Jurisprudential Authority and Empire in the Ottoman Domains (16th - 17th Centuries)," demonstrates the importance of the role of the chief *muftī* of the Ottoman Empire in the process of legal change. The core contribution of Burak's work is that he shows how the Ottoman state,

represented by the chief imperial jurisconsult (Shaykh al-Islām), creates an imperial canon to pursue desired legal change. Burak argues that, "the chief imperial jurisconsult was able to specify what texts should be incorporated into the imperial canon due to the hierarchical and centralized nature of the imperial religious-judicial establishment."[58] Burak's study on the centrality of the Ottoman state in the formation of an imperial Ottoman canon deserves attention. I dedicate the following few paragraphs to a discussion of his ideas and conclusions.

To Burak, the Ottoman adoption of the Ḥanafī school cannot be reduced to an act of state patronage.[59] He argues that it was "an active intervention by the Ottoman dynasty in the structure of the school of law and its doctrines." In this sense, Burak asserts the Ottoman adoption of the school was very different from the support that earlier Muslim sovereigns and dynasts extended to jurists and religious scholars.[60] The Ottoman state intervention manifested through several "institutional and administrative practices, such as the appointment of *muftīs* and the development of an imperial learned hierarchy."[61] A key argument in Burak's work is his emphasis on the idea that "the emergence of the Ottoman official *madhhab* depended to a significant degree on the existence of the notion of dynastic law." Burak argues that the Ottoman dynasty attempted "to regulate the structure and the doctrine of a specific branch within the Ḥanafī school of law by appointing *muftīs* and developing an imperial learned hierarchy."[62]

On the idea of a state *madhhab*, Burak argues that four developments contributed to the evolution of this concept: "(1) the rise of the imperial learned hierarchy, (2) the emergence of the practice of appointing *muftī*s by the dynasty, (3) the dynasty's/state's regulation of the structure

[58] Guy Burak, "The Abū Ḥanīfah of His Time: Islamic Law, Jurisprudential Authority and Empire in the Ottoman Domains 16th -17th Centuries" (PhD diss., New York University, 2011), 189.
[59] Guy Burak, "The Second Formation of Islamic Law: The Post-Mongol Context of the Ottoman Adoption of a School of Law," *Comparative Studies in Society and History* 55 (2013): 580.
[60] Burak, "The Second Formation," 583.
[61] Burak, "The Second Formation," 584.
[62] Burak, "The Abū Hanīfa of His Time," 81.

and doctrine of the school, and (4) the rise of dynastic law in the post-Mongol eastern Islamic lands."[63] Burak emphasizes that the first three elements depend upon the fourth. He explains, "the Ottoman dynasty contributed to the emergence of an Ottoman Ḥanafī school through certain administrative practices, edicts, and legal codes, which together constituted part of a legal corpus and discourse of Ottoman dynastic law."[64]

One of the important contentions in Burak's account is his challenge of the accepted view of the field that "the rupture in Islamic legal history in the nineteenth century, which was initiated by the state, occurred when a more fluid and diverse Islamic law was replaced by state codes and legislature."[65] Burak insists that "the role states played in regulating Islamic law, and the growing intervention of post-Mongol dynasties is observable from the fifteenth century (and perhaps even earlier)."[66] Hence, Burak claims that by appointing jurisconsults, "the Ottoman dynasty, either directly or, from the mid-sixteenth century, through the chief imperial *muftī* (and the learned hierarchy in general), sought to determine the content of Islamic law – that is, to craft a particular version of the Ḥanafī school out of a wider range of possible opinions."[67]

My study seeks to balance the state-centric perspective in Burak's evaluation of the Ottoman imperial canon. The Ottoman state appears in Burak's narrative as the sole defining aspect of the Ḥanafī school in this late period. Burak's convenient division between state-centric and non-state centric jurists may explain some aspects of the local legal Ḥanafī traditions in Anatolia, Syria, Palestine, and Egypt. These categories, however, would be challenged by the

[63] Guy Burak, "The Second Formation of Islamic Law: The Post-Mongol Context of the Ottoman Adoption of a School of Law," *Comparative Studies in Society and History* 55 (2013): 584.
[64] Ibid.
[65] Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodian of Change* (Princeton: Princeton University Press, 2002); Wael B. Hallaq, *Sharīʿah: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009); Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford: Oxford University Press, 2009).
[66] Burak, "The Abū Hanīfa of His Time," 361
[67] Ibid. 408; Burak, "The Second Formation of Islamic Law," 580, 600, 601.

prominence of the Ottoman state and imperial jurists in most legal scholarship by non-state appointed jurists and *muftīs*. Another way to address this development, I believe, is to pinpoint the change in the legal culture of late Ḥanafīs in the early modern period. In this change, juristic discourse as a whole, not individuals, accepted certain legislative roles of the Ottoman state, where certain probative value was assigned to its orders and edicts.

I also submit that the local legal Ḥanafī traditions in Anatolia, Syria, Palestine, and Egypt are part of the larger development of the late Ḥanafī tradition in the early modern period, in which state authority is recognized as a general feature of the *madhhab*. A distinct feature of these local legal traditions is that they are influenced by their local customs and social realities, which generates vibrant discussion on a range of issues.[68] I contend that the idea of a "state *madhhab*" is a contradiction in terms. The Ḥanafī *madhhab* does not lose its authority structure to the Ottoman state because of the mere "structural" interventions of the state through the appointment of *muftīs* and judges. Burak's study overlooks the nature of the legal order, which manifests in Islamic law in the concept of the *madhhab*. The interventions by the Ottoman state in the juristic discourse are legitimated and sustained by Ḥanafī jurists who are attempting to create a legal order in which state policies are taken into consideration but are not allowed to determine the final legal results. Ḥanafī jurists are not apologists for the actions of the Ottoman state.

This dissertation will re-examine some of Burak's conclusions concerning central issues in late Ḥanafī scholarship. For instance, Burak argues that the chief *muftī* needed the sulṭān's edict (and approval) to rule according to a minority opinion within the school, and by issuing this edict the Ottoman sulṭān (and dynasty) shaped the doctrine of the school and defined what

[68] Many issues were described by Ḥanafīs in the Arab provinces as unique to Ottoman Anatolian Ḥanafīs (*fuqahā' al-rūm*) for instance, *ṣalāt al-raghā'ib* and *waqf al-nuqūd*.

constituted *sharīʿa*.[69] However, we lose sight of the need, in this case, for the sulṭān's approval before adopting a minority opinion in the school. Late Ḥanafīs consistently reiterate in their positive legal works that the preponderant opinion should be the default opinion adopted by judges for their judicial reasoning and litigations among the subjects of the Empire.[70] They are also critical of jurists and judges who adopt a weak or minority opinion in the school. Late Ḥanafī discussions of the realm of the judge's legal mandate insist that the sulṭān has the authority to ask the judges to faithfully adhere to the preponderant opinions in their schools.[71] They stipulate that the sulṭān has the authority to order judges to rule with a specific opinion on disputed issue in the *madhhab* for the sake of public good and benefit.[72] They unanimously agree that the sulṭān should state this condition in the letter of judges' appointments.[73] My contention is that understanding the nature of the *madhhab* and internal juristic discourse is indispensible for analyzing later legal development in the Ottoman Empire.

It is crucial to note that the Ottoman state authority was not absolute in religious and legal affairs. However, it is true that the Shaykh al-Islāms, who were appointed by the state, enjoyed immense authority. Recep Şentürk explains that the holder of this position had authority over the sphere of justice, education, and religion.[74] Shaykh al-Islām was responsible for the compatibility of state actions, including those of the sulṭān and grand viziers, with the *sharīʿa*. He had the right to veto any state action he determined to contradict the *sharīʿa*. He was responsible for verifying that the new sulṭān had all of the leadership qualities required by the *sharīʿa* to become caliph. He installed the new sulṭān on the throne through a ceremony at the

[69] Burak, "The Abū Hanīfa of His Time," 189.
[70] Muḥammad b. ʿAbd Allāh al-Timurtāshī, *Masʿafat al-Ḥukkām ʿalā al-Aḥkām*, ed. Ṣāliḥ al-Zayid (Riyadh, Maktabat al-Maʿārif, 1996), 2:627-9.
[71] Ibid.
[72] ʿAlī Ḥaydar Efendī, *Durar al-Ḥukkām fī Sharḥ Majallat al-Aḥkām* (Cairo: Dār al-Jīl, 1991), 4:598.
[73] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:76; vol. 5:408.
[74] Recep Şentürk, "Between Traditional and New Forms of Authority in Modern Islam" in *Tradition and Modernity: Christian and Muslim Perspectives* (Washington D.C.: Georgetown University Press, 2013), 45.

shrine of Ayyūb Sulṭān (Eyüp Sultan), a famous companion of the Prophet buried in Istanbul. Moreover, Shaykh al-Islām had the power to dethrone the sulṭān when he decided that the sulṭān was no longer qualified for the position. Around one third of Ottoman sulṭāns were dethroned by a *fatwā* from the Shaykh al-Islām.[75]

Rudolph Peters' work also contributes to our understanding of how to approach the idea of an official *madhhab*. He argues, "Ḥanafī doctrine, between the 12th and 16th centuries, was molded into an unequivocal body of rulings ready to be applied by the *qādīs*."[76] He contends that the Ottoman state and the Ḥanafī jurists "developed a body of law that did not leave much room for judicial discretion on points of law."[77] He insists that the Ḥanafī jurists and the state "defined precisely what the prevailing Ḥanafī doctrine was, thus creating an unequivocal body of rules and restricting the *qādīs'* freedom in choosing specific views from Ḥanafī doctrine."[78] Peters emphasizes, "The only way for the state to influence the administration of justice, according to these *madhhabs*, is to prohibit the *qādīs* from hearing certain types of cases."[79] He maintains: "the Hanafī *madhhab* was the one that accepted such administrative practices without reservations."[80]

Peters is accurate to point out that the Ottoman state appointed Ḥanafī judges, and – as a policy continued from the Mamluk era – Ḥanafī judges were instructed to apply exclusively the preponderant opinion in their *madhhab*. Peters' characterization of this Ottoman policy as "restrictive" needs reconsideration in the light of the fact that the juristic discourse itself in

[75] Şentürk, "Between Traditional and New Forms of Authority in Modern Islam," 45.
[76] Rudolph Peters, "What Does It Mean to Be an Official Madhhab? Hanafism and the Ottoman Empire," in Peri Bearman, Rudolph Peters, and Frank E. Vogel, eds., *The Islamic School of Law: Evolution, Devolution, and Progress* (Cambridge: Islamic Legal Studies Program, Harvard Law School, distributed by Harvard University Press, 2005), 147.
[77] Ibid.
[78] Peters, "What Does It Mean to Be an Official Madhhab?" 148.
[79] Peters, "What Does It Mean to Be an Official Madhhab?" 149.
[80] Ibid.

Ḥanafī legal commentaries point to a unanimous agreement that the Ḥanafī judges should adhere to the preponderant opinions of the school. Ḥanafīs viewed the judges who do not commit to the methodology and opinions of their school to be operating based on pure discretion.[81] Peters is right to highlight that Ottoman Ḥanafī doctrine developed and was elaborated by Ḥanafī jurists and the state acting in close cooperation.[82] However, it is inaccurate to assume that Ḥanafīs accepted Ottoman administrative practices without reservations.[83]

Furthermore, Wael Hallaq argues that, "although it is common place for the Western lawyer or jurist to view the state as a body wielding and exercising legal authority, such a view is neither obvious nor normative for his Muslim counterpart, even less obvious by far to the Muslim masses around the world."[84] In addition, Hallaq observes that in "contemporary Muslim thinking [there] exists an obvious dislocation between two perceptions of legal authority, one emanating from the state and the other from elsewhere," by which he means juristic authority.[85] This second source of authority, Hallaq asserts, has been "the dominant, indeed unrivaled, conception for over a millennium, while the perception of authority lodged in the states was introduced in these nations only during the 19th and 20th centuries. The dislocation between the two sources of authority sums up the legal (if not cultural and social) rupture that occurred with the introduction of so-called modern reform."[86] In short, for Hallaq, legal authority in Islamic law is epistemically designed to be divorced from political authority. Therefore, legal knowledge is the exclusive domain of the jurists.[87] Hallaq argues, "It is accurate to say that Islamic law was

[81] Al-Timurtāshī, *Masʿafat al-Ḥukkām ʿalā al-Aḥkām*, ed. Ṣāliḥ al-Zayid (Riyadh: Maktabat al-Maʿārif, 1996), 2:627-9.
[82] Al-Timurtāshī, *Masʿafat al-Ḥukkām*, vol. 1:158.
[83] I discuss this issue in chapter one. I point to Ibn Nujaym's criticisms of some Ottoman administrative practices.
[84] Wael B. Hallaq, "Juristic Authority vs. State Power: The Legal Crises of Modern Islam," *Journal of Law and Religion*, Vol. 19, No. 2 (2003 - 2004): 243.
[85] Ibid.
[86] Ibid.
[87] Hallaq, "Juristic Authority vs. State Power," 250.

a system that operated outside of 'state' and government influence. And it did so with remarkable independence and success."[88] Hallaq comes to this conclusion based on the fact that "Muslim jurists routinely associate the government and 'state' with corruption, coercion, and temporal predilection."[89]

I do not dispute Hallaq's emphasis on fact that the transposition of legal authority from the hands of Muslim jurists to those of the state represents the most important phenomenon of modern legal reform.[90] However, the treatment of the state in legal works of late Ḥanafī jurists in the early modern period suggests revisiting the claim that Islamic law is entirely independent from the political authority. The legal commentaries, treatises, and *fatāwā* of late Ḥanafī jurists demonstrate that these jurists recognized certain legal roles for the political authority (sulṭān) in the law-making process. It is evident from the Ḥanafī legal literature that the Ottoman state had a role in terms of enforcing the law, solving disputes, and addressing injustices in the system through some forms of judicial councils whose existence was justified in the name of Islamic law (*siyāsa*). Beyond this role, Ottoman state orders and edicts entered the authoritative Ḥanafī legal commentaries and *fatāwā* literature and garnered probative value in the juristic discourse.

Can Islamic Law be the Law of the State?

Abdullahi An-Naʿim in his *Islam and the Secular State: Negotiating the Future of Sharīʿa* argues that, "Islamic law cannot be the state law of any state, whether Muslims are the majority or minority of the population."[91] For An-Naʿim, "Islamic law cannot be enforced as state law and remain Islamic law in the sense that Muslims believe it to be religiously binding.

[88] Ibid.
[89] Hallaq, "Juristic Authority vs. State Power," 249.
[90] Hallaq, "Juristic Authority vs. State Power," 258.
[91] Abdullahi Ahmed An-Naʿim, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic law and State Law," *Modern Law Review*, 73 (1) (January 2010): 20.

Since the enforcement of Islamic law through state institutions negates its religious nature, the outcome will always be secular, not religious. In other words, all state law is secular, regardless of claims of an 'Islamic state' that enforces Islamic law in countries like Iran and Saudi Arabia."[92] Muslims everywhere are bound to observe Islamic law as a matter of religious obligation. An-Naʿim insists that this can be fulfilled when the state is impartial to all religions. Ironically, an-Naʾim contends that the religious authority of Islamic law exists only outside the framework of the state. An-Naʿim asserts that when a state law enforces a principle of Islamic law, the outcome is a "matter of state law and not Islamic law because it does not have the religious significance of compliance with a religious obligation."[93]

An-Naʿim sees Islamic law to be characteristically inapplicable within the modern nation-state. There are two central assumptions that weave throughout an-Naʿim's account: (1) the religious nature of Islamic law; (2) and that state interventions in the process of law-making violate the religious nature of *sharīʿa*. I argue that these two generalizations do not hold when we read the legal manuals of Ḥanafī jurisprudence during the Ottoman Empire. Moreover, these two assumptions fail to identify the role of the state in enforcing the law in Islamic legal history and the fact that Ḥanafī jurists opened up legal doctrine to allow certain interventions by the Ottoman state. Most importantly, these assumptions contradict the legal scholarship of key authorities on Islamic law such as Baber Johansen, Sherman Jackson, Khaled Abou El Fadl, Ahmad Ahmad, Mohammad Fadel, Wael Hallaq, and others, who show how Islamic law was a viable legal system that was deeply preoccupied with questions of continuity and social change, but also enjoyed an inherent flexibility in the face of urgent situations and social needs.

[92] Ibid.
[93] Ibid.

In addition, following a similar narrative, Rudolph Peters argues that the "position" of the *sharīʿa* in most Middle Eastern legal systems has changed drastically by comparing its role in pre-modern and modern legal articulations.[94] He examines how the relationship between the state and the *sharīʿa* developed, focusing on the Ottoman Empire and its successor states. Peters is interested in the question of who controls the production of *sharīʿa* norms and the authority to formulate its new rules.[95] Peters declares that the *sharīʿa* is a religious law based on his observation that "the content of any book of jurisprudence will include 'purely religious' topics such as ritual prayers, fasting, and pilgrimage."[96] Also, he stresses that the basis of its validity is God's will. This "religious" character of *sharīʿa*, for Peters, is "accentuated in the legal topics that are discussed normally in Western law such as marriage, divorce, torts, and criminal law."[97] Peters argues that the norms that are developed in these topics constitute the etiquettes of a good Muslim. Thus, he emphasizes its "religious character" and focuses on how the *sharīʿa* is the "guide to attain eternal bliss in Paradise."[98] In the pre-modern world, Peters insists, the *sharīʿa* was "a jurists' law and the jurists, and not the state, had the exclusive authority to formulate its rules."[99] Moreover, he accurately points to the fact that unlike legal code, *fiqh* texts are comprised of scholarly discussions and debates. Peters concludes that due to the "religious training" of Muslim jurists, they had the exclusive right to formulate the law based on the revealed texts.[100]

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[94] Peters, "From Jurists' Law to Statute Law or What Happens When the Shariʿa is Codified," 82.
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] Peters, "From Jurists' Law to Statute Law," 83.
[99] Ibid.
[100] Peters, "From Jurists' Law to Statute Law," 86. Western scholarship tends to identify Islamic law as "divine law", and "jurists' law," see for example Coulson, *Conflicts and Tensions*, 19; Johansen, "The Muslim *Fiqh* as a Sacred Law," 3, 6; Weiss, *Spirit of Islamic Law*, 35.

Peters raises the question of whether modern legislation can still be regarded as *sharīʿa* and as Islamic. Peters emphasizes that raising this question is "not very relevant" and "betrays a certain polemical point of view". He states, "Those who argue that the codified *sharīʿa* is not *sharīʿa* and not Islamic want to demonstrate that the re-Islamization of the law that was introduced in some countries, was not a real re-introduction of the *sharīʿa.*"[101] He holds that "outsiders are not qualified to determine for Muslims what Islam and the *sharīʿa* is."[102] Peters defers the correct answer to Muslim scholars.[103] Peters consider this question to be a normative discussion that should be addressed from within the Muslim context.

However, Peters' description of the normative nature of the discussion (i.e. whether codified Islamic law is *sharīʿa*) is not a convincing reason to avoid answering the central question upon which he furnished his argument. Peters already cements the distinctions between what he calls the "striking difference" between *sharīʿa* in the premodern and modern period, but he does not pass judgment about the nature of modern legal formulations.[104] Also, in my estimation, the current scholarship that denies that the modern codification of Islamic law in Muslim majority countries is representative of *sharīʿa* relies on the absence of the key structures, participants, discourse, and language of premodern Islamic jurisprudence. The heart of this issue is the characterization of Islamic law as a "religious" tradition, which triggers certain narratives that render the "mix" of purely religious themes and other legal themes in the books of Islamic jurisprudence to be confusing for the modern lawyer.

Sherman Jackson's important study on Shihāb al-Dīn al-Qarāfī (d. 1285) challenges the insistence on categorizing Islamic law as a "religious" law. Jackson points out that approaches to

[101] Ibid.
[102] Ibid.
[103] Peters, "From Jurists' Law to Statute Law," 93.
[104] Peters, "From Jurists' Law to Statute Law," 89.

Islamic law and its categorization as a 'sacred law' or 'religious law' are a product of a particular approach to law from the perspective of legal rules.[105] Relying upon the American legal experience, especially that of legal realism, Jackson asserts that it has been demonstrated that law can be viewed from the perspective of legal process.[106] The advantage of this approach, Jackson insists, is that "it provides a more useful framework within which to examine the relationship between law and government."[107] Jackson affirms that the distinction between law and legal process "draws a clear demarcation between the more primary act of making or interpreting law and secondary activity of legal implementation."[108] These approaches, for Jackson, are crucial for defining the interconnectedness of Islamic law and government. This study embraces Jackson's contention that "to adopt any of these approaches will affect one's judgment of the relationship between Islamic law, the state, and the individual."[109]

Jackson maintains that Islamic law from the perspective of 'legal rules' is encompassing, and from the perspective of 'legal process' it is limited to specified areas of concern. Relying on his study of al-Qarāfī, Jackson offers a unique perspective of whether government in Islam presides over the law or the legal process. Jackson maintains that there is a significant area of the civil and criminal procedures, *muʿāmalāt*, in which government authority would have to be recognized. Jackson discovers that al-Qarāfī cedes to the state certain discretionary powers through which it discharged such duties as raising armies, declaring war, making appointments to public office, and the like. Here the government enjoys either direct legal jurisdiction or discretionary powers. Yet, al-Qarāfī's doctrine on the limits of the legal process was designed to

[105] Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab Al-Din Al-Qarafi* (Leiden: Brill, 1997), 186-7.
[106] Jackson, *Islamic Law and the State*, 188.
[107] Ibid.
[108] Ibid.
[109] Ibid.

limit the range of matters over which government could legally claim the authority to resolve disputes.[110] Jackson demonstrates, through al-Qarāfī, that the head of the state has a role in the process of law giving, although his legal pronouncements are not considered to be *fatāwā*.[111]

Finally, in the last two decades, Islamic Studies has seen a shift towards ethnographic and anthropological research and fieldwork, which successfully attempts to provide a complex picture of how local cultures shaped legal practice. Lawrence Rosen's *Anthropology of Justice: Law as Culture in Islamic Society,* first published in 1989, is an example. Rosen's work is an anthropological examination of the legal practice of judges and their courts in Moroccan society. He explores the practice of judges serving the town of Sefrou, Morocco, in the 1960s and 1970s. Rosen argues, "Muslim judges do not focus on substantive legal doctrines, do not emphasize antecedent concepts, and do not employ a mode of judicial reasoning that would result in increasingly refined modes of legal analysis."[112] Also, Rosen insists that the judge's primary goal in deciding a case is to determine the consequences of his judgment on the social relationships of the litigants. For Rosen, the judge's central aim is to "assist people to negotiate their own relationships outside of the legal realm."[113]

David Powers in his *Law, Society, and Culture in the Maghrib, 1300 – 1500*, viewed Rosen's conclusions as an attempt to refine Weber's idea of *kadijustiz*.[114] This concept is defined by Weber as "a system of law in which judges are empowered to decide each case according to what they see as its individual merits, without referring to a settled and coherent body of norms

[110] Jackson, *Islamic Law and the State*, 213.
[111] Ibid.
[112] Lawrence Rosen, *The Anthropology of Justice: Law as a Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989), 50.
[113] Ibid.
[114] David Powers, *Law, Society, and Culture in the Maghrib, 1300 – 1500* (Cambridge: Cambridge University Press, 2002), 23.

or rules and without employing a rational set of judicial procedures."[115] In Weber's view, the judge's rulings were driven by considerations relating to politics, ethics, personal expediency, and general utility.[116] Powers explains: "Unlike Weber, Rosen contends that Islamic law is rational and consistent, although dependent in these respects on the skill with which the judge interprets the testimony of reliable witnesses, assesses competing social interests, and relies upon local experts."[117]

After reading Rosen's work, the reader will come out with significant insights about Moroccan cultural and social institutions, but will not know much about the internal discourse of Islamic law.[118] It seems to me that Rosen is not necessarily attempting to refine Weber's idea of *kadijustiz*, as Powers claims; rather the nature of anthropological research, and the type of questions that he was trying to address, primarily scrutinize elements beyond the nature of legal order and juristic discourses. Anthropological investigation, as a method of inquiry, is not generally interested in engaging the internal juristic discourse of legal regimes.[119]

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[115] Bryan S. Turner, Weber and Islam: A critical study (London: Routledge and Keggan Paul, 1974), 107-21.
[116] David Powers, *Law, Society, and Culture in the Maghrib, 1300 – 1500* (Cambridge: Cambridge University Press, 2002), 23-4. Max Weber, *Wirtschaft and Gesellschaft* (2nd edn 1925), translated by Edward Shils as *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1959), xlviii-xlix; Bryan S. Turner, *Weber and Islam: A critical study* (London: Routledge and Keggan Paul, 1974), 107-21; Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: E.J.Brill, 1999), 42.
[117] Ibid.
[118] A similar result is maintained after reading John Bowen. See "Sanctity and Shariah: Two Islamic Modes of Resolving Disputes in Today's England", in Franz von Benda-Beckmann, Keebet von Benda-Beckmann, Martin Ramstedt, and Bertram Turner, eds., *Religion in Disputes: Persuasiveness of Religious Normativity in Disputing Processes* (London: Palgrave Macmillan, 2013), 129-45.
[119] I do not dismiss anthropological research as a valid method of inquiry. Instead, I suggest that anthropological research will not be productive or sufficient to pass definitive judgments on Islamic law and juristic discourses based on observations of the modern judiciary. Talal Asad argues that "anthropology is more than a method, and it should not be equated—as it has popularly become—with the direction given to inquiry by the pseudoscientific notion of fieldwork." Asad refers to Mary Douglas's proposal that the "conventional accounts of the rise of modern anthropology locate it in the shift from armchair theorizing to intensive fieldwork" does not capture the real story of the emergence of anthropology as a method of inquiry. For Douglas, anthropology is better understood as a systematic inquiry into cultural concepts. However, Asad interjects to declare that such conceptual analysis is as old as philosophy. Asad insists, "What is distinctive about modern anthropology is the comparison of embedded concepts (representations) between societies differently located in time or space. The important thing in this comparative analysis is not their origin (Western or non-Western), but the forms of life that articulate them, the

METHODOLOGY

This study is informed by some of the important insights offered by Ronald Dworkin in his book, *Law's Empire*. His discussion of what he calls the "theoretical disagreements" about the law is particularly relevant.[120] Dworkin adopts what he calls "the internal point of view" of the participants in the legal process, and more specifically the point of view of the judge, not the external point of view of a sociologist or a historian, to navigate these disagreements.[121] Dworkin affirms that law is a social phenomenon. Yet, he asserts that sociological and historical approaches pay little attention to internal jurisprudential debates over the characterization of legal arguments. Dworkin insists, "The complexity, function, and consequences of law depend on the special features of its structure."[122] For him, legal practice, unlike many other social phenomena, is argumentative. Dworkin elaborates that the point of view of sociologists or historians about legal practice engages in external questions such as why certain patterns of legal argument develop in some periods or circumstances rather than others. By contrast, Dworkin asserts that the participants' approach to law pays careful attention to the internal structure of legal arguments, doctrinal attitudes, and the argumentative nature of legal practice. He stresses: "Historians cannot understand law as an argumentative social practice."[123] Thus, for him, any approach that ignores the structure of legal argument for larger questions of history and society is untenable.[124] Put differently, Dworkin is primarily interested in the juristic and judicial discourses, which, for him might be informed by history, economics, and social realties, but they are not completely determined by these external factors.

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powers they release or disable. Secularism—like religion—is such a concept." See Asad, Talal, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003), 17.
[120] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 7-15.
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid.

Furthermore, this study is indebted to Khaled Abou El Fadl's interventions in the field of Islamic legal studies. Abou El Fadl, like Dworkin, insists that "Islamic law is influenced by the economic infrastructure, pressured by political demands, impacted by social considerations, and shaped and channeled by the text, but it is ultimately not fully determined by any of them."[125] Abou El Fadl explains: "Islamic law is influenced by theological imperatives and socio-political demands, but it is articulated, constructed, and asserted by jurists who belong to a common, although not uniform, culture."[126] He asserts: "Juristic culture constructs its own rituals, habits, paradigms, and symbolism, and its own domains of truth."[127] He emphasizes that this characterization of Islamic law does not mean that Islamic legal doctrines are the product of the legal culture, or that they exist to serve the interests of the members of that culture. What this "semi-autonomous nature of Islamic legal discourse" means, for him, is that legal culture, within specific historical contexts, "attempt[s] to express, promote, challenge, and undermine socio-political demands." He explains: "At times legal culture transmits and supports certain socio-political demands, but it also frustrates, dilutes, and makes it possible to thwart them."[128]

Additionally, I rely upon Sherman Jackson's conceptual framework of legal scaffolding to better describe the process of legal change in the late Ḥanafī tradition in the early modern period. Legal scaffolding, according to Jackson, is the dominant activity in the more advanced stages of *taqlīd*. In legal scaffolding, Jackson argues, "instead of abandoning existing rules in favor of new interpretations of the sources (which would be *ijtihād*), jurists seek adjustments through new divisions, exceptions, distinctions, prerequisites, and expanding or restricting the

[125] Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), 322.
[126] Ibid.
[127] Ibid.
[128] Ibid. A perfect example of a how juristic discourse thwarts a social practice is Ibn Nujaym and Ibn ʿĀbidīn's treatment of *ṣalāt al-raghāʾib* (a voluntary 12 units of prayers offered on the first Friday of Rajab. According to Ibn Nujaym and Ibn ʿĀbidīn, it was very popular among Anatolian Muslims.) See Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 2: 56-57; Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 2:26.

scope of existing laws." [129] I apply this framework in my investigation of late Ḥanafī articulations of legal authority within the school. I explore the ways in which these jurists situate their authority in relation to early Ḥanafīs and the eponym of the school. For instance, Muḥammad Amīn ʿĀbidīn known as Ibn ʿĀbidīn (d. 1836) derives his authority from his association with the figure of Abū Ḥanīfa. It is through this relationship that Ibn ʿĀbidīn was able to justify many changes in key Ḥanafī doctrines, transforming the classical opinion of the school by calling on its eponym and founders. Ibn ʿĀbidīn insists, invoking the authority of Abū Ḥanīfa, that "were he here, he would say the same on this issue."[130]

Notably, Jackson insists that *taqlīd* is not a methodology to incorporate previous legal interpretations; rather it is an attempt to gain authority for one's interpretation by associating it with the name or doctrine of a previously established authority. It is a methodology that emphasizes "claims to static authorities as opposed to static legal tools or rulings."[131] Therefore, when late Ḥanafīs revisit doctrinal boundaries, readjust jurisprudential norms, or reverse and rectify maxims of the Ḥanafī school, they are simply acting within the realm of the school. Therefore, Ḥanafī jurists in the Ottoman Empire from Ibn Nujaym through Ibn ʿĀbidīn assert that any new espoused positions would have been endorsed by key eponyms of the school if they had been exposed to the new customs, times, and compelling social-practical needs.

Dworkin, Abou El Fadl, and Jackson's insights inform my decision to examine Ḥanafī positive legal works to evaluate juristic responses and debates that incorporate Ottoman state edicts and orders into the authoritative legal texts (*mutūn*, *shurūḥ*, and *fatāwā*). This study is

[129] Sherman A Jackson, "Taqlīd, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory Muṭlaq and ʿĀmm in the Jurisprudence of Shihāb al-Dīn al-Qarāfī. *Islamic Law and Society*, vol. 3, No. 2 (1996): 167.
[130] Muḥammad Amīn ʿĀbidīn, *Majmūʿat Rasāʾil Ibn ʿĀbidīn* (Istanbul: Dār-i Saʿādat, 1907), 1:44; Hallaq, "A Prelude to Ottoman Reform," in *Histories of The Modern Middle East: New Directions*, ed. Israel Gershoni, Hakan Erdem and Ursula Wokök (Boulder: Lynne Rienner Publishers, 2002), 56.
[131] Jackson, "Taqlīd, Legal Scaffolding and the Scope of Legal Injunctions," 167.

particularly interested in the probative value that late Ḥanafī jurists in the early modern period assigned to the state and imperial authority in settling juristic debates, enforcing certain legal opinions, and revisiting established doctrines in the school. This incorporation of state orders within the authoritative Ḥanafī legal texts was made possible only by a turn in Ḥanafī legal culture that embraced the indispensible nature of the state in the law-making process. This study centers on late Ḥanafī juristic literature to examine the ways in which these jurists articulated their own authority and the juristic discourse espoused to construct late Ḥanafism in the early modern period. I pose the following questions to explore these intricate issues: How can we explain Ḥanafī jurists' departure from the established norms of the school and their adoption of a new set of doctrines? What are the underlying justifying tools for such changes? What are the ways by which Ḥanafī jurists incorporated Ottoman edicts and orders? How should we evaluate the codification of Ḥanafī legal doctrines in the late 19th century?

ARGUMENT

This study focuses on the details of Ḥanafī juristic discourses and traces their various permutations and transformations over the course of the 16th – 19th centuries. I examine the legal scholarship of late Ḥanafī jurists in the early modern period, and I dedicate special attention to the Ḥanafī responses to the Ottoman state authority in the process of law-making. Specifically, I pinpoint the process by which this Ḥanafī legal tradition portrayed the political authority and local state actors. This dissertation primarily engages the legal literature of *muta'akhkhirī al-aḥnāf* (late Ḥanafī jurists) of the early modern period, following the establishment of Ottoman control over the core Arab lands. To this end, I interrogate the sources of this late Ḥanafī tradition and the course of its development. This project does not consider the structural

interventions of the Ottoman state in the Ḥanafī school by appointing *muftī*s, judges, or by developing an Ottoman learned hierarchy, to have penetrated the law-making process; rather, this project specifically engages with Ḥanafī positive works (*furūʿ*) and case studies from the legal literature that negotiate their own relationship with the state.

I argue that the late Ḥanafī legal tradition developed its own distinct identities, opinions, and consensus in relation to early Ḥanafī opinions. Late Ḥanafī jurists developed a set of juristic tools and devices to change, alter, or perpetuate early Ḥanafī opinions, even if they were the opinions of Abū Ḥanīfa. For instance, late Ḥanafīs employed the legal devices of necessity (*ḍarūra*), customary practice (*ʿurf*) and change of time (*ikhtilāf ʿaṣr wa zamān*), widespread communal necessity (*ʿumūm al-balwā*), and others to justify fundamental changes in key Ḥanafī doctrines that transformed the classical opinion of the school. In fact, late Ḥanafīs invoked the authority of the eponym of the school in their legal formulations, insisting: "were [he] here, would say the same [on this issue]."[132] Beyond these legal devices, late Ḥanafīs were also concerned about the contours of the role of the political authority in the process of law-making. This study provides evidence of the probative value of sulṭānic orders and edicts in authoritative legal commentaries (*shurūḥ*) and *fatāwā* literature.

It is important to note that this late Ḥanafī tradition was essentially formulated, and existed, in conversation with early Ḥanafī methodological commitments and doctrinal attitudes, upon which it based its authority and formulations. For late Ḥanafīs, the past was never irrelevant; it constituted a point of reference and continuity for later Ḥanafī scholarship. In

[132] Muḥammad Amīn ʿĀbidīn, *Majmūʿat Rasāʾil Ibn ʿĀbidīn* (Istanbul: Dār-i Saʿādat, 1907), 1:44; Ibn Nujaym, *Rasāʾil Ibn Nujaym*, ed. Khalīl al-Mays (Beirut: Dār al-Kutub al-ʿIlmiyya, 1980), 32. The statement in Ibn Nujaym's treatise appears as follows: "if the early Ḥanafī had witnessed what late Ḥanafī are experiencing, they would have unanimously agreed with their opinions"; Hallaq, "A Prelude to Ottoman Reform," in *Histories of The Modern Middle East: New Directions*, ed. Israel Gershoni, Hakan Erdem and Ursula Woköck (Boulder: Lynne Rienner Publishers, 2002), 56.

addition, late Ḥanafī jurists of the early modern period are particularly careful to pinpoint local customs (*ʿurf*) in Cairo, Istanbul (and Anatolia more generally), and Damascus, despite the geographical proximity of these centers of Ḥanafī training to one another. These local practices and traditions were significant factors in their juristic discourse.

Furthermore, I propose that confining practical aspects of Islamic law to the judiciary (court records and registers) is a mischaracterization of the process of legal practice in the Ḥanafī tradition. Unlike common law jurisdictions where law is to be found in precedent established by courts of law, Islamic law exists in a body of writings authored by jurists and *muftī*s.[133] In fact, it is misleading to attempt to understand juridical practice and reasoning in the Ottoman Empire by overlooking the *madhhab*. Also, the assumption that books of jurisprudence address the theory while the *fatāwā* and court records engage actual practice and social reality is not indicative of the substance of the legal discourse of late Ḥanafīs. The latter insisted that their authoritative legal works contain the legal and judicial norms that should be prioritized before consulting *fatāwā* collections and must be adopted by judges in their legal rulings.[134]

Moreover, late Ḥanafī jurists in the early modern period negotiated the boundaries of imperial authority in their engagement with the Ottoman state. These jurists rejected, accepted, and expanded certain policies and decisions by the Ottoman state. I provide evidence from Ḥanafī legal literature to demonstrate how the Ottoman state and its local actors in the provinces, such as local rulers, judges, and treasury, negotiated with Ḥanafī jurists on many issues regarding political, social, and economic order within these communities.

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[133] Wael Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 10.

[134] Ibn Nujaym, *al-Baḥr*, vol. 1:61; Ibn ʿĀbidīn, *Minḥat al-Khāliq*, vol. 1:89. They emphasize: "It is established that what is in the *mutūn* should be prioritized over what is in the *shurūḥ*, and what is *shurūḥ* should precede what in the *fatāwā*." See also ʿAbd al-Raḥmān Shaykh-Zada, *Majmaʿ al-Anhur fī Sharḥ Multaqā al-Abḥur*, (Beirut: Dār al-Kutub al-ʿIlmiyya, 1998), 1:341. He emphasized: "*al-iftāʾ bimā fī al-mutūn awlā*."

Additionally, the development of Ḥanafī jurisprudence during the Ottoman period presents a compelling case study of how imperial orders and edicts were incorporated into the authoritative opinions in the legal texts of the school. This was reflected in the consistent adoption of *Maʿrūḍāt Abū Suʿūd*. The *Maʿrūḍāt* is a collection of legal opinions (*fatāwā*) issued by Abū al-Suʿūd al-ʿImādī (d. 1574) and sanctioned by Sultan Süleyman I (r. 1520-1566).[135] A key feature in the *Maʿrūḍāt* is the obligation (*ilzām*) for the judiciary and jurists to act upon the sulṭānic edicts. Ḥanafīs from the 17th - 19th centuries refer to these *Maʿrūḍāt* and emphasize their obligatory nature in their legal commentaries and *fatāwā* collections. In light of this fact, I revisit assertions in the secondary literature that the notion of state legal authority was only introduced in modern times. The arguments about the law as the private and exclusive domain of the jurists, or the characterization of any role for the political authority in the law-making process as an encroachment on the legal domain, needs to be reconsidered. Ḥanafī legal literature during the Ottoman period yields another picture of the relationship between the political and legal authorities. This relationship recognizes an increasing role for the Ottoman state in the law-making process in Sunni jurisprudence. Also, it points to the spaces in which Ḥanafī legal doctrine is able to expand to accommodate decisions and policies of the political authority.

The goal of this investigation is not to "Islamically" justify the current legal regimes in the majority Muslim countries, where the state is indispensible – if not the source – for legislating and enforcing the law. The idea that the law is the will of the sovereign and the state, and that it is imposed by the sovereign on society,[136] is beyond Ḥanafī jurists' characterization of

[135] Abū al-Suʿūd Efendī, *Maʿrūḍāt* (Ann Arbor: University of Michigan, Isl. Ms. 69, fols. 268b – 272a [5 fols., copied c. 1149/1736]). The complete text of *Maʿrūḍāt* is transcribed in modern Turkish see Ahmet Akgündüz, *Osmanlı Kanunnameleri ve Hukuki Tahlilleri*, vol. 4: 35-59.

[136] Herbert Lionel Adolphus, *The concept of law* (Oxford: Oxford University Press, 1961), 24. He argues that the legal system of a modern state is characterized by a certain kind of supremacy within its territory and independence from other systems.

the role of the Ottoman state in the legal literature. In the early Ḥanafī legal discourse, the emphasis is on the enforcement of the law by the political authority, not the legislation of it. The notion of enforcing a law in Ḥanafī jurisprudence in closely intertwined with the concept of political jurisdiction (*dār*). The existence of this political jurisdiction is dependent on the legal dominance of the political leader over the Muslim jurisdiction. Many Ḥanafī jurists conditioned the transformation of any territory into Muslim or non-Muslim jurisdiction (*dār Islam*/*dār kufr*) upon the ability of the political ruler to enforce the law. In this regard, Ḥanafīs relegate the authority to apply the law exclusively to the political ruler.[137] However, this emphasis on enforcing the law in early Ḥanafī doctrine was combined with the probative value of sulṭānic orders and edicts in late Ḥanafī doctrine in a turn in Ḥanafī legal culture that created space for the role of the state. Late Ḥanafī jurists in the early modern period opened up the legal doctrine to allow space for the political authority in the law-making process. This study aims to show what type of authoritative value was assigned to the sulṭān's orders in the hierarchy of authority within the school in the early modern period.

In short, the idea that the state is the sole source of law is completely alien to the premodern Islamic legal tradition. Instead, Ḥanafī jurists acknowledge the authority of the political ruler alone to dispense rules and codes – aside from the prescribed punishments of the *sharīʿa* – for the general benefit of the Muslim community. The interventions of the Ottoman state in the law-making process were selective in order to adapt to new circumstances and emergent situations. Most seriously, Ottoman legal interventions – as they appear in the late Ḥanafī juristic discourse – were largely on issues related to general policy considerations, public

[137] Samy Ayoub, "Territorial jurisprudence, *ikhtilaf al-darayn*: Political boundaries & legal jurisdiction", *Contemporary Islamic Studies* 2012:2 http://dx.doi.org/10.5339/cis.2012.2

interest, and the self-interest of the state. To put it simply, my argument is that the sulṭān (or the state) intervenes only in certain areas of the law.

Dissertation Narrative

Islamic law can be characterized as "a system, which embodies a multiplicity of authorities and a diversity of opinions instead of a single authority speaking with the voice of God."[138] This study focuses on how juristic discourses portrayed the late Ḥanafī tradition, as it was understood and constructed by late Ḥanafī jurists themselves. I am interested in the process by which a group of Ḥanafī jurists construct state authority within the legal discourse in response to particular political and social realties. This study attempts to understand and make sense of the legal categories and distinctions made by a distinct body of Muslim jurists, and then reach certain conclusions about the nature of these juristic discourses. Aided by case studies, this dissertation demonstrates the process by which late Ḥanafī juristic discourse in the early modern period attempted to rearticulate early Ḥanafī opinions, arguments, and doctrines.

This study is comprised of four chapters. The first chapter starts with a discussion of Ibn Nujaym's legal literature and his contributions to the late Ḥanafī tradition. It explores the characteristics, influences, and authority structure of late Ḥanafī jurists as articulated in the legal commentaries, treatises, and *fatāwā* of Ibn Nujaym al-Ḥanafī al-Miṣrī (d. 970/1562-3).[139] I investigate how Ibn Nujaym articulates late Ḥanafī authority and positions in relation to early opinions of the school. I contend that Ibn Nujaym's legal works forge the backdrop against which later Ḥanafī works of the 17th - 19th centuries were articulated. I maintain that Ibn Nujaym is a central figure in the crystallization of a late Ḥanafī tradition in the early modern period in

[138] Recep Şentürk, "Between Traditional and New Forms of Authority in Modern Islam" in *Tradition and Modernity: Christian and Muslim Perspectives* (Washington D.C.: Georgetown University Press, 2013), 45.
[139] For Ibn Nujaym's biography see ʿAbd al-Wahhāb al-Shaʿrānī, *Al-Tabaqāt al-Ṣughrā* (Cairo, 1970), 100.

relation to early Ḥanafī scholarship.

The second chapter examines the process by which Ḥanafī jurists in the 17th and 18th centuries authorized edicts and orders of the Ottoman state as part of their juristic discourse and reasoning. I dedicate my attention to the following jurists: Ḥasan b. ʿAmmār al-Shurunbulālī (d. 1659), ʿAbd al-Raḥmān b. Muḥammad b. Sulaymān Shaykh-Zāda known as Damād Efendī (d. 1667/1078), ʿĀlāʾ al-Dīn al-Ḥaṣkafī (d. 1677), and Ḥāmid b. ʿAlī al-ʿImādī (d. 1757). I argue that Ottoman state edicts and sulṭānic orders were incorporated for the first time in Ḥanafī *fiqh* works in the 17th and 18th centuries. Additionally, I argue that late Ḥanafīs in the early modern period assign authoritative and probative value to the edicts and orders of the Ottoman state to settle juristic disputes or to adopt specific legal opinions (*fatāwā*).

The third chapter explores the legal writings of Ibn ʿĀbidīn to capture the full development of the tradition of late Ḥanafism in the early modern period. I argue that by situating Ibn ʿĀbidīn within what Ḥanafīs call "the late Ḥanafī tradition," we can better understand the strong emphasis on loyalty to early authorities in his legal endeavor, and, at the same time, appreciate a crystallization of the identity, opinions, and authoritativeness of the later Ḥanafī jurists and their revisions of early school opinions. I contend that based on the legal devices of necessity (*ḍarūra*), customary practice (*ʿurf*), change of time (*ikhtilāf ʿaṣr wa zamān*), and others, Ibn ʿĀbidīn is able to justify a fundamental change in key Ḥanafī doctrines that transforms the early opinion of the school by calling on its eponym and founders.[140]

The fourth chapter is dedicated to the *Mecelle*, the first Islamic Civil Law Code. It is primarily concerned with the substance of the articles of the *Mecelle*. I propose that the *Mecelle* is a culminating articulation of late Ḥanafī legal scholarship from the early modern period. I maintain that what is important about the *Mecelle* is not only that it represents a faithful synthesis

[140] Muḥammad Amīn ʿĀbidīn, *Majmūʿat Rasāʾil Ibn ʿĀbidīn* (Istanbul: Dār-i Saʿādat, 1907), 1:44.

of late Ḥanafī jurisprudential norms in the early modern period, but also that it articulates new social and legal norms for the late Ottoman Empire.[141] The *Mecelle* underscores the increasing bureaucratization and centralization of the judicial and legal authority in the Ottoman Empire.[142] This chapter stresses that the *Mecelle* should be understood in the context of the Ottoman modernization project, and that it is a response (generated from within the Islamic legal tradition) to the Tanzimat and penetration of Western laws in Ottoman society.

This study provides a new approach to understanding late Ḥanafism in the early modern period. It demonstrates the different ways in which late Ḥanafīs asserted their authority in relation to early Ḥanafī scholarship. By making the *madhhab* and its juristic discourse the center of this study, I challenge readings of the late Ḥanafī school that arise primarily from the prism of the "state *madhhab*," where the hegemony of the state is overstated. By exploring juristic discourse, I am able to examine the micro-dynamics of late Ḥanafī law to identify state interventions in the law-making process as well as a series of practices, norms, and encounters through which late Ḥanafism was formulated, imagined, and sustained.

[141] Recep Şenturk, "Intellectual Dependency: Late Ottoman Intellectuals between fiqh and Social Science," *Die Welt des Islams*, 47 (2007): 295.
[142] Osman Kaşıkçı, *İslam ve Osmanlı Hukukunda: Mecelle* (İstanbul: Osmanlı Araştırmaları Vakfı, 1997), 52-55.

CHAPTER ONE

THE FATHER OF EARLY MODERN ḤANAFISM?
IBN NUJAYM, LEGAL AUTHORITY, AND THE OTTOMAN STATE

This chapter explores the characteristics, influences, and authority structure of late Ḥanafī jurists (*al-mutaʾakhkhirūn*) in the early modern period as articulated in the legal commentaries, treatises, and *fatāwā* of Ibn Nujaym al-Ḥanafī al-Miṣrī (d. 970/1562-3).[1] I dedicate my attention to three major issues. First, I investigate how Ibn Nujaym articulates late Ḥanafī authority and late Ḥanafī positions in relation to the early opinions of the school. Ibn Nujaym's legal works forge the backdrop against which later Ḥanafī works of the 17th - 19th centuries are articulated. The importance of Ibn Nujaym is reflected in the specialized commentaries written on his *al-Baḥr al-Rāʾiq* and *al-Ashbāh wa al-Naẓāʾir*. For instance, Muḥammad Amīn ʿĀbidīn (d. 1836, known as Ibn ʿĀbidīn), whose work I examine in Chapter 3, authored *Minḥat al-Khāliq* and *Nuzhat al-Nawāẓir* on Ibn Nujaym's *al-Baḥr al-Rāʾiq* and *al-Ashbāh wa al-Naẓāʾir,* respectively.

Second, I explore Ibn Nujaym's work on legal maxims (*qawāʿid*), *al-Ashbāh wa al-Naẓāʾir*, because it is central to the argument for the legitimacy of the *Mecelle* as an authentic Islamic legal code, as I explain in Chapter 4. *Al-Ashbāh wa al-Naẓāʾir* gained immense popularity among late Ḥanafīs in the early modern period, and numerous commentaries were penned on this new genre in the *madhhab*.[2] One of the important characteristics of *al-Ashbāh*/legal maxims works is that they inspire 19th century Ḥanafī jurists and Ottoman officials who saw legal maxims as the place to find legitimation for the first *Muslim Civil Code*. This

[1] For Ibn Nujaym's biography see ʿAbd al-Wahhāb al-Shaʿrānī, *Al-Tabaqāt al-Ṣughrā* (Cairo, 1970), 100.
[2] Guy Burak, "The Abū Ḥanīfah of His Time: Islamic Law, Jurisprudential Authority and Empire in the Ottoman Domains 16th -17th Centuries" (PhD diss., New York University, 2011), 205-217. Burak provides evidence that Ibn Nujaym's work entered the Ottoman imperial canon and became part of the curriculum. In other words, Burak underscores the role of the Ottoman state in deciding the works that became authoritative and part of the key works for training in the *madhhab*.

discussion provides background on Ibn Nujaym's contribution and his importance and relevance to the *Mecelle*, which was a state-sponsored project.[3]

Third, Ibn Nujaym's engagement with the Ottoman state is critical for the assessment of the nature of the relationship between Ḥanafī jurists and the Ottoman state. The state is particularly visible in Ibn Nujaym's legal discourse. He stresses that political rulers (the sulṭāns/Imāms) enjoy public authority (*wilāya ʿāmma*).[4] This manifests in his discussions of the Porte and local state actors, such as judges, military executive officials, and tax collectors.[5] Also, Ibn Nujaym includes symbolic discussions on the permissibility of praying for Ottoman sulṭāns in Friday prayers in his commentary.[6] Ibn Nujaym's works paint a complex relationship with the Ottoman state, and he even refers to a sulṭānic edict that was issued to open a closed Coptic church in Cairo in his *al-Ashbāh wa al-Naẓāʾir*.[7] Although Ibn Nujaym does not incorporate sulṭānic orders and edicts consistently in his juristic discourse, he does draw the boundaries of the relationship between Ḥanafī jurists and the state. For instance, Ibn Nujaym agrees with Qāḍī Khān's assertion that the sulṭānic orders should be executed if they are in conformity with the *sharīʿa*.[8] Furthermore, even though Ibn Nujaym recognizes the legitimacy of the Ottoman

[3] See Chapter 4 for a full discussion of the *Mecelle*, the role of the genre of legal maxims, and how Ottoman officials invoke Ibn Nujaym's authority in putting together the *Mecelle*.
[4] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 1:369. It is important to note that the Ḥanafī legal commentaries in the early and late periods extensively discuss the realm of *wilāya* in relation to the judge and Imām. They explain its types, limitations, and place in the legal discourse. See for example, al-Marghinānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, vol. 2:294; al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq*, vol. 3:56; Badr al-Dīn al-ʿAynī, *al-Bināya Sharḥ al-Hidāya*, vol. 5:711. Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 7:317.
[5] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 2:180, 227, 240.
[6] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 1:369.
[7] Ibn Nujaym, *al-Ashbāh*, 334. The sulṭānic edict was issued to re-open a church that had been closed by the Chief Judge Muḥammad b. Ilyās in the neighborhood of Ḥārat Zuwayla. Ibn Nujaym draws an analogy between the destruction of a church (deliberately, illegitimately, or by natural causes) and the closing of a church. He cites Tāj al-Dīn al-Subkī's reasoning in this analogy, and harmonizes it with the Ḥanafī consensus that a destroyed church should be reconstructed. He reinterprets the *madhhab* to argue that Ḥanafīs do not support reconstructing a church that was destroyed due to natural causes. He states that Ḥanafīs only support reconstructing a church that was illegitimately destroyed by the ruler. Ibn Nujaym bases his opinion in part on the fact that there was immense popular support for not re-opening the church. He tells us that no judge dared to re-open it, even after the sulṭānic edict was issued.
[8] Ibn Nujaym, *al-Ashbāh*, 337.

Empire, he offers unadorned criticism for the corruption and abusive state practices within it. I discuss two case studies on these subjects to show Ibn Nujaym's formulations of legal authority in relation to the Ottoman state. These case studies emphasize the process by which late Ḥanafī jurists in the early modern period understand the realm and type of authority that they accord to state officials and political rulers in their legal works.[9]

This dissertation begins with Ibn Nujaym, instead of an earlier Ḥanafī authority, because: (1) the context of Ibn Nujaym's legal endeavor comes after the Ottoman Empire gains control of the core Arab lands (Ibn Nujaym is among the first generation of Ottoman Egyptian jurists); (2) he is the first Ḥanafī jurist to incorporate the legal scholarship of the Ottoman Shaykh al-Islām and Anatolian jurists in his commentary[10] and in his *al-Ashbāh wa al-Naẓāʾir*[11]; (3) the sources (books) that Ibn Nujaym frequently invokes in the introductions of his legal scholarship – which in itself is a new a development in the late Ḥanafī tradition – comprise the authoritative works upon which the later Ḥanafī tradition in the early modern period was articulated; and (4) the authority of Ibn Nujaym's works, especially on legal maxims, defines Ḥanafī legal discourse in 17th - 19th centuries. Ibn Nujaym's legal works are crucial for understanding later Ḥanafī scholarship in the *madhhab*. For example, Ibn ʿĀbidīn based his scholarship on being in conversation with Ibn Nujaym's works and opinions. Ibn Nujaym is a central figure in the crystallization of late Ḥanafī authority in the early modern period. This is reflected in his

[9] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 2:227-8; vol. 8:146.

[10] Ibn Nujaym is careful to include the legal opinions of Mullā Khusraw (d. 1480). For instance, he argues that Mullā Khusraw's opinions on his strict proscription of Imāms to delegate others to lead prayers without permission from the sulṭān influenced Ottoman judges and led them to deposing some local mosques' Imāms for not pursuing sulṭānic permission for delegating others to lead prayers and give Friday sermons. I address this issue in detail in chapter 2 and I show how the Ottoman state reverses this policy. See Ibn Nujaym, *al-Baḥr*, vol. 2: 155-6. Ibn Nujaym also frequently incorporates the opinions of Ottoman jurists such as Yaʿqūb Paşa and al-Qiwām al-Itqānī. See Ibn Nujaym, *al-Baḥr*, vol. 1: 36, 133,191; vol. 1:228.

[11] Ibn Nujaym, *al-Ashbāh wa al-Naẓāʾir*, ed. Muḥammad al-Ḥāfiẓ (Cairo: Dār al-Fikr, 2005), 16. Ibn Nujaym includes the legal opinions of Mullā Khusraw in his stated sources for his work.

recurrent references to (and adoption) of "late Ḥanafī" opinions, legal works, consensus, figures, and controversies, and is supported by a substantial body of evidence.[12]

Late Ḥanafī legal works in the early modern period are particularly intertwined with the development of social, economic, and political realities in the Ottoman Empire. Late Ḥanafī jurists readily identify such defining aspects in their commentaries.[13] This explains the careful investigation of the preponderant, authentic, and authoritative opinions in late legal works. These late Ḥanafī legal works should not be considered "theoretical works," but rather a lens through which we can monitor aspects of social, political, and economic developments. Unlike other legal schools, the cases and problems with which late Ḥanafīs in the early modern period engage in their legal commentaries are contemporary and anchored in actual practice.[14] Importantly, these legal works frequently refer to authoritative *fatāwā*, contemporaneous anecdotes, specific events, and dates as parts of the legal reasoning process. For instance, Ibn Nujaym consistently employs Egyptian custom (*ʿurf al-qāhira*) to depart from the eponyms' opinions and to argue for the authority of late Ḥanafīs in the early modern period.[15] It crucial to also mention that Ibn Nujaym points to other local customs such as the Anatolian *ʿurf* and how it generated debates among Ḥanafīs in these lands.[16]

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[12] One of the controversies in the late Ḥanafī scholarship is the issue of the permissibility of using water from small pots called *fasāqī* in the *madrasas* (schools). Ibn Nujaym informs us that Qāsim Ibn Quṭlūbughā wrote a treatise on this issue titled: "*rafʿ al-ishtibāh ʿan masʾalat al-miyāh*." See Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol.1: 75. Ibn Nujaym states: "*waqaʿa…kalām khathīr bayn al-ṭalaba wa al-ʿafāḍil fī ʿaṣrinā wa qablah*."

[13] ʿAbd al-Ḥayy al-Luknawī, *al-Fawāʾid al-Bahiyya fī Tarājim al-Ḥanafīyya* (Beirut: Dār al-Maʿrifa, n.d), 134-135.

[14] El Shamsy, in his investigation of the Shāfiʿī commentaries, argues that the *Ḥāshiya* (legal commentaries) led to significant narrowing of Islamic legal scholarship. He concludes that due to "the dramatic social changes affecting Muslim societies from the nineteenth century onwards, legal commentaries were not capable of furnishing the stage for discussions of social utility and social benefit that could provide principles to guide the Muslim societies in an era of rapid change." see Ahmad El Shamsy, "The Ḥāshiya in Islamic law: A Sketch of the Shāfiʿī Literature," *Oriens* 41(2013): 303.

[15] See Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 3:175, 200; vol: 5: 251, 303, 317.

[16] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 1:191. Ibn Nujaym points to the *kirbās*, which is a white piece of cloth worn on the feet under one's leather socks. It caused a divide among the Anatolian Ḥanafīs whether wiping over the *kirbās* is valid or not for the purposes of one's ritual ablution. Ibn Nujaym also identifies certain practices as unique to Anatolian residents (*ahl al-rūm*) see Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 2:57.

To support my arguments, I first situate Ibn Nujaym's works within late Ḥanafī legal scholarship. I discuss his sources and the bibliography of what he considers authoritative Ḥanafī works. Then, I explore his treatment of the late Ḥanafīs' opinions. Also, I examine his influence in the later Ḥanafī scholarship of the 17th – 19th centuries. I dedicate special attention to Ibn Nujaym's work on legal maxims to reveal its significance for the codification of Ḥanafī jurisprudence in the *Mecelle* in 1876. Finally, I pinpoint how Ibn Nujaym characterizes and responds to state authority in the process of law-making. I provide case studies on Ibn Nujaym's treatment of late Ḥanafī opinions and state authority (in their respective sections) to demonstrate the intertwined nature of all of these issues in his legal scholarship.

PRE-OTTOMAN ḤANAFISM: *SIYĀSA*, JUSTICE, AND LAW

In Mamluk legal history, scholarship in the field notes the direct influence of the political authority over the judiciary. For instance, the Mamluk sulṭāns appointed four chief *qāḍīs* (judges)[17], one for each legal school (*madhhab*) to administer justice in the sultanate. In addition, the Mamluk sulṭāns also established Dār al-ʿAdl (House of Justice)[18] to manage military and criminal punishments.[19] In the exercise of their authority over the domain of the judiciary,

[17] Al-Ẓāhir Baybars appointed four chief qāḍīs in Cairo in 1265. See J. Nielsen, "Sultan al-Ẓāhir Baybars and the Appointment of Four Chief Qāḍīs, 663/1265," *Studia Islamica* 60 (1984): 167–76; Sherman Jackson, "The Primacy of Domestic Politics: Ibn Bint al-Aʿazz and the Establishment of the Four Chief Judgeships in Mamluk Egypt," *Journal of the American Oriental Society* 115 (1995): 52–65.

[18] Yossef Rapoport states: "The establishment of a Hall of Justice was introduced by the Ayyubid sultans, with the earliest known built in 1163 by Nūr al-Dīn ibn Zankī in Damascus, followed by another one in Aleppo in 1189. In Cairo, the Ayyubids built a Dār al-ʿAdl in the citadel by 1207. Baybars, upon assuming power, built a new Dār al-ʿAdl in 1262, in a location just under the Cairo Citadel."

[19] Yossef Rapoport, "Royal Justice and Religious Law: Siyāsah and Shariʿah under the Mamluks," *Mamluk Studies Review* vol. XVI, 79.

Mamluk sulṭāns required judges to make rulings in conformity with their legal schools.[20] This policy was continued under the Ottomans.[21]

Yossef Rapoport suggested three stages to explore the sulṭān's authority and its relationship to *sharīʿa* in Mamluk legal history. The first stage begins with the appointment of four chief *qāḍīs* in 1265, and the construction of a royal Dār al-ʿAdl. Rapoport explains that in this period, the jurisdiction of the royal and military courts is largely limited to penal law, areas of the law where "the *sharīʿa*'s strict evidentiary procedures often failed to secure conviction."[22] The second stage starts around 1350. In this period Rapoport argues that, "the jurisdiction of military officers, especially the chamberlains (*ḥujjāb*), expands significantly to include family law and debts."[23] The third stage is represented by the reigns of Qāytbāy (r. 1468–96) and Qānṣūh al-Ghawrī (r. 1501–16), in which Rapoport points to "a concentration of all jurisdiction in the hands of the sultans," who present themselves as "champions of the *sharīʿa* and openly dispute the formalistic doctrines of the judiciary."[24]

In the Mamluk period, the authority of the sulṭāns was expanded due to the widening of *siyāsa* (the political authority's discretionary power to be used for to dispense punishments or to bring about benefit) jurisdiction.[25] Rapoport explains that these *siyāsa* rulings "offered justice,

[20] Rapoport, "Royal Justice," 77. Rapoport points to the Shāfiʿī jurist al-Fazārī's response to a query sent from the royal encampment of sulṭān Baybars in 662/1264, explains that "some of our colleagues prevent a judge who subscribes to one school of law from giving judgments according to another school, to avoid suspicion [of impartiality]. This rule is required by the administration of justice (*siyāsah*)...not by the Divine law (*sharīʿa*)." Rapoport rightly argues that the regulation of *qāḍīs* was explicit in appointment decrees, which instructed conformity to the dominant opinion of the school in order to guarantee predictability.

[21] Guy Burak convincingly argues that the Ottoman *siyāsa* was different "discursively and institutionally from the Mamluk *siyāsa*." Burak calls attention to revise the dominant view in the field that the Ottoman *ḳānūn* is a continuation of the Mamluk (and, more broadly, the pre-Ottoman) notion of *siyāsa*. Guy Burak, *The Ḳānūn of Qāytbāy, Yasaq, and Siyāsa in Early Ottoman Egypt and Syria*, unpublished article.

[22] Rapoport, "Royal Justice," 76.

[23] Ibid.

[24] Ibid.

[25] Ibid.

not law."[26] Rapoport pinpoints four ways in which the Mamluk sultanate intervened in the legal system: (1) the state indirectly intervened in social and economic interactions by authorizing *qāḍīs* from different schools to follow their doctrine on specified points of law[27]; (2) the sulṭāns and military executive officials intervened in criminal law and *maẓālim* sessions, until the middle of the 14th century[28]; (3) the jurisdiction of *siyāsa* courts expanded to include cases of debt and matrimonial litigation by 1350 (this expansion in *siyāsa* jurisdiction, Rapoport asserts, was linked to a shift in the role of the *ḥājib* [chamberlain])[29]; and (4) the sulṭāns Qāytbāy (r. 1468–96) and Qānṣūh al-Ghawrī (r. 1501–16), intervened in an unprecedented manner in the administration of justice. Rapoport contends that Qāytbāy and Qānṣūh did not see themselves as "merely enforcers of Islamic law and justice, but also as its interpreters."[30] Rapoport insists that the Mamluk era legal system was one in which the "state takes an active role in adapting the sacred law, the *sharīʿa*, to social practice."[31] He explains that Mamluk jurists "viewed the ruler's *siyāsa sharʿīya* to be part of the *sharīʿa*."[32]

The Mamluk period is particularly important for the continuity of the role of the political authority in appointing and deposing judges into the Ottoman period. Rapoport's conclusions about the contours of state interventions in Islamic law in the Mamluk period should be carefully situated. I affirm Rapoport's conclusions regarding the increasing role of the *siyāsa* courts and the Mamluk sulṭāns in the dispensation of justice. Mamluk sulṭāns revisited and altered some of the judges' decisions according to the sulṭāns' discretion of what they considered beneficial for

[26] Rapoport, "Royal Justice," 85.
[27] Ibid.
[28] Rapoport, "Royal Justice," 79.
[29] Ibid.
[30] Ibid. Rapoport quotes Carl Petry statement about these two sulṭāns that they were, "champions of the shariʿah" against the formalistic attitude of the *qādīs* and the *muftīs*."
[31] Rapoport, "Royal Justice," 75.
[32] Rapoport, "Royal Justice," 96.

public order and interest. Rapoport's account provides an important insight into the role played by sulṭāns in the administration of justice in the Mamluk era.

The main issue with Rapoport's assessment is that all of these Mamluk sulṭānic "interventions" in the legal system fall outside of the central domain of the law and the law-making process. The Mamluk Ḥanafī legal commentaries only authorize and admit the discretionary powers of the political authority (*siyāsa*) in their legal literature. They do not authorize legislation from or a legislative role for the political authority.[33] To assess the contours of the legal authority of the state, one has to address the details of juristic discourses found in the *mutūn*, *shurūḥ*, and *fatāwā* literature. The *siyāsa* treatises, historical accounts, and court cases are not the loci for examining the tension, competition, and cooperation between jurists and sulṭāns.

Furthermore, Rapoport recurrently uses the word "formalistic," to point out that Muslim jurists separate their legal reasoning from public policy considerations.[34] For Rapoport, judges and *muftīs*' rulings rest on a closed set of organized rules, which prompts Mamluk sulṭāns to intervene. Formalist and substantive tendencies are germane to legal cultures. In the Islamic legal tradition, the formalist attitude might appear in the form of the legal process, where the law is

[33] It is important to note that Rapoport does not cite any Ḥanafī legal works in his assessment of how Mamluk Ḥanafīs responded to the sulṭāns' *siyāsa*. Instead, he relies primarily on Ḥanbalī and Shāfiʿī sources on Ḥanafī rulings.

[34] Rapoport, "Royal Justice," 75, 76, 80, 84, 90, 91, 97. Rapoport states: "These new institutions were called siyāsah courts, because of their emphasis on equity at the expense of the formalism of the shariʿah," "the reigns of Qāytbāy (r. 1468–96) and Qānṣūh al-Ghawrī (r. 1501–16) see a concentration of all jurisdiction in the hands of the sultans, who present themselves as champions of the shariʿah and openly dispute the formalistic doctrines of the judiciary," "It is clear from Ibn Taymīyah's account that the jurisdiction of the military courts was limited to these legal cases in which the qadis' formalistic attitude to proof and evidence prevented the application of justice," "He undoubtedly believed that the debtors had the means to pay up for the goods they had bought, and that the formalism of the qadi would allow them to escape payment," "It encapsulates the contrast between the formalism of the shariʿah law and the popular, "common sense" notions of equity that guide siyāsah justice," "The formalism of the qadi contrasts, however, with the perspective of the dawādār; for him, this was a case of a twelve-year-old girl being subjected to sexual intercourse and financial extortion," "For Ibn Taymīyah, the qadis focus on the formalities of the law rather than its intent," "Qāytbāy and Qānṣūh did not see themselves as merely enforcers of Islamic law and justice, but also as its interpreters. They were, as Carl Petry aptly puts it, "champions of the shariʿah" against the formalistic attitude of the qadis and the muftīs."

most clearly seen "in action."[35] The substantive approach manifests in the Muslim jurists' emphasis that the aim of the law is to address emergent problems or to promote certain societal benefits. The increasing role of the political authority in the administration of justice in the Mamluk period cannot be solely explained in terms of the "formalistic" nature of the *sharīʿa* tradition.[36]

In the Ottoman context, the realm of state edicts and orders gains authoritative value in the law-making process. Ibn Nujaym invokes many cases that occurred in the Mamluk period to define the boundaries and limitations of state authority in the legal literature. What is unique about late Ḥanafī legal articulations in the Ottoman period is the ways in which the Ḥanafīs talk to and about political power.

Badr al-Dīn al-ʿAynī: A Mamluk Ḥanafī Jurist

The relationship between Ḥanafī jurists and political authority is not a new innovation in the Ottoman period. One of the most influential Ḥanafī jurists and Ḥadīth scholars in the Mamluk period is Badr al-Dīn al-ʿAynī (d. 1451).[37] Al-ʿAynī belonged to a family of scholars (his father was a judge). He established himself in Cairo, where he was appointed *muḥtasib* (market inspector) in 801/ 1398-1399, during the reign of the Sulṭān al-Malik al-Ẓāhir. Because

[35] Alan Watson, *The Nature of Law* (Edinburgh: Edinburgh University Press, 1979), 8.

[36] It is important to point out that Ibn Taymiya's criticism of the jurists is not because they "focus on the formalities of the law rather than its intent," as Rapoport claims. Instead, Ibn Taymiya is critical of the jurists because they do not follow the "Sunna" so that they do not fulfill people's rightful claims and avoid applying the prescribed punishments (*ḥudūd*), and he is also critical of the *siyāsa* courts because they do rely upon the Qurʾān and Sunna, and it functions primarily based on discretionary judgments. Ibn Taymiya appears to be particularly frustrated by this legal process, probably referring to the Ḥanafīs, where convictions of murder, theft, and other prescribed punishment can be avoided due to any uncertainty and doubt in the evidence. See Ibn Taymiya, *Majmūʿ Fatāwā Aḥmad ibn Taymiya*, ed. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim al-ʿĀṣimī wa-ibnuh Muḥammad (Beirut, 1997), 20:392–93.

[37] Marçais, W. "al-ʿAynī." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs. Brill Online, 2014. University of Arizona. 08 February 2014 <http://referenceworks.brillonline.com.ezproxy1.library.arizona.edu/entries/encyclopaedia-of-islam-2/al-halabi-SIM_2642>First appeared online: 2012.

of his knowledge of the Turkish language, Al-ʿAynī enjoyed a special relationship with the Mamluk sulṭāns such as al-Muʾayyad, al-Malik al-Ẓāhir Tatar, and al-Malik al-Ashraf Barsbāy.[38] He even translated al-Qudūrī's legal treatise into Turkish for al-Malik al-Ẓāhir. Al-ʿAynī was appointed in 829/1425-6 to be the chief judge of the Ḥanafīs, and he occupied this post for 12 consecutive years. In 846/1442-3, Al-ʿAynī took on the combined the offices of *muḥtasib*, inspector of pious foundations, and chief judge of the Ḥanafīs. He also taught at the al-Muʾayyadiyya school.[39] The life of al-ʿAynī provides evidence on the relationship of Ḥanafī jurists with the Mamlūk sulṭāns. He helps us establish that what is unique about Ḥanafī scholarship in the Ottoman period is that the juristic discourses and positive legal works assign probative value for Ottoman state edicts and orders in the *mutūn*, *shurūḥ*, and *fatāwā* literature. In al-ʿAynī's *al-Bināya*, a commentary on *al-Hidāya*, for example, these features are absent. He does not go beyond the acknowledgement of the role of Mamluk sulṭāns' *siyāsa*.[40]

The following chart shows a considerable increase in engagement with the political authority (sulṭān) in Ibn Nujaym's work as compared to the Mamluk-era scholars, al-ʿAynī and Ibn al-Humām (d. 861/1457). The chart is not merely a record of references to the words *sulṭān*, *amīr*, or *Imām* in the Ḥanafī *fiqh* literature. Rather, I trace references to the political authority through these terms as they are mentioned in relation to the function and role of the *sulṭān*, *amīr*, or *Imām* in the legal literature. The aim of this chart is to show how the legal literature reflects an increasing visibility of the state in the legal discourse itself.

[38] Ibid.
[39] Ibid.
[40] Badr al-Dīn al-ʿAynī, *al-Bināya Sharḥ al-Hidāya*, vol. 1:560, 633; vol. 2:228; vol. 3:43.

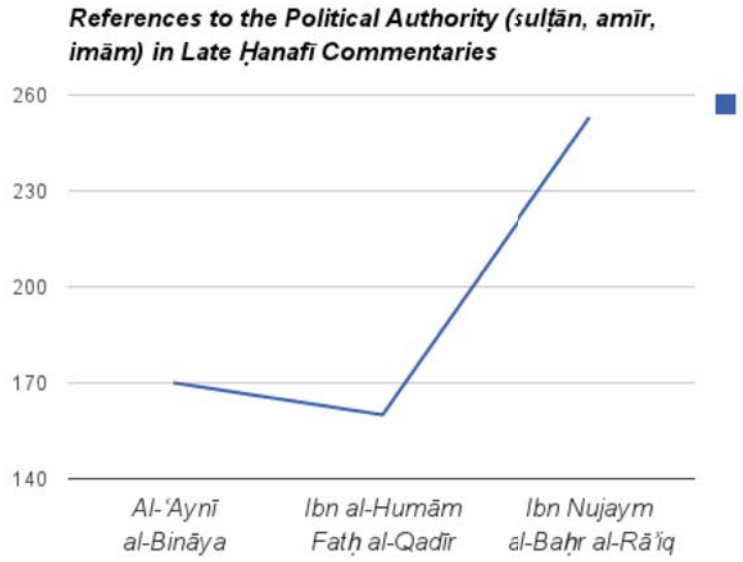

Figure 1.1

IBN NUJAYM: A BACKGROUND

The full name of Ibn Nujaym is Zayn b. Ibrāhīm b. Muḥammad b. Muḥammad b. Muḥammad al-Miṣrī.[41] He is a distinguished Egyptian Ḥanafī jurist. We know very little about the events of his life. He was born in Cairo in 926/1520. He received traditional Islamic and Arabic education and started to teach and to give *fatāwā* at an early age. He performed *ḥajj* in 953/1547 and taught at the *madrasa* of the Amīr Sarghitmish. He died in 970/1563 and was buried near the sanctuary of Sayyida Sukayna in Cairo.[42] His main intellectual interest was in the field of *fiqh,* but he was also inclined towards *taṣawwuf* (Sufism). He was close to ʿAbd al-Wahhāb al-Shaʿrānī (d. 973/1565) for ten years and he performed *ḥajj* in his

[41] Ibid.
[42] Khayr al-Dīn al-Ziriklī, *al-Aʿlām* (Beirut, Dār al-ʿIlm lil Malayīn, 2002) vol. 3:64.

company. Ibn Nujaym was particularly interested in the systematic structure of *fiqh*, and this interest shows itself in his writing, which was very extensive.[43]

Ibn Nujaym wrote commentaries on several handbooks of Ḥanafī jurisprudence, not all of which have been preserved. The most famous legal work of Ibn Nujaym is *al-Baḥr al-Rāʾiq*, a commentary on the *Kanz al-Daqāʾiq* of Abū al-Barakāt ʿAbd Allāh b. Aḥmad al-Nasafī (d. 1310). Ibn Nujaym only wrote as far as the beginning of the lease contract (*kitāb al-ijāra*), and the work was completed with a *Takmila* by Muḥammad b. ʿAlī al-Ṭūrī (d. 1004/1595), the Ḥanafī *muftī* of Egypt after Ibn Nujaym. This commentary was first printed in Cairo in 1311/1893 in eight volumes, seven of which contain *al-Baḥr al-Rāʾiq,* and one of which (the eighth) contains the *Takmila*.[44] It is considered one of the key textbooks of the Ḥanafī school, especially in the later period.

Moreover, Ibn Nujaym composed *al-Ashbāh wa al-Naẓāʾir*. This work is based on the Shāfiʾī jurist Jalāl al-Dīn al-Suyūtī's (d. 1505) work, which carries the same title. The similarity is limited to the discussion of *qawāʿid,* but Ibn Nujaym's work is more extensive with regard to the discussion of *fawāʾid* (restatements). Wolfhart Heinrichs defines *ashbāh* as cases that are alike in appearance (*ẓāhir*) and legal status, while *naẓāʾir* refers to the cases that are alike in appearance, but differ in legal status.[45] Intrigued by the genre of legal maxims (*qawāʿid*), Ibn Nujaym wrote his *al-Fawāʾid al-Zayniyya*, which includes more than one thousand rules or norms (*qawāʿid*) concerning void sale (*al-bayʿ al-fāsid*).[46] Ibn Nujaym wrote numerous smaller

[43] Schacht, J. "Zayn b. Ibrāhīm b. Muḥammad b. Muḥammad b. Muḥammad al-Miṣrī." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel; and W.P. Heinrichs.Brill,2011. BrillOnline.ArizonaUniversity.12January2012<http://www.brillonline.nl/subscriber/entry?entry=islam>.
[44] Ibid.
[45] Heinrichs, W.P. "Kawaʿid Fikhiyya (a.)." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel; and W.P. Heinrichs. Brill, 2011. Brill Online. UNIVERSITYOFARIZONA.12January2014<http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-8763>.
[46] Khayr al-Dīn al-Ziriklī, *al-Aʿlām* (Beirut, Dār al-ʿIlm lil Malayīn, 2002), 3:64.

treatises, forty of which were collected after his death by his son Aḥmad under the title *al-Rasāʾil al-Zayniyya fi Madhhab al-Ḥanafīyya*.[47]

IBN NUJAYM'S SOURCES

The table below shows the sources that Ibn Nujaym consulted in his important legal commentary *al-Baḥr al-Rāʾiq*. Ibn Nujaym also mentions these sources, with slight discrepancies, in his works on *fatāwā*, *rasāʾil*, and *qawāʿid*. The table points to the fact that – in the geographical distribution of these sources – Egypt was an important center for Ḥanafī training. The table also confirms that Syrian and Anatolian Ḥanafī works became part of the canonical Ḥanafī scholarship. It demonstrates that the Syrian Ḥanafī networks are particularly important, especially in Aleppo. Aside from the distribution of Ḥanafī networks, the authoritative works that Ibn Nujaym consults are divided between legal commentaries and *fatāwā* collections. The table points to the accumulative nature of the legal scholarship of late Ḥanafīs. The past works of the Ḥanafī school are a constitutive element of late Ḥanafī scholarship.

[47] "Al-Imām Ibn Nujaym al-Ḥanafī", Dār al-Iftāʾ al-Miṣriyya, accessed January 22, 2014. http://www.dar-alifta.org/ViewScientist.aspx?ID=89&LangID=1.

Ibn Nujaym's Sources[48]

***Shurūḥ* Works**	**Ḥanafī Network**	***Fatāwā* Collections**	**Ḥanafī Network**
Sharḥ al-Jāmiʿ al-Ṣaghīr Qāḍī Khān (d. 593/1196)	Transoxania	*al-Muḥīṭ al-Burhānī* Ibn Māza (d. 616/1219)	Transoxania
Sharḥ Mukhtaṣar al-Ṭaḥāwī Aḥmad b. Manṣūr al-Isbijābī (d. 1087)	Transoxania	*al-Dhakhīra* - Ibn Māza	Transoxania
Sharḥ al-Kāfī	Transoxania	*al-Ziyāda* – Qāḍī Khān	Transoxania
Shurūḥ al-Hidāya	Transoxania, Egypt, Syria, Ḥijāz	*al-Walwājiyya* - Isḥāq b. Abū Bakr al-Ḥanafī (d. 710/1310)	Transoxania
al-Nihāya Sharḥ al-Hidāya al-Sighnāqī (d. 712/1312)	Transoxania	*al-Bazzāziyya* - Muḥammad b. Shihāb (d. 827/1424)	Anatolia
al-ʿInāya ʿalā al-Hidāya - Muḥammad Maḥmūd al-Bābārtī (d. 786/1384)	Egypt (Anatolian origins)	*al-Wāqiʿāt* - Ibn Māza	Transoxania
Fatḥ al-Qadīr Kamāl b. al-Humām (d. 861/1457)	Egypt	*ʿUmdat al-Muftīn*- Ibn Māza	Transoxania
Ghāyat al-Bayān wa Nādirat al-Aqrān - Amīr Kātib al-Itqānī (758/1356)	Baghdād, Syria, Egypt	*Maʾāl al-Fatāwā* - Muḥammad b. Yūsuf al-Samarqandī (d. 556/1161)	Transoxania
Miʿrāj al-Dirāya - Muḥammad b. Aḥmad al-Sinjārī (Qiwām al-Dīn al-Kākī) (d. 749/1348)	Egypt (Anatolian origins)	*Multaqaṭ al-Fatāwā*- Nāsir al-Dīn - Muḥammad b. Yūsuf al-Samarqandī	Transoxania
Ḥāshiya ʿalā al-Hidāya al-Khabbāzī	Transoxania	*Ḥayrat al-Fuqaḥāʾ* - Ibn Māza	Transoxania
al-Kāfī sharḥ al-Wāfī – Abū al-Barakāt al-Nasafī (d. 710/1310)	Transoxania	*al-Ḥāwī al-Qudsī* - Jamāl al-Dīn al-Ghaznawī (d. 593/1197)	Syria (Aleppo)
al-Tabyīn - al-Zaylaʿī (d. 1342)	Egypt	*Qunyat al-Munya* - Mukhtār b. Maḥmūd al-Zāhidī (d. 658/1286)	Anatolia
al-Sirāj al-Wahāj - Abū Bakr b. ʿAlī al-Ḥadādī (d. 800/1397)	Yemen	*al-Sirājiyya* - Sirāj al-Dīn ʿAlī b. ʿUthmān al-Ḥanafī (d. 773/1372)	Transoxania
al-Jawhara al-Nayyira al-Ḥadādī	Yemen	*al-Qāsimiyya* - Qāsim b. Qutulbugha (d. 879/1474)	Egypt

[48] Wael Hallaq refers to Ibn Nujaym's *al-Baḥr al-Rāʾiq* to support his argument that *fatāwā* were regularly incorporated into *furūʿ* works. He explains that Ibn Nujaym incorporated not only other commentaries on *Kanz al-Daqāʾiq* but also the *fatāwā* of a number of jurisconsults. Hallaq points out that Ibn Nujaym was able to draw on no less than twenty *fatāwā* collections. See Wael Hallaq, *Authority Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2004), 182.

al-Mujtabā - al-Zāhidī al-Ghazmīnī (d. 685/1260)	Anatolia (Khawārizm origin)	*al-Tajnīs* - ʿAlī b. Abū Bakr al-Marghinānī (d. 593/ 1197)	Transoxania
al-Aqtaʿ- Mukhtaṣar al-Qudūrī - Aḥmad b. Muḥammad al-Baghdādī (d. 474/1346)	Al-Ahwāz, Iran	*Taṣḥiḥ al-Qudūrī* - Qāsim b. Qutulbugha	Egypt
al-Yanābīʿ fi Maʿrifat al-Uṣūl wa al-Tafarīʿ- Muḥammad b. ʿAbd Allāh al-Shiblī (d. 769/ 1367)	Damascus, Judge in Sham (Spent time in Egypt)	*al-Ẓahīrīyya* - Muḥammad b. Aḥmad al-Qāḍī (d. 619/1222)	Transoxania
Sharḥ al-Majmaʿ ʿAbd al-Laṭīf b. Farashtah (d. 801/1398)	Anatolia (Izmir)		
Sharḥ al-Wiqāya - ʿUbayd Allāh b. Masʿūd al-Maḥbūbī (d. 474/1346)	Transoxania		
Sharḥ al-Nuqāya - Aḥmad b. Muḥammad al-Shimnī (d. 872/1467)	Egypt		
al-Muṣffā Mukhtaṣar al-Mustaṣfā - Abū al-Barakāt al-Nasafī	Transoxania		
Sharḥ Munyāt al-Muṣalī (Ḥalbat al-Mujallī) This commentary is based on a Transoxanian text- Ibn Amīr Ḥājj (d. 1474)	Damascus (Trained in Egypt)		

Figure 1.2

LATE ḤANAFĪS: IF ONLY EARLY ḤANAFĪS WERE AWARE OF WHAT WE HAVE BEEN WITNESSING

The legal works of *Kanz al-Daqāʾiq*, *al-Wiqāya*, *al-Mukhtār*, and *Majmaʿ al-Baḥrayn* are particularly prominent texts, to which late Ḥanafīs either dedicated specialized commentaries or upon which they heavily relied in their legal scholarship.[49] ʿAbd al-Ḥayy al-Luknawī (d. 1887) provides a similar list for the authoritative texts in the late Ḥanafī school: *al-Wiqāya*, *al-Kanz*, and *Mukhtaṣar al-Qudūrī*.[50] Overall, these four texts formed the backbone for the late Ḥanafī legal discourse. In the legal tradition of the late Ḥanafīs, the term *matn* (legal manual)

[49] ʿAbd al-Ḥayy al-Luknawī, *al-Nāfiʿ al-Kabīr*, 23.; *al-Fawāʾid al-Bahiyya*, 15.
[50] Ibid.

exclusively refers to the *mutūn* in which late Ḥanafī authors distinguish between *al-rājiḥ* (preponderant) and *al-marjūḥ* (less preferred); *al-maqbūl* (accepted) and *al-mardūd* (rejected); *al-qawiyy* (strong) and *al-ḍaʿīf* (weak). Late Ḥanafī jurists underscore, in their legal manuals, that they incorporate only *al-rājiḥ*, *al-maqbūl*, and *al-qawiyy* to emphasize the legal authority of the late Ḥanafīs and their continuous relevance to the social, economic, and political realities of the Ottoman Empire. These features distinguish the authors of the legal manuals of the late Ḥanafī tradition.[51] These legal texts generally adhere to the authentic narrations of the *madhhab* (*ẓāhir al-riwāya*) and the authenticated opinions of the late Ḥanafī scholars.[52] In his engagement with early Ḥanafī legal formulations, Ibn Nujaym adopts and rejects some of these early opinions based on considerations of time, place, accompanying circumstances, and public interest. In fact, Ibn Nujaym rejects some of the late Ḥanafī opinions and declares his preference for the early opinion in the school based on these same considerations.

In his legal commentaries, treatises, and *fatāwā*, Ibn Nujaym refers to late Ḥanafism as a tradition distinct from that of the early Ḥanafī authorities. The following phrases are employed by Ibn Nujaym to show the legal formulation of late Ḥanafīs and the fully developed nature of their identities, opinions, and consensus in relation to early Ḥanafīs: *ajmaʿ al-mutaʾakhkhirūn* (the late Ḥanafīs agreed upon), *ikhtalaf al-mutaʾakhkhirūn* (the late Ḥanafīs disputed), *ṭāʾifa min al-mutaʾakhkhirīn* (a group of the late Ḥanafīs), *ʿāmmat al-mutaʾakhkhirīn* (the majority late Ḥanafīs), *baʿḍ al-mutaʾakhkhirīn* (some/one of the late Ḥanafīs), *kathīr min mashāyikhinā al-mutaʾakhkhirīn* (many of our master scholars of the late Ḥanafīs), *jamāʿa min al-mutaʾakhkhirīn* (many of the late Ḥanafīs), *ikhtiyār al-mutaʾakhkhirīn* (the preference of the late Ḥanafīs), *al-mukhtār ʿinda al-mutaʾakhkhirīn* (the preferred opinion among the late Ḥanafīs), *shawādh baʿḍ*

[51] Ibid.
[52] Ibid.

al-mutaʾakhkhirīn (legal opinions among the late Ḥanafīs that fall beyond the accepted boundaries of the school), *akthar al-mutaʾakhkhirīn* (most of the late Ḥanafīs), *al-madhhab ʿind al-mutaʾakhkhirīn* (the authentic opinion of the late Ḥanafīs), *qawl al-mutaʾakhkhirīn* (the opinion of the late Ḥanafīs), *ahl madhhab al-mutaʿakhkhirīn* (the late Ḥanafī members of the school).[53] These extensive references to the late Ḥanafīs are evident throughout in Ibn Nujaym's legal literature. Ibn Nujaym clearly situates himself from among the late Ḥanafīs.

To put the extent of these references in perspective, the chart below records the references to late (*al-mutaʾakhkhirūn*) and early (*al-mutaqaddimūn*) Ḥanafī opinions in five topics of jurisprudence (*al-ṣalāh*, *al-ṭalāq*, *al-aymān*, *al-siyar*, and *al-waqf*) in Ibn Nujaym's *al-Baḥr al-Rāʾiq*. These references do not exhaust the opinions of *al-mutaqaddimūn* and *al-mutaʾakhkhirūn* because of the numerous vernacularisms by which Ibn Nujaym identifies and classifies opinions of late and early Ḥanafīs. For instance, he employs phrases such as: *al-mukhtār al-yawm* (the legal choice of today), *al-maftī bihi al-yawm* (the adopted opinion for today), *fī zamāninā* (in our times), *fī zamānihim* (in their times), and *al-ʿamal al-yawm* (the custom of today). The aim of the following chart is modest. It traces the explicit reference to the terms "*al-mutaqaddimūn*" and "*al-mutaʾakhkhirūn*."

[53] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 2:9,151,167, 210, 272; vol. 3:12,119,165,293,309; vol. 4:158.

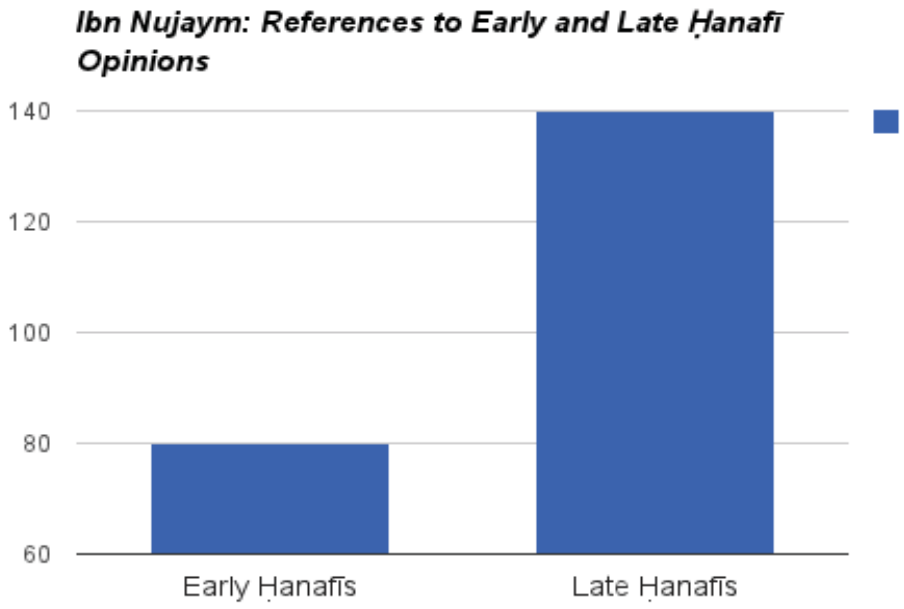

Figure 1.3

Ibn Nujaym's treatise on land tax, *al-Tuḥfa al-Marḍiyya fi al-Arāḍī al-Miṣriyya*, written in 959/1552, prompted a few studies to explore the social and political history of the Ottoman Empire as well as how the legal discourse adapted to changes in private land ownership policy.[54] Baber Johansen and Kenneth Cuno are among the few scholars who explored Ibn Nujaym's famous treatment of the land tax and its characterization within late Ḥanafī jurisprudence.[55] In *The Islamic Law of Land Tax and Rent*, Johansen argues that Ibn Nujaym's treatise was meant to preclude Ottoman policies to reexamine documentary records of private endowment due to the change of the status of private land ownership in Egypt.[56] Johansen elaborates on this point stating: "Ibn Nujaym knew that he could not solve the problems he faced merely by continuing

[54] Zayn al-ʿAbidīn Ibn Nujaym, *Rasāʾil Ibn Nujaym, al-Tuḥfa al-Marḍiyya fī al-Arāḍī al-Miṣriyya, ed. Khalīl al-Mays,* (Beirut, 1980), 61.
[55] Kenneth M. Cuno, *The Pasha's Peasants: Land, Society, and Economy in Lower Egypt 1740-1858* (Cambridge, 1992), 33-*47.;* Kenneth M. Cuno, "Was the Land of Ottoman Syria Miri or Milk? An Examination of Juridical Differences within the Hanafi School," *Studia Islamica*, (1995), 124.
[56] Ibid.

the old Ḥanafite legal tradition in dealing with them. The immense authority which his writings enjoyed in later centuries not only in Egypt but also in Syria and Palestine shows that his solutions were widely accepted."[57] Johansen is the only one, to my knowledge, who observes not only the change of the legal doctrine of the land ownership, but also the existence of a late Ḥanafī tradition where new opinions, figures, and consensus are being created and sustained.

Baber Johansen is one of the few scholars in the Western scholarship who paid attention to the concept of the late Ḥanafī tradition. He observed that Syrian and Palestinian *muftī*s of the 17th and 18th centuries frequently refer to Ibn Nujaym as one of the most important late Ḥanafī authorities.[58] Johansen stresses: "Ibn Nujaym's writings constitute an important attempt to take stock of the problems connected with the changes in land tenure, tax and rent in the middle of the sixteenth century."[59] Johansen argues that "from the beginning in the eleventh century and continuing until the period of the Tanzimat (1839-76), the Ḥanafī jurists were aware of differences in conceptions and doctrines that separated the Hanafite doctrine of what he calls the 'modern jurists' (*al-mutaʾakhkhirūn)* from that of the 'classical jurists' (*al-mutaqaddimūn*)."[60] Johansen stresses that Ḥanafī jurists repeatedly inform their readers that, "they follow a legal doctrine that was developed by the 'modern jurists'."[61]

Johansen accurately points to a crucial element of the late Ḥanafī tradition: namely, that it was not limited to those cases that had not been settled by the early Ḥanafī doctrines. The *muftī*s and jurists, Johansen stresses, "openly acknowledged that their doctrine differs from the legal opinions of the classical school of Ḥanafī law and stressed the point that the *fatwā* has to be

[57] Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (London, 1988), 98.
[58] Johansen, *Land Tax and Rent*, 98.
[59] Ibid.
[60] Ibid.
[61] Ibid.

given according to the legal opinion of the modern jurists."[62] Johansen's account suggests that the differences between early and late Ḥanafī opinions were driven primarily by doctrine. These doctrinal attitudes of both early and late Ḥanafīs, Johansen claims, were shaped in line with the interests of the jurists' class.[63] However, as I show in the following pages, the development of the late Ḥanafī tradition cannot be explained solely in terms of internal doctrinal disputes influenced by social and economic concerns. A key factor that appears to be overlooked by Johansen's account is that the late Ḥanafī tradition was articulated within the framework of the Ottoman state. Key norms of this late tradition were articulated against the increasing role of the Ottoman state in the judicial and law-making processes. Most seriously, the issue of the legal authority of the late Ḥanafī tradition, as it manifests in positive law, was defined in the name of the eponyms of the school, not in opposition to them.[64] The essence of this late Ḥanafī authority is evident in the following statement by Ibn Nujaym. Against early Ḥanafī recommendations of judges' involvement in managing private endowments, Ibn Nujaym defends the late Ḥanafī opinion to entirely reject the broadening of judges' authority to interfere in the private endowment. He insists: "If the early Ḥanafīs witnessed what the late Ḥanafīs experienced, they would have held a consensus on the late Ḥanafī opinion. Thus, whoever claims an absolute opinion for the judge, they have been siding with falsehood and aided it, and forsake the truth and violate it."[65]

[62] Johansen, *Land Tax and Rent*, 117.
[63] Ibid.
[64] Ibn Nujaym invokes change in the name of the early eponyms of the school. See Ibn Nujaym, *Rasāʾil Ibn Nujaym*, ed. Khalīl al-Mays (Beirut: Dār al-Kutub al-ʿIlmiyya, 1980), 32.
[65] Ibn Nujaym, *Rasāʾil*, 33-34.

Case Studies

I. Women's Mosque Attendance: Revisited[66]

The case of women's mosque attendance is important not only because it points to the different (and unexpected) ways in which legal logic develops, but also how Ḥanafī legal culture responds to such changes and dissenting opinions in the school. The early Ḥanafī authority Muḥammad b. al-Ḥasan al-Shaybānī narrated that Abū Ḥanīfa declared [young] women's attendance of Eid prayers, Friday prayers, and the five daily prayers in congregation to be undesirable, despite they were sanctioned to attend these prayers in earlier times.[67] Abū Ḥanīfa states that old women are allowed to attend dawn (*fajr*), evening (*maghrib*), and night (*ʿishāʾ*) prayers.[68] Muḥammad al-Shaybānī himself coined this case in different terms and language. In *al-Aṣl*, al-Shaybānī discusses a case in which a woman prayed *ẓuhr* at her home instead of going to Friday prayer, then, she decided to attend Friday prayer anyway. Al-Shaybānī argues that the Friday prayer would be the obligatory ritual that has been fulfilled.[69] In other words, al-Shaybānī hints that woman's prayers at home will be considered voluntary and more importantly he considers the woman's attendance to be the default for the fulfilling the religious duty.

By contrast, late Ḥanafī jurists dismiss the opinions of Abū Yūsuf and Muḥammad al-Shaybānī on the permissibility of women to attend all congregational prayers. The default opinion of school becomes Abū Ḥanīfa's opinion on this issue. In *al-Hidāya*, ʿAlī b. Abī Bakr al-Marghinānī (d. 1197) states that it is undesirable for young women to attend congregational prayers in the mosque for the fear of the *fitna* (sexual seduction). Yet, he permits the old women

[66] This issue is consistently discussed in the early and late Ḥanafī commentaries. See for example, Muḥammad b. al-Ḥasan al-Shaybānī, *Al-Aṣl* (Beirut: Dār Ibn Ḥazm, 2012), 1:323; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. 1:125; Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 5:318. Behnam Sadeghi dedicates special attention to this case study in his investigation of Ḥanafī legal logic. Behnam Sadeghi, *The Logic of Law Making in Islam Women and Prayer in the Legal Tradition* (Cambridge: Cambridge University Press, 2013), 105-124.
[67] Muḥammad b. al-Ḥasan al-Shaybānī, *Al-Aṣl* (Beirut: Dār Ibn Ḥazm, 2012), 1:323.
[68] Ibid.
[69] Al-Shaybānī, *Al-Aṣl*, vol. 1:309.

to attend dawn (*fajr*), evening (*maghrib*), and night (*ʿishāʾ*) prayers.[70] This opinion was consistently introduced in the legal literature to be the "late Ḥanafī" opinion in the majority of Mamluk and Ottoman Ḥanafīs.[71] ʿUthmān b. ʿAlī b. Maḥjan al-Zaylaʿī provides key insights to understand the dialect between law and social change. Al-Zaylaʿī states that women used to attend congregational prayers in the mosque during the Prophet's time and in the reign of Abū Bakr. Then, this practice was prevented by ʿUmar b. al-Khattāb and it was established since then to be the normative practice.[72] The central lesson here is that social practices, even if there were sanctioned by scripture and prophetic statements, still exist in tension with changes of time, customs, and the conservative nature of legal culture.[73] The crucial aspect about late Ḥanafī reformulations in the early modern period on the women's mosque attendance is their pursuit to completely prevent women (young and old) from attending congregational prayers in the mosques. This position reverses the import of the scriptural evidence and dismisses the nuances of early Ḥanafī discussions on this matter.

The position of late Ḥanafīs on this issue is discussed extensively in Ibn Nujaym's *al-Baḥr al-Rāʾiq*. He argues that women should not attend congregational prayers in mosques.[74] He justifies this ruling by citing a verse from the chapter of the Confederates (*al-Aḥzāb*): "And stay in your houses (33:33)."[75] He supports his ruling with a Prophetic tradition in which the Prophet allegedly said: "[the woman's] prayer inside her house is better than her prayer in the courtyard, and her prayer in her courtyard is better than her prayer in the mosque. Indeed, their houses are

[70] ʿAlī b. Abī Bakr al-Marghinānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d), 1:58.
[71] For Mamlūk Ḥanafīs see ʿUthmān b. ʿAlī b. Miḥjin al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq* (Cairo: Maṭbaʿat Bulāq, 1895), 1:126; Badr al-Dīn al-ʿAynī, *al-Bināyā Sharḥ al-Hidāya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000), 2:354-356. For Ottoman Ḥanafīs see Ibrāhīm al-Ḥalabī, *Multaqā al-Abḥur*, vol. 1:164.
[72] Al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, vol. 5:125.
[73] Ibn ʿĀbidīn prevents all women from attending any prayers in the mosques, including Friday prayer, due to the spread of corruption of his time. See Ibn ʿAbidīn, Radd al-Muḥtār, vol. 1:566.
[74] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 1:380.
[75] Ibid.

better for them."[76] Ibn Nujaym develops his argument, stating that when women go out to attend the mosque, curbing one's temptation (as a man) will be not ensured. Ibn Nujaym explains that this ruling (i.e. preventing them from mosque attendance) is general, so it includes the young and old women, along with the daytime or night prayers.

Ibn Nujaym informs us that al-Nasafī, in his *al-Kāfī Sharḥ al-Wafī*, contends that the *fatwā* in his time period was that it is undesirable (for women to attend mosques) at all prayer times due to the prevalence of moral corruption (*fasād*).[77] Once women's mosque attendance is declared to be undesirable, it follows, Ibn Nujaym insisted, that their attendance of circles of remembrance (*dhikr*), especially with those ignorant people who claim themselves to be scholars, is also undesirable. Ibn Nujaym cites the Transoxanian Ḥanafī scholar Fakhr al-Islām al-Bazdawī (d. 483/1090) to support the latter position.[78] Ibn Nujaym also cites Ibn al-Humām's *Fatḥ al-Qadīr* discussion on this topic, in which he claims that the authoritative opinion of the late Ḥanafīs is the prevention of all women from attending all prayers at the mosque (*manʿ al-kull fī al-kull*). However, Ibn al-Humām provides an exception to this general rule: the *very* old women, as opposed to those old women who may still be sexually attractive (*dhawāt al-ramaq*) and who adorn themselves, are allowed to attend the mosque.[79]

Furthermore, Ibn Nujaym engages in a discussion with a hypothetical interlocutor who highlights the fact that this *fatwā* (i.e. completely preventing all women, old and young, from mosque attendance), which is declared to be the authoritative opinion by the late Ḥanafīs (*al-*

[76] This *ḥadīth* is narrated with different versions. All of *ḥādīths* in this meaning are declared to be doubted in their authenticity by Ibn Khuzayma. This *ḥadīth* is abrogated in the Malikī school based on the Medina consensus of woman's mosque attendance during the time of the Rightly-Guided Caliphs. Ḥanafīs employ some of these weak traditions to support a legal ruling in the *madhhab*.
[77] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 1:380.
[78] Ibid.
[79] Ibid.

mutaʾakhkhirūn), clearly contradicts the opinions of Abū Ḥanīfa and his disciples.[80] The interlocutor points out that preventing young women from mosque attendance might have been authentically narrated and unanimously agreed upon in the school; however, Abū Ḥanīfa stressed that old women have the right to attend congregational prayers except the noon (*ẓuhr*), afternoon (*ʿaṣr*), and Friday prayers.[81] The interlocutor emphasizes the opinion of Abū Yūsuf and Muḥammad which goes further than that of Abū Ḥanīfa to argue that old women should be allowed to attend prayers at all times, as it was stated in *al-Hidāya* and *al-Mujtabā*.[82] The interlocutor contends that the late Ḥanafīs' *fatwā* prevents old women from mosque attendance at all times and at all prayers, and thus contradicts the opinions of all early Ḥanafī authorities.[83] The interlocutor states that the authoritative ruling in this case should be Abū Ḥanīfa's opinion (i.e. allowing old women to attend certain prayers in mosques).[84]

We can glean some insights on the interlocutor's point from Ibn Nujaym's brother's commentary, *al-Nahr al-Fāʾiq,* and learn more about how late Ḥanafīs supported their *fatwā* to prevent all women from mosque attendance (despite the fact that it contradicts the opinions of Abū Ḥanīfa and his disciples).[85] ʿUmar b. Nujaym (d. 1596) argues that the late Ḥanafī position is actually based on Abū Ḥanīfa's ruling. He explains that the late Ḥanafī opinion to prevent all women at all times is driven by the prevalence of overwhelming desires (*farṭ al-shahwa*). He explains that the depraved people – in past centuries – did not go out to the streets during *maghrib* prayers because they were busy with dinner, and they did not go out for *fajr* and *ʿishāʿ* because they were asleep. However, ʿUmar b. Nujaym argues, those depraved people, in his

[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] ʿUmar b. Nujaym, *al-Nahr al-Fāʾiq*, ed. Aḥmad ʿIzzū ʿInāya (Beirut, Dār al-Kutub al-ʿIlmiyya, 2002), 1:250-251.

time, seek to be out in the streets at all times due to the dominance of their lewdness. Therefore, the prevention of women from attending prayers in mosques is evident to protect them from the sight of the depraved.[86]

This legal argument not only carves out a new legal authority for the late Ḥanafīs, but also it points to the intertwined nature of early Ḥanafī formulations with elements of time, custom, and circumstance. Late Ḥanafī jurists in the early modern period successfully employ these aspects to reinterpret the *madhhab*. For instance, Ibn Nujaym justifies the new legal opinions adopted in his commentary which are opposed to the eponyms of the school by stating that they were generated due to: "the difference of time and circumstances". Ibn Nujaym cites the Mamluk Ḥanafī jurist al-Zaylaʿī who emphasizes that Abū Ḥanīfa articulated his opinion to address an issue in his time, but that in their times the circumstances have completely changed.[87] A similar trend can be observed in the discussion of early and late Ḥanafīs in the following case study on conversion to Islam.[88]

Kevin Reinhart discusses the issue of women's mosque attendance as addressed in a treatise by an Ottoman jurist named Muḥammad al-Aydinī. Al-Aydinī's treatise touches on the same arguments as those found in Ibn Nujaym's work. The treatise is dedicated to the issue of the continuity and effectiveness of legal rules in the Ḥanafī tradition. Reinhart argues that the larger context for this treatise is "the anxiety or humility occasioned by epistemological uncertainty."[89] The central argument in al-Aydinī's treatise is that earlier legal assessments in the

[86] ʿUmar b. Nujaym, *al-Nahr al-Fāʾiq*, 1:251.
[87] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, 6:229.
[88] Ibn Nujaym shifts the discussion to when the woman is allowed to go out. He derives this discussion from the Transoxanian Ḥanafī text *Khulāṣat al-Fatāwā* in which the author, Ṭāhir b. Aḥmad al-Bukhārī who was educated in Egypt and died in Transoxiania, enumerates seven positions when the husband permits his wife to go out: visit her parents, take care of them, offer them condolences, or visit one of them, visit her *maḥārim* (relatives that she cannot marry). If the she was working as a doula or washing the dead, or she has a legal right to claim from others, she can go out with or without permission.
[89] Kevin Reinhart, "When Women Went to Mosques: al-Aydini on the Duration of Assessments," in *Islamic Legal*

school may be revoked due to changes of circumstances that shaped the productions of these rules. For al-Aydinī, the effectiveness of a legal rule is maintained as long as its cause or rationale is sustained. However, al-Aydinī insists that the accompanying circumstances may alter the effectiveness of a legal rule.[90] Reinhart rightly observes that "al-Aydinī invokes the notion of the duration of the assessment as a means to evade the liberality of the Islamic scriptural sources, not as a means to evade the oppressiveness of tradition: the examples he adduces all justify abandonment of a more equalitarian ethic in favor of one that particularizes the roles of women and non-Muslims."[91] It is important to note that what Reinhart identifies as al-Aydinī's true purpose in invoking "the duration of the assessment" – that is, the change of time and circumstances – is actually al-Aydinī relying on the late Ḥanafī tradition to justify his conservative opinion.[92] In other words, al-Aydinī's technique is a manifestation of a trend in how late Ḥanafīs interacted with earlier authoritative opinions in the school, and his techniques should be considered "late Ḥanafī" techniques.

II. Considerations of Custom: Is Pronouncement of *Shahādatayn* Enough to be Considered a Muslim?[93]

The late Ḥanafī discussions on whether the pronouncement of the *Shahādatayn* ("I witness that there is no god but Allāh and I witness that Muḥammad is His servant and Messenger") is a sufficient indication for a person to be considered legally a Muslim is

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Interpretation: Muftis and Their Fatwas, ed. Muhammad Khalid Masud, Brinkly Messick, and David Powers (Cambridge: Harvard University Press, 1996), 118.

[90] Reinhart, "when Women," 120-1.

[91] Reinhart, "when Women," 121.

[92] Al-Aydinī in the original Arabic text, accompanied Reinhart's article, stresses that the opinion to prevent all women from mosque attendance to be articulated by "our scholars from the late Ḥanafīs." al-Aydinī points explicitly to the opinions of Ibn al-Humām al-Ḥanafī, in particular, to make his argument. See Reinhart, "when Women," 123.

[93] This case was discussed in most of late Ḥanafī works after Ibn Nujaym. See for example Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4: 228-9. Early Ḥanafī works discuss the issue of denial of one's earlier beliefs as a sign of conversion to Islam. See Al-Sarakhsī, *al-Mabsūṭ*, vol. 10: 99, 112; Al-Sarakhsī, *Sharḥ al-Siyār al-Kabīr*, vol. 1:152.

particularly important for the purposes of this chapter.[94] The case in its origin is a theological debate that took on a legal form. This case not only asserts the maturity of formalized Muslim legal identity, but also it shows the process by which local customs were central to late Ḥanafī legal formulations. Ibn Nujaym engages in a lengthy discussion of what types of statements or actions qualify a non-believer to be considered to be within the fold of Islam.

Ibn Nujaym explains that al-Nasafī, in his *Kanz al-Daqāʾiq*, did not mention any criteria by which a non-believer becomes a Muslim. This does not stop Ibn Nujaym from offering important insights on this delicate issue. Ibn Nujaym tells us that there are two ways for non-believers to become Muslims: statements and actions. He states that the non-believers are divided into three categories: (1) those who reject the existence of God Almighty, and the process by which they become Muslims is their affirming of His existence; (2) those who affirm the existence of God but deny His oneness, and the process by which they become Muslims is to affirm His oneness; (3) those who affirm the oneness of God but deny the Messengership of the Prophet Muḥammad, and the process by which they become Muslims is to affirm his Messengership.[95]

The fundamental principle here, Ibn Nujaym insists, is that whoever affirms the opposite of what was known of his/her belief is considered a Muslim. Ibn Nujaym argues that this principle applies primarily to non-*dhimmīs*.[96] Ibn Nujaym explains that the process that *dhimmī*s (here, Jews and Christians) used to follow to become Muslims during the time of the Prophet is simply to pronounce the *Shahāda*. This simple pronouncement was acceptable because they only deny the Messengership of the Prophet.[97]

[94] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:80.
[95] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:80.
[96] A *dhimmī* is a protected non-Muslim person who is a resident in Muslim lands.
[97] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:80.

Ibn Nujaym draws our attention to an important discussion in the early Ḥanafī school. The subject of the discussion is that early Ḥanafīs (the primary reference is the opinion of Muḥammad al-Shaybānī) argued that the pronouncement of the *shahāda* is no longer a sufficient means for Jews and Christians to become Muslims. Early Ḥanafī jurists insisted: "Today in Iraq the pronouncement of the *shahāda* would not be sufficient to admit Jews and Christians as Muslims unless they denounce their previous religions." Early Ḥanafīs maintained that the Jews and Christians who desire to become Muslims should state: "I denounce my previous religion and enter into the religion of Islam," after their pronouncement of the *shahāda*. Early Ḥanafīs contend that the reason for attaching such a denunciation to the pronouncement of the *shahāda* is the Jews' and Christians' belief: "Muḥammad was sent to the Arabs and *al-ʿAjam* (non-Arabs) not to the children of Israel."[98]

The reason that the denunciation is paired with a statement about "entering the religion of Islam," we are told, is because the Jews, in particular, might denounce Judaism and embrace Christianity or Zoroastrianism. By stating that they are entering Islam, these individuals clarify their intentions for legal (and theological) purposes. Ibn Nujaym gives us more examples of when clarification was considered to be necessary in early Ḥanafī legal scholarship. For example, if a Christian was asked: Is Muḥammad a true messenger from God? And s/he answered in the affirmative, then s/he would not be considered a Muslim. He tells us this is the sound position.[99] Also, if s/he answered by affirming that Muḥammad is a Prophet to the Arabs and the *ʿAjam*, then s/he would not be considered a Muslim because s/he can say, "Muḥammad is a Prophet to the Arabs and the *ʿAjam*, except that he was not sent to us."[100] These examples demonstrate that the early Ḥanafīs were concerned with potential trickery among those who

[98] Ibid.
[99] Ibid.
[100] Ibid.

would convert to Islam, and sought to theologically and legally guarantee the clarity of their status as Muslims of *dhimmī*s.

To introduce the late Ḥanafī opinion, Ibn Nujaym engages with a hypothetical interlocutor who poses the following question to him: Is it incumbent not to admit Jews or Christians as Muslims, even after their confirmation of the Prophet Muḥammad's Messengership and their denouncing of their previous religions and declaring their adherence to Islam, unless they declare their belief in God, His angels, Books, Messengers, and affirm resurrection after death, and predestination, with its good and bad? These principles are from among the preconditions of Islam. Ibn Nujaym tells us that an individual's assent to these principles is confirmed through the indicator of their embracing Islam. Since they affirmed their embrace of Islam, they are committed to fulfilling all of the conditions of the validity of their belief.[101]

Thus, in the early Ḥanafī legal formulations, if a Jew or a Christian (*dhimmī*) said: "I am a Muslim (*anā muslim*), or I have become a Muslim (*aslamt*)," s/he would not be considered a Muslim. The same ruling applies if they say, "I am of the religion of Abraham." Also, if a *dhimmī* told a Muslim: "I am a Muslim like you," he would not be considered a Muslim as stated in the *Dhakhīra*.[102] The result, early Ḥanafīs assert, is that if Jews and Christians pronounced the *Shahāda* today, they would not be considered Muslims. Furthermore, in *al-Fatāwā al-Sirājiyya*, Sirāj al-Dīn al-Ḥanafī (d. 1372) was asked: if a *dhimmī* says, "I am a Muslim," or "If I do such and such, I am a Muslim," or pronounces the *Shahādatayn*, does this person become a Muslim? Sirāj al-Dīn al-Ḥanafī answers that this person would not be considered a Muslim on the basis of any of these statements, and that such a ruling was considered to be the *fatwā* of the Ḥanafī

[101] Ibid.
[102] This work is *Dhakhīrat al-Fatāwā* and known also as *al-Dhakhīra al-Burhāniyya* by Maḥmūd b. Māza (d. 616/1219).

scholars.[103]

Ibn Nujaym interjects at this point in the discussion to put forward the authority of late Ḥanafīs based on Cairene customs. He affirms that those who pronounce the *Shahādatayn* would be considered Muslims even without denouncing their previous religion. The mere pronouncement of the *Shahādatyn* has become a marker of embracing Islam, and thus they would be considered Muslims. If they renounce Islam, they would be liable (because of their apostasy) to be killed, unless they return to Islam. Then they would be left to their own affairs. Ibn Nujaym concludes: "This is the opinion that should be followed in the Egyptian lands because we do not hear from the People of the Book in Egypt their embrace of the *shahādatyn* [that is, they do not already profess that God is one, and that Muḥammad is His Messenger]. Therefore, the opinion of Muḥammad al-Shaybānī was specified with Iraq."[104] In other words, a Christian or a Jew pronouncing the *Shahādatayn* in Egypt in Ibn Nujaym's time period would be a noteworthy event that would theologically and legally clarify that person's status as a Muslim.

In addition, Ibn Nujaym discusses the actions by which a non-believer can become a Muslim. For example, he considers participation in congregational prayers (as opposed to praying alone) to be a marker of conversion. However, Ibn Nujaym does not consider fasting Ramadan, paying charity, or going for *Ḥajj*, to be indicative of conversion to Islam according to the authentic Ḥanafī narrations (*ẓāhir al-riwāya*). Nevertheless, he refers to a narration from Muḥammad al-Shaybānī that if a person performs Ḥajj in the same way that a Muslim performs it, then that person would be considered a Muslim as stated in *al-Dhakhīra* and al-*Tatārkhāniyya*.[105] It appears that Ibn Nujaym is inclined to define conversion to Islam in terms of public and visible communal rituals.

[103] Ibid.
[104] Ibid.
[105] Ibid. This works was compiled by al-ʿAllāma b. al-ʿAlāʾ al-Anṣārī al-Andaraptī al-Dihlawī al-Hindī (d. 1384/5)

In his *Minḥat al-Khāliq*, a commentary on *al-Baḥr al-Rāʾiq*, Ibn ʿĀbidīn provides a unique perspective on the internal Ḥanafī debates on this subject. His discussion affirms the process by which late Ḥanafīs revisited early Ḥanafī determinations. Ibn ʿĀbidīn explains that he read a treatise by the Egyptian Ḥanafī Nuḥ Efendī (d. 1659) refuting Ibn Nujaym's *fatwā* in which he incorporates the clear-cut opinions of early Ḥanafī authorities that stipulate the denunciation of the person's previous religion for conversion. Ibn ʿĀbidīn defends Ibn Nujaym, affirming that his *fatwā* did not contradict any of the textual proofs within the Ḥanafī school. Ibn ʿĀbidīn explains that Ibn Nujaym based his *fatwā* on the fact that the People of the Book in Egypt and beyond do not affirm the Messengership of the Prophet Muḥammad. Thus, the pronouncement of *shahādatayn* is an indicator of embracing Islam, as it was during the time of the Prophet.[106]

Ibn ʿĀbidīn continues his defense of Ibn Nujaym, stating that what early Ḥanafī authorities narrated was primarily shaped by the circumstances of their time and the customs of their lands. The key lesson here is that the shift in legal opinions is tied to changes in customs and times. The new opinion does not mean a rejection of early Ḥanafīs' reasoning; rather, it indicates a change of circumstances that drives the legal change.[107] Ibn ʿĀbidīn stresses that in this specific case, attention should be drawn to the difference in customs and times. There is no doubt that it was sufficient for the Prophet to accept the pronouncement of the *Shahādatayn* from the polytheists and the People of the Book. The early Ḥanafīs stipulated the denunciation of one's previous religion in their times because the People of the Book used to believe that the Prophet was a Messenger to the Arabs and the *ʿAjam*, but not to the Children of Israel (as it was clearly stated by Muḥammad al-Shaybānī). However, since the People of the Book in Ibn

[106] Ibn ʿĀbidīn, *Minḥat al-Khāliq*, vol. 5:80.
[107] Ibid.

ʿĀbidīn's day generally deny the Messengership of the Prophet Muḥammad, the situation has become very similar to the time of the Prophet. Thus, it is not permissible to oppose the pronouncement of the *shahāda* or to neglect it as a marker of their conversion. However, Ibn ʿĀbidīn explains if it is known from the overall circumstances of the People of the Book that some of them specify the Messengership of the Prophet to the Arabs and *ʿAjam*, then the person who wishes to convert would have to denounce his/her previous religion as part of his/her conversion to Islam.[108]

Ibn ʿĀbidīn continues his discussion, explaining that the custom in his times is that the *dhimmī*s would go to the court and embrace Islam. In this case, there is no doubt that the person affirms the universality of the Prophet's Messengership and that s/he does not specify it to a group of people. Whether or not this person would specify the Prophet's message to the Arabs and the *ʿAjam* is evident in the manner of their conversion (going to court), so the possibility of the specification should be ignored even if the person does not denounce his/her previous religion. Muḥammad al-Shaybānī did not stipulate the denunciation of one's previous religion except after he had certain knowledge of the circumstances of the people of his land and their belief in the specification of the Prophet's messengership to all people except the Israelites. Without his certain knowledge of such belief, Ibn ʿĀbidīn insists, it would not have been possible for Muḥammad al-Shaybānī, or those who came after him, to contradict the clear ruling from the *sharīʿa* which affirms that the *Shahādatayn* are sufficient to render the non-believer a Muslim. Therefore, "it is necessary to tie legal judgments to their causes in all times."[109] By saying this, Ibn ʿĀbidīn supports the idea that legal judgments must take into changes in circumstance, custom, and time.

[108] Ibid.
[109] Ibid.

In short, late Ḥanafīs are not only conscious of the authority of the eponyms of the school, but also they are cognizant of the milieu that shaped and produced the early Ḥanafī opinions. Late Ḥanafīs do not attribute an automatic authoritative value to the early opinions in the school. This is supported, Ibn Nujaym narrates, by the early Ḥanafī authorities' statement: "It is not permissible for anyone to adopt our opinions as a *fatwā* until the person knows the basis upon which we formulated what we stated."[110] Based on this logic, the opinion of Ibn Nujaym that the *shahāda* is a sufficient marker for conversion was adopted as the opinion of the late Ḥanafīs.[111]

IBN NUJAYM'S INFLUENCE ON THE LATE ḤANAFĪ TRADITION

One reason that Ibn Nujaym's works became central for late Ḥanafīs is his engagement with key authoritative works that came to represent the primary references for late Ḥanafī jurists. In his introduction to *al-Baḥr al-Rāʾiq*, Ibn Nujaym draws our attention these authoritative texts beginning with al-Nasafī's *Kanz al-Daqāʾiq*. This text becomes one of the four key legal references in the late Ḥanafī tradition. Ibn Nujaym explains that al-Nasafī's work is the best *mukhtaṣar* in Ḥanafī jurisprudence, although only a few authoritative commentaries were penned on this work.[112] Ibn Nujaym specifically acknowledges *Tabyīn al-Ḥaqāʾiq* by Imam al-Zaylaʿī (d. 1343, an important Ḥanafī jurist of the Mamluk era) as the best commentary that was written on al-Nasafī's *Kanz*. However, Ibn Nujaym explains that Imam al-Zaylaʿī's commentary dedicated too much attention to legal differences and disputes. Also, Ibn Nujaym complains that al-Zaylaʿī does not explicate fully his opinions and understanding of the text. As such, Ibn Nujaym dedicated himself to al-Nasafī's work from the start of his own career, and incorporates

[110] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5: 81.
[111] Ibid.
[112] Ibn Nujaym, *al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq*, vol. 1:2.

in his commentary on the *Kanz* many new legal cases and revisions that distinguish his work from those of al-Zaylaʿī and others.[113] Ibn Nujaym also identifies *Fatḥ al-Qadīr* (Ibn al-Humām), *Sharḥ al-Nuqāya* (Aḥmad al-Shimnī), and commentaries on al-Marghinānī's *al-Hidāya* as being among the most authoritative works for late Ḥanafīs.

The importance of Ibn Nujaym's works do not manifest only in late Ḥanafīs' extensive engagement with him in their legal literature, but also in the specialized commentaries on Ibn Nujaym's *al-Baḥr al-Rāʾiq*. The Palestinian Ḥanafī jurist Khayr al-Dīn al-Ramlī (d. 1671), who was trained in Egypt, wrote a commentary on Ibn Nujaym's *al-Baḥr al-Rāʾiq*.[114] Ibn ʿĀbidīn composed *Minḥat al-Khāliq* and *Nuzhat al-Nawāẓir* on Ibn Nujaym's *al-Baḥr al-Rāʾiq* and *al-Ashbāh wa al-Naẓāʾir* respectively.[115] Ibn ʿĀbidīn writes in his introduction to *Minḥat al-Khāliq* that in composing his commentary on the margins of *al-Baḥr al-Rāʾiq*, he systematically collected his notes so as to explain or support issues or cases that need investigation, not to offer further material for the text (i.e., he considered *al-Baḥr al-Rāʾiq* to be nearly sufficient in and of itself). He includes in his commentary insights from *al-Nahr al-Fāʾiq* and notes penned on the same text by Khayr al-Dīn al-Ramlī (d. 1671).[116] The significance of Ibn ʿĀbidīn's statements is that it shows that the *al-Baḥr* was part of Ḥanafī legal training and curriculum. Ibn Nujaym's brother Sirāj al-Dīn ʿUmar b. Nujaym (d. 1005/1596) composed a commentary on al-Nasafī's *Kanz al-Daqāʾiq*, like his brother, in which he engages extensively with Zayn Ibn Nujaym's opinions. He states that his work combines both the opinions of the early and late Ḥanafīs.[117]

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[113] Ibid.
[114] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya fī Tanqīḥ al-Fatāwā al-Ḥāmidiyya*, vol. 1:8.
[115] Late Ḥanafīs celebrated Ibn Nujaym's work on legal maxims with a plethora of commentaries on *al-Ashbāh wa al-Naẓāʾir*. For instance, Sharaf al-Dīn al-Ghazzī (d. 1005/1596), *Tanwīr al-baṣāʾir ʿalā ʾl-Ashbāh waʾl-naẓāʾir*; Aḥmad b. Muḥammad al-Ḥamawī (d. 1098/1687), *Ghamz ʿuyūn al-baṣāʾir sharḥ al Ashbāh wa al-Naẓāʾir*; Abū al-Suʿūd al-Ḥusaynī (d. 1172/1758-59), *ʿUmdat al-nāẓīr ʿalā al-Ashbāh wa al-Naẓāʾir*. Ms; Muḥammad Hibat Allāh b. Muḥammad b. Yaḥyā Tājī (d. 1224/1809), *al-Taḥqīq al-bāhir fī sharḥ al-Ashbāh wa al-Naẓāʾir*.
[116] Ibn ʿĀbidīn, *Minḥat al-Khāliq ʿalā al-Baḥr al-Rāʾiq*, vol. 1:3.
[117] ʿUmar b. Nujaym, *al-Nahr al-Fāʾiq*, vol. 2:4.

The influence of Ibn Nujaym extends to intra-*madhhab* debates among late Ḥanafī jurists. Ibn Nujaym's opinions are portrayed as the point of reference for the debates among the 17th and 18th century Ḥanafī scholars. For example, on the issue of the sulṭān's appointment of *muftīs*, ʿAlāʾ al-Dīn al-Ḥaṣkafī (d. 1677) and ʿAbd al-Ghanī al-Nābulsī (d. 1730) primarily base their opinions on their interpretations of the opinion of Ibn Nujaym.[118] Also, ʿAbd al-Raḥmān b. Muḥammad Shaykh-Zāda (d. 1667), known as Dāmād Efendī, frequently brings Ibn Nujaym into his legal discussion on ritual purity, prayers, prescribed punishments, endowments, and financial transactions (*buyūʿ*).[119] The Egyptian Ḥanafī Ḥasan b. ʿAmmār al-Shurunbulālī (d. 1659) refers to Ibn Nujaym's works in his work *Marāqī al-Falāḥ*.[120] The Damascene Ḥanafī jurist Ḥāmid b. ʿAlī al-ʿImādī (d. 1757) engages in his important *fatāwā* work with Ibn Nujaym's opinions.[121] What is important here is the authority structure of late Ḥanafī legal scholarship. These jurists of the 17th - 19th centuries sought to establish their own authority by commenting, engaging, or referring to Ibn Nujaym in their works. The geographical dispersion of Ibn Nujaym's legal works in the core Arab lands and the Ottoman imperial capital suggests that the Ḥanafī networks in Egypt, Syria, Palestine, and Anatolia was interconnected. Furthermore, the fact that Ibn Nujaym's *fatāwā* were translated into Ottoman Turkish and published in 1872 demonstrates that his work had lasting and multilingual influence across the Ottoman Empire.[122]

Moreover, Ibn Nujaym's significance is reflected in the discussions on the codification of Ḥanafī jurisprudence in the late 19th century. The drafters of the *Mecelle* insisted that the code

[118] Guy Burak, "The Abū Ḥanīfah of His Time: Islamic Law, Jurisprudential Authority and Empire in the Ottoman Domains 16th - 17th Centuries" (PhD diss., University of New York, 2011), 87.
[119] ʿAbd al-Raḥmān b. Muḥammad, *Majmaʿ al-Anhur fī Sharḥ Multaqā al-Abḥur* (Beirut: Dār Iḥyaʾ al-Turāth al-ʿArabī, n.d.), vol. 1:51, 72, 81, 585, 731; vol. 2:9,13.
[120] Ḥasan b. ʿAmmār al-Shurunbulālī, *Marāqī al-Falāḥ bi imdād al-Fattāḥ Sharḥ Nūr al-Iḍāḥ wa Najāt al-Arwāḥ* (al-Maktaba al-ʿAṣriya, 2005), 1:180, 184.
[121] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya*, 1:4,8. Interstingly, Ibn ʿĀbidīn edited al-ʿImādī's *fatāwā* work.
[122] Zayn Ibn Nujaym, *Fetāvā-yı Ibn Nucaym*, trans. Ḥasan Raʾafat al-Istānbūlī (Istanbul: Maṭbaʿat Shaykh Yāḥya, 1872)

was inspired by the genre of legal maxims (*al-qawāʿid al-fiqhiyya*) within Ḥanafī jurisprudence. References in the *Mecelle* and its commentaries specifically invoke the founding work by Ibn Nujaym, *al-Ashbāh wa al-Naẓāʾir,* in order to justify the legitimacy of the *Mecelle*. The *Mecelle* report points out that Ibn Nujaym gathered in *al-Ashbāh wa al-Naẓāʾir* many of the jurisprudential canons and overarching legal principles under which the particular cases of jurisprudence are treated. Thus, the *Mecelle* contends, Ibn Nujaym's work opens up a new window that facilitates knowledge of the particular cases in the school.[123]

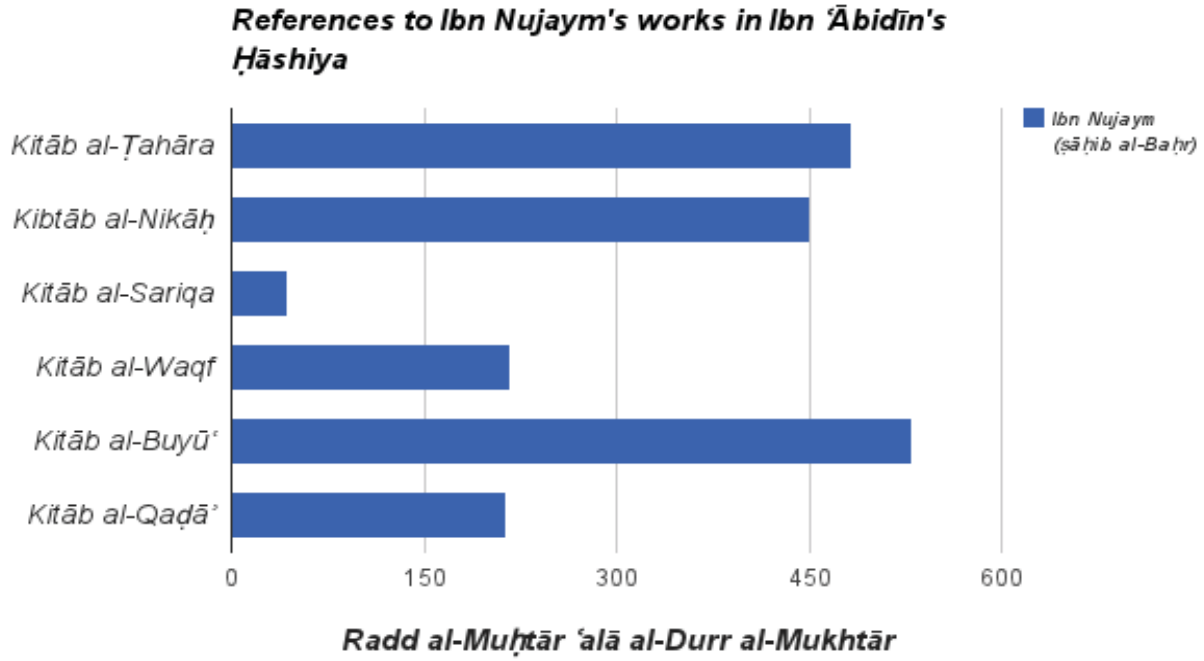

Figure 1.4

The above chart records the extensive references to Ibn Nujaym's work by the late 19th century Damascene jurist Ibn ʿĀbidīn. It shows how often Ibn ʿĀbidīn refers in particular to Ibn Nujaym's *al-Baḥr al-Rāʾiq*. Ibn ʿĀbidīn uses the term *ṣāḥib al-Baḥr* primarily to refer to Ibn Nujaym's opinions. Ibn ʿĀbidīn does not take the opinions of Ibn Nujaym for granted. Instead,

[123] *Mecelle*, 5.

he engages with these opinions by endorsing, altering, or refuting aspects about them. Notably, Ibn ʿĀbidīn frequently refers to Ibn Nujaym's brother ʿUmar's commentary *al-Nahr al-Fāʾiq* on al-Nasafī's *Kanz al-Daqāʾiq* when he engages with Ibn Nujaym's opinions. Moreover, the overwhelming authority of Ibn Nujaym's opinions is evident from the recurrent references to them in Ibn ʿĀbidīn's *Radd al-Muḥtār*. On average, Ibn ʿĀbidīn refers to Ibn Nujaym's opinions three times on each page of the surveyed *fiqh* chapters of his commentary. For example, Ibn Nujaym's opinions are invoked 483 times in *Kitāb al-Ṭahāra*, 451 times in *Kitāb al-Nikāḥ*, and 530 times in *Kitāb al-Buyūʿ*. The total number of references to Ibn Nujaym's opinions in these six *fiqh* chapters is 1940.

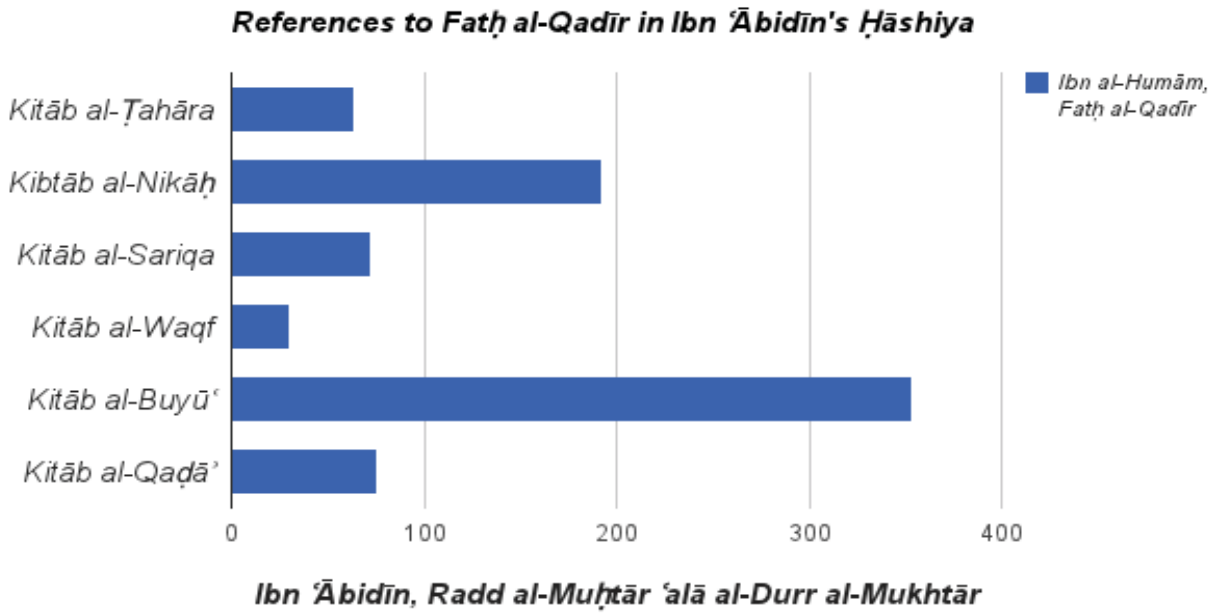

Figure 1.5

As a comparison to the influence of Ibn Nujaym, the above bar chart traces the references of Ibn al-Humām al-Ḥanafī's (d. 1457) *Fatḥ al-Qadīr* in Ibn ʿĀbidīn's *Radd al-Muḥtār*. The point of this chart is to compare how often an essential Ḥanafī authority before Ibn Nujaym

influenced the legal discourse of late Ḥanafīs. The chart shows the references to Ibn al-Humām in Ibn ʿĀbidīn's *Radd al-Muḥtār* in the same legal chapters where the references to Ibn Nujaym were recorded. Ibn al-Humām's commentary was central in many issues in the late Ḥanafī legal scholarship. For example, he is the first Ḥanafī jurist to redefine private and state land ownership in Egypt.[124] Ibn al-Humām's opinion formed the background against which late Ḥanafī articulations of state and private land ownership in Egypt were debated. The opinions of Ibn al-Humām are particularly prominent in the chapter on financial transactions (*buyūʿ*): they come up 354 times. The significance of this chart is to show the conscious decision on the part of late Ḥanafī jurists to engage with what they consider to be authoritative Ḥanafī legal works. The chart shows that there are 788 references to Ibn al-Humām's opinions in these six *fiqh* chapters.

AL-QAWĀʿID AL-FIQHIYYA: LEGAL MAXIMS AND ḤANAFĪ JURISPRUDENCE

Legal maxims (*al-qawāʿid al-fiqhiyya*) are pithily-expressed principles that function as jurisprudential frameworks in order to identify doctrinal commitments and facilitate the process of legal discretion. Legal maxims represent an exhaustive inductive process of the Ḥanafī legal school's substantive legal cases. These legal maxims were meant to achieve three goals: (1) reinvigorate the process of legal reasoning; (2) identify the basic constitutive legal, methodological, and doctrinal commitments within the Ḥanafī school; (3) and accommodate new emerging cases (*nawāzil*) within schools' legal structures.[125] In *al-Ashbāh wa al-Naẓāʾir*, Ibn Nujaym points out that universal legal maxims function as the frame of reference for substantive

[124] Johansen refers to this the idea as "the death of the proprietors" in Ḥanafī jurisprudence. Johansen, *The Islamic Law on Land Tax and Rent*, 80.; Kamāl al-Dīn Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol. 6:37.
[125] Wolfhart Heinrichs,"Qawaʾid as a Genre of Legal Literature," in *Studies in Islamic Legal Theory,* ed. Bernard Weiss (Boston: Brill, 2002), 366-84; Intisar Rabb, *Doubt's Benefit: Legal Maxims in Islamic Law* (Unpublished PhD Thesis, 2009), 1-5.

legal cases (*turadd ilayhā masāʾil al-fiqh*) through which legal determinations should be structured.[126]

The concept of fundamental legal principles (*uṣūl*) that defined the legal and methodological commitments of legal schools existed rather early in the Ḥanafī legal tradition.[127] We can observe that Ḥanafī jurists use the term *uṣūl* to refer to the fundamental principles of the school that govern their legal literature. In this regard, we can find references to these *uṣūl* in early Ḥanafī commentaries often phrased as: the fundamental principle according us (*al-aṣl ʿindanā*); the principle of Abū Ḥanīfa (*al-aṣl ʿinda Abī Ḥanīfa*); or the principles of Abū Yūsuf (*al-aṣl ʿinda Abī Yūsuf*).[128] The first developed work on Ḥanafī legal norms seems to have been *Uṣūl al-Karkhī* of ʿUbayd Allāh b. al-Ḥusayn al-Karkhī (d. 340/951).[129]

The significance of Ibn Nujaym's *al-Ashbāh wa al-Naẓāʾir* on legal maxims is threefold. First, this work generated numerous commentaries in the Ḥanafī school and was considered a welcome and necessary addition to the training of Ḥanafī students. It was also incorporated in the Ottoman imperial canon as part of the curriculum in Ḥanafī jurisprudence.[130] Second, key late Ḥanafī commentaries frequently refer us to Ibn Nujaym's work on legal maxims, despite the warning against using it as the basis for issuing *fatwā*s due to its brevity.[131] Third, discussions on the codification of Ḥanafī jurisprudence in the late 19th century specifically invoke Ibn Nujaym's *al-Ashbāh wa al-Naẓāʾir* for justifying the legitimacy of the *Mecelle*.[132] The drafters of the *Mecelle* insisted that Ibn Nujaym's work facilitates knowledge of the particular cases in the

[126] Zayn al-Dīn Ibn Nujaym, *al-Ashbāh wa al-Naẓāʾir*, ed. Muḥammad al-Ḥāfiz (Cairo: Dār al-Fikr, 2005), 1-3.
[127] ʿUbayd Allāh b. al-Ḥusayn al-Karkhī, "Risāla fī al-Uṣūl," in *Taʾsīs al-Naẓar*, ed. Muḥammad Muṣtafa al-Qabbanī al-Dimashqī (Cairo: Maktabat al-Kulliyāt al-Azhariyya, n.d.), 161-175.
[128] Al-Karkhī, "Risāla fī al-Uṣūl," 60-63.
[129] Khaleel Mohammed, "The Islamic Law Maxims" *Islamic Studies* , Vol. 44, No. 2 (Summer 2005): 191.
[130] Burak, *The Abū Ḥanīfah of His Time*, 204.
[131] Muḥammad Amīn ʿĀbidīn, *Majmūʿat Rasāʾil Ibn ʿĀbidīn*, vol.1 (Istanbul: Dār-i Saʿādat, 1907), 13.
[132] *Al-Majallah : wa-hiya taḥtawī ʿalā al-qawānīn al-sharʿīyah wa-al-aḥkām al-ʿadlīyah al-muṭābiqah lil-kutub al-fiqhīyyah*. 2nd Edition (Qusṭanṭīnīyah : al-Maṭbaʿah al-ʿUthmānīyah, 1887), 4.

school. In fact, the *Mecelle* drafters lament, "No one came after Ibn Nujaym following his method in order to further develop and expand this genre."[133] Hence, Ibn Nujaym's approach to legal maxims was instrumental in the modernization process of the legal system of the Ottoman Empire. This manifested in the creation of the *Mecelle* and the subsequent family code of 1917.

Ibn Nujaym justifies the title of his work *al-Ashbāh wa al-Naẓāʾir* by arguing that he designates such title to the whole work based on one of the sub-genres incorporated in the book itself (*tasmiyatan lahu bi-ism baʿḍ funūnih*). Ibn Nujaym lists all of the works that shaped his juristic opinions. Noticeably, his sources are mainly composed of the authoritative Ḥanafī *shurūḥ* works and *fatāwā* collections upon which the late Ḥanafī tradition was articulated.[134]

Ibn Nujaym contends that although Ḥanafī jurists have authored many works in the genre of *mukhtaṣar* (abridgment), *mabsūṭ* (detailed summary), *shurūḥ* (commentaries), and *fatāwā*, Ḥanafīs lack legal works in the genre of *al-Ashbāh wa al-Naẓāʾir*.[135] Furthermore, he argues that he did not come across a book written by Ḥanafī jurists similar to Tāj al-Dīn al-Subkī's *al-Ashbāh wa al-Naẓāʾir* (d. 771/1370) that contains different juristic disciplines.[136] Moreover, Ibn Nujaym tells us that this is not the first time that he has written on the theme of legal maxims. He refers us to his abridged work on legal principles and legal exceptions in void sale contracts (*al-ḍawābiṭ wa al-istithnāʾāt fī al-bayʿ al-fāsid*).[137] Following the same methodological pattern of this previous work, Ibn Nujaym informs us that he was inspired to write *al-Ashbāh wa al-Naẓāʾir,* which contains seven juristic disciplines.[138]

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[133] *Mecelle*, 5.
[134] Ibn Nujaym, *al-Ashbāh wa al-Naẓaʾir*, ed. Muḥammad al-Hāfiz (Cairo: Dār al-Fikr, 2005), 9. Ibn Nujaym informs us that he exhausted almost all the Ḥanafī works in Cairo in 968/1560. The complete list of these works is in Figure 1.2.
[135] Ibn Nujaym, *al-Ashbāh wa al-Naẓāʾir*, 1-3.
[136] Ibid.
[137] Ibid.
[138] Ibid. Ibn Nujaym divides *al-Ashbāh wa al-Naẓāʾir* into different categories of legal maxims and legal genres. He started this work with a detailed introduction justifying his authorship of this work, his motives, and listing his

In his discussion of universal legal maxims (*qawāʿid kulliyya*), Ibn Nujaym lists six: (1) deeds are judged by their intentions (*al-ʿamāl bi niyyāt*); (2) matters are decided by their objectives (*al-umūr bi maqāsidihā*); (3) certitude is not superseded by doubt (*al-yaqīn la yazūl bi al-shakk*); (4) harm shall be removed (*al-ḍarar yuzāl*); (5) hardship brings about facilitation (*al-mashaqqa tajlib al-taysīr*); (6) custom has a legal consideration (*al-ʿāda muḥkkama*). Additionally, Ibn Nujaym follows these legal maxims with restatements (*fawāʾid*) that decide the realm, objective, and functionality of these maxims when it comes to practice. Despite the fact that universal maxims are five in all legal schools, Ibn Nujaym includes six maxims. Nevertheless, we can observe that the first and second legal maxims render similar legal meaning and effect.[139]

Ibn Nujaym insists that *fiqh* is one of the most prestigious sciences, the most beneficial, and the highest in ranking among other sciences.[140] He states: "*Fiqh* fills the eyes with light, the heart with joy, the soul with peace and tranquility, and it opens up cases and issues to a wider perspective."[141] Upon reading his introduction, we observe the personal affinity of Ibn Nujaym with the field of *fiqh* and how he situates its functions in society. He writes: "*Fiqh* is an essential factor for the preservation of order within society. The order we have seen in private and public spheres as well as the stability and continuity of social harmony is due to the knowledge of permissible acts (*al-ḥalāl)* and prohibited conduct (*al-ḥarām*) and the ability to distinguish

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sources. This work consists of seven main genres of law: (1) *al-qawāʿid* (legal maxims); (2) *al-fawāʾid* (restatements); (3) *al-farq wa al-jamʿ* (dissimilarities and intersections); (4) *al-alghāz* (juristic riddles); (5) *al-ḥiyal* (legal exits); (6) *al-furūq* (cases similar with regard to facts, yet different as to their legal implications); (7) *al-hikāyāt wa al-murāsalāt* (narrated legal precedents and correspondences). The first two genres cover more than half of the book. Ibn Nujaym divides the first genre of legal maxims into two categories: (1) six universal legal maxims (*qawāʿid kulliyya*); (2) twenty nine substantive legal maxims (*qawāʿid juzʾiyya*). In addition, Ibn Nujaym arranges the genre of *fawāʾid* (restatements) according the chapters of *fiqh* books. In his discussion of the *al-farq wa al-jamʿ*, Ibn Nujaym primarily addresses the intricacies of specific complex legal cases, which are frequently posed as questions. Ibn Nujaym emphasizes that it is a shame for a jurist not to be aware of these cases. The genres of *al-alghāz*, *al-ḥiyal* and *al-furūq* are arranged according to the chapters of *fiqh* and they are significantly short in length.

[139] Ibid.

[140] Ibid.

[141] Ibid.

between valid and invalid legal determinations".[142] Moreover, Ibn Nujaym emphasizes: "Ḥanafīs spear-headed and gained seniority in legal scholarship; all other schools are followers of them."[143] Also, he highlights the unique status of Abū Ḥanīfa, stating: "People are dependent upon Abū Ḥanīfa in learning jurisprudence (*al-nās fī al-fiqh ʿiyāl ʿalā Abī Ḥanīfa*)".[144] Ibn Nujaym stresses that these universal maxims are the "real" fundamentals of *fiqh* (*uṣūl al-fiqh fi al-ḥaqīqa*). In his entry on "Kawaʿid Fikhiya," in the *Encyclopaedia of Islam*, Heinrichs sees this statement as "shocking."[145] It appears that he understood it to be an anti-legal theory (*uṣūl al-fiqh)* statement.

This statement is meant to express the intended function of legal maxims rather than to pass a judgment on legal theory as a discipline. Four elements contribute to this understanding. First, the context of this statement is Ibn Nujaym's introduction, which is primarily concerned with the science of *fiqh* and its importance and relevance to secure order and harmony in society. Second, immediately after this statement, Ibn Nujaym stresses that *uṣūl al-fiqh al-haqīqiyya* are necessary to improve the performance of the jurist (*faqīh*) such that s/he attains the degree of *al-ijtihād*, at least in issuing *fatāwā*.[146] Therefore, the text refers to the utility and relevance of these fundamental legal norms in the process of *ijtihād* and their role to better equip the jurist. Third, Heinrichs himself refers to the fact that the work written by Abū al-Ḥasan al-Karkhī al-Ḥanafī (d. 340/952) under the title of *uṣūl* is actually a work on *qawāʿid*. Therefore, Heinrichs defines the term *aṣl*, among the three meanings he provides, as a legal principle under which several

[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Heinrichs, W.P. "Kawaʿid Fikhiyya (a.)." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel; and W.P. Heinrichs. Brill, 2011. BrillOnline. UNIVERSITYOFARIZONA.12January2014<http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-8763>.
[146] Ibn Nujaym, *al-Ashbāh wa al-Naẓāʾir*, 14.

individual cases are subsumed.[147] Finally, Ibn Nujaym emphasizes his interest in reading legal theory (*uṣūl*) works. He singles out the works of al-Bazdawī, al-Dabusī, and Ibn al-Humām. In fact, he takes pride in his commentary *Fatḥ al-Ghaffār bi Sharḥ al-Manār*, a legal theory work by the Transoxanian Ḥafiẓ al-Dīn Abū al-Barakāt al-Nasafī (710/1310).[148] Ibn Nujaym's commentary on al-Nasafī's *uṣūl* work was first published in Egypt in 1355/ 1936 by Muṣṭafā al-Bābī al-Ḥalabī, with a commentary on its margins by ʿAbd al-Raḥmān al-Bāḥrāwī (d. 1322/ 1904).[149]

EARLY MODERN ḤANAFĪ LEGAL DISCOURSE ON STATE AUTHORITY

One of the central issues in the late Ḥanafī tradition is the ways in which the legal literature responds to increasing state authority in the judicial and law-making processes. Ibn Nujaym's engagement with the concept of *siyāsa* offers insights into how the late Ḥanafī tradition addressed this problem. Although Ibn Nujaym tells us, "I did not find a definition of the word *siyāsa* in our scholars' works," he uses the word *siyāsa* to denote the ruler's action/order/decision based on an interest that he identifies, even without having particular legal proofs to support such actions.[150] It is notable that Ibn Nujaym mainly discusses *siyāsa* in his treatment of *ḥudūd* (prescribed punishments). It is also important to point out that Ibn Nujaym confines the jurisdiction of *siyāsa* rulings to the political authority (sulṭān/Imām).[151] He stipulates that the judge does not have the authority to any issue *siyāsa* rulings.[152]

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[147] Heinrichs, W.P. "Kawaʿid Fikhiyya".
[148] Ibn Nujaym, *al-Ashbāh wa al-Naẓaʾir*, 12.
[149] Ibn Nujaym, *Fatḥ al-Ghaffār bi Sharḥ al-Manār* (Cairo: Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī, 1936)
[150] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:76.
[151] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:18; vol. 7:126.
[152] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:18. This situation changes with Ibn ʿĀbidīn, who appears to expand the realm of *siyāsa*. Ibn ʿĀbidīn grants the judge the authority to pass judgments based on *siyāsa* rulings. See Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4: 14-15.

Ibn Nujaym refers to al-Maqrīzī's *al-Khuṭaṭ* to explain that the phrase *sāsa al-amr siyāsa* is customarily used to mean, "to manage the affairs of something".[153] A person can be described as *sāʾis* (manager of affairs), and it is taken from the Arabic sayings *sāsahu* and *sawwasahu al-qawm*, which means: "They appointed him to manage their affairs." Moreover, Ibn Nujaym indicates that the word *sūs* means innate nature and morals.[154] For instance, the phrase *al-faṣāḥa min sūsihi wa al-karam min sūsihi* means: "eloquent speech and generosity is of his innate nature."[155] Ibn Nujaym argues that this is the origin of the linguistic meaning of *siyāsa*. Then, he points out that the word was used to mean "to postulate a law to guard morals, interests, and wealth." Ibn Nujaym explains that the *siyāsa* is of two kinds: (1) *siyāsa ʿādila,* which is to apply justice and fulfill the claims against the wrongful unjust person. This *siyāsa* is part of the *sharīʿa.* Ibn Nujaym insists that the knowledge of *siyāsa* is knowledge of the *sharīʿa* and ignorance of it is ignorance of the *sharīʿa*. The second kind, (2) *siyāsa ẓālima,* is prohibited by the *sharīʿa*.[156]

The legal discourse of Ibn Nujaym stresses the limits of authority of local state actors, especially judges and local administrators (*nuẓẓār*). Ibn Nujaym's legal treatises consistently allude to the corruption of some of the local judges and administrators on issues such as endowments and land tax. Ibn Nujaym makes a strong argument to delimit the authority of these local state actors for greater oversight from the political authority in the imperial capital (Porte). Ibn Nujaym discusses the mandate of public authority of Ottoman officials and he dedicates a unique treatise to bribery.[157] The significance of Ibn Nujaym's account is not only that he lived at the time that the events took place, but also that he participated in shaping the results of these lawsuits as a jurisconsult. Ibn Nujaym offers a passionate criticism of bribery and corruption,

[153] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:76.
[154] Ibid.
[155] Ibid.
[156] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:76.
[157] Ibn Nujaym, *Rasāʾil Ibn Nujaym*, ed. Khalīl al-Mays (Beirut: Dār al-Kutub al-ʿIlmiyya, 1980), 110.

which appears to have been rampant in the Ottoman Empire at his time. He frequently points to the mistrust of many people in the judicial class. In this regard, Ibn Nujaym's work suggests that the Sublime Porte (the political authority) was the final authority and more trusted to keep justice among people than the local state employees.[158]

The negative portrayal of judicial magistrates (*ḥukkām*, sing. *ḥākim*) by Ibn Nujaym is balanced by late Ḥanafī formulations of the importance of the office of the judge.[159] The late Ḥanafī legal tradition revisits the negative portrayal of holding judgeship positions. Late Ḥanafīs recognize the importance of the office of the judge is to ensure justice among the people. Late Ḥanafī treatises on the judiciary emphasize that the negative literature about holding the office of the judge is exaggerated due to the extreme punishment promised for unjust judges.[160] This late Ḥanafī literature balances the idea that the office of the judge is actually desirable, and the idea that the negativity and extreme repercussions stated in the literature are essentially for the unjust judges.[161]

Case Studies

I. The Sulṭān's Authority to Dispose of Public Property: Reinstated by Late Ḥanafīs

Ibn Nujaym stresses that the lands that are under the jurisdiction of *bayt al-māl* (the state treasury) are public property and thus it is not permissible for the political ruler to sell or buy from his appointed administrators of *bayt al-māl*.[162] Ibn Nujaym elaborates that the sulṭān's authority over public Muslim property is analogous to the oversight of the guardian over the orphans' property. Thus, Ibn Nujaym stresses, it is not permissible to sell such property except in

[158] Ibn Nujaym, *Rasāʾil*, 111.
[159] ʿAlī b. Khalīl al-Ṭarabulsī, *Muʿīn al-Ḥukkām fīmā Yataradad bayn al-Khiṣmayn min al-Aḥkām* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1973), 7.
[160] Al-Ṭarabulsī, *Muʿīn al-Ḥukkām*, 8.
[161] Al-Ṭarabulsī, *Muʿīn al-Ḥukkām*, 9.
[162] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:114.

case of necessity where it is the sole source of spending. Ibn Nujaym informs us that Ibn al-Humām issued a *fatwā* to respond to a question addressed to him on the legality of a land purchase of the sulṭān al-Ashraf Barsbay (r. 1422 - 1438) from the local administrator who was appointed by him to supervise and manage *bayt al-māl*. Ibn al-Humām's answer is subtle. He states, "If the Muslim community is in dire need – may God forbid – it may be permissible."[163] Ibn Nujaym comments that Ibn al-Humām's answer is phrased as if he answered in the negative. This position is based on early Ḥanafī opinion, as Ibn Nujaym elaborates.[164]

However, Ibn Nujaym alerts us that the late Ḥanafī opinion, which is the *fatwā* of the *madhhab*, revises the earlier Ḥanafī rationale. Late Ḥanafīs argue that the guardian's power to authorize spending from the orphan's money is not limited to necessitous circumstances. Late Ḥanafīs contend that this authority is extended to satisfy the debts of the deceased by selling the property of the orphan. This authority is also extended to bring a possible benefit by selling the orphan's property for double its value. By analogy, late Ḥanafīs assert, the political ruler (sulṭān/Imām) has the authority to buy from *bayt al-māl* without a compelling necessity if the sulṭān desires to purchase such a state property for double its value, which is the *fatwā* of the *madhhab*.[165]

Ibn Nujaym explains that the nature of the lands owned by the state treasury is an important issue, which triggers many disputes in his time. He narrates that during a review by the deputy of Egypt to investigate the treasury in the year 958/1551, the deputy argued that the financial transactions of the lands owned by *bayt al-māl* are not valid. Ibn Nujaym emphasizes that the deputy's opinion was a pretext to justify the invalidity of endowments and charities

[163] Ibid.
[164] Ibid.
[165] Ibid.

established from *bayt al-māl*. Ibn Nujaym explains that the deputy's opinion is refuted by what the late Ḥanafīs have established as the *madhhab* opinion.[166]

Ibn Nujaym tells us another anecdote that happened shortly after the deputy's examination of the treasury. He mentions that the sulṭān appointed an administrator to manage the affairs of the state endowments in Egypt. The new administrator insisted on initiating a tax or tribute (*kharāj*) on the endowment lands, asserting that the *kharāj* is obligatory on the lands of endowment. Ibn Nujaym points out that this opinion should be rejected based on what he transmits from Ibn al-Humām al-Ḥanafī, who argued that the *kharāj* was abolished from the Egyptian lands and that what is taken from it now is only a rent. Thus, this new status led to the characterization of the state endowment lands as private property, due to the death of those whom the *kharāj* should be taken from. Therefore, if a person purchases land from the sulṭān in a legally valid purchase, then the purchaser would not incur any *kharāj* on the land because of his ownership.[167]

A much-developed discussion on this matter can be found in Ibn ʿĀbidīn's *Radd al-Muḥtār*. He points out that Abū al-Suʿūd (d. 1574), the *muftī* of the Ottoman Empire, issued a *fatwā* that the endowments set up by kings and princes does not have to meet the established conditions for the validity of endowments. He explains that it is permissible for the sulṭān to violate the conditions of an endowment if the objects of the endowment are farms and lands because they already belong to *bayt al-māl*.[168] The sulṭān's endowment from *bayt al-māl* for scholars and students, for example, is a form of assistance for them to fulfill some of their rights in the revenues of *bayt al-māl*. Ibn ʿĀbidīn points out that it is apparent that Abū al-Suʿūd is more acquainted with the issue of the endowment of kings. Clearly, the Ḥanafī legal discourse

[166] Ibid.
[167] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:115.
[168] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4:184.

accommodates certain decisions by the sulṭān for the benefit of the community. At the same time, late Ḥanafīs resist Ottoman policies that they deemed to result in injustices in the land tenure of state endowments.

Ibn Nujaym points out that sulṭān Barqūq, (al-Malik al-Ẓāhir Sayf al-Dīn Barqūq, r. 1382–1389 and 1390 –1399, the first sulṭān of the Mamluk Burjī dynasty) declared his intention after 1378 to revoke endowments that are financed from *bayt al-māl*. The reason behind this decision, we are told, is that these lands are public property. To address this issue, sulṭān Barqūq summoned an important meeting, which was attended by the Shāfiʿī Sirāj al-Dīn al-Bulqīnī (d. 1403), al-Burhān b. Jamāʿa al-Shāfiʿī (d. 1388), and Akmal al-Dīn al-Bābārtī al-Ḥanafī (d. 1384). In this meeting, al-Bulqīnī argued that established endowments for scholars and students can in no way be revoked because they already have a prescribed share in the *khums*[169] (he refers here either to the state land or to the revenues of *bayt al-māl*) which is more than the salaries generated from these endowments.[170] The argument continues that the established endowment from state land for individuals, even if they were for the Prophet's household, Fātima, Khadīja, and ʿAʾisha, could be revoked because they do not have a prescribed share in state revenue.[171] Ibn Nujaym narrates that this argument was supported by all of the attendees as has been recorded by al-Suyūṭī in his statements on the permissibility of receiving salaries from an endowment for scholars, even if the scholars do not show up for their duties at school. Ibn Nujaym argues that this is a clear statement that the endowments of the sulṭāns from the *bayt al-māl* are designations (*irṣadāt*), a different category of endowment, and they are not endowments in reality. Also, Ibn Nujaym differentiates between public and private endowment by arguing

[169] It refers to a religious obligation to contribute one-fifth of a certain type of income to charity.
[170] Ibid.
[171] Ibid.

that unlike the sulṭān's endowments for his own children, these designations for those who have a prescribed share from the revenues from *bayt al-māl* cannot be revoked.[172]

Ibn Nujaym, in his *al-Tuḥfa al-Marḍiyya*, argues that the sulṭān has the authority to set up an endowment from *bayt al-māl*, specifically for a public interest.[173] This opinion, Ibn Nujaym inform us, is also narrated from al-Ṭursūsī from Qāḍī Khān. Similarly, Ibn Wahbān (d. 1306) states, "when the sulṭān assigned this endowment, he prevented unjust princes from spending state wealth outside its legitimate venue." Ibn Nujaym explains that this designated venue by the sulṭān is a public interest. He elaborates this is the meaning of the sulṭān's designation of *bayt al-māl*.[174]

These late Ḥanafī articulations of state authority are indicative of the process of redefining the Ottoman state's role and how the legal literature responds and situates this role in the legal tradition. The important aspect of re-imaging the state role is the way in which the late Ḥanafī jurists position the sulṭān's decisions in the authority structure of the legal system. Late Ḥanafīs reinstated the authority of the sulṭān to dispose of the lands owned by the state treasury. Yet, late Ḥanafīs criticized some decisions made by some Ottoman state officials concerning revoking endowments financed from the state treasury or imposing taxes on lands purchased from the treasury. This state authority is not absolute. It is a negotiated endeavor between political and legal actors. The meeting between sulṭān Barqūq and jurists from different legal schools in order to discuss his decision on revoking endowments financed from the state treasury embodies the nature of this authority. In the third and fourth chapters, I show how the Ottoman state authority manifests in the incorporation of Ottoman decrees in late Ḥanafī legal commentaries and *fatāwā* literature.

[172] Ibid.
[173] Ibn Nujaym, *Rasā'il*, 50.
[174] Ibid.

II. Judges' Authority: Criticism of the State's Abusive Practices

"Those who support the absolute authority of judges are contradicting *sharīʿa* and should be admonished."[175]

In his treatise *Risāla fī al-Qawl al-Sarī (al-Naqī?) fī al-Radd ʿalā al-Muftarī* (*The Authoritative Statement in Refuting the Allegations of the Falsifier*), Ibn Nujaym vehemently criticizes granting absolute authority to judges. He explains that this absolute authority is the reason for some judges' abusive practices. He condemns the broadening of this authority so that the judges will have the power to depose private endowments' caretakers for no legitimate reason. Ibn Nujaym frames this discussion in terms of the unjust nature of this absolute authority. He reiterates the need to delimit such authority to ensure that endowments are not subject to the corruption of judges.[176]

Furthermore, this treatise on judge's public authority gives us a context for the local dynamics in Egypt and how late Ḥanafī jurists were able to articulate a rigorous legal response to state practices. In this treatise, Ibn Nujaym engages with actual realities and problems in the Egyptian lands and tries to position late Ḥanafī jurists and himself as a kind of brake on the unjust broadening of judges' authority. A close reading of this treatise results in serious rethinking of the relationship between Ḥanafī jurists and the Ottoman state. Importantly, it shows how Ibn Nujaym defends late Ḥanafī legal scholarship against the incorporation of any opinions that contradict key principles of justice in Islamic law. Ibn Nujaym successfully challenges state control of private individual endowments (*waqf ʿahlī*) by limiting the role of the judge in administering endowments. The style of this treatise and the powerful language employed to

[175] Ibn Nujaym, *Rasāʾil*, 26.
[176] Ibn Nujaym, *Rasāʾil*, 27.

condemn such authority is indicative of how the Ḥanafī jurists did not act as apologists for the practices of the Ottoman state.

Ibn Nujaym begins his treatise by asserting that this work is based on the statements of the authentic opinions of Ḥanafī scholars concerning the endowments' salaries (*waẓāyif al-awqāf*), the creation of new endowments (*al-saʿy fīha*), and a judge's authority to depose an endowment's caretakers without valid justification. Ibn Nujaym emphasizes that: "I write this treatise because of what has been falsely attributed to the Ḥanafī jurists in our times of what has never been a sound or weak, nor an early or late, opinion. [These opinions were] falsely attributed to Ḥanafī jurists by those who have neither experience nor knowledge of the school, which resulted in a violation of protected legal rights."[177]

On the nature of state authority, Ibn Nujaym argues that both the sulṭān and the judge enjoy a form of public authority.[178] Ibn Nujaym qualifies this statement in his *Rasāʾil*.[179] He offers a strong condemnation for expanding the public authority of judges to manage the affairs of private endowments, and emphasizes that such a broad authority violates the endower's stated conditions of his own endowment. Ibn Nujaym insists that early Ḥanafī opinions on this issue, which secured a space for the involvement of local judges in managing individual and private endowments, should be understood within the framework of priorities and recommendations. Ibn Nujaym justifies his categorical rejection of such authority, stating: "If the early Ḥanafīs were aware of problems that late Ḥanafīs are experiencing today, they would have unanimously adopted the late Ḥanafī opinion [of rejecting the widening of judges' authority]."[180] Ibn Nujaym maintains that the public authority of the judge is primarily defined in term of strictures of

[177] Ibid.
[178] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 1:369.
[179] Ibn Nujaym, *Rasāʾil*, 28.
[180] Ibn Nujaym, *Rasāʾil*, 32.

oversight (*naẓar*).[181] In other words, the expansion of the judge's authority is beyond the boundaries of his career.

Additionally, Ibn Nujaym situates judges' authority in the hierarchy of the Ottoman state by discussing the legal standards for the sulṭān's orders to be legitimate. He points to the *sharīʿa*'s built-in restraints for the sulṭān's orders and for the decisions to guarantee their legitimacy. Then, he demands that these high standards of the *sharīʿa* for the sulṭān's decisions be applied to the rulings and decisions of the judge, who is lower in hierarchy and is appointed by the sulṭān.[182] Ibn Nujaym narrates the following *fatwā* to support this assertion:

> Imām al-Sughdī (d. 1068), a Transoxanian Ḥanafī jurist, argued in his *fatāwā*, based on Abū Yūsuf's letter to Harūn al-Rashīd, that "it is not permissible for the political ruler (Imām) to seize anything from people's private possessions except with a stated and known legal claim."[183]

Ibn Nujaym uses this *fatwā* to argue that if these conditions are necessary from the political ruler, it is probably strongly required from the judges to meet these conditions as well. Ibn Nujaym hints at the fact that the sulṭān has the authority to ask the judge to abide by the sound opinions in his school. If the judge ignores this condition, Ibn Nujaym argues, his judgments should not be executed. Ibn Nujaym poses a hypothetical question: What are the measures that should apply, then, if the judge passes an unjust ruling? He enumerates a few cases in which it appears that the unchecked absolute authority of the judge has lead to injustices and abusive practices. Ibn Nujaym fervently criticizes the opinions that grant the judge this range of unchecked authority. He reiterates after each one of these injustices that, "whoever grants the absolute authority to the judge, then he is a falsifier and violates the *sharīʿa*."[184]

[181] Ibn Nujaym, *Rasāʾil*, 33-34.
[182] Ibid.
[183] Ibn Nujaym, *Rasāʾil*, 27.
[184] Ibid.

More Criticism: An Endowment Case

Ibn Nujaym narrates the following *fatwā*:

> In *Jāmiʿ al-Fuṣūlayn*, based on the legal rulings of Shaykh al-Islam Burhān al-Dīn al-Marghinānī (d. 1197), Maḥmūd b. Isrāʾil (d. 1420), known as Ibn Qāḍī Samāwānih, responded to the following questions: if the endower conditioned in his endowment that the caretaker of the endowment should be someone of his lineage, does the judge have the authority to appoint someone else to this position to manage the endowment without any crime on the part of the named caretakers? And if the judge issued such a ruling, does this ruling render someone else the caretaker of the endowment? The answer of Ibn Qāḍī Samāwānih was in the negative.[185]

Ibn Nujaym elaborates on this ruling that it sanctions prohibiting judges from appointing someone else beyond the stated caretakers in the endowment certificate. It also points to the invalidity of deposing of the named caretakers of the endowment. Ibn Nujaym emphasizes: "These statements in *Jāmiʿ al-Fuṣūlayn* cleared any alleged confusion, dispelled any guessing or conjuring, confuted the liar and the falsifier, and revealed the ignorance of the impudent transgressor."[186]

To stress his authority and that of the late Ḥanafī tradition, Ibn Nujaym scorns an unnamed interlocutor who alleges that Ḥanafīs grant the judge such a broad authority, stating: "How could it be possible for a believer in God and the Last Day to falsify the Ḥanafī position on the judge's authority by attributing to them the opinion that judges have the authority to depose the named caretakers of the endowment with or without a crime (or justifiable reason)? We seek refuge with God from the evil of our evil deeds and ourselves!"[187] Ibn Nujaym reiterates that in *Jāmiʿ al-Fuṣūlayn*, the judge does not have the authority to appoint a guardian or a caretaker if the deceased has specified a guardian or a caretaker, except in cases of an evident crime on the part of the specified individuals. Ibn Nujaym maintains: "Whoever grants

[185] Ibn Nujaym, *Rasāʾil*, 28.
[186] Ibn Nujaym, *Rasāʾil*, 29.
[187] Ibid.

the judge the authority to depose caretakers of endowments without a crime, he is a liar and tyrant."[188]

Ibn Nujaym surveys the Ḥanafī opinions on this matter to give us a trajectory of the Ḥanafī position. He starts with *Khulāṣat al-Fatāwā* by Ṭāhir b. Aḥmad b. ʿAbd al-Rashīd al-Bukhārī (d. 1077), who argues that if the guardian is trustworthy and is able to properly manage the wealth of the deceased, then the judge does not have the authority to depose him. Ibn Nujaym adds that a similar opinion is related by Muḥammad b. al-Ḥusayn al-Bukhārī (d. 1099), known as Khwāhar-Zāda, who insisted: "If the guardian is just and competent, then the judge should not depose him. Yet, if the judge deposes him anyway, the guardian is not legally deposed."[189] The same position – that the guardian cannot be fired – is stated by Yūsuf b. Aḥmad al-Khwārizmī (d. 1236) in his *al-Fatāwā al-Ṣughrā*.[190]

These authoritative opinions lead Ibn Nujaym to conclude that there is a consensus among Ḥanafīs that judges do not have the authority to depose guardians. Yet, if the guardian commits a crime, Ḥanafīs differed on whether the judge can depose him or not. Ibn Nujaym wonders how could it be possible for someone to use the Ḥanafī dispute on this latter issue to argue that the judge has the authority to fire the guardian without a crime being committed, despite the Ḥanafī consensus that judges cannot fire guardians without any crime or legitimate cause.[191]

Overall, Ibn Nujaym argues that the statements of Ḥanafī jurists assert the invalidity of a judge's ruling to depose the guardian appointed by the deceased. He stresses that the same standards must be met in the affairs of the endowment caretakers. Ibn Nujaym reexamines a

[188] Ibid.
[189] Ibn Nujaym, *Rasāʾil*, 29.
[190] Ibn Nujaym, *Rasāʾil*, 31.
[191] Ibid.

statement in *Jāmiʿ al-Fuṣūlayn*: "If the guardian appointed by the deceased is trustworthy and competent, then the judge should not fire him from his position. Yet, if the judge fires him, then it is narrated that the judge's decision is effective." Ibn Nujaym revises this opinion and states that the sound opinion is that the guardian cannot be fired because the testator who appointed this guardian is more attentive to his own interests than a judge could be. How then could the judge fire him? "This opinion should be the *fatwā* of the Ḥanafī school due to the corruption of judges in our times," Ibn Nujaym concludes.[192]

To examine the boundaries of the judges' authority, Ibn Nujaym narrates the following *fatwā* from *al-Fatāwā al-Ṣughrā*, "If the appointed caretaker of the endowment dies in the life of the endower, the decision for appointing a new caretaker is the endower's decision, not the judge's. Yet, if the endower himself is dead, the guardian in this case (who is appointed by the deceased) is the preferred person to make the decision (rather than the judge). If the deceased did not appoint any guardians, then the decision will be left up to the judge."[193]

Ibn Nujaym explains that this opinion demonstrates that the judge's ruling is only admissible in the absence of any guardian and beneficiaries of the deceased. He concludes that the judge has the authority to decide on the affairs of the endowment exclusively in the absence of any stated conditions of the endower. In principle, the appointed caretaker of the endowment is the only one who has the authority to decide on the salaries of the endowment. Ibn Nujaym determines: "The authority of the judge is only admissible in the absence of a stated caretaker. Thus, whoever claims an absolute authority for judges, he has only followed his own whims and corrupted his faith to benefit from life."[194]

[192] Ibid.
[193] Ibid.
[194] Ibid.

Throughout his treatise, Ibn Nujaym is adamant about emphasizing the corruption of judges in his time. This leads him to revise an early Ḥanafī position to address his reality. He argues that family members, who are known for their righteousness, can manage their private endowments and can appoint a caretaker of the endowment without seeking the opinion of the judge. Although early Ḥanafīs stated that it is preferred to file their case with a judge, Ibn Nujaym intervenes to say that a judge has no authority over family endowments the beneficiaries of which are stipulated in the endowment certificate. He concludes: "If the early Ḥanafīs witnessed what the late Ḥanafīs experienced, they would have joined the consensus on the late Ḥanafī opinion. Thus, whoever claims an absolute authority for the judge, they side with falsehood, forsake the truth, and violate it."[195]

CONCLUSION

Although Ibn Nujaym recognizes the legitimacy of the Ottoman political and legal authority, he offers unadorned criticism for the corruption within the Ottoman state. Late Ḥanafī jurists, represented here by Ibn Nujaym, were able to articulate a rigorous legal response to state practices. Ibn Nujaym's legal scholarship on the sulṭān's and judges' authority is indicative of how late Ḥanafī jurists did not act as apologists for the abusive practices of the Ottoman state. He is interested in articulating a viable legal order in which the state has become part of the law-making process, and even refers to a sulṭānic order in his *al-Ashbāh wa al-Naẓāʾir*.[196] Ibn Nujaym draws the boundaries between late Ḥanafī jurists in the early modern period and the Ottoman state. Late Ḥanafī jurists grant political rulers (the sulṭān/Imām) public authority

[195] Ibn Nujaym, *Rasāʾil*, 34.
[196] Ibn Nujaym, *al-Ashbāh*, 334.

(*wilāya ʿāmma*) to emphasize the legitimacy of their discretionary powers. They characterized this authority to be within the *sharīʿa*'s standards.

Ibn Nujaym articulates a distinct late Ḥanafī authority in the early modern period in relation to early Ḥanafī scholarship. This is reflected in his recurrent references to late Ḥanafī opinions, consensus, figures, issues, and controversies. He employs different rationales to depart from the eponyms' opinions. For instance, he invokes Egyptian custom (*ʿurf al-qāhira*, *ʿurf al-diyār al-miṣriyya*), the change of time and circumstances, and widespread corruption in his time as critical factors for his legal reasoning. Furthermore, Ibn Nujaym's legal scholarship had an immense influence on the later Ḥanafī scholarship. His legal works were the point of reference for the 17th - 19th century Ḥanafī jurists, and they shaped debates and opinions among Ḥanafīs in this later period. The significance of Ibn Nujaym is also reflected in many commentaries, which were primarily dedicated to his *al-Baḥr al-Rāʾiq*.

In their engagement with the Ottoman state, late Ḥanafī jurists did not necessarily agree with Ottoman state policies. These jurists rejected, accepted, and expanded certain policies and decisions by the Ottoman state. A key element in this chapter has been to stress the multi-faceted nature of the authority structure of the political and legal spheres in the Ottoman Empire. This chapter provides evidence that the Ottoman state and its local actors in the provinces such as local rulers, judges, and the local treasury were in conversation with Islamic legal professionals on many issues. We see in Ibn Nujaym's legal treatises how the local rulers used to send him questions and seek his advice to navigate new emergent situations. At the same time, we witness the powerful style of the treatise that Ibn Nujaym wrote to criticize local officials and judges and their corruption. It is evident that late Ḥanafī jurists defended the legitimacy of the Ottoman

state, but that they also offered criticism for what they saw as deviation from justice and proper governance.

The works of Ibn Nujaym provide a window through which we are able to revisit the emphasis in the secondary literature on court archives as the proper medium to explore how Islamic law was actually applied. To confine practical aspects of Islamic law to adjudication is a mischaracterization of the legal practice of Islamic law in the Ottoman period. In fact, it is difficult to understand the juridical reasoning in many cases unless the reader is aware of the background of such issues in the authoritative commentaries in the *madhhab* (such as in the endowment case of the second case study on state authority). Also, the assumption that books of jurisprudence address the theory while the *fatāwā* and judiciary alone engage social reality is not indicative of the development of the legal discourse in late Ḥanafī scholarship.

The concerns in the secondary literature, especially in Ottoman studies circles, appear to mirror modern concerns about the separation of power in modern nation states. The paradigm through which the judiciary sustains its authority and relevance during the Ottoman Empire should be explored against its own internal logic. Thus, to characterize any legislative role for the political authority as an encroachment on the legal domain should be revisited. Like the Mamluk Ḥanafīs, Ottoman Ḥanafī jurists recognized a substantial role for the political authority through *siyāsa* jurisdiction in the administration of justice. However, late Ḥanafī legal literature in the early modern period goes further to authorize a legislative role for the political authority in the law-making process.

The importance of Ibn Nujaym is reflected in the late 19th century references by the *Mecelle* drafters to his work on legal maxims. These legal maxims were instrumental in the modernization process of the legal systems within the Ottoman Empire. This manifested in the

creation of the *Mecelle* and the subsequent family code. The earliest criticism of Ḥanafī legal commentaries that sought to promote the use of legal maxims in the place of commentaries was written by the late Ottoman Ḥanafī jurist Maḥmūd b. Muḥammad Naṣīb Ḥamza (d. 1887), the *muftī* of Damascus. He criticizes what he calls the stagnant situation of legal manuals (*mutūn*) of his time, describing these manuals as blind (*ʿamyāʾ*) because they are detached from the reality of peoples' everyday affairs.[197] He emphasizes two functions for legal maxims: (1) to produce answers to new emerging cases (*lil wuṣūl ilā ājwibat al-nawāzil*); (2) to facilitate the process of legal knowledge and reasoning (*tashīl al-masālik*) for students and researchers.[198] These attestations to the importance of legal maxims (*qawāʿid*) provide evidence for the ability of the *qawāʿid* to accommodate new emerging cases within the fold of Islamic law. Also, these legal maxims assist jurists to exercise a wide range of discretion.[199]

The late discourse reformulations of Islamic legal schools are not unique phenomena to the Ḥanafī school. Yet, Islamic legal schools express these "late" reformulations in very different ways.[200] The Ḥanafī school offers the most to examine in this regard because of its official adoption by the Ottoman Empire. The direct encounter with the Ottoman state, and its incorporation of Ḥanafī jurists and judges within its apparatus, provides the context in which we can examine the late Ḥanafī jurists' response to the state and how they understand their own authority, identity, and function in relation to early Ḥanafī authorities. The techniques that they use to articulate their authority and methodology are indicative of the highly negotiatory historical process that the tradition goes through. The late Ḥanafī tradition of the early modern

[197] Maḥmūd b. Muḥammad Naṣīb Hamza, a*l-Farāʾiḍ al-Bahiyyah fī al-Qawāʿid al Fiqhiyya* (Damascus: Salīm al-Mudawwar, 1298/1880), 2.
[198] Ibid.
[199] Intisar Rabb, *Doubt's Benefit: Legal Maxims in Islamic Law*, 1.
[200] See Ahmad El Shamsy on the notion of authority in the late Shāfiʿī school. Ahmad El Shamsy, "The Ḥāshiya in Islamic law: A Sketch of the Shāfiʿī Literature," *Oriens* 41(2013): 291-292.

period is formulated and exists in conversation with early Ḥanafī methodological commitments and doctrinal attitudes, thereby gaining its authority and distinct character.

CHAPTER TWO
"THE SULṬĀN SAYS":
STATE AUTHORITY IN EARLY MODERN ḤANAFĪ TRADITION

This chapter examines the process by which Ḥanafī jurists during the 17th - 18th century authorized edicts and orders of the Ottoman state to influence their juristic discourse and juridical reasoning. I dedicate my attention to the following jurists: Ḥasan b. ʿAmmār al-Shurunbulālī (d. 1659), ʿAbd al-Raḥmān b. Muḥammad b. Sulaymān known as Shaykh-Zāda (d. 1667) or Dāmād Efendī, ʿĀlāʾ al-Dīn al-Ḥaṣkafī (d. 1677), and Ḥāmid b. ʿAlī al-ʿImādī (d. 1757). These jurists are the markers for Ḥanafī legal scholarship in the 17th and 18th century. The works these jurists produced are among the authoritative Ḥanafī works during this era. Additionally, the 19th century Ḥanafī jurists embraced these authorities and their opinions in the their legal scholarship.

I argue that the Ottoman state edicts and sulṭānic orders were consistently incorporated, for the first time, in the authoritative Ḥanafī legal commentaries, treatises, and *fatāwā* literature of the 17th and 18th centuries. These Ḥanafī legal works recurrently refer to the Ottoman *muftī* Abū al-Suʿūd Efendī (d. 1574), in particular, citing his legal opinions and his treatise *Maʿrūḍāt*. The *Maʿrūḍāt* is a collection of legal opinions (*fatāwā*) issued by Abū al-Suʿūd and sanctioned by sulṭān Süleyman I (r. 1520-1566).[1] A key feature in the *Maʿrūḍāt* is the obligation (*ilzām*) for the judiciary and the jurists to act upon these edicts. Ḥanafī jurists from the 17th - 19th centuries refer to the *Maʿrūḍāt* and emphasize their obligatory nature in their legal commentaries,

[1] The *Maʿrūḍāt* (Tr. *Maʿrūzāt*) primarily exist in Ottoman Turkish. The only Arabic rendering of its content is found scattered in late Ḥanafī legal commentaries. The whole text of the *Maʿrūḍāt* is usually found attached to *fatāwā* collections of Ottoman *muftīs*. Abū Suʿūd Efendī, *Maʿrūḍāt* (Ann Arbor: University of Michigan, Isl. Ms. 69, fols. 268b – 272a [5 fols., copied c. 1149/1736]). The complete text of *Maʿrūḍāt* is transcribed in modern Turkish see Ahmet Akgündüz, *Osmanlı Kanunnameleri ve Hukuki Tahlilleri*, vol. 4: 35-59.

treatises, and *fatāwā* collections. *Maʿrūḍāt Abū Suʿūd* is not only a new legal genre on its own,[2] but also because it is comprised of state edicts it influenced and changed some Ḥanafī doctrines. I submit that this late Ḥanafī legal discourse assigns certain authority and probative value to the edicts and orders of the Ottoman state. Late Ḥanafī jurists employ state authority to settle juristic disputes, adopt specific conclusions in their *fatāwā*, and to establish state orders as authoritative and final references. Additionally, this chapter affirms the authority of Ibn Nujaym as a central figure in late Ḥanafī scholarship by demonstrating consistent references to his treatises, opinions, and *fatāwā* in the works of late Ḥanafīs in the early modern period.

ARTICULATIONS OF *MADHHAB* AUTHORITY IN THE 17TH CENTURY

Ghiyāth al-Dīn Ghānim b. Muḥammad al-Baghdādī (d. 1620) describes the authority structure of the Ḥanafī school in his treatise, *Maljaʿ al-quḍāh ʿinda taʿāruḍ al-bayyināt* (*The Refuge of Judges Upon Conflicting Evidence*). This treatise is designed to guide Ḥanafī judges and *muftīs* to the authoritative opinions and hierarchy within the school. Al-Baghdādī discusses the realm of *madhhab* authority in his conclusion to this treatise. His articulations of *madhhab* authority affirm the process by which late Ḥanafīs understood the authoritative legal opinions in the school.[3] Al-Baghdādī explains: "When the *muftīs* of our times from among the colleagues of our school are asked to issue a ruling about a situation – and they are certain that the issue is narrated in the authentic narrations of the school (*ẓāhir al-riwāya*) with no difference of opinion – they are more inclined to follow the opinions in the authentic narrations and adopt those rulings in their *fatāwā*."[4] Also, al-Baghdādī insists, his Ḥanafī jurist contemporaries do not oppose these authentic opinions with their own rulings even if his contemporaries are extraordinary *mujtahids*.

[2] Haim Gerber, *State, Society, and law in Islam* (New York, State University of New York, 1994), 88-89.
[3] Ghānim al-Baghdādī, *Maljaʿ al-Quḍāh ʿinda Taʿāruḍ al-Bayyināt*, Folio 54a.
[4] Ibid.

He explains this assertion by arguing, "it is obvious that the eponyms of the school captured the truth (i.e. the best judgment on this case), and later scholars do not surpass them. Their *ijtihād* does not reach the degree of the eponyms' *ijtihād*." Therefore, the opinions of those jurists who oppose the authentic narrations of the eponyms should not be taken into consideration, and their legal proofs should not be investigated. Al-Baghdādī concludes, "the eponyms, Abū Ḥanīfa, Abū Yūsuf, and Muḥammad al-Shaybānī, identified the legal proofs in the school, and they distinguished between what has been established as sound and its opposite."[5]

Furthermore, al-Baghdādī explains that if the ruling of a case is disputed among the eponyms of the school, then the opinions of Abū Ḥanīfa should be prioritized, followed by the opinions of Abū Yūsuf, Muḥammad al-Shaybānī, the scholars from among the companions of Abū Ḥanīfa, and lastly the interpretations (*taʾwīl*) of later Ḥanafī scholars. Al-Baghdādī explains that if Abū Ḥanīfa holds an opinion, and Abū Yūsuf and Muḥammad al-Shaybānī hold a different opinion on the same issue, the ruling will depend on the accompanying circumstances. If the difference is generated by the change of time and circumstances, the opinion of Abū Yūsuf and Muḥammad al-Shaybānī should be adopted due to the change in people's circumstances for many issues such as share-cropping (*muzāraʿa*), financial transactions (*muʿāmala*), and similar matters.[6] Al-Baghdādī reiterates: "This is the consensus that the late Ḥanafīs (*al-mutaʾakhkhirūn*) hold on the mode of authority and hierarchy within the *madhhab*."[7]

However, al-Baghdādī refers to a few scholars who apparently rejected aspects of this established mode of authority within the school. For instance, ʿAbd Allāh b. al-Mubārak (d. 797) is reported to have said: "We should only follow Abū Ḥanīfa's opinions to pass judgments on any case." Al-Baghdādī points to a similar attitude in *Sharḥ al-Ṭaḥāwī*, in which al-Ṭaḥāwī

[5] Ibid.
[6] Ibid.
[7] Ibid.

affirms that the person who is not a *mujtahid* should only follow Abū Ḥanīfa's opinions, and he should not follow the opinions of his disciples, Abū Yūsuf and Muḥammad al-Shaybānī, except in issues such as share-cropping (*muzāraʿa*) and financial transactions (*muʿāmala*).[8] Furthermore, al-Baghdādī points to the fact that some Ḥanafī jurists insist on adopting a later *mujtahid*'s opinions, or on following the results of their own *ijtihād*, rather than adhering to any aspect of the established *madhhab* authority.[9]

Al-Baghdādī also discusses the qualifications of the proper Ḥanafī *mujtahid*. He explains: "Some scholars argued that a *mujtahid* is someone who – when asked to pass a judgment on ten questions – would give sound opinions for eight of them and err in the rest." Others insist, al-Baghdādī explains, that the *mujtahid* is "the one who memorized the *Mabsūṭ,*[10] and he should be familiar with what abrogates and what is abrogated, the clear and the ambiguous, and he should hold a sufficient knowledge of peoples' customs and traditions."[11] Thus, the idea of the *mujtahid* does not cease to exist in the early modern Ḥanafī tradition. Al-Baghdādī defines what a *mujtahid* is in the 17th century because *ijtihād* continues in this period. In order to be a Ḥanafī jurist, one must know what the early authorities say (for instance, by memorizing the *Mabsūṭ*) in order to perform *ijtihād*. Al-Baghdādī asserts the continuing authority of late Ḥanafī jurists by arguing that when late Ḥanafīs agree on a new norm in the school – even without an opinion from earlier Ḥanafī authorities on the issue – the new norm should be followed.[12] However, if

[8] Ibid.
[9] Ibid.
[10] The reference is to Muḥammad b. al-Ḥasan al-Shaybānī's book *al-Aṣl* known as *al-Mabsūṭ*. It is one of the key works of *ẓāhir al-riwāya* in the Ḥanafī school. This work was finally published in its full extent (13 volumes) See al-Shaybānī, *al-Aṣl*, ed. Muḥammad Būynūkālin (Beirut: Dār Ibn Ḥazm lil-Ṭibāʿah wa-al-Nashr wa-al-Tawzīʿ, 2012)
[11] Al-Baghdādī, *Maljaʿ al-Quḍāh*, Folio 54a.
[12] Ibid.

late Ḥanafīs differ on an issue, then they should exert their best *ijtihād* individually and give a *fatwā* based on what it is considered sound according to their own reasoning.[13]

To sum up this discussion, al-Baghdādī's account demonstrates how late Ḥanafīs understand the hierarchy of authoritative opinions within the school. This discussion is essential to our assessment of how to situate *ẓāhir al-riwāya* (authentic narrations) in the work of late Ḥanafī jurists. Al-Baghdādī's insistence that the opinions of the founders are intertwined with elements of time, location, and economic and social realties should draw our attention to the issue of legal methodology rather than the question of imitation and loyalty. Late Ḥanafīs insist that when the conditions upon which the eponyms of the school formulated their opinion change, the legal rulings accompanying them change, too. As a general principle, late Ḥanafīs were able to avoid and revisit *ẓāhir al-riwāya* narrations due to emergent need, necessity, and widespread social practices. This approach is sustained for another two centuries, when we see that the 19th-century Ḥanafī jurist Ibn ʿĀbidīn confirms this authority structure within the school.[14]

ḤASAN B. ʿAMMĀR AL-SHURUNBULĀLĪ (D. 1659)[15]

My discussion of al-Shurunbulālī's work will focus on two issues: (1) how al-Shurunbulālī conceived of the authority of the Ottoman state, and (2) the ways in which al-Shurunbulālī employs sulṭānic orders and edicts in his legal argumentation and reasoning. I argue that al-Shurunbulālī is very attentive to Ottoman state policies and decisions, despite the fact that he did not hold any official positions. Also, I maintain that al-Shurunbulālī uses sulṭānic orders

[13] Ibid.
[14] Ibn ʿĀbidīn, *Rasāʾil*, 1:44. It is important to note that al-Baghdādī's works remain important sources for 18th and 19th century Ḥanafī jurists.
[15] I relied on two main manuscripts of al-Shurunbulālī's treatises, namely: King Saud University and the Süleymaniye Library copies. See al-Shurunbulālī's work. Ḥasan b. ʿAmmār Abū al-Barakāt Abū al-Ikhlāṣ al-Wafāʾī al-Miṣrī al-Ḥanafī al-Shurunbulālī, *al-Taḥqīqāt al-Qudsiyya wa al-Nafaḥāt al-Raḥmāniyya fī al-Rasāʾil al-Ḥanafiyya* (Riyadh: King Saud University, MS 944 [2 vols., 224 fols./182 fols., copied 1316/1899]); *al-Taḥqīqāt al-Qudsiyya wa al-Nafaḥāt al-Raḥmāniyya*, Murad Molla, No. 000835.

to argue against other legal schools whose opinions clearly violate these orders.

Al-Shurunbulālī's full name is Abū al-Barakāt Ḥasan b. ʿAmmār Abū al-Ikhlāṣ al-Wafāʾī al-Miṣrī al-Ḥanafī al-Shurunbulālī. He was born around 994/1585-6 in a small town in the Delta of Egypt called Shubrabulūla in the province of al-Munūfiyya. At the age of seven, he moved to Cairo, where he studied at al-Azhar. Al-Shurunbulālī is considered one of the most important Ḥanafī jurists at al-Azhar in the 17th century. He was considered to be the premier authority of his generation on Ḥanafī opinions. He died in 1069/1658-9 and was buried in the cemetery of al-Muqaṭṭam. He was a contemporary of important Ḥanafī jurists such as Khayr al-Dīn al-Ramlī, who studied in Egypt and spent most of his career in Palestine.[16]

Al-Shurunbulālī was a prolific jurist. A number of works are attributed to him, including: *Nūr al-Iḍāḥ wa Najāt al-Arwāḥ fī al-Fiqh al-Ḥanafī*, *Marāqī al-Falāḥ Sharḥ Nūr al-Iḍāḥ*, *Sharḥ Manẓūmat Ibn Wahbān*, and his legal *rasāʾil* known as *al-Taḥqīqāt al-Qudsiyya*. He also authored a legal commentary, titled *Ghunyat Dhawī al-Iḥkām*, on *Durar al-Ḥukkām fī Sharḥ Ghurar al-Aḥkām* by Mullā Khusraw (d. 1480). Kātib Çelebi, Muṣṭafā b. ʿAbd Allāh, Ḥājjī Khalīfa (d. 1657) points out, in his encyclopedic work *Kashf al-Ẓunūn ʿan Asāmī al-Kutub wa-al-Funūn* (The Removal of Doubt from the Names of Books and the Arts), that al-Shurunbulālī's commentary on *al-Durar* was a very popular work in the author's life and many people benefited from it.[17] Al-Shurunbulālī studied with Shaykh ʿAbd Allāh al-Naḥrīrī[18], Muḥammad al-Muḥibbī (d. 1699), and ʿAlī b. Ghānim al-Maqdisī (d. 1595).[19] We are told that many Egyptian and Syrian scholars studied with al-Shurunbulālī.[20]

[16] Ḥajjī Khalīfa, *Kashf al-Ẓunūn*, 2:1199. ʿAmr Kaḥḥāla, *Muʿjam al-Muʿallifīn*, vol. 3:215, 265.
[17] Ibid.
[18] I did not find an exact death date for Shaykh ʿAbd Allāh al-Naḥrīrī. He appears in al-Muḥibī's *Khulāṣat al-Athar*, vol. 1:402. He was alive till 1013/1604.
[19] Ibid.
[20] Ibid.

In his *al-Taḥqīqāt al-Qudsiyya wa al-Nafaḥāt al-Raḥmāniyya fī al-Rasāʾil al-Ḥanafiyya*, al-Shurunbulālī tells us that the motivation for writing this collection of treatises (60 in total) came from his teacher, Muḥammad al-Muḥibbī, who asked him to compose a work that addresses the important legal issues of his time.[21] Al-Shurunbulālī immediately and positively responded to his teacher's request.[22] He arranges the treatise thematically based on the organization of Ḥanafī books of jurisprudence. The copyist of the manuscript held in the library of King Saud University – who appears to have made the copy for himself – tells us that he copied al-Shurunbulālī's sixty treatises that comprise the *al-Taḥqīqāt* throughout the year 1316/1899. According to the copyist's reports, most of the legal treatises were completed by al-Shurunbulālī himself prior to 1651. For the purposes of this chapter, I will dedicate special attention to three treatises: numbers 10 (on delegating authority to another person for leading prayer), 23 (on the actions promised in oath-making), and 44 (on the statute of limitations on endowment claims).

Rasāʾil al-Shurunbulālī[23]

Risāla #10: "Itḥāf al-arīb bi jawāz istināabat al-khaṭīb" ("Presenting to the clever person the permissibility of delegation by the appointed Imām")[24]

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[21] Ḥasan b. ʿAmmār Abū al-Barakāt Abū al-Ikhlāṣ al-Wafāʾī al-Miṣrī al-Ḥanafī al-Shurunbulālī, *al-Taḥqīqāt al-Qudsiyya wa al-Nafaḥāt al-Raḥmāniyya fī al-Rasāʾil al-Ḥanafiyya* (Riyadh: King Saud University, MS 944 [2 vols., 224 fols./182 fols., copied 1316/1899]).

[22] Ibid.

[23] I am aware of seven treatises from *al-Taḥqīqāt* that have been edited and published. None of the discussed treatises in this chapter appeared to be published. There are some scholars in Saudi Arabia working to edit and publish the whole 60 treatises of al-Shurunbulālī's work. Ḥasan b. ʿAmmār Abū al-Barakāt Abū al-Ikhlāṣ al-Wafāʾī al-Miṣrī al-Ḥanafī al-Shurunbulālī, *al-Taḥqīqāt al-Qudsiyya wa al-Nafaḥāt al-Raḥmāniyya fī al-Rasāʾil al-Ḥanafiyya* (Riyadh: King Saud University, MS 944 [2 vols., 224 fols./182 fols., copied 1316/1899]).

[24] The first discussion on the proscription of the delegation of the Imām appears in Mullā Khusraw's *Durar al-Ḥukkām Sharḥ Ghurar al-Aḥkām* (Damascus: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, n.d), 1:139. Al-Shurunbulālī has a commentary on *Durar al-Ḥukkām* where he supports Kamāl Ibn al-Humām's arguments to reverse this ruling and allow the Imām to delegate others. This opinion has become the authoritative opinion in later Ḥanafī commentaries, see Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 2:140. Al-Shurunbulālī, "Itḥāf al-arīb," *al-Taḥqīqāt*, vol. 1, fol. 85a.

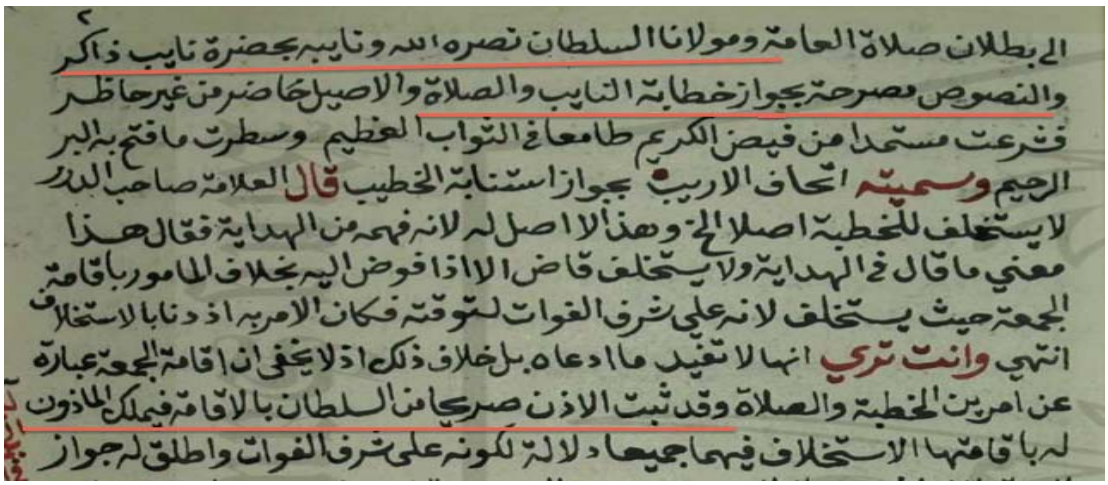

Figure 2.1: Al-Shurunbulālī, "Itḥāf al-arīb," *al-Taḥqīqāt*, vol. 1, fol. 86a.

This is the 10th treatise in al-Shurunbulālī's collection of *Rasāʾil*. It was completed on the 10th of Muḥarram 1046/1636. The subject of this treatise is that a sulṭānic order is a necessary condition of appointing an Imām to perform Friday prayer and to give the *khuṭba* (sermon). This treatise discusses at length how the sulṭānic order also authorizes the appointed Imām to delegate someone else to give the Friday *khuṭba* and to lead the prayer. Al-Shurunbulālī primarily engages with two Ottoman Ḥanafī jurists: Shaykh al-Islām Mullā Khusraw (d. 1480), identified in the text as *ṣāḥib al-ḍurar*, and Ibn Kamāl Paşa (d. 1534). Al-Shurunbulālī points out that Mullā Khusraw prohibits the appointed Imām from delegating the duty of leading Friday prayers to someone else. Also, we learn that Ibn Kamāl Paşa argues that it is impermissible for a person to whom the Imām has delegated the duty of leading prayer to give the Friday *khuṭba* in the presence of the appointed Imām. Al-Shurunbulālī engages with these two opinions and explains the way Ḥanafīs should address the issue of delegation and sulṭānic authority. Al-Shurunbulālī argues that these opinions lead to the invalidation of the Friday prayer of the Muslim community. His opinion is that the sulṭānic order and the central texts of the school (*nuṣūṣ*) make it possible for the appointed Imām to delegate his Friday prayer duties to someone else, and for that person

to give the Friday *khuṭba* and to lead the prayer in the presence of the appointed Imām.[25] (Figure 2.1)

Al-Shurunbulālī challenges the opinions of Mullā Khusraw and Ibn Kamāl Paşa. To do so, he relies on both the nature of sulṭānic orders and the authoritative opinions of the school. Al-Shurunbulālī explains that the legal ruling prohibiting the appointed Imām from delegating his Friday prayer duties does not have any supporting evidence. He argues that Mullā Khusraw misunderstood the statement on this matter from *al-Hidāya*, which is the basis for Mullā Khusraw's legal ruling. Al-Shurunbulālī argues that *al-Hidāya* states: "A judge cannot delegate his position to someone else, unless the sulṭān conferred such authority to do so upon him. This is different from the case wherein an appointed Imām already has the authority to delegate the *khuṭba* and leading the prayer to someone else. The Friday prayer is strictly timed and unless it is fulfilled it will be missed. The sulṭānic order to the appointed Imām also implies the Imām's authority to delegate the duties to someone else."[26]

Al-Shurunbulālī concludes that the statement in *al-Hidāya* does not support Mullā Khusraw's opinion. For him, the statement renders the exact opposite result of Mullā Khusraw's ruling. Al-Shurunbulālī maintains that the Friday service is composed of two parts: (1) the *khuṭba*, and (2) the prayer. He elaborates that the sulṭānic order to appoint an Imām to lead the Friday prayers also entails that the appointed Imām has the authority to choose another person to perform both parts of the Friday service. Al-Shurunbulālī reiterates that the Imām's delegation of duties has a general nature, and thus it encompasses the conditions of illness, health, absence, or even presence of the appointed Imām. Al-Shurunbulālī insists that this should be the guiding principle in this case until a *mujtahid* or a scholar from *ahl al-tarjīḥ* (those who have the

[25] Al-Shurunbulālī, "Itḥāf al-arīb," *al-Taḥqīqāt*, vol. 1, fol. 85b.
[26] Al-Shurunbulālī, "Itḥāf al-arīb," *al-Taḥqīqāt*, vol. 1, fol. 86a.

authority to declare the preponderant opinion of the Ḥanafī school) restricts this general ruling. Al-Shurunbulālī engages with the opinions of Ibn al-Humām al-Ḥanafī, Qāḍī Khān, al-Sarakhsī, and Abū Ḥanīfa to support his own opinion. The authoritative argument, as it is articulated by al-Shurunbulālī, is that the sulṭān's order to the appointed Imām implies the Imām's authority to delegate some of his duties to someone else.[27]

The opponents of al-Shurunbulālī stress that the Friday *khuṭba* and the position of Imām fall under the sulṭān's authority, just like the judiciary. Hence, it is not permissible for anyone other than the sulṭān to delegate these duties except with the sulṭān's explicit permission. Al-Shurunbulālī contends that seeking an explicit permission from the sulṭān for a valid delegation of duties is an incorrect opinion on the issue. He claims that this opinion is refuted by the agreement of late Ḥanafī scholars.[28]

To conclude, al-Shurunbulālī debates the ways in which some Ḥanafīs interpreted the nature of the sulṭānic order in this treatise. The discussion is centered on how Ḥanafī jurists should understand the reach of sulṭānic orders, and how these orders should be interpreted.[29] Al-Shurunbulālī stressed that the appointed Imām has an implicit permission, from the sulṭān, to delegate his duties. This implicit understanding is sufficient and valid for authorizing the Imām to delegate as he sees fit. The method by which al-Shurunbulālī situates sulṭānic orders, and the way he engages earlier Ḥanafī legal scholarship in this case, highlight the probative value of the sulṭānic order in his arguments.

[27] Al-Shurunbulālī, "Itḥāf al-arīb," *al-Taḥqīqāt*, vol. 1, fol. 86b.
[28] Ibid.
[29] Al-Shurunbulālī, "Itḥāf al-arīb," *al-Taḥqīqāt*, vol. 1, fol. 92a.

Risāla #23: "Aḥsan al-aqwāl li al-takhalluṣ ʿan maḥẓūr al-fiʿāl" ("The best of statements to remove the proscribed actions")[30]

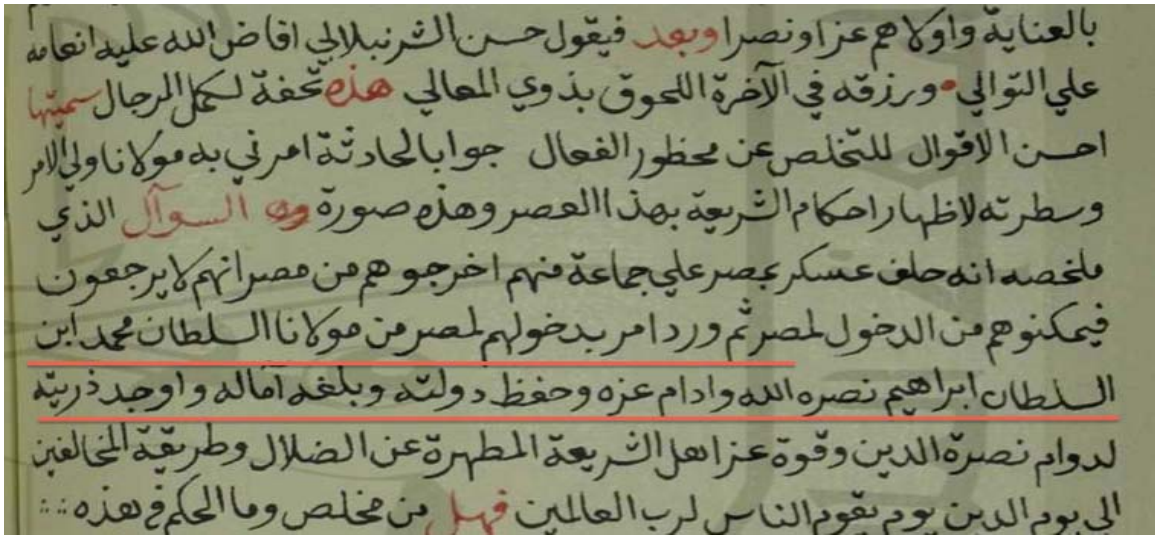

Figure 2.2: Al-Shurunbulālī, "Aḥsan al-aqwāl," *al-Taḥqīqāt*, vol. 1, fol. 169b

This treatise was completed in 1062/1652. It was composed based on a sulṭānic need to respond to an emergent issue. The question in this case involves a military group that was sanctioned to be banished from Egypt. Military leaders took an oath (*yamīn*) that this group would never be allowed to re-enter Egypt. Following this oath, a sulṭānic order was issued by the Ottoman Sulṭān Muḥammad b. Sulṭān Ibrāhīm (known as Muḥammad IV [1642-1693]) to allow this group to re-enter Egypt.[31] Al-Shurunbulālī's answer was very clever. He affirms that the verbal statement by the Egyptian soldiers who took the oath not to allow this banished group to re-enter Egypt would be sufficient to fulfill this oath. In other words, they would not be required to act on their verbal statement, as their words are sufficient to fulfill the oath.[32]

[30] Al-Shurunbulālī, "Aḥsan al-aqwāl," *al-Taḥqīqāt*, vol. 1, fol. 169a.
[31] Al-Shurunbulālī, "Aḥsan al-aqwāl," *al-Taḥqīqāt*, vol. 1, fol. 169b. Sulṭān Muḥammad IV ruled between August 12, 1648 and November 8, 1687. See Günhan Börekçi, "Mehmed IV," in *Encyclopedia of the Ottoman Empire*, ed. Gábor Ágoston and Bruce Masters (New York: Facts On File, Inc., 2009), 370-371.
[32] Al-Shurunbulālī carefully situates the emergent case of his time and engages with the Ḥanafī legal tradition to respond to this situation. See Kamāl b. al-Humām, *Fatḥ al-Qadīr*, vol. 5:210.

Al-Shurunbulālī provides an extensive survey of the authoritative Ḥanafī opinions to support his *fatwā*.[33] He concludes that Ḥanafīs agree that the fulfillment of this oath is attained by the soldiers verbally stating that they would not admit this banished group to Egypt. Al-Shurunbulālī explains that the military leaders do not have to intervene physically to prevent the admission of the banished group into Egypt. He elaborates that his judgment on the method of fulfilling this oath is influenced neither by the idea of duress nor by the obligatory nature of the sulṭānic order. Al-Shurunbulālī insists that these elements do not negate the violation of one's oath. The core factor that helps to shape this judgment, al-Shurunbulālī maintains, is the existence of the sulṭān's authority over Egypt.[34]

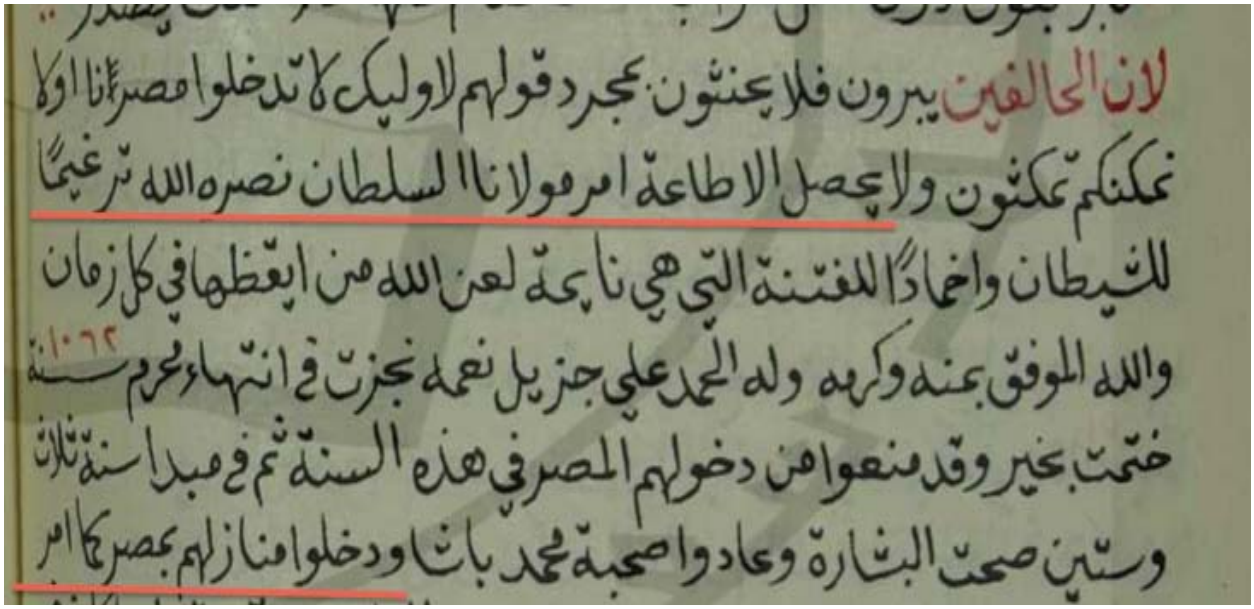

Figure 2.3: Al-Shurunbulālī, "Aḥsan al-aqwāl," *al-Taḥqīqāt*, vol. 1, fol. 170b

Al-Shurunbulālī reiterates that it is imperative to obey the sulṭānic order. Al-Shurunbulālī informs us that the military group in this case had been banished for a year. They were forced to leave Egypt in 1062/1652 and they were able to re-enter Egypt in the beginning of 1063/1653.

[33] Al-Shurunbulālī relies on the opinions of Qāḍī Khān, Kamāl b. al-Humām, Ibn al-Bazzāz, al-Marghinānī, and Ibrāhīm Karakī, see Al-Shurunbulālī, "Aḥsan al-aqwāl," *al-Taḥqīqāt*, vol. 1, fol. 169b.
[34] Al-Shurunbulālī, "Aḥsan al-aqwāl," *al-Taḥqīqāt*, vol. 1, fol. 170b.

They returned to their homes according to the order of Sulṭān Muḥammad IV.[35] We observe that the main point of contention of this treatise was how to accommodate the consequences of the oath within the context of the obligatory nature of sulṭānic orders and the Sulṭān's sovereignty. It is this authority of the Sulṭān and his dominion over Egypt that shaped the discussion. This treatise further supports the notion that the incorporation of sulṭānic orders into the legal discourse itself, and the probative value and authority assigned to them, are unique Ottoman Ḥanafī phenomena.

Risāla #44: "Tadhkirat al-bulaghāʾ al-nuẓẓār bi wujūh radd ḥujjat al-wulāh al-nuẓẓār ("A reminder for the endowments' caretakers of the reasons for rejecting the endowers' certificate")[36]

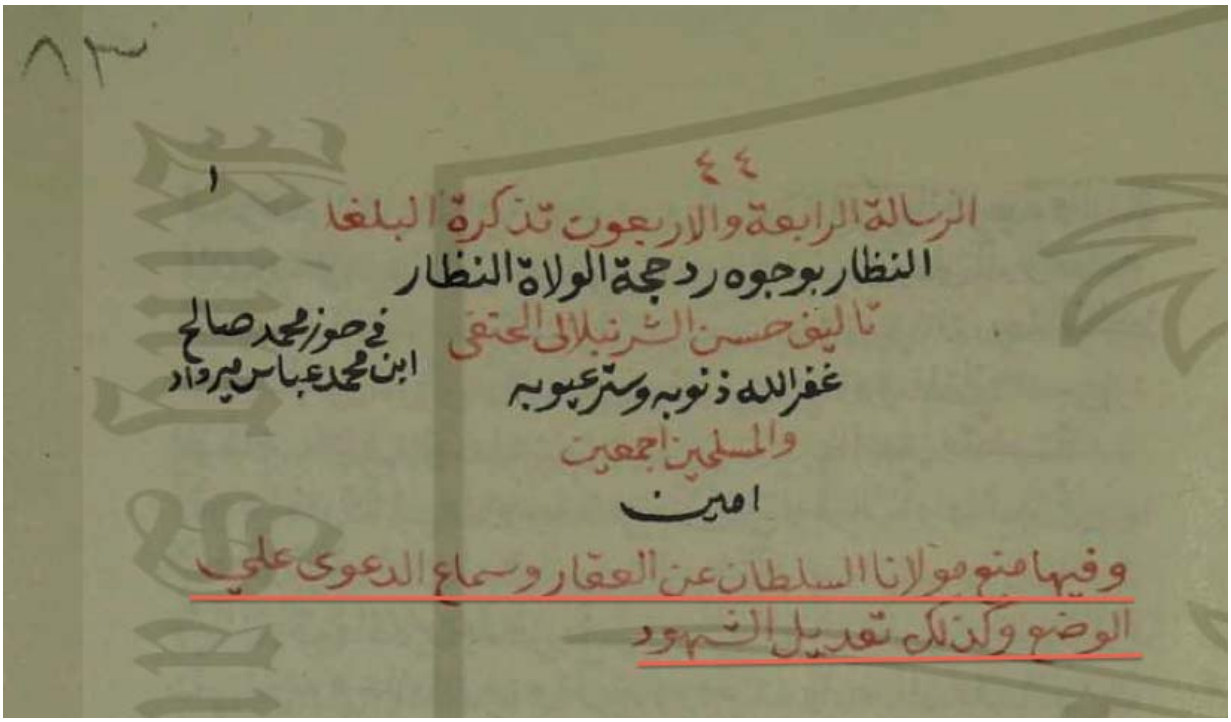

Figure 2.4: Al-Shurunbulālī, "Tadhkirat al-bulaghāʾ," *al-Taḥqīqāt*, vol. 2, fol. 83a.

[35] Ibid.
[36] Al-Shurunbulālī, "Tadhkirat al-bulaghāʾ," *al-Taḥqīqāt*, vol. 2, fol. 83a. The issue of endowment supervision is discussed extensively in the works of Ibn Nujaym. See Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5: 241, 263.

This treatise was completed on Saturday, 26 Ṣafar 1061/1651. On the cover of this treatise, the copyist (and most likely, al-Shurunbulālī) stipulates three key topics that are discussed in it: the sulṭānic order to prevent judges from hearing legal claims after a specific time frame (statute of limitations), the conditions for the validity of hearing legal claims, and the conditions for accepting witnesses' testimony. This treatise demonstrates that Ottoman sulṭānic orders and edicts were completely incorporated in Ḥanafī scholarship by the 17th century. Most importantly, these imperial orders are used as a basis for rejecting certain legal opinions and settling disputes in the Ḥanafī school on the issue of the statute of limitations.[37]

Al-Shurunbulālī explains that this treatise addresses a contemporary incident, and it was written to identify the legal defects in two title deeds presented by two brothers who wanted to establish themselves as beneficiaries of the endowment of their late father, Ḥijāzī b. Muḥammad b. Kanāyif al-Burullusī. The brothers also sought to establish themselves as the endowment caretakers. The endowment itself is a house located on al-ʿUrābī street in the province of Rosetta in the Nile Delta. Al-Shurunbulālī informs us that the father of these two brothers designated the late ʿAlāʾ al-Dīn, his descendants, and his wife as the exclusive beneficiaries of this endowment. The two brothers claimed that ʿAlāʾ al-Dīn incorporated the brothers as beneficiaries of the endowment after his descendants and his wife perished based on ʿAlāʾ al-Dīn's legal capacity to incorporate and excise beneficiaries from the endowment. Al-Shurunbulālī notes the fact that the two brothers filed their claim more than ten years after ʿAlāʾ al-Dīn's death. We are also told that the brothers filed this claim in Cairo (as opposed to Rosetta) and a legal certificate (or title deed, *tamassuk*) was issued to support their claim. The central question that al-Shurunbulālī addresses is: does this document legally affirm that the brothers' claim, and thus their incorporation as beneficiaries of the endowment, are valid? Or is the document itself invalid and thus ineffective?

[37] Al-Shurunbulālī, "Tadhkirat al-bulaghāʾ," *al-Taḥqīqāt*, vol. 2, fol. 83b.

Al-Shurunbulālī rules that the brothers' claim is not established. He insists that their argument is based solely on these title deeds, which state that the incorporation of the two brothers as beneficiaries of the endowment is legally valid when made by the one who has the legal capacity to do so. However, their claim is not substantiated due to the lack of conditions of validity in the two title deeds. Al-Shurunbulālī dedicates most of his treatise to specifying the legal deficiencies in these title deeds, which forge the foundation of the brothers' claims. He explains that the purpose of this treatise is to assist other jurists to address and solve similar issues.[38] Al-Shurunbulālī centers his discussion on elaborating the extent of a judge's authority on such matters, and Ḥanafī differences on the statute of limitations for a person to file such a legal claim in a court of law.

Relying on *Kanz al-Daqāʾiq* by Abū al-Barakāt al-Nasafī (d. 1310), a key late Ḥanafī text that early modern Ḥanafīs heavily relied upon in their commentaries, al-Shurunbulālī asserts that if a piece of property is not within the jurisdiction of a judge, then that judge's rulings on cases related to the property are not valid. Al-Shurunbulālī emphasizes that the commentator on *al-Kanz* (who remains nameless) argues that the judge does not have jurisdiction over the locale in which this property is found.[39] Al-Shurunbulālī points to various cases discussed in Ḥanafī *fatāwā* that might suggest that the limitations of the judge's authority to his geographical jurisdiction are not held unanimously by Ḥanafīs. He solves this issue by declaring that the rulings in the *fatāwā* literature cannot take precedence over the legal norms in *Kanz al-Daqāʾiq*.[40] Thus, al-Shurunbulālī screens out most of the authoritative Ḥanafī discussions on the

[38] Ibid.
[39] Al-Shurunbulālī, "Tadhkirat al-bulaghāʾ," *al-Taḥqīqāt*, vol. 2, fols. 83b-84a. It is important to mention that Ibn Nujaym holds the exact opposite opinion. He insists that geographical locale is not a condition for the judge to pass his judgment, even if the disputed property is outside the judge's jurisdiction. See Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 6:280.
[40] Al-Shurunbulālī, "Tadhkirat al-bulaghāʾ," *al-Taḥqīqāt*, vol. 2, fol. 84a.

limitation of judges' decisions based on their geographic jurisdiction. He presents a trajectory of legal opinions wherein Ḥanafīs appear to be inclined to restricts judges' decisions to within their geographic jurisdictions.

Central to al-Shurunbulālī's legal treatise is his discussion of the limitations of the time frame within which a person can file a legal case. This phenomenon is known as the statute of limitations in the common law system in the United States, or the period of prescription in civil law jurisdictions in Europe. Al-Shurunbulālī starts this discussion by invoking the work, *al-Fawākih al-Badriyya* by Ibn al-Ghars al-Ḥanafī (932/1526). Ibn al-Ghars supports the argument that a legal claim filed thirty-three years after the relevant event, without a legitimate obstacle to filing such a claim earlier, would not be admitted for consideration in court. He insists that one's negligence by not filing a legal claim for this period points to the absence of any legitimate claim in the first place.[41]

Al-Shurunbulālī then refers us to *al-Muhimmāt* by Ibn Kamāl Paşa. Ibn Kamāl Paşa stresses that if a person neglected to file a legal claim for three years, his claim would be invalid and it would not be admitted for consideration in court. He elaborates that, according to early Ḥanafīs, it is not permissible for a judge to rule on claims filed three years after the relevant event, except in three exceptional cases: (1) if the plaintiff was missing for the intervening three year period, (2) if the plaintiff was a young boy who did not reach puberty at the time of the event, or if he was an insane person who did not recover from this condition until three years after the event, or (3) if the defendant is an unjust ruler. As for the person who waits 30 years to file a claim, Ibn Kamāl Paşa explains that the late Ḥanafī opinion is that the claim will not be admitted except in one of the exceptional cases just mentioned. Some other late Ḥanafīs stated

[41] Ibid.

that if the person neglected to file his claim for thirty-six years, the claim would not be admitted for consideration in court.[42]

Ibn Kamāl Paşa attempts to accommodate these various narrations by arguing for the specificity of each narration to a type of legal claim. He explains that the Ḥanafī opinion to reject hearing a case after three years is specific to legal claims regarding endowed or public lands. The opinion preventing judges from hearing a case after thirty years is specific to state lands. The opinion precluding hearing a case after thirty-six years is specific to privately owned lands. Ibn Kamāl Paşa contends that late Ḥanafīs adopted the opinion of preventing judges from hearing cases after thirty years in all legal claims because it is a compromise of all of the stated opinions.[43]

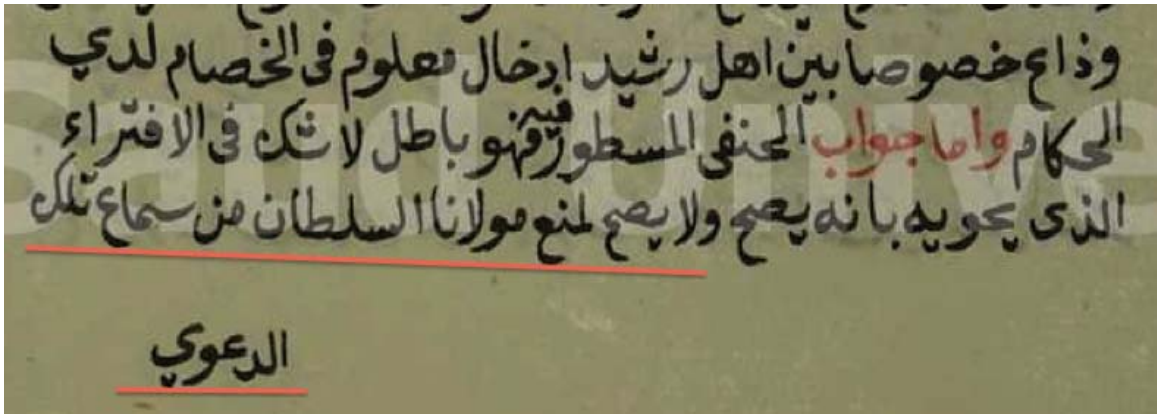

Figure 2.5: Al-Shurunbulālī, "Tadhkirat al-bulaghā'," *al-Taḥqīqāt*, vol. 2, fol. 87b.

Al-Shurunbulālī calls attention to the extreme disparity among these opinions. He is not content with Ibn Kamāl Paşa's reconciliation because of the significant disparity among three, thirty, thirty-three, and thirty-six years as time frames for the limitation of filing legal claims. Al-Shurunbulālī argues that the late Ḥanafīs' *fatwā* to adopt thirty years, as a middle ground for these opinions is not effective for addressing the variety of situations in which people file legal claims. Most importantly, it is not clear to al-Shurunbulālī why Ḥanafī jurists adopted thirty

[42] Ibid.
[43] Al-Shurunbulālī, "Tadhkirat al-bulaghā'," *al-Taḥqīqāt*, vol. 2, fol. 84b.

years as the middle position, and so he rejects it.[44] For al-Shurunbulālī, the compromise among these opinions is not sufficient because it limits the various opinions on this issue to the standard applied to land claims. Al-Shurunbulālī insists that the issue is more general than land claims. He elaborates that the statute of limitations applies to claims related to debts, inheritance, commercial partnership, contract of lease, mortgages, marriage, and certificates of freedom for manumitted slaves.

Al-Shurunbulālī argues that the different periods in which a legal claim can be filed (three, thirty, etc) are the reason behind the imperial order from the sulṭān (*warad al-amr min mawlānā al-sulṭān*) to prevent judges from hearing cases fifteen years after an incident, except for a few exceptions that the imperial order stipulated. Al-Shurunbulālī declares the sulṭānic order to be the middle ground among these various opinions in the school.[45]

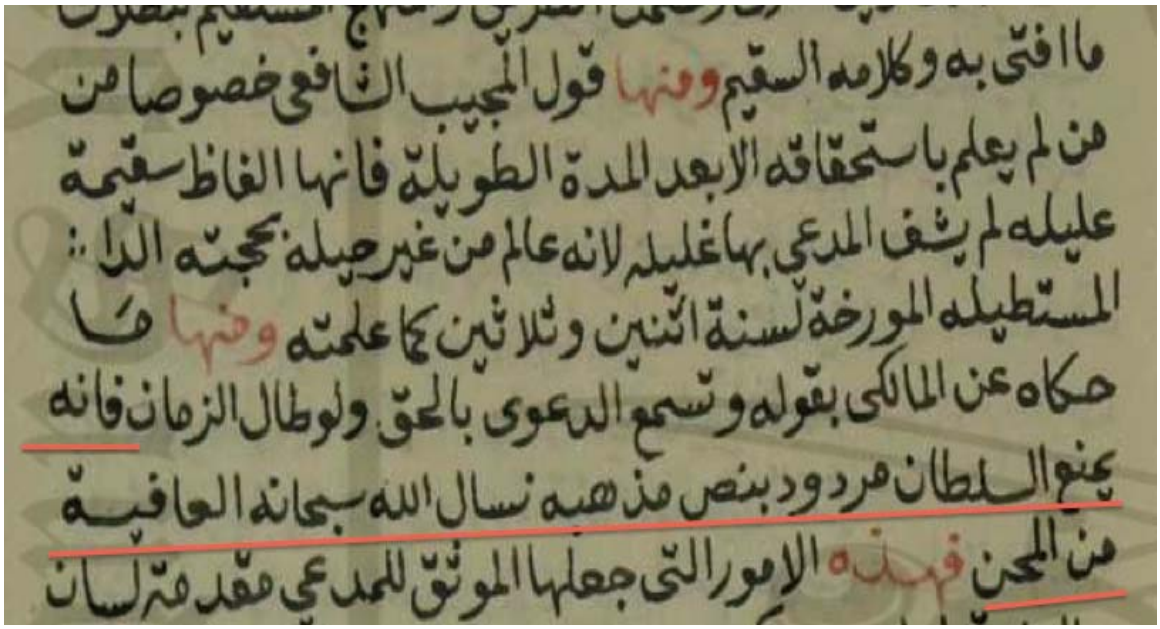

Figure 2.6: Al-Shurunbulālī, "Tadhkirat al-bulaghā'," *al-Taḥqīqāt*, vol. 2, fol. 88a.

Al-Shurunbulālī engages in a lengthy examination of the title deeds presented by the two brothers to establish themselves as beneficiaries of the endowment. He points to the fact that the

[44] Ibid.
[45] Ibid.

title deeds do not specify the date of the incorporation by ʿAlāʾ al-Dīn of the two brothers among the endowment beneficiaries. Al-Shurunbulālī insists that the specification of this date is a must in any legal claim. Also, the title deeds do not specify when the brothers became eligible to act on the endowment and to benefit from the endowment's profits after the death of ʿAlāʾ al-Dīn, his wife, and his descendants. Al-Shurunbulālī emphasizes that among the defects in the title deeds is that the judge who granted them was not identified by his name, lineage, the date of his ruling, or the place where passed his judgment. Al-Shurunbulālī enumerates a few other defects, including the lack of conditions for the soundness of the witnesses' testimony. Based on these legal defects, al-Shurunbulālī rules that the title deeds are invalid.[46]

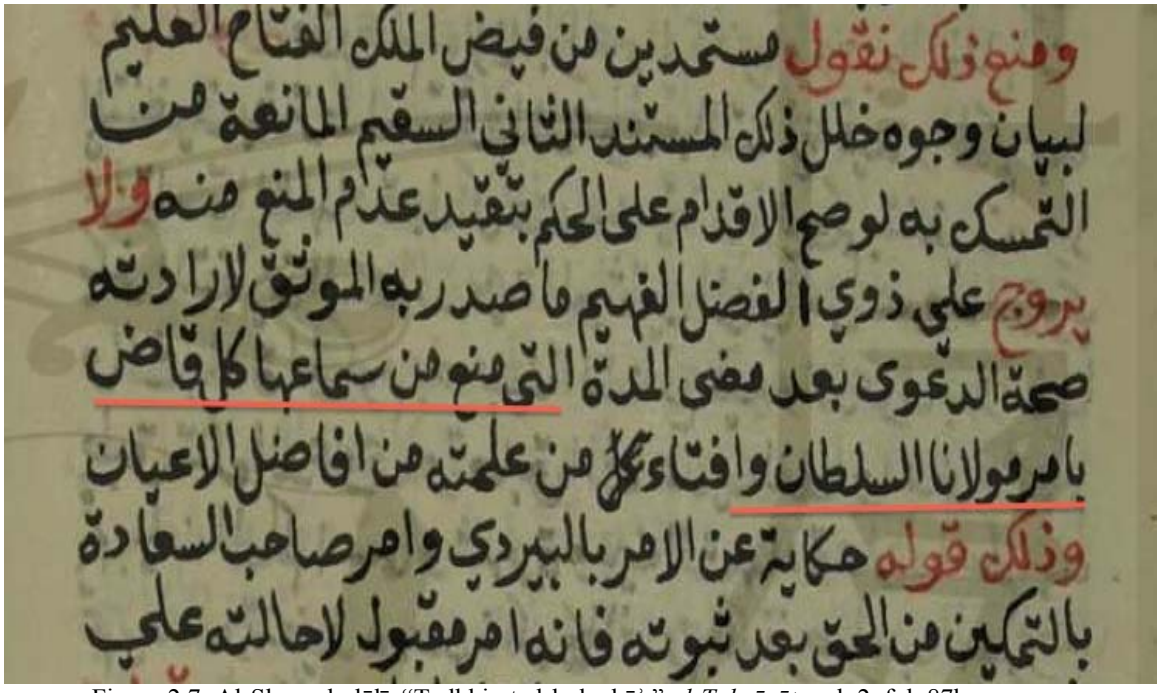

Figure 2.7: Al-Shurunbulālī, "Tadhkirat al-bulaghāʾ," *al-Taḥqīqāt*, vol. 2, fol. 87b.

In addition, al-Shurunbulālī points out that one of these invalid title deeds is dated 8 Jumādā al-Ākhir 1032/1622. He wonders why the claimants were silent and did not legally act on the endowment from 1032/1622 to 1060/1650, when they file their claim. Yet, these two brothers are now seeking to manage the endowment and to be part of its beneficiaries. Al-

[46] Al-Shurunbulālī, "Tadhkirat al-bulaghāʾ," *al-Taḥqīqāt*, vol. 2, fol. 85a.

Shurunbulālī states that the claimants filed their claim after 28 years, and it is established by the sulṭānic order (mentioned above) that judges cannot hear claims after 15 years. On that basis, he declares that it is not permissible for any judge to hear their claim. Also, if it had been possible to hear the two brothers' claim, al-Shurunbulālī reiterates, there is no justificatory reason to rely upon their title deeds produced as a result of the hearing because they are legally invalid.

Based on the sulṭānic order, al-Shurunbulālī declares that a judge's ruling in 1060/1650 to establish the two brothers as beneficiaries of the endowment is invalid. The judge's decision to issue the title deeds was wrong because he should not have heard the case at all. Furthermore, the documents produced by the court are invalid because they lack the basic requirements of authenticity for such claims. Al-Shurunbulālī points out that if a Malikī judge decided to hear the brothers' claim and endorsed it, the judge's decision would not be valid because the conditions for the validity of the title deeds (witness testimony, proper dates, judge's record, etc) do not exist (Figure 2.6). In addition, the sulṭānic order preventing judges from hearing cases after 15 years cannot be ignored, even by a Mālikī judge whose *madhhab* opinion on the statute of limitations differs from that of the Ḥanafīs and the sulṭānic order.[47]

In short, in the Ottoman courts, the claimants were usually asked to support their claims with a *fatwā*, *tamassuk*, *ḥujja* (an official transcript of a legal case from the registers of the court to affirm certain rights), or *amr* (sulṭānic order). The legal term *temessuk* (Ar. *tamassuk*), is an Ottoman word for a legal document that supports claims by the claimants in the court of law. It is a certificate that substantiates one's claims in court. Al-Shurunbulālī clearly believes that these title deeds are forged. Although he does not state this explicitly, every argument implies that fraud was involved in the case of the two brothers.

[47] Al-Shurunbulālī, "Tadhkirat al-bulaghāʾ," *al-Taḥqīqāt*, vol. 2, fols. 87b - 88a.

Most importantly, he assigns probative value and authority to sulṭānic orders in his legal reasoning. This sulṭānic authority is even stated on the title page of the treatise. Furthermore, the sulṭānic order settles the dispute in Ḥanafī legal discourse on the issue of the statute of limitations. Al-Shurunbulālī treats the sulṭānic order as an imperative for all judges in the Ottoman Empire. In fact, he asserts that the sulṭānic order to prevent judges from hearing cases 15 years after the incident is the majority opinion and *fatwā* for authoritative figures among the late Ḥanafīs.[48] Discussions of the role and authority of sulṭānic orders to instruct judges to adopt or avoid certain practices are unique to the Ottoman context, and do not appear in pre-Ottoman Ḥanafī legal works. In Mamluk Ḥanafī legal commentaries, it is evident that the sulṭān's authority was limited to appointing or deposing judges and demanding them to abide by their *madhhab*.[49] The discussion of how the sulṭān determines the statute of limitations is entirely an Ottoman phenomenon.[50]

ʿABD AL-RAḤMĀN B. MUḤAMMAD B. SULAYMĀN AL-KALĪBŪLĪ, SHAYKH-ZĀDA, KNOWN AS DĀMĀD EFENDĪ (D. 1078/1667)

Dāmād Efendī was born in Syria and studied and worked in Cairo and Istanbul. He was interested in *qurʾānic* commentaries, and he is known for a commentary he wrote on al-Bayḍāwī's *Anwār al-Tanzīl*, a key *qurʾānic* commentary of the Ottoman period. He served as a judge in Rumeli, a neighborhood in what is now Istanbul. The most important legal work that he authored is *Majmaʿ al-Anhur fī Sharḥ Multaqā al-Abḥur*, a commentary on Ibrāhīm al-Ḥalabī's (d. 956/1549) legal manual (*matn*) *Multaqā al-Abḥur*. Dāmād Efendī's commentary was important because al-Ḥalabī's work was an essential reference in the late Ḥanafī legal tradition.

[48] Al-Shurunbulālī, "Tadhkirat al-bulaghāʾ," *al-Taḥqīqāt*, vol. 2, fols. 84b and 87a.
[49] Badr al-Dīn al-ʿAynī, *al-Bināya*, vol. 9:3; Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 7:253, 264.
[50] See Chapter 1 for a longer discussion of Mamluk Ḥanafism.

Dāmād Efendī's commentary was first published by *al-Maṭbaʿa al-ʿĀmira* in Istanbul in 1328/1910 along with al-Ḥaṣkafī's commentary on the same work. This was during the reign of Sulṭān Muḥammad Rashād Khān (d. 1918).

In his introduction, Dāmād Efendī praises al-Ḥalabī's work, saying: "Although small in size, it combines all emergent cases."[51] He contends that it is one of the best legal manuals (*mutūn*) in the Ḥanafī school, and he tells us that it "is very popular among Ḥanafīs."[52] Hājjī Khalīfa provides more details on al-Ḥalabī's work. He explains that the work was written in 930/1523, and few commentaries were dedicated to it. Among them are: a commentary by al-Ḥalabī's student ʿAlī al-Ḥalabī (d. 967/1559) in which he recorded his reservations and problems with some issues in al-Ḥalabī's work; a commentary by Muḥammad al-Thayrawī (d. 1016/1607); a commentary by Muḥammad b. Muḥamamad known as Ibn al-Bahnasī (d. 987/1579); a commentary by Nūr al-Dīn al-Bāqānī (d. 995/1586) entitled *Majrā al-Anhur ʿalā Multaqā al-Abḥur*; a commentary by ʿAlāʾ al-Dīn ʿAlī b. Muḥammad al-Ṭarabulsī (d. 1032/1622) titled *Sakb al-Anhur ʿalā Farāʾiḍ Multqā al-Abḥur*; and a commentary by ʿAlāʾ al-Dīn al-Ḥaṣkafī titled *al-Durr al-Muntaqā fī Sharḥ al-Multaqā*.[53]

Throughout the work, it is evident that Dāmād Efendī is attentive to Ḥanafī legal scholarship from the imperial capital, such as that of Mullā Khusraw (d. 885/1480),[54] and to scholarship from the provinces, such as that of the Egyptian Ibn al-Humām al-Ḥanafī (d. 1457).[55] Dāmād Efendī also relies upon Ibn Nujaym's opinions, especially those recorded in his *al-Baḥr*

[51] Dāmād Efendī, *Majmaʿ al-Anhur*, vol. 1:2.
[52] Dāmād Efendī, *Majmaʿ al-Anhur*, vol. 1:3.
[53] Hājjī Khalīfa, *Kashf al-Ẓunūn*, vol. 2:1815.
[54] Dāmād Efendī, *Majmaʿ al-Anhur*, vol. 1: 24,25,26,57,69,71,77,79,92,108,112,115,143,148,150,165,185,186,187. These are the references in two chapters: ritual purity and prayer.
[55] Dāmād Efendī, *Majmaʿ al-Anhur*, vol. 1: 12, 21, 53,67, 79, 86,110,119, 123, 125. These are the references in two chapters: ritual purity and prayer.

al-Rāʾiq.[56] (Figure 2.8) Furthermore, he discusses aspect of the *Maʿrūḍāt Abī al-Suʿūd* in his legal commentary, noting that, "We are now ordered to follow it."[57] In so doing, he provides a window into the process by which the *Maʿrūḍāt* was incorporated in Ḥanafī legal commentaries in this time period.

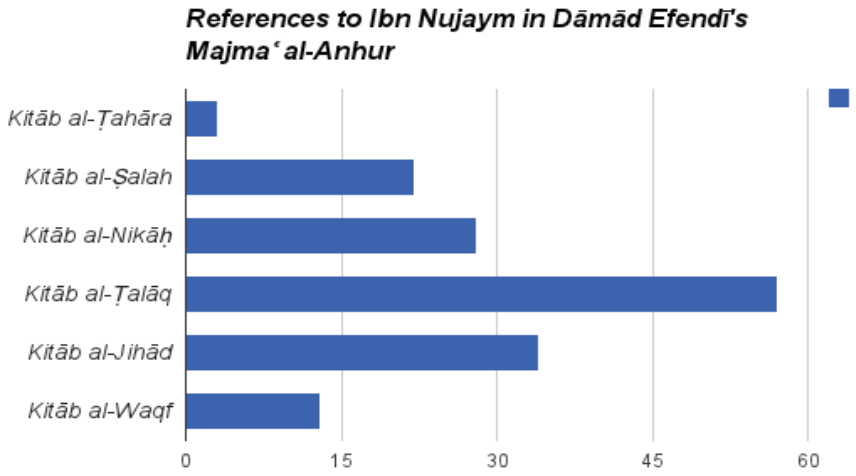

Figure 2.8

Dāmād Efendī's commentary is carefully framed within the context of the Ottoman state. He takes the time to note that he wrote his commentary during the reign of the Sulṭān Muḥammad Khān b. Sulṭān Ibrāhīm Khān b. Sulṭān Aḥmad Khān (d. 1692).[58] Moreover, he invokes sulṭānic orders and decisions to settle legal debates in the Ḥanafī school. For instance, in his discussion of the legal differences with regard to the conditions of the validity for Friday prayer, he points to a state order that settles such differences among jurists. He argues that the validity of the Friday prayer depends upon the sulṭān or the local ruler delegating the authority to lead the prayer by to a certain Imām. Like al-Shurunbulālī, Dāmād Efendī points to a difference

[56] Dāmād Efendī, *Majmaʿ al-Anhur*, vol., vol. 1:51,71,72,81,85,105,111,115,120,130,132,136,141,142,155,165,166. These are only few examples from two chapters only: ritual purity and prayer.
[57] Dāmād Efendī, *Majmaʿ al-Anhur*, vol. 1: 667.
[58] Dāmād Efendī, *Majmaʿ al-Anhur*, vol. 1:4.

of opinion regarding the authority of the appointed Imām to assign someone else to lead the Friday prayer. He states that there are two opposing opinions in the school.

The first opinion – attributed to Mullā Khusraw – asks how an appointed Imām (who does not have the authority to lead Friday prayer himself without sulṭānic permission) would have the authority to assign someone else his duties to give the sermon and lead the prayer. By contrast, Ibn Kamāl Paşa[59] affirms the permissibility for the appointed Imām to delegate the duty to lead Friday prayer to someone else in case of an emergent necessity that hinders the appointed Imām from leading it himself. Outside of these necessitous circumstances, Ibn al-Kamāl insists, it would not be permissible for the appointed Imām to delegate his duties. Dāmād Efendī interjects to note that a public permission (*idhn ʿāmm*)[60] was issued in 945/1538 by the Ottoman state to allow Imāms to delegate their Friday duties to others without restrictions. Dāmād Efendī declares that the *fatwā* of the *madhhab* adopts this state decision.[61] It is important to note that Dāmād Efendī's approach goes beyond al-Shurunbulālī's treatment of the same issue, as the latter only attempts to reinterpret and expand the realm of the sulṭānic order to include the implicit authority for the appointed Imām to delegate his duties to others.

Ottoman state interventions in legal reasoning are clearly identified by Dāmād Efendī. He mentions several instances in which the state issued a ruling and asked jurists to follow it in their *fatāwā*. For example, Dāmād Efendī discusses Ḥanafī reservations concerning a woman who marries herself (without a guardian present) to a person of unequal socioeconomic status (*ghayr kufʾ*). His opinion is that the guardian would have the authority to challenge the legality of such a marriage in front of a judge if this marriage brings shame to the family. He also elaborates that if

[59] Al-Ḥalabī and Dāmād Efendī refer to Ibn Kamāl Paşa as Ibn al-Kamāl al-Ḥanafī, and notes that he wrote a whole treatise to respond to this issue.
[60] He explains that the public permission means that the two doors of the mosque should be wide open to the mosque attendees.
[61] Dāmād Efendī, *Majmaʿ al-Anhur*, vol. 1:165-6., vol. 1:166; Al-Ḥaşkafī, *al-Durr al-Mukhtār*, vol. 2:142.

the woman has children from this husband, the guardian would not have the authority to invalidate the marriage, based on the interest of the children. Dāmād Efendī explains that a minority opinion in the school insists that the guardian has the authority to invalidate the marriage despite the importance of the children's welfare. His final opinion is that it is impermissible for the woman to marry herself to a man who is *ghayr kufʿ*. He tells us: "This opinion is supported by Qāḍī Khān. It is the sound opinion to adopt in our times because not all guardians know how to invalidate such a marriage, and not every judge is just in his rulings."[62] Dāmād Efendī notes that a sulṭānic order was issued to support this opinion, and the order commanded jurists to adopt the opinion as the *fatwā* for future cases.[63]

In his discussion of how a judge should treat highly disputed issues in the *madhhab*, Dāmād Efendī highlights the opinion of Muḥammad al-Shaybānī and Abū Yūsuf that if the judge passes a ruling that is opposed to what is established in the *madhhab* – intentionally or out of forgetfulness – his ruling should not be executed.[64] The opinion of Abū Ḥanīfa is that the judge's ruling should be executed if he passes a ruling opposed to what is established in the school out of forgetfulness. It appears that there are two narrations from Abū Ḥanīfa regarding the judge who intentionally adopted an opinion different from the established opinion in the school.[65] The most authentic narration, according to Dāmād Efendī, is recorded in *al-Fatāwā al-Khāniyya*, which maintains that the judge's decision would be effective. Muḥammad and Abū Yūsuf, on the other hand, argue that the judge in this situation rules based on what he knows to be erroneous according to his school.

[62] Dāmād Efendī, *Majmaʿ al-Anhur*, vol. 1:332
[63] Ibid.
[64] Ibid.
[65] Ibid.

Dāmād Efendī stresses that the authentic narration from Abū Ḥanīfa – that the judge's decision would be effective – is the *fatwā* of the *madhhab* as it has been stated in *al-Muḥīṭ al-Burhānī* and *al-Hidāya*. However, he takes the opportunity at this point in the discussion to affirm the authority of late Ḥanafīs. He explains that Ibn Humām in *Fatḥ al-Qadīr* revises Abū Ḥanīfa's opinion by arguing that, in their time and circumstances, the *fatwā* of the *madhhab* is to adopt Muḥammad and Abū Yūsuf's opinion that the judge's decision should not be executed. The reason, we are told, is that the one who intentionally passes a judgment in opposition to his legal school's opinions is doing so based on his invalid whims, rather than on a sound intention.[66] Also, the judge's ruling in opposition to his school's opinions out of forgetfulness is ineffective. Dāmād Efendī insists that the sulṭān appointed this judge to abide by the *madhhab* of Abū Ḥanīfa, so the judge has no authority to oppose the parameters of his designation. Therefore, by ruling against his *madhhab*, the judge goes against the sulṭānic order and essentially removes himself from the position to which he was appointed – i.e., he renders himself deposed. Dāmād Efendī highlights this case as an example of the authority of the sulṭān to issue orders to judges. He extends the example to discuss the sulṭānic order not to consider any claims fifteen years after of an incident. He asserts that the sulṭān has the authority to issue such an order, and that the judges should not consider such cases. If a judge hears a case and passes a ruling fifteen years after the events related to the case, despite the sulṭānic prohibition, the judge's ruling should not be executed. Dāmād Efendī asserts that the judge in this case will also have removed himself from office through disobedience of the sulṭānic order.[67]

Dāmād Efendī incorporates the edicts and orders of the Ottoman state as part and parcel of his legal discourse. This feature is characteristic of the ways in which late Ḥanafī jurists

[66] Ibid.
[67] Dāmād Efendī, *Majmaʿ al-Anhur*, vol. 2:171.

accommodate the increasing role of the Ottoman state in the process of law-making.[68] Dāmād Efendī especially focuses on the authority of the sulṭānic orders and edicts to settle juristic disputes. It is important to reiterate that the authoritative value of sulṭānic orders within Ḥanafī legal commentaries, *fatāwā*, and treatises does not exist prior to the Ottoman period. Unlike the Ottoman era, pre-Ottoman formulations of the judiciary confined the authority to the sulṭān to appointing and deposing judges.

ʿĀLāʾ AL-DĪN AL-ḤAṢKAFĪ (D. 1088/1677)

Muḥammad b. ʿAlī b. Muḥammad al-Ḥiṣnī, known as ʿAlāʾ al-Dīn al-Ḥaṣkafī, was the *muftī* of the Ḥanafī school in Damascus, where he was born and where he died. His main works are *al-Durr al-Mukhtār fī Sharḥ Tanwīr al-Abṣār*, *Ifāḍat al-Anwār ʿalā Uṣūl al-Manār*, *al-Durr al-Muntaqā Sharḥ Multaqā al-Abḥur*.[69] One of the most important treatises of the Ḥanafī school in the 17th century is al-Ḥaṣkafī's commentary *al-Durr al-Mukhtār* on al-Khatīb Muḥammad b. ʿAbd Allāh b. Aḥmad b. al-Timurtāshī's (d. 1004/1596) *Tanwīr al-Abṣār*. Al-Ḥaṣkafī finished this commentary in 1071/1660. He refers to al-Timurtāshī as *ʿumdat al-mutaʾakhkhirīn al-akhyār* (the master figure of the best of the late Ḥanafīs). Al-Ḥaṣkafī authored another important commentary, *al-Durr al-Muntaqā fī Sharḥ al-Multaqā,* on Ibrāhīm al-Ḥalabī's *Multaqā al-Abḥur*.[70]

In the introduction to his commentary on al-Timurtāshī, al-Ḥaṣkafī states that he is very familiar with the works of the *mutaʾakhkhirūn*. He specifies the following authors as the backbone of his legal endeavor: *ṣāḥib al-Baḥr* (Zayn Ibn Nujaym, author of *al-Baḥr al-Rāʾiq*), *ṣāḥib al-Nahr* (ʿUmar Ibn Nujaym, author of *al-Nahr al-Fāʾiq*), *ṣāḥib al-Fayḍ* (Ibrāhīm b. ʿAbd

[68] Dāmād Efendī, *Majmaʿ al-Anhur*, vol. 1:591.
[69] Al-Ziriklī, *al-Aʿlām*, vol. 6:294.
[70] Hājjī Khalīfa, *Kashf al-Ẓunūn*, vol. 2:1815.

al-Raḥmān al-Karakī [d. 922/ 1516], author of *al-Fayḍ al-Karakī*), al-Ḥaṣkafī's grandfather, ʿAzmī-Zāda, Akhī-Zāda, Saʿdī Efendī, al-Zaylaʿī, Akmal al-Dīn al-Bābārtī, al-Kamāl Ibn Humām, Ibn Kamāl Paşa, and al-Timurtāshī (the author of *Tanwīr al-Abṣār*). Al-Ḥaṣkafī claims an *isnād* (chain of authority, in this case) from his teacher "ʿAbd al-Nabī al-Khalīlī from Muḥammad al-Timurtāshī from Ibn Nujaym al-Miṣry. Then from Ibn Nujaym's chain of transmission to the Prophet."[71] This *isnād* demonstrates the importance of both al-Timurtāshī and Ibn Nujaym for establishing the authority of late Ḥanafīs, according to al-Ḥaṣkafī. Additionally, the authority of Ibn Nujaym as a legal reference point for late Ḥanafī jurists is clearly visible in al-Ḥaṣkafī's commentary through numerous references to Ibn Nujaym's works and *fatāwā*.[72] (Figure 2.9)

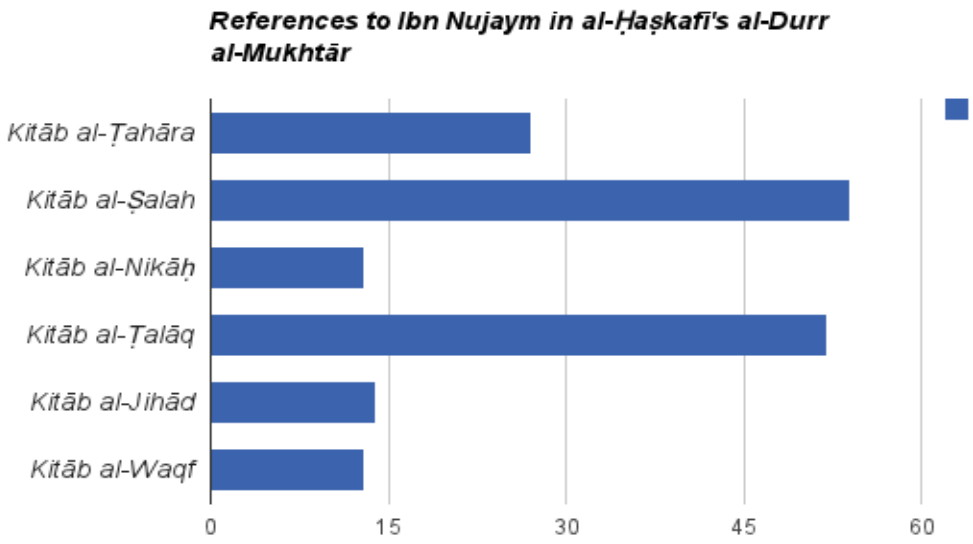

Figure 2.9

[71] Al-Ḥaṣkafī, *al-Durr al-Mukhtār*, vol. 1:20.
[72] Al-Ḥaṣkafī, *al-Durr al-Mukhtār*, vol. 4:195, 228, 355, 380, 390, 398, 429, 452, 467; vol. 5: 319, 362, 371, 384; vol. 6: 87, 207, 454, 685.

Al-Ḥaṣkafī values his own work and its authority to such an extent that he expects that those who come to understand his work will be skilled jurists. This assertion of the importance of al-Ḥaṣkafī's own work, as Ibn ʿĀbidīn speculates, may be due to its exhaustion of the important issues, problems, and disputes in the *madhhab*, and his incorporation of revised opinions introduced by late Ḥanafīs.[73] Al-Ḥaṣkafī's teacher Khayr al-Dīn al-Ramlī (d. 1081/1671) congratulated al-Ḥaṣkafī on this work with the following two poetry lines:

> Say to those who do not see [any authority or value] in the contemporary jurists
> And assign all value to the early jurists
> Tell them that the early jurists' works [when they were authored] were considered late
> Indeed this late work will one day be considered early[74]

Al-Ramlī's lines of poetry emphasize that the quality of jurists and their work should not be determined based on the historical accident of their birth date, but rather, based on the value of the work for the *madhhab*. He stresses that the early works when they were authored were considered late additions and they did not, then, acquire any additional value because of the time of their authorship. Similarly, this current work of al-Ḥaṣkafī will one day be considered early for the school.[75] In other words, late Ḥanafī scholarship is as important and authoritative as early Ḥanafī works.

Authority Structure in the Ḥanafī School

Al-Ḥaṣkafī states that the agreed-upon opinions in the authentic narrations (*ẓāhir al-riwāya*) are to be followed for *iftā'*. However, there is a difference of opinion on how to deal with disputed issues. Al-Ḥaṣkafī takes the opinion given in *al-Fatāwā Sirājiyya*[76], that any *fatwā* should be based first on the opinion of Abū Ḥanīfa, then on the opinions of Abū Yūsuf and

[73] Al-Ḥaṣkafī, *al-Durr al-Mukhtār*, vol. 1:27.
[74] Al-Ḥaṣkafī, *al-Durr al-Mukhtār*, vol. 1:32.
[75] Ibid.
[76] Sirāj al-Dīn ʿAlī Ibn ʿUthmān al-Ḥanafī (d. 575/1179).

Muḥammad. Zufar and al-Ḥasan b. Ziyād follow in order of priority. Al-Ḥaṣkafī alerts us to the fact that this position was revised in *al-Ḥāwī al-Qudsī*[77] to say that any *fatwā* should be based on *quwwat al-mudrak* (the strength of the legal proof evident in the case). He refers us to Ibn Nujaym, who argues that if a case has two opinions in the school, it is permissible to adopt either one of them for judicial and *iftāʾ* decisions. Al-Ḥaṣkafī enumerates a few phrases that indicate how late Ḥanafīs identify their preferred legal opinions: *ʿalāyhī al-fatwā* (the *fatwā* is established on this opinion), *bihi yuftā* (the *fatwā* adopts this opinion), *bihi naʾkhudh* (we adopt this opinion), *ʿalayhi al-ʿitimād* (we rely on this opinion), *ʿalayhi ʿamal al-yawm* (the practice of today approves this opinion), *ʿalayhi ʿamal al-umma* (the practice of the community approves this opinion), *huwa al-ṣaḥīḥ* (this is the sound opinion), *al-aṣaḥḥ* (this is the most sound), *al-aẓhar* (this is the most evident sound opinion), and *al-mukhtār* (this is the preferred opinion). Al-Ḥaṣkafī insists that these signposts for the preferred legal opinions are not absolute. He informs us that these previous phrases could indicate preference instead of absolute opinion. So, it is permissible for a *muftī* to adopt an opinion described with one of these phrases, or its opposite.[78]

Al-Ḥaṣkafī invokes Qāsim Ibn Quṭlūbughā's (d. 879/1474) commentary on al-Qudūrī (d. 428/1037), in which Ibn Quṭlūbughā argues that the there is no difference between the *qāḍī* and the *muftī*, except that the *muftī* delivers a legal ruling and the judge enforces it. Al-Ḥaṣkafī stresses that to issue a *fatwā* or legal ruling with what is considered a less sound opinion is willful ignorance and a violation of the consensus of the school. Furthermore, if the judge is a *muqallid,* his judgments should not be executed when they oppose the stated opinion of the school.[79] Al-Ḥaṣkafī points out that sometimes the opinions of the school might be narrated without clear signs of preference, which leads Ḥanafī jurists to disagree on the *ṣaḥīḥ* in the

[77] Aḥmad b. Maḥmūd al-Ghaznawī (d. 593/ 1197)
[78] Al-Ḥaṣkafī, *al-Durr al-Mukhtār*, vol. 1:73.
[79] Ibid.

madhhab. In this situation, al-Ḥaṣkafī recommends that Ḥanafī jurists apply what they have always taken into consideration in their legal reasoning, namely, changes in custom and the circumstances of the people.[80]

The authoritative nature of sulṭānic orders is reflected in the authority and mandate of the judiciary. Al-Ḥaṣkafī mentions the sulṭān's declaration of the prohibition of judges from resorting to the weak opinions in their schools during his time period. Thus, if the judge does not abide by what is known to be the authoritative opinions in his school, his juridical rulings should not be executed.[81] Al-Ḥaṣkafī supports the sulṭānic order's position by asserting that this opinion is also narrated by the Ibn Nujaym brothers (Zayn al-Dīn and Sirāj al-Dīn), and by Ibn Humām al-Ḥanafī. It is interesting to note that all of them are Egyptian Ḥanafīs.[82]

Additionally, a sulṭānic order settles the dispute over what to do in the case of a *dhimmī* (a protected non-Muslim minority) who frequently and consistently insults Islam, the Qurʾān, or the Prophet. Al-Ḥaṣkafī states his opinion that the *dhimmī* who does this once or twice should be reproached for his actions. He tells us that the source of his ruling is *al-Ḥāwī al-Qudsī*. Al-Ḥaṣkafī notes that Badr al-Dīn al-ʿAynī argues that the legal preference for the punishment in the case of any insult to Islam, the Qurʾān, or the Prophet, is to kill the perpetrator.[83] This opinion, al-Ḥaṣkafī tells us, is followed by Ibn al-Humām al-Ḥanafī, and it is the *fatwā* of Khayr al-Dīn al-Ramlī. It is also the opinion of al-Shāfiʿī (d. 204/820).[84] In light of these various opinions, al-Ḥaṣkafī found the strongest support for a legal ruling in *Maʿrūḍāt Abī al-Suʿūd*. In that work, he tells us that he read about a sulṭānic order that required the adoption of the statements of the

[80] Ibid.
[81] Al-Ḥaṣkafī, *al-Durr al-Mukhtār*, vol. 1:75-76.
[82] It is important to stress that late Ḥanafīs draw extensively upon Egyptian Ḥanafīs such as the Ibn Nujaym brothers, Ibn al-Humām and al-Sirāj Ḥānūtī, as well as upon Ottoman jurists such as Abū al-Suʿūd Efendī, Yaʿqūb Paşa, and Akhī-Zāda Ḥusayn. Another general feature of the early modern Ḥanafīs is their consistent identification of early and late opinions.
[83] Al-Ḥaṣkafī, *al-Durr al-Mukhtār*, vol. 4:214-216.
[84] Ibid.

Ḥanafī masters who supported the killing of the person who is known for frequently insulting the Prophet. Al-Ḥaṣkafī states: "I adopt this sulṭānic order to support my *fatwā*." His opinion also applies to the case of a Jew who insults a Christian by telling him: "Your prophet Jesus was born out of wedlock (*walad zinā*)." The reason for applying the opinion so widely is that the insult is directed at the prophets, who cross religious boundaries.[85]

Another crucial indication of the probative value of Ottoman state interventions is the sulṭānic order regarding the reading of *Fuṣūṣ al-Hikām* of al-Shaykh Muḥiyy al-Dīn Ibn ʿArabī (d. 1240). Al-Ḥaṣkafī tells us that in *Maʿrūḍāt Abī al-Suʿūd* he read about a question which was posed to Abū al-Suʿūd inquiring about a person who claims that *Fuṣuṣ al-Hikām* is outside the fold of the *sharīʿa,* and that it was written to mislead people. Thus, whoever reads it should be considered a non-believer. Al-Ḥaṣkafī explains that Abū al-Suʿūd responded to this question stating that the book might have some phrases that contradict the *sharīʿa,* and that some proud individuals unsuccessfully tried to attribute these words to the *sharīʿa.* Additionally, some Jews falsely attributed the problematic phrases to Ibn ʿArabī. Al-Ḥaṣkafī attempts to moderate this evaluation of Ibn ʿArabī by referring us to the praise offered him by ʿAbd al-Wahhāb al-Shaʿrānī (d. 937/1565). He also notes that Abū al-Suʿūd insists that vigilance is required when reading such problematic phrases. Al-Ḥaṣkafī points out that a sulṭānic order was issued to avoid reading these phrases. Abū al-Suʿūd encourages jurists to preserve this ruling, and al-Ḥaṣkafī agrees.[86]

Similarly, al-Ḥaṣkafī invokes a sulṭānic order to address a crucial issue of his time: if a Ḥanafī jurist declares someone to be an unbeliever because the latter insulted the Prophet, is it permissible for Shāfiʿī jurists to accept his repentance? Al-Ḥaṣkafī takes the Shāfiʿī opinion on

[85] Ibid.
[86] Al-Ḥaṣkafī, *al-Durr al-Mukhtār*, vol. 4:240.

accepting the repentance because "it is a new legal incident."[87] Al-Ḥaṣkafī states that he based his ruling on ʿUmar b. Nujaym's opinion in *al-Nahr al-Fāʾiq*. He also points to a parallel case that he read in *Maʿrūḍāt Abī al-Suʿūd* and that supports his opinion. The case concerns a student who heard a Prophetic tradition, and then objectionably asked: "Are all the Prophet's traditions true and should be followed?!" Abū al-Suʿūd stressed that this student should be considered a *kāfīr* (unbeliever) due to the nature of his objectionable inquiry and attributing shame to the Prophet. Thus, the student is required to renew his profession of faith in order to avoid the death penalty. For Abū al-Suʿūd, attributing shame to the Prophet renders a person deviant (*zindīq*). He explains that if the student refuses to renew his profession of faith, his repentance would not be accepted unanimously, and thus, he would be killed. Yet, there is difference among the eponyms of the school regarding accepting the student's repentance. Abū al-Suʿūd explains that Abū Ḥanīfa insists that the student's repentance should be accepted and that he would not face the death penalty. For the rest of the scholars of the *madhhab*, the student's repentance would not be accepted and he would be killed according to the prescribed punishment.

However, Abū al-Suʿūd states that a sulṭānic order was issued in 944/1537 to the judges of the Ottoman provinces to harmonize these opinions. The imperial order stresses that if the person's righteousness, repentance, and Islam are apparent, then he should not be killed. It would be sufficient to reproach him (*taʿzīr*), to put the person in jail for a time. This is based on the opinion of Abū Ḥanīfa. However, if the person's situation and circumstances do not indicate any good in him, he should be killed. This order is based on the opinions of the rest of the Ḥanafī jurists. The sulṭānic order was modified in 955/1548 to reflect the accused person's community

[87] Ibid.

affiliation, and thus future judgments would be passed based on other accompanying circumstances.[88]

Lastly, al-Ḥaṣkafī engages with a sulṭānic order in his discussion of the sale of escaped slaves. He explains that the owner of an escaped slave has the right to re-acquire his slave after presenting sufficient evidence of his ownership. Al-Ḥaṣkafī asserts that the judge has the authority to sell escaped slaves, if the owners do not claim them. Yet, if the owners reclaim their slaves after the judge has authorized the slaves to be sold, the judge's verdict would still stand. Al-Ḥaṣkafī provides some exceptions to this rule. He informs us that in consulting *Maʿrūḍāt Abī al-Suʿūd*, he learned about the sulṭānic order that was issued to prevent judges from authorizing the sale of escaped slaves from the military. The slaves in question had belonged to the cavalry-men (*ʿabīd al-sabāhiya*). In this case, the owners have the right to re-acquire their slaves. Also, the buyer has the right to claim his money back from the seller.[89] Al-Ḥaṣkafī tells us that the same ruling would apply to slaves owned by the subjects of the Ottoman Empire, if their slaves were sold without their knowledge and not for a fair price. Otherwise, the owners would be entitled to the slaves' financial value. Al-Ḥaṣkafī writes that this ruling is important, and should be memorized.[90]

[88] Al-Ḥaṣkafī, *al-Durr al-Mukhtār*, vol. 4:235-6.
[89] Al-Ḥaṣkafī, *al-Durr al-Mukhtār*, vol. 4:288.
[90] Ibid.

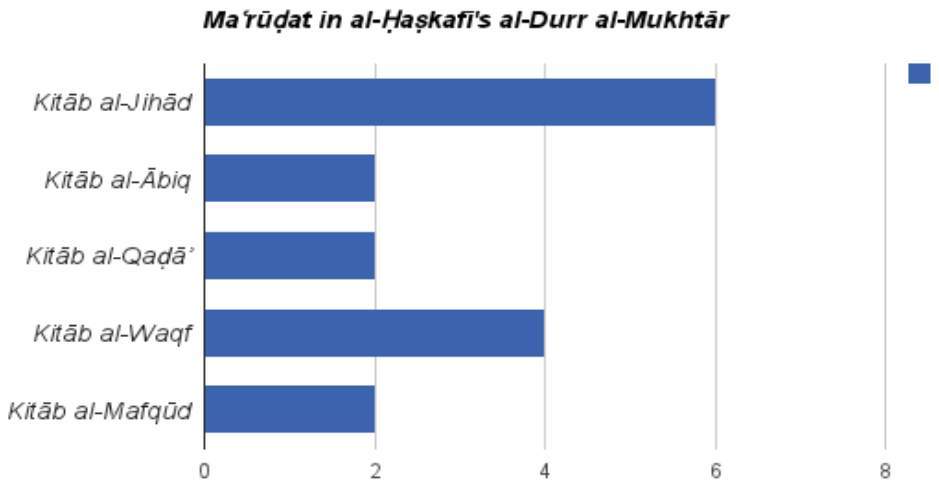

Figure 2.10

Al-Ḥaṣkafī's legal scholarship assigns integral value and authority to *Maʿrūḍāt Abī al-Suʿūd*. He consistently incorporates the *Maʿrūḍāt* in his legal commentaries, and he adopts Abū al-Suʿūd's opinions in his legal reasoning. Most importantly, he is attentive to the Ottoman state's interventions as recorded in the *Maʿrūḍāt*. The cases that al-Ḥaṣkafī discusses in his commentary point to the fact that the Ottoman state was closely involved in certain detailed issues of the law. In the case studies mentioned above, the Ottoman state intervenes to settle the variant opinions of the school. This role and authority should not be overlooked in the assessment of later articulations of Islamic law within a centralized state structure. Reflecting on al-Ḥaṣkafī's work, it appears that state interventions in legal literature cannot be reduced to the fact that al-Ḥaṣkafī was a state appointed *muftī*. I maintain that these interventions were sustained by a new understanding of the state's role and authority in the law-making process. These interventions, to be sure, were not limited to those Ḥanafī jurists or *muftīs* who were related to the Ottoman state. It is a phenomenon that marks the legal scholarship of early modern Ḥanafīs.

ḤĀMID B. ʿALĪ AL-ʿIMĀDĪ (D. 1757)

Ḥāmid b. ʿAlī b. Ibrāhīm b. ʿAbd al-Raḥīm b. ʿImād al-Dīn b. Muḥib al-Dīn al-Ḥanafī al-Dimashqī was the Ḥanafī *muftī* of Damascus. He pursued a career as an official, state-appointed *muftī* in 18th-century Damascus.[91] He memorized the Qurʿān at an early age and was active in study circles to such an extent that he became well-known for his skill and knowledge. He studied with scholars such as al-Shaykh ʿAbd al-Ghanī al-Nābulsī (d. 1730). He also studied with Anatolian Ḥanafī scholars such as Mullā Aḥmad, who was the military judge in the imperial capital of the Ottoman Empire. Al-ʿImādī started teaching at the Umayyad Mosque in Damascus, and then became a *muftī* in 1137/1724.[92] In this section, I discuss how al-ʿImādī invokes the edicts and orders of the Ottoman state in his *fatāwā*. I contend that al-ʿImādī brings the Ottoman state and sulṭānic orders to his legal reasoning as an indispensible authority for deciding cases.[93] He also consistently refers to the opinions of Khayr al-Dīn al-Ramlī, Zayn b. Nujaym, ʿUmar b. Nujaym, Shaykh al-Ḥānūtī (d. 1601), and Ottoman Shaykh al-Islām ʿAbd Allāh Efendī to establish the authority of late Ḥanafīs.

In his *al-Fatāwā al-Ḥāmidiyya*, al-ʿImādī responds to the following question: if a sulṭān is deposed and another ruler is appointed in his place, but the new sulṭān does not fire or affirm the positions of judges appointed by the deposed sulṭān, what is the correct opinion on the status of the previously appointed judges? Are the judges' appointments invalidated with the removal of the sulṭān who appointed them, or when the new appointed sulṭān fires them? Are the rulings and decisions of the judges appointed by the deposed sulṭān effective and valid?

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[91] Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Los Angeles: University of Californian Press, 1998), 33.
[92] Muḥammad Khalīl al-Murādī, *Suluk al-Durar fī ʿAyān al-Qarn al-Thānī ʿAshar* (Cairo: Dār Ibn Ḥazm, 1988),11-13.
[93] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya fī Tanqīḥ al-Fatāwā al-Ḥāmidiyya*, vol. 1:193, 300; vol. 2:5, 6.

Al-ʿImādī answers that the judges' appointments would not be invalidated due to the deposing of the sulṭān who had appointed them. This opinion is supported by al-Sarakhsī, al-Kāsānī, and al-Ṭursusī. These scholars argue that a change of political leadership does not necessarily invalidate the appointments of judges and provincial rulers. The death or the replacement of the imperial ruler does not inevitably lead to the deposing of the holders of these positions. The holders of these positions are working to serve the public interest of Muslims. The imperial authority is only a deputy for the Muslim community who appoints these judges and provincial rulers to their positions. It is the Muslim community that is in need of the judges and thus they retain their positions, even after the death or replacement of the imperial ruler.[94]

In this opinion, al-ʿImādī articulates a key legal principle that came to define late Ḥanafī legal thought: the idea of delegation within the Ottoman judicial system. The source of authority of public and state officials is no longer vested with the state alone. Ḥanafī jurists portrayed the Muslim community as the source of public officials' authority and the reason for its formation. In fact, the sulṭān is only a deputy for the community in appointing judges and provincial rulers to their positions. Thus, public officials cannot simply be deposed by the death or replacement of the sulṭān because they serve general Muslim interests, not the state.

In another case, the sulṭān prevents a judge from hearing a person's claim to a certain endowment, except in a certain court in Istanbul. The question posed to al-ʿImādī is: should the judge act upon the sulṭānic prohibition? Al-ʿImādī answers that the sulṭān's prohibition is valid, affirming the authority of the sulṭānic order. Similarly, al-ʿImādī was consulted about the case of a woman whose husband divorced her more than 20 years ago. Her ex-husband died and left behind heirs and an estate. This woman then filed a legal claim, in which she alleged that her deceased ex-husband owed her the delayed portion of her dowry; however, the heirs denied her

[94] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya fī Tanqīḥ al-Fatāwā al-Ḥāmidiyya*, vol. 1:298.

claim. The facts of the case suggest that there were no obstacles for her to file her claim earlier, keeping in mind that all of them live in the same town. The question posed to al-ʿImādī is: can this woman's claim be heard in court in light of the sulṭānic prohibition of hearing cases 15 years after the relevant incident? Al-ʿImādī answers this question in the negative. He confirms the late Ḥanafī norm of adopting the sulṭānic order to limit the time frame for hearing cases in the court to 15 years. In fact, al-ʿImādī cites many cases in which the time frame for filing a legal claim is more than 15 years. In all of these cases, he consistently invokes the sulṭānic prohibition for not allowing the hearing of these cases in courts.[95]

Furthermore, al-ʿImādī tackles an example case in which a judge received an imperial order against hearing a legal claim filed by "Zayd" against "ʿAmr."[96] The judge held a hearing for this case and overlooked the directive of the imperial order. When ʿAmr decided to press charges against Zayd because the judge heard a case that should not have been in court due to the imperial order, the judge prevented ʿAmr from doing so. The judge wrote a document to prevent ʿAmr from reversing the judge's ruling. The question posed to al-ʿImādī is: does the judge's document carry any value, in light of the fact that the judge is prevented from hearing this case in the first place?[97] Al-ʿImādī answers the question in the negative. He emphasizes that it is permissible for judicial claims to be specified, for the claims to be limited with elements of time and place, and for the imperial authority to introduce exceptions in some litigations. In these instances, if the judge ignores the sulṭānic order, he is no longer acting as a judge. His disobedience renders his judgments moot.[98] Al-ʿImādī states that the other legal schools

[95] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya fī Tanqīḥ al-Fatāwā al-Ḥāmidiyya*, vol. 2:9.
[96] The names Zayd and ʿAmr are characteristically invoked to indicate that this case is a broad example derived from many specific cases.
[97] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya*, vol. 1:300.
[98] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya*, vol. 1:301.

recognize this mandate of the sulṭān's authority. He asserts that the Shāfiʿī, al-Ḥanbalī, and al-Mālikī jurists hold the same opinion on this matter.[99]

A recurrent issue in the late Ḥanafī tradition is the way the sulṭān is portrayed as the one who settles disputes and differences among legal schools with regard to issues of legal practice in the Ottoman state. Al-ʿImādī refers us to the case of the punishment for insulting the Prophet, as I have discussed above in the work of other early modern Ḥanafīs. In his *Fatāwā*, al-ʿImādī dedicates special attention to this matter and discusses it at length. I am interested primarily in the ways in which he invokes the sulṭān's authority to settle disputes among legal schools with regard to the legal consequences for the one who commits such a crime. Al-ʿImādī informs us that this matter was presented to Sulṭān Sulaymān Khān b. Sulaymān Khān in order to find a compromise among the various opinions of legal schools. The sulṭān ruled that it is preferable to look into the conditions of the person who insults the Prophet, and that if the sincerity of his repentance, Islamic manner, and the righteousness of his life are gleaned from his circumstances, then the opinion of the Ḥanafīs should be adopted. This opinion is to accept the person's repentance, and it would suffice the court to discipline the person with a discretionary punishment and jail time. The sulṭānic order explains that if the person's conditions are not indicative of his repentance, the opinions of the Shāfiʿiyya, Ḥanābila, and Mālikiyya should be adopted, and the person would be killed as a prescribed punishment. Al-ʿImādī points out that the sulṭān ordered all the judges in the Empire to adopt this compromise opinion, because it serves as both encouragement and deterrent.[100]

Al-ʿImādī adds another layer to this discussion. He contends that this previous sulṭānic order by the late Sulṭān Sulaymān to all the judges in the Ottoman Empire is not legally effective

[99] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya*, vol. 2:5. He specifies the Shāfiʿī *muftī* Aḥmad al-ʿĀmirī in Shām, al-shaykh *al-muftī* Muḥammad al-Ḥanbalī, and al-shaykh *al-muftī* Asʿad al-Mālikī.
[100] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya*, vol. 1:103-5.

today because the judges of that generation have all passed away. Thus, al-ʿImādī insists, another sulṭānic order should be issued for the judges of the Ottoman state in his time. The reason for renewing such an order is that the judges in his time demand a new sulṭānic order in order to rule on the basis of an opinion from another legal school. In ruling on the basis of such an opinion they are acting as deputies for the sulṭān, not for their legal schools. Al-ʿImādī explains that the Ottoman sulṭāns, take the same oath as the previous sulṭāns when they are first appointed. Based on that oath, they are given a pledge of allegiance (*bayʿa*) by the people once they claim power. Al-ʿImādī emphasizes that the taking the same oath by the different sulṭāns is not sufficient to require that the judges under the new sulṭān adhere to previous sulṭānic orders. Al-ʿImādī asserts that the new sulṭān should renew the sulṭānic orders that he wishes to be continued when he affirms the judges' appointments. Al-ʿImādī states that late Ḥanafīs establish that the judge is a deputy for the sulṭān in ruling among the people. Thus, the sulṭān has the authority to limit a judge's ruling with a specific time, place, litigants, case, or a specific opinion. Otherwise, Ḥanafī judges are required to rule based on the authentic opinions of Abū Ḥanīfa. Late Ḥanafīs insist that the ruling of a judge who makes a determination opposed to the stated opinions in his school is ineffective. In this case, a Ḥanbalī or a Malikī judge would be assigned to rule on the case, and then the Ḥanafī judge would enforce it.[101]

[101] Ibid.

CONCLUSION

This chapter proposes to read late Ḥanafī juristic literature of the Ottoman Empire beyond the narrow focus on the official affiliation or appointment of these jurists by the Ottoman state. This criterion is arbitrary in light of the prominence of the state in the late Ḥanafī tradition in the early modern period as a whole. The value and authority assigned to sulṭānic orders and edicts demonstrates a turn in Ḥanafī legal culture that embraced a role for the imperial establishment to regulate a range of legal issues. These interventions by the Ottoman state were incorporated in the authoritative Ḥanafī legal commentaries, treatises, and *fatāwā* collections to mark a new paradigm of legal reasoning, where the state is part and parcel of the making and enforcement of the law. Ḥanafī jurists of the 17th and 18th centuries, such al-Shurunbulālī, al-Ḥaṣkafī, Dāmād Efendī, and ʿImādī incorporate sulṭānic edicts and orders in their legal manuals. These jurists are attentive to the legal works produced by members of the imperial religious-judicial establishment, such as Abū al-Suʿūd Efendī and his *Maʿrūḍāt*. As a result, this chapter affirms that although Ḥanafī jurists were sensitive to their local customs, they were not ignorant of the legal scholarship being produced across the Ottoman Empire. Additionally, the authority of Ibn Nujaym as a legal reference point for late Ḥanafī jurists is clearly visible in the 17th – 18th century commentaries through numerous references to his opinions, works, and *fatāwā*.

These articulations of legal authority and its relationship to the Ottoman state mark a distinctive feature of the late Ḥanafī tradition in the early modern period. To overlook the juristic discourse and the ways in which it sanctions a role for the Ottoman state in the law-making process is to fail to appreciate a key development in Ḥanafī legal scholarship throughout the Ottoman Empire beyond familiar essentialisms and strict binaries: state and jurists; secular and religious; local and imperial; and *qānūn* and *sharīʿa*.

CHAPTER THREE

IF ABU ḤANĪFA WERE HERE: AUTHORITY, CONTINUITY, AND REVISION IN ḤANAFĪ JURISPRUDENCE

This chapter addresses three issues: (1) how the late Damascene Ḥanafī jurist Muḥammad Amīn b. ʿĀbidīn, known as Ibn ʿĀbidīn (d. 1836), understood the authoritative hierarchy within the Ḥanafī school, and the basis upon which he justified his departure from earlier authorities' opinions; (2) the ways in which Ibn ʿĀbidīn invoked late Ḥanafīs (*al-mutaʾakhkhirūn*) in relation to early authorities (*al-mutaqaddimūn*); and (3) the contours of the probative value attributed to Ottoman state orders in Ibn ʿĀbidīn's legal discourse. I am particularly interested in his references to both *Maʿrūḍāt* of Shaykh al-Islām Abū al-Suʿūd and sulṭānic commands and prohibitions in order to depart from the school's opinions. This chapter continues the discussion of the major issues of Chapter 1 and Chapter 2. Ibn ʿĀbidīn's legal commentaries revolve around the works of Zayn Ibn Nujaym (d. 1563), ʿĀlāʾ al-Dīn al-Ḥaṣkafī (d. 1677), and Ḥāmid b. ʿAlī al-ʿImādī (d. 1757).

Ibn ʿĀbidīn is an encyclopedic Ḥanafī jurist. His significance is established by his ability to authoritatively articulate – on the basis of enormous early and late Ḥanafī sources – the Ḥanafī school's norms in the 19th century. Ibn ʿĀbidīn's commentaries on Ibn Nujaym's *al-Baḥr al-Rāʾiq* and al-*Ashbāh wa al-Naẓāʾir*, al-Ḥaṣkafī's *al-Durr al-Mukhtār*, and al-ʿImādī's *al-Fatāwā al-Ḥāmidiyya,* situate him within the late Ḥanafī tradition in the early modern period. Ibn ʿĀbidīn takes pride in his legal commentary on al-Ḥaṣkafī's *al-Durr al-Mukhtār*, titled *Radd al-Muḥtār*, because of its unique approach and its meticulous engagement with earlier authoritative books in the *madhhab*.[1] This scrutiny and attention to the continuity of the Ḥanafī tradition

[1] Muḥammad Amīn ʿĀbidīn, *Majmūʿat Rasāʾil Ibn ʿĀbidīn*, vol.1 (Istanbul: Dār-i Saʿādat, 1907), 15.

allowed Ibn ʿĀbidīn to revise many the late Ḥanafī opinions, which he believed were not accurately transmitted from the early texts in the *madhhab*.[2]

Ibn ʿĀbidīn inserts his legal voice throughout his commentary *Radd al-Muḥtār* – famously known as *al-Ḥāshiya* – by affirming, clarifying, and revising the legal norms and opinions of the school. He is careful to record his own contributions to late Ḥanafī scholarship. Ibn ʿĀbidīn consistently refers to his own opinions, and precedes them with the statements, "I say" (*wa aqūl*) or "I said" (*qult*). Also, he frequently alerts his reader to "warnings" (*tanbīhāt*) about his take on emergent issues and cases that previous legal literature did not fully explain.[3] Ibn ʿĀbidīn guides his reader through a set of phrases in command form such as: *taʾammal* (reflect), *ightanim* (obtain benefit), and *ifham* (discern).[4]

I argue that by situating Ibn ʿĀbidīn within what Ḥanafīs call "the late Ḥanafī tradition," we can understand better the strong emphasis on loyalty to early authorities in his legal endeavor. Through the *mutaʿakhkhirūn* framework, we can appreciate the authoritativeness of Ibn ʿĀbidīn (and other the late Ḥanafī jurists), and his ability to revise early school opinions. Ibn ʿĀbidīn sanctions intra-*madhhabic* differences in the school, especially late Ḥanafī revisions of earlier opinions, by stressing that when Ḥanafīs adopt opinions that revise earlier opinions in the school, these opinions do not necessarily fall outside the *madhhab*. He explains that these new opinions are generated through adopting the methods of the eponym of the school.[5] This understanding of authority structure – which revolves around continuity and change within the school – should guide our evaluation of how Ibn ʿĀbidīn interacts with *ẓāhir al-riwāya* opinions.[6] Based on the

[2] Ibid. Ibn ʿĀbidīn lists many opinions in the late Ḥanafī commentaries, where he intervened to show the inaccuracies of transmitting school opinions.
[3] Muḥammad Amīn Ibn ʿĀbidīn, *Radd al-Muḥtār ʿalā al-Durr al-Mukhtār*, vol.1 (Beirut: Dār al-Fikr, 1992), 14, 27, 38, 42, 58, 87, 89, 121, 133, 139, 153, 161, 165, 170, 177, 189. These are few examples only.
[4] Ibid.
[5] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:68.
[6] Late Ḥanafī jurists are explicit in their avoidance of some of the opinions in *ẓāhir al-riwāya*. They adopted many

legal devices of necessity (*ḍarūra*), customary practice (*ʿurf*), change of time (*ikhtilāf ʿaṣr wa zamān*), and widespread communal necessity (*ʿumūm al-balwā*), Ibn ʿĀbidīn is able to justify fundamental changes (in relation to *ẓāhir al-riwāya*, earlier opinions) in many Ḥanafī doctrines that transform the classical opinion of the school. In order to situate these new opinions within the school, Ibn ʿĀbidīn invokes the authority of Abū Ḥanīfa: "were [he] here, he would say the same [on this issue]."[7]

Furthermore, I submit that Ibn ʿĀbidīn embraces a role for the Ottoman state in the process of law-making. This position is an affirmation of the 17th and 18th century Ḥanafī reformulations of state authority. This state authority is affirmed by the probative value attributed to the state's orders and edicts in the legal discourse within the tradition of the *mutaʾakhkhirūn* of the early modern period. Ibn ʿĀbidīn's commentaries show how these orders and edicts are able to change and reverse many jurisprudential opinions in the *madhhab*.

This chapter explores the contours of Ḥanafī legal authority in Ibn ʿĀbidīn's juristic discourse.[8] I discuss the primacy of the *madhhab* for Ibn ʿĀbidīn, demonstrating that the departure from the early opinions of the *madhhab* is justified in the name of these early authorities themselves using internal legal devices within the school. I propose to understand Ibn ʿĀbidīn's legal formulations within three hallmarks of late Ḥanafism in the early modern period: (1) the clear distinction between the late and early Ḥanafī legal doctrines, texts, and authorities (2) the role of the Ottoman state in influencing the late Ḥanafī tradition, and (3) the internal

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views in the *nawādir* narrations in the school justifying such shift in terms of need and emergent social practices. See Maḥmūd b. Isrāʾīl, known as Ibn Qāḍī Simawānah, *Jāmiʿ al-Fuṣūlayn Wa-bi-hāmishihi al-ḥawāshī al-raqīqa wa-al-taʿālīq al-anīqa* (Cairo: al-Maṭbaʿa al-Kubrā al-Amīriyya,1883),15.

[7] Muḥammad Amīn ʿĀbidīn, *Majmūʿat Rasāʾil Ibn ʿĀbidīn* (Istanbul: Dār-i Saʿādat, 1907), 44; Hallaq, "A Prelude to Ottoman Reform," in *Histories of The Modern Middle East: New Directions*, ed. Israel Gershoni, Hakan Erdem and Ursula Woköck (Boulder: Lynne Rienner Publishers, 2002), 56.

[8] Yaʿakov Meron divides Ḥanafī texts in ancient, classical and postclassical. He situates Ibn ʿĀbidīn within the post-classical Ḥanafī scholarship. See Yaʿakov Meron, "The Development of Legal Thought in Hanafi Texts," *Studia Islamica,* 30 (1969), 97-98.

mechanisms of the *madhhab* that made doctrinal shifts and legal changes possible. This examination of Ibn ʿĀbidīn and his work contributes to my argument that "late Ḥanafism in the early modern period" is best understood in terms of a set of authoritative texts, doctrinal shifts, and concerns that shaped, almost exclusively, the legal discourse of Ḥanafī jurists in this later period.

I begin with an introduction to Ibn ʿĀbidīn's life and scholarly production. I then discuss the three main issues mentioned above, accompanied by relevant case studies and explorations of the secondary literature: (1) how the late Damascene Ḥanafī jurist Muḥammad Amīn b. ʿĀbidīn, known as Ibn ʿĀbidīn (d. 1836), understood the authoritative hierarchy within the Ḥanafī school, and the basis upon which he justified his departure from earlier authorities' opinions; (2) the ways in which Ibn ʿĀbidīn invoked late Ḥanafīs (*al-mutaʾakhkhirūn*) in relation to early authorities (*al-mutaqaddimūn*); and (3) the contours of the probative value attributed to Ottoman state orders in Ibn ʿĀbidīn's legal discourse. I conclude that the *mutaʾakhkhirūn* of the Ḥanafīs are indispensable to the development of the Ḥanafī school itself. Their interventions were not just a matter of temporary strategies, but rather they were based on built-in mechanisms intended to reinterpret the *madhhab* and keep it relevant to the ever developing social, political, and economic circumstances in the early modern Ottoman Empire.

IBN ʿĀBIDĪN: INTRODUCTION

The full name of Ibn ʿĀbidīn is Muḥammad Amīn b. ʿUmar b. ʿAbd al-ʿAzīz b. ʿĀbidīn. He was born in 1784 in Damascus.[9] He grew up in his father's care and memorized the Qurʾān at a very young age and was a frequent visitor at his father's shop where he learned the skills of trade. He was taught the Qurʾān and Shāfiʿī *fiqh* with Muḥammad b. Ibrāhīm al-Ḥamawī (d.

[9] Al-Ziriklī, *al-Aʿlām*, vol. 6:42.

1820).[10] He also studied Arabic grammar, morphology, and obtained an authorization (*ijāza*) from him. During his study, Ibn ʿĀbidīn met one of the greatest scholars of his age, Shaykh Shākir al-ʿAqqād (d. 1808). Ibn ʿĀbidīn's encounter with Shaykh al-ʿAqqād was a significant step in his career as a scholar. Under his supervision, he read books of Qurʾānic exegesis, juristic principles, inheritance, *taṣawwuf*, mathematics and rational sciences. Al-ʿAqqād appears to be instrumental in changing Ibn ʿĀbidīn's *madhhab* to the Ḥanafī school. With him, Ibn ʿĀbidīn read major books of Ḥanafī *fiqh* such as *Multaqā al-Abḥur*, *Kanz al-Daqāʾiq*, and commentaries on the *Hidāya*. After his death, Ibn ʿĀbidīn started reading *al-Durr al-Mukhtār* with the famous Shaykh Sayyid al-Ḥalabī. Ibn ʿĀbidīn was also a member of the Qādirī Sufi order to which he was committed till his death.[11] It is important to note that between 1830 and 1880 Damascene ʿUlamāʾ, such as Ibn ʿĀbidīn and his son ʿAlāʾ al-Dīn, witnessed tremendous change and decline in status due to the impact of the Ottoman Empire's administrative reforms in social, political, cultural, and economic life.[12]

Ibn ʿĀbidīn's *Radd al-Muḥtār* is his magnum opus, in which he compiled the preponderant and revised opinions of the Ḥanafī school, thereby making it an authority in the late Ḥanafī tradition. Some key authors in the *madhhab* such as Kamāl Ibn al-Humām (d. 1457), who attempted similar comprehensive works, passed away before they could complete their works. Usually these *fiqh* works did not progress beyond the section on *ijāra* (hire & Lease). Therefore, Ibn ʿĀbidīn started his *Radd al-Muḥtār* from the book on *ijāra* saying: "If death takes me sooner, this should serve as the completion of the unfinished earlier Ḥanafī works. But if I live long

[10] Ibn ʿĀbidīn, *Tanqīḥ al-Fatāwā al-Ḥāmidiyya*, vol. 1:2; Ibn ʿĀbidīn, *Radd al-Muḥtār,* 170.
[11] Ibn ʿĀbidīn, *Tanqīḥ al-Fatāwā al-Ḥāmidiyya*, vol.1:2.
[12] David Commins, *Islamic Reform : Politics and Social Change in Late Ottoman Syria* (Oxford: Oxford University Press, 1990), 7. He suggests that the Ottoman reforms led to the dislocation of the status of the ʿulamāʾ and their prestige in the Syria. He argues that these Ottoman reforms created a new social class who grew in power and wealth to the disadvantage of the ʿUlamāʾ. See Commins, *Islamic Reform*, 19-20.

enough, I shall return to make it a whole, complete work."[13] Ibn ʿĀbidīn did not complete the final edited copy of his manuscript. He died at Damascus in 1836. His son ʿAlāʾ al-Dīn completed the final copy and appended his own notes spanning two separate volumes, and named it *Qurrat ʿUyūn al-Akhyār bi-Takmilat Radd al-Muḥtār*.[14]

Ibn ʿĀbidīn's Sources[15]

The encyclopedic nature of Ibn ʿĀbidīn's scholarship is affirmed by the extensive and impressive list of references and sources available to him during his writing of *Radd al-Muḥtār*. The following table records some of the major sources he cites in his commentary.[16] I observe that Ibn ʿĀbidīn is particularly attentive to late Ḥanafī legal commentaries, *fatāwā*, and treatises from the Mamluk and Ottoman periods. He is also attentive to Anatolian Ḥanafī jurists and their legal scholarship. The Egyptian Ḥanafī legal literature maintains its centrality in Ibn ʿĀbidīn's sources and references.

Ibn ʿĀbidīn's Sources: Arranged by Genre

Mutūn	***Shurūḥ***	***Fatāwā***	***Rasāʾil***
Al-Aṣl fī al-Furūʿ Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805)	*Shurūḥ al-Kanz: Al-Baḥr al-Rāʾiq; Al-Nahr al-Fāʾiq; Tabyīn al-Ḥaqāʾiq;*	*Fatāwā Ibn al-Shiblī (d. 769/1367)*	*Al-Tuḥfa al-marḍiyya fī al-arāḍī al-miṣriyya - Ibn Nujaym (d. 970/1563)*
Al-Ikhtiyār li-Taʿlīl Al-Mukhtār ʿAbd Allāh b. Mawdūd (d. 683/1284)	*Shurūḥ Multaqā al-Abḥur: Majmaʿ al-Anhur, Majrā al-Anhur, Sakb al-Anhur*	*Fatāwā Ibn Kamāl Paṣa (d. 941/1535)*	*Al-Khayr al-bāqī fī jawāz al-wuḍūʾ min al-fasāqī - Ibn Nujaym (d. 970/1563)*

[13] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:170.
[14] Ibn ʿĀbidīn, *Tanqīḥ al-Fatāwā al-Ḥāmidiyya*, vol. 1:2.
[15] A new work in Arabic is dedicated to Ibn ʿĀbidīn's sources, titled *Laʾālīʾ al-Miḥār fī Takhrīj Maṣādir Ibn ʿĀbidīn*. This work is published in two volumes and it has a detailed list of all of Ibn ʿĀbidīn's sources and authorities. See Luʾay ʿAbd al-Raʿūf al-Khalīlī, *Laʾālīʾ al-Miḥār fī Takhrīj Maṣādir Ibn ʿĀbidīn fī Ḥāshiyatihi Radd al-Muḥtār* (Amman: Dār al-Fatḥ li al-Dirāsāt, 2010).
[16] Ibn ʿĀbidīn incorporates many of his subtle and unique revisions throughout *Radd al-Muḥtār*. He explains that many of his insights were not addressed before. See Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:123, 126, 135, 180, 219, 229, 230, 240, 279.

Al-Kāfī fī al-Furūʿ (d. 710/1310)	*Sharḥ al-Mabsuṭ - Khwāhar Zāda*	*Fatāwā Ibn Nujaym (d. 970/1563)*	*Al-Durra al-yatīma fī al-Ghanīma - Ḥasan al-Shurunbulālī*
Kanz al-Daqāʾiq Abū al-Barakāt al-Nasafī (d. 710/1310)	*Shurūḥ al-Qudūrī: Al-Mujtabā; Al-Muhimm al-Ḍarūrī; Al-Yanābīʿ; Al-Lubāb; Al-Aqṭaʿ; Kifāyat al-Fuqahāʾ; Zād al-Fuqahāʾ*	*Fatāwā al-Anqrawiyya (d. 1098/1686)*	*Al-Zahr al-Naḍīr ʿalā al-Hawḍ al-Mustadīr - Ḥasan al-Shurunbulālī (d. 1069/1659)*
Al-Hidāya Al-Marghinānī (d. 593/1197)	*Shurūḥ al-Hidāya: Al-Bināya; Fatḥ al-Qadīr; Al-ʿInāya; Al-Kifāya*	*Fatāwā Al-Ustrushaniyya (d. 633/1235)*	*Al-Ṣulḥ bayn al-ikhwān fī ibāḥat shurb al-dukhkhān ʿAbd al-Ghanī al-Nābulsī (d. 1143/1731)*
Tanwīr al-Abṣār Al-Timurtāshī (d. 1004/1595)	*Shurūḥ al-Nuqāya: Fatḥ Bāb al-ʿInāya; Kamāl al-Dirāya; Jāmiʿ al-Rumūz*	*Fatāwā al-Bazzaziyya (d. 642/1244)*	*Al-ʿIqd al-farīd li-bayān al-Rājiḥ min al-khilāf fī jawāz al-taqlīd, al-Shurunbulālī (d. 1069/1659)*
Majmaʿ al-Baḥrayn Ibn al-Saʿātī (d. 694/1294)	*Shurūḥ al-Wiqāya: Wiqāyat al-Riwāya; Tawfīq al-ʿInāya*	*Fatāwā al-Tatārkhāniyya (d. 800/1397)*	*Al-Iqnāʿ fi al-rāhin wa al-murtahin idhā ikhtalafa fī radd al-rahn wa lamm yadhkur al-ḍayāʿ - al-Shurunbulālī (d. 1069/1659)*
Mukhtaṣar al-Qudūrī (d. 428/1036)	*Shurūḥ Majmaʿ al-Baḥrayn : Al-Mustajmaʿ; Al-Manbaʿ fī sharḥ al-Majmaʿ*	*Fatāwā al-Timurtāshī (d. 1004/1595)*	*Itḥāf man bādar ilā ḥukm al-nushādir - ʿAbd al-Ghanī al-Nābulsī (d. 1143/1731)*
Multaqā al-Abḥur Ibrāhīm al-Ḥalabī (d. 956/1549)	*Shurūḥ al-Kāfī: Mabsūṭ al-Sarakhsī; Sharḥ al-Kāfī al-Isbījābī*	*Fatāwā al-Ḥānūtī (d. 1010/1610)*	*Al-masʾala al-khāṣṣa fī al-wakāla al-ʿāmma - Ibn Nujaym (d. 970/1563)*
Al-Wiqāya – Maḥmūd b. Ṣadr al-Sharīʿa al-Maḥbūbī (d. 1274)	*Sharḥ al-Aṣl (al-Mabsūṭ)*	*Fatāwā al-Ẓahīriyya (d. 619/1222)*	*Badhl al-majhūd fī masʾalat taghyīr al-nuqūd - al-Timurtāshī (d. 1004/1595)*
Mukhtaṣar al-Ṭaḥāwī (d. 321/933)	*Sharḥ al-Jāmiʿ al-Ṣaghīr*	*Fatāwā al-Walwājiyya (d. 540/1145)*	*Taḥrīr al-aqwāl fī ṣawm al-sitt min shawwāl - Ibn Quṭlūbughā (d. 879/1474)*
Al-Jāmiʿ al-Ṣaghīr Al-Jāmiʿ al-Kabīr Muḥammad al-Shaybānī (d. 189/805)	*Sharḥ al-Jāmiʿ al-Kabīr*	*Fatāwā al-Nasafī (d. 537/1142)*	*Radʿ al-rāghib ʿan ṣalāt al-raghāʾib - ʿAlī b. Ghānim al-Maqdisī (d. 1004/1595)*
		Fatāwā Qāriʾ al-Hidāya (d. 861/1456)	*Al-Qawl al-balīgh fī ḥukm al-tablīgh, Aḥmad b. Muḥammad al-Ḥamawī (d. 1098/1686)*

Figure 3.1

THE PRIMACY OF THE MADHHAB

In his *Radd al-Muḥtār*, Ibn ʿĀbidīn starts off by defining the authorities from which he acquired his knowledge. He also identifies the hierarchy of legal authorities within the *madhhab*. Ibn ʿĀbidīn divides the hierarchy of the authoritative opinions of the *madhhab* into three categories: (1) *masāʾil al-uṣūl* and they point to the opinion narrated in the authoritative works of Ḥanafī school (*ẓāhir al-riwāya*: *al-Mabsūṭ*, *al-Jāmiʿ al-Kabīr*, *al-Jāmiʿ al-Ṣaghīr*, *al-Siyar al-Kabīr*, *al-Siyar al-Ṣaghīr*, and *al-Ziyādāt*) that represent the positions of Abū Ḥanīfa, Abū Yusuf, and Muḥammad b. al-Ḥasan al-Shaybānī; (2) *masāʾil al-nawādir*, which refer to these previous eponyms' opinions that were narrated in non-authoritative works of Ḥanafī school such as *al-Amālī* of Abū Yūsuf; and (3) *masāʾil al-wāqiʿāt*; which are the opinions that were produced by later independent jurists such as ʿIṣām b. Yūsuf (d. 830), Ibrāhīm b. Rustum (d. 826) , and Abū Ḥafṣ al-Bukhārī (d. 832) to address new emerging social issues that were not tackled before in the *madhhab*.[17] The first work that gathered the opinions of these jurists is *Kitāb al-Nawāzil* by Abū al-Layth al-Samarqandī (d. 983).[18]

Ibn ʿĀbidīn draws our attention to similar works such as al-Nāṭifī's (d. 1054) *Majmūʿ al-Nawāzil wa al-Wāqiʿāt*.[19] In this hierarchy of opinions, Ibn ʿĀbidīn follows al-Ḥaṣkafī in stipulating that the *fatwā* of the *madhhab* is to adopt the opinions of the eponyms in following order: Abū Ḥanīfa, Abū Yūsuf, Muḥammad al-Shaybānī, Zufar b. al-Hudhayl, and al-Ḥasan b. Ziyād. Yet, Ibn ʿĀbidīn argues that this hierarchy of opinions should not necessarily be followed if the *muftī* is a *mujtahid*. The reason for the *mujtahid* jurists not to follow this hierarchy, Ibn

[17] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:69.
[18] Ibn ʿĀbidīn explains that *ẓāhir al-riwāya* refers primarily to the opinions of Abū Ḥanīfa, Abū Yūsuf, and Muḥammad. He makes a subtle distinction between *ẓāhir al-riwāya* and *riwāyat al-uṣūl*. For him, *riwāyat al-uṣūl* points mainly to opinions narrated in the *al-Mabsūṭ*, *al-Jāmiʿ al-Kabīr*, *al-Jāmiʿ al-Ṣaghīr*, *al-Siyar al-Kabīr*, *al-Siyar al-Saghīr*, and *al-Ziyādāt*. All of these opinions are Muḥammad al-Shaybānī's narrations. As for *ẓāhir al-riwāya*, Ibn ʿĀbidīn argues that it may include opinions transmitted in the *al-nawādir* by al-Ḥasan b. Ziyād, if they are also narrated in one of the *uṣūl* books. See Ibn ʿĀbidīn, *Majmūʿat Rasāʾil*, 16-18.
[19] Ibid.

ʿĀbidīn argues, is their ability to exercise their discretion in the evidence (*al-naẓar fi al-dalīl*).[20] Ibn ʿĀbidīn explains that Ḥanafī jurists have adopted the opinions of Zufar b. al-Hudhayl in seventeen cases [leaving behind the opinions of the eponyms] and declared it to be the preponderant opinion of the school. Ibn ʿĀbidīn asserts the obligation to follow what Ḥanafī jurists declared to be the preponderant opinion of the *madhhab*.[21] Ibn ʿĀbidīn maintains that the opinions of Abū Ḥanīfa are authoritative, yet their use is contingent upon the authorities of the *madhhab* not declaring a new preponderant opinion. In fact, Ibn ʿĀbidīn stresses that in case the authorities of the *madhhab* do declare a new preponderant opinion, Abū Ḥanīfa's opinions would be considered less preponderant and they should not be admitted to judicial decisions.[22]

Ibn ʿĀbidīn reiterates, in his ʿ*Uqūd Rasm al-Muftī*, the central issue of legal authority and authenticity of Ḥanafī jurists. The system of authority Ibn ʿĀbidīn articulates embodies his emphasis on affirming the authority of the *madhhab*.[23] Ibn ʿĀbidīn constructs a hierarchy of the school's legal opinions and how to relate to the early authorities of the school. He defines the framework of this authority through asserting loyalty, methodological commitment, and authority of early Ḥanafī jurists as indispensible to the continuation of the Ḥanafī school. Ibn ʿĀbidīn substantiates these claims by quoting his teacher's work *al-Fatāwā al-Khayriyya* stating:

> It is established in our school that neither a *fatwā* nor an action can be embraced unless it is in accordance with the opinions of the great Imam (Abū Ḥanīfa). The opinions of Abū Ḥanīfa should not be abandoned for the sake of his disciples' opinions, except in necessity (*ḍarūra*).[24]

Furthermore, Ibn ʿĀbidīn asserts that it is incumbent upon jurists to follow the most preponderant opinions in their *madhāhib*. The incorporation of certain opinions into the *mutūn*, Ḥanafīs insist, makes them preponderant. Also, late Ḥanafīs use certain phrases to point to these

[20] Ibid.
[21] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:70.
[22] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4:395.
[23] Ibn ʿĀbidīn, *Majmūʿat Rasāʾil*, 44.
[24] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:69.

opinions in their commentaries. He insists that it is not permissible to perform an act or adopt a *fatwā* with what is declared to be less preponderant in the *madhhab*, except in necessitous circumstances. Ibn ʿĀbidīn invokes *al-Fatāwā al-Kubrā* by Ibn Ḥajar al-Makkī (d. 1567) to argue that it is not permissible for *muftīs* and those who follow a specific *madhhab* to give a *fatwā* or undertake an action based on their personal preference. Ibn ʿĀbidīn insists that there is no difference of opinion regarding this position. He warns his colleagues against ignoring the preponderant opinion of the *madhhab*, otherwise, they will fall into the trap of following one's personal whims (*ittibāʿ al-hawā*).[25] Ibn ʿĀbidīn is concerned about the hierarchy of legal opinions and the necessity for any legal discretion to be articulated from within the framework of the school.

Thus, in his treatise, Ibn ʿĀbidīn declares that issuing a *fatwā* or a legal ruling with what is considered to be less preponderant by scholars is antithesis to the consensus established by legal schools (*madhāhib*). Ibn ʿĀbidīn cites *al-Fatāwā al-Khayriyya* to support his claim that there is no doubt that the knowledge of the preponderant opinions from the less probable and its levels of authoritativeness whether in strength or weakness is essential for the jurist. Ibn ʿĀbidīn asserts that it is an obligation for the *muftī* and the judge to maintain certain knowledge before giving any answers, lest they prohibit what is halal and permit what is actually impermissible (*ḥarām*).[26]

Ibn ʿĀbidīn insists that the *mutūn* are the vehicle for the continuation of the *madhhab*. He stipulates seven *mutūn* to represent the authoritative opinions in the school: al-Marghinānī's *al-Bidāya* (this is the original *matn* for the *Hidāya*), *mukhtaṣar al-Qudūrī*, al-Mawṣilī's *al-Mukhtār*, Ṣadr al-Sharīʿa's *al-Nuqāya*, al-Maḥbūbī's *al-Wiqāya*, al-Nasafī's *al-Kanz*, and al-Ḥalabī's

[25] Muḥammad Amīn ʿĀbidīn, *Majmūʿat Rasāʾil Ibn ʿĀbidīn*, vol.1 (Istanbul: Dār-i Saʿādat, 1907), 45.
[26] Ibid.

Multaqā al-Abḥur. It is important to note that Ibn ʿĀbidīn orders the authority structure of legal genres in the school in the following manner: *mutūn*, *shurūḥ*, and *fatāwā*. The opinions of *mutūn* are the final reference for any dispute in the school. Once an opinion has become authoritative it will be considered the madhhab opinion, it was incorporated in the *mutūn* or the *shurūḥ*. Unlike the secondary literature where the *fatāwā* are considered anchored in social realty of Muslim societies, Ibn ʿĀbidīn placed the emphasis on the authoritative opinions in the *mutūn* and *shurūḥ*.[27]

Besides, the central issue to Ibn ʿĀbidīn is the concept of *madhhab* as a paradigm of thinking. Ibn ʿĀbidīn refers us to the concepts of *tarjīḥ* (to declare the preponderant opinion through the various factors that jurists consider in weighing the evidence before reaching a legal determination), and *taṣḥiḥ* (to revisit a legal opinion within the *madhhab*) wherever he wishes to stress the contribution of late Ḥanafīs in order to underscore the necessity of the *madhhab* and how the process of change occurs within its internal structure. Ibn ʿĀbidīn establishes a hierarchy of authoritativeness within the *madhhab* however, it is through necessity (*ḍarūra*) that such established opinions can be reconsidered and even reversed.

Furthermore, the idea of the *madhhab* is not only essential for preserving the consistency of legal discretion of the school but also it is the only way for the followers of the *madhhab* to internalize the moral principles of the school. Moral principles point to the ethics of learning and legal training of the school followers Thus, for Ibn ʿĀbidīn, the follower of a *madhhab* (*muqallid*) cannot internalize norms of morality on the basis of independent reasoning. Doing so solely on that basis ultimately leads to relative deficiency in moral knowledge and rectitude. Learning merely through the reading of texts on one's own, even when the language of the text has been mastered, nevertheless leaves one prone to misinterpretation, which can have major

[27] Ibn ʿĀbidīn, *Majmūʿat Rasāʾil*, 36-37.

consequences for one's understanding and application of both ethical and legal norms. The importance of *taqlīd* as a vehicle for both legal and moral instruction lies in its facilitation of close personal contact between student and teacher. This contact is what successfully conveys norms and ultimately transforms the student in a way that his own independent reasoning and study could not accomplish.[28]

This commitment to the *madhhab* is further clarified by Ibn ʿĀbidīn's reference to the *fatāwā* of Ibn Ḥajar al-Makkī al-Shāfiʿī (d. 1565)[29] where he was asked whether it is permissible for a person who closely reads the books of jurisprudence, on his own without an authority jurist, to issue *fatwā* solely dependent upon his readings.[30] Ibn ʿĀbidīn explains that the answer that was given is that it is not permissible for him to give a *fatwā* in any way because he is an ignorant layperson that does not understand what he is saying. In fact, Ibn ʿĀbidīn asserts that even the person who acquires knowledge from considered authorities, it is not permissible for him to engage in the process of *iftāʾ* from one or two books only.[31] Ibn ʿĀbidīn recalls al-Nawawī's assertions that not even ten or twenty books are sufficient to engage in *iftāʾ*, arguing that these scholars might rely on a weak opinion in the *madhhab*, and thus it is not permissible to follow these opinions. By contrast, Ibn ʿĀbidīn affirms that the one who can issue a *fatwā* (*yuftī*) and can serve to be the medium between people and God, is the skilled jurist who acquired his legal knowledge from its reliable authorities which resulted in developing a set of skills by which he can distinguish the authentic opinions, and possess the knowledge of the particular cases and their interrelations. Ibn ʿĀbidīn concludes that the individuals who lack any of these necessary

[28] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:30.
[29] Shihāb al-Dīn Abū al-ʿAbbās Aḥmad b. Muḥammad b. Muḥammad b. ʿAlī b. Ḥajar al-Haytamī al-Shāfiʿī. He was born in Egypt in small village called Maḥallat Abī al-Haytam. He moved to Mecca and resided there around 940/1534. Many late Ḥanafīs refer to the works of Ibn Ḥajar al-Makkī, See Ibn ʿĀbidīn, *Minḥat al-Khāliq ʿalā al-Baḥr al-Rāʾiq*, vol. 1:283; vol. 2: 31; vol. 6: 38, 108; vol. 7: 90.
[30] Ibn ʿĀbidīn, *Majmūʿat Rasāʾil*, 46.
[31] Ibid.

skills and try to claim a high status by issuing *fatāwā*, they should be severely punished and reproached to abstain from this repugnant matter that leads to infinite evils.[32]

Local Custom (ʿurf)

This section examines how Ibn ʿĀbidīn invokes and is attentive to the influence of local customs in his legal discourse.[33] He dedicates a discussion in *Radd al-Muḥtār* to the authority of local customs for reversing legal rulings that are based on *qiyās* (analogy). Ibn ʿĀbidīn emphasizes that emergent custom is admitted to the legal discourse, and that it does not have to have been established since the time of the Prophet's Companions (*ʿitibār al-ʿurf al-ḥādith fa-lā yalzam kawnahu min ʿahd al-ṣaḥāba*).[34] He cites many cases where Cairene, Damascene, and Anatolian customs[35] impact his legal reasoning.[36] For example, he invokes Damascene custom to argue that street mud that is spilled on one's clothes would not prevent one from praying: it is permissible to pray in such clothes. Ibn ʿĀbidīn points out that the one who suffers from the stains of this street mud cannot avoid it easily anyway, especially in winter in Syria because the roads are not usually free from such impurities.[37] He explains that late Ḥanafīs made this case analogous to Muḥammad b. al-Ḥasan al-Shaybānī's opinion of the purity of animal droppings should they get on one's clothes.[38]

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[32] Ibid.
[33] Ibn ʿĀbidīn's famous treatise *Nashr al-ʿarf fī bināʾ baʿḍ al-aḥkām ʿalā al-ʿurf* (*Disseminating Fragrance: On Building some Laws on Custom*) on the status of custom as a source of law gained significant attention in the secondary literature.
[34] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4:364.
[35] I dedicate a case study on Anatolian Custom in this chapter see p. 207.
[36] For examples of Ibn ʿĀbidīn's discussions of Cairene customs see Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 3: 131; vol. 4: 423, 521,548; vol. 5: 189, 198, 516, 542. For examples of Ibn ʿĀbidīn's discussions of Damascene customs see Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1: 189, 197, 324; vol. 2: 99, 169; vol. 3: 131, 746; vol. 4: 186. For examples of Ibn ʿĀbidīn's discussions of Anatolian customs see Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1: 325, vol. 2: 160, vol. 3: 608, vol. 4: 364, 395, 432, 435; vol. 5: 279, 420; vol. 6: 12.
[37] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:103.
[38] Ibid.

In his discussion of the greetings after Eid prayers, Ibn ʿĀbidīn relies upon Cairene and Damascene custom, as explained by his late Ḥanafī predecessors, to argue that the greeting *taqabbal Allāh minnā wa minkum* (may God accept [your rituals] from both of us) is permissible to use. He states that there is no narration about this specific greeting from Abū Ḥanīfa and his disciples. Some Ḥanafīs understood that the indifference to narrations on this issue might be an indication of its undesirability. This is also the opinion of Imām Mālik b. Anas. Ibn ʿĀbidīn reports that al-Awzāʿī stated that this greeting is a *bidʿa* (undesirable innovation). By contrast, late Ḥanafīs starting from Ibn Amīr Ḥājj, the student of Ibn al-Humām al-Miṣrī, argued that the usage of this greeting is permissible and even desirable. He explains that the custom in Syria and Egypt is to say *ʿĪd Mubārak ʿAlayk* (may you have a blessed Eid), and that this greeting is a sort of *duʿāʾ*.[39]

It is important to stress that Ibn ʿĀbidīn admits custom and persistent social practices as part and parcel of his legal reasoning. However, the ways in which Ibn ʿĀbidīn rejects, accepts, and approves these customary practices is a different issue. He is aware of the fact of that a legal system that does not directly engage with social change and time can lose its relevance, and so he strives to maintain a balance between the stability offered by Ḥanafī norms and the change in time and customs.

Secondary Literature

There are few studies that explore Ibn ʿĀbidīn's usage of custom to drive independent legal reasoning (*ijtihād*) which is a central factor to the understanding of doctrinal shifts of the school among late Ḥanafīs. The works of Haim Gerber[40], Norman Calder[41], Judith Tucker[42],

[39] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 2:169. There are other examples of the Syrian customs see Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 3:601; vol. 4:208.
[40] Haim Gerber, *Islamic Law and Culture* (Leiden: Brill, 1999).

Khaled Abou El Fadl[43], Ahmad A. Ahmad[44], and Ayman Shabana[45] analyze Ibn ʿĀbidīn's use of custom to introduce new rulings or shift from established opinions of the school. These scholars viewed Ibn ʿĀbidīn's scholarship in different ways. Wael Hallaq, for example, argues that Ibn ʿĀbidīn "succeeded in elevating custom to the status of a legal source, capable of overriding the effects of other sources, not excluding much of the Qurʾān and the Sunna."[46] Thereby, according to Hallaq, Ibn ʿĀbidīn "sacrificed the entire structure of law and legal methodology, despite his expressed loyalty to the accepted hierarchy of his school, and he paved the way to modern legal reform."[47] Moreover, he insists "Ibn ʿĀbidīn's hermeneutical venture resulted in a conflict between his loyalty to the authoritative hierarchy of Ḥanafī doctrine and the demands of custom."[48] Also, Haim Gerber calls Ibn ʿĀbidīn's treatment of *ʿurf* "the practical secularization of Islamic law." According to Gerber, Ibn ʿĀbidīn "departed in an unprecedented manner from the most fundamental postulate of the law, namely its attribution to revelation."[49] In addition, Itzchak Weismann claims that the scholars on Ibn ʿĀbidīn generally "fail to mention that along with his scholarly occupation Ibn ʿĀbidīn had been a no less ardent Sufi."[50]

I dedicate some attention to Hallaq's article, "A Prelude to Ottoman Reform," because he grapples with similar issues, and it is beneficial to juxtapose his conclusions with the arguments of this chapter. Hallaq dedicates the entire article to discuss the status of custom as a source of

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[41] Norman Calder, "The ʿUqūd rasm al-mufti of Ibn ʿĀbidīn," *Bulletin of the School of Oriental and African Studies*. 63.2 (2000): 215-228.
[42] Judith Tucker, "Muftis and Matrimony: Islamic Law and Gender in Ottoman Syria and Palestine." *Islamic Law and Society*. 1.3 (1994): 265-300.
[43] Khaled Abou El Fadl, "Islam and the Theology of Power." *Middle East Report*. 221 (2001): 28-33.
[44] Ahmad Atif Ahmad, *Islam, modernity, violence, and everyday life*. (New York: Palgrave Macmillan, 2009).
[45] Ayman Shabana, *Custom in Islamic law and legal theory the development of the concepts of ʿurf and ʿādah in the Islamic legal tradition*. (New York, N.Y.: Palgrave Macmillan, 2010).
[46] Wael Hallaq, *Shari'a: Theory, practice, transformations* (Cambridge: Cambridge University Press, 2009), 447-8.
[47] Ibid.
[48] Ibid.
[49] Itzchak Weismann and Fruma Zachs. *Ottoman reform and Muslim Regeneration: Studied in Honor of Butrus Abu-Manneh* (New York: I.B. Tauris, 2005), 71.
[50] Weismann, *Ottoman reform and* Muslim, 71.

law in Ibn ʿĀbidīn's treatise *Nashr al-ʿarf fī bināʾ baʿḍ al-aḥkām ʿalā al-ʿurf* (*Disseminating Fragrance: On Building some Laws on Custom*).[51] In this treatise, Hallaq explains that Ibn ʿĀbidīn deals with two issues: (1) the relationship between custom and explicit scriptural evidence; (2) the status of custom in relation to the authoritative Ḥanafī opinions embodied in *ẓāhir al-riwāya* (authentic narrations in the Ḥanafī school). Hallaq argues that "although custom may have been incorporated as a part of the Ḥanafī juristic discourse, it was Ibn ʿĀbidīn who elevated it to the status of a source of law."[52] He claims that the price of such move on the part of Ibn ʿĀbidīn "was that he sacrificed the entire structure of law and legal methodology in favor of custom."[53] Hallaq contends that Ibn ʿĀbidīn used necessity to raise custom to status of a main legal source.[54] He accurately states, "Being a Ḥanafite [Ibn ʿĀbidīn], his frame of reference was his school, and Abū Ḥanīfa and his two chief disciples the ultimate authorities. It was their interpretation of the texts that counted, not the texts as such."[55]

A quick glance at Ibn Nujaym's formulations of *ʿurf* should make us skeptical of some of Hallaq's conclusions about Ibn ʿĀbidīn. Hallaq is accurate to state that *ʿurf* gains a substantial status in the legal commentaries prior to Ibn ʿĀbidīn.[56] Ibn Nujaym consistently insists that custom is a decisive factor (*ʿibra*) in legal reasoning. Beyond the notion that custom is a decisive factor, Ibn Nujaym uses custom as the sole criterion, in some cases, upon which he passes some of his legal judgments.[57] Ibn Nujaym emphasizes, "What is established by custom is, indeed, as

[51] Hallaq misread the title of this treatise throughout his article (he is unfamiliar with the vocalization of the first word, Hallaq thinks its *Nashr al-ʿurf*). Hallaq does not cite the complete title for Ibn ʿĀbidīn's treatise at any point of his article.
[52] Hallaq, "A Prelude to Ottoman Reform," in *Histories of The Modern Middle East: New Directions*, ed. Israel Gershoni, Hakan Erdem and Ursula Woköck (Boulder: Lynne Rienner Publishers, 2002), 55.
[53] Hallaq, "A Prelude," 55.
[54] Hallaq, "A Prelude," 56.
[55] Hallaq, "A Prelude," 56.
[56] Ibn Nujaym, *al-Baḥr*, vol. 1:71, 109, 267.
[57] Ibn Nujaym, *al-Baḥr*, vol. 3:81.

if it is established by scriptural evidence (*al-thābit bi al-ʿurf ka al-thābit bi al-naṣṣ*)."[58] Most importantly, Ibn Nujaym explains that emergent custom is a reason to abandon the stated opinions in *ẓāhir al-riwāya* as advocated by Ibn al-Humām.[59] Ibn Nujaym insists that scriptural evidence (*naṣṣ*) is stronger than *ʿurf* (custom). For him, the strong evidence should not be abandoned for the sake of a weaker proof.

However, Ibn Nujaym reveals that custom may be considered in spite of explicit scriptural evidence. In this regard, he relies on Abū Yūsuf's argument that scriptural proofs are intertwined with elements of time and are tied to local customs, which is the basis for the articulation of these proofs in the first place. Scriptural proofs in the form of the Qurʾān and the Sunna are defined by their temporal and social context, and as such, they need to be reinterpreted in light of new times and societies. The departure from earlier opinions, for Abū Yūsuf, is driven primarily by the fact that these customs evolved and changed.[60] It is imperative to note that Ibn ʿĀbidīn did not advocate that custom should be a source of law in absolute. In fact, the title of his treatise indicates that law can be based on custom, albeit only partly.[61] The legal scholarship of Ibn Nujaym, and late Ḥanafīs, provide evidence to challenge Hallaq's reading of the formulations of custom in Ibn ʿĀbidīn's treatise as "modern". Custom is central in the juristic discourse of late Ḥanafīs, not just in the work of Ibn ʿĀbidīn. What makes Ibn ʿĀbidīn an important jurist, on the cusp of modernity, is not his mere usage of custom and other established techniques of late Ḥanafīs; instead, it is how he employs custom and the methodological tools available in the *madhhab* to address tremendous changes in his time.

[58] Ibn Nujaym, *al-Baḥr*, vol. 3:188.
[59] Ibn Nujaym, *al-Baḥr*, vol. 4:47.
[60] Ibn Nujaym, *al-Baḥr*, vol. 6:140; al-Sarakhsī, *al-Mabsūṭ*, vol. 12:142.
[61] Ahmad, *Islam, modernity, violence, and everyday life*, 87.

The central difference between my arguments in this chapter and Hallaq's conclusions is the way we position Ibn ʿĀbidīn in the *madhhab* and how we interpret his legal articulations. I present Ibn ʿĀbidīn as part of a late Ḥanafī tradition in which custom was already established as a source of law. Hallaq is mistaken in his assertions that Ibn ʿĀbidīn's formulations of custom are modern. The cases that Hallaq closely explores in ʿĀbidīn's works such as the issue of sale of silver, wheat, and gold in is taken word for word from Ibn Nujaym's legal commentary (*al-Baḥr*).[62] Also, the adoption of Abū Yūsuf's opinion that custom can be prioritized over a prophetic tradition is discussed by Ibn Nujaym and was maintained by Ibn al-Humām to be his adopted opinion (*fatwā*). It is worth mentioning that Hallaq does not consult Ibn Nujaym's legal commentary at all. He dedicates his full attention to Ibn Nujaym's work on legal maxims (*al-Ashbāh*), where custom is briefly discussed. This is one of the factors that shaped Hallaq's argument (i.e. Ibn ʿĀbidīn's formulations on custom are modern). Similarly, Hallaq's assertion that no works prior to Ibn ʿĀbidīn invoked the founders' of the school to justify departure from the school is inaccurate. The same language and technique are found in Ibn Nujaym's and other later Ḥanafī works.[63] Another difference between Hallaq's approach to Ibn ʿĀbidīn's scholarship and the arguments of this study is that Ibn ʿĀbidīn's presumed conflict of loyalties or his negligence of legal methodology misrepresent how early modern Ḥanafī understood their authority and role within the Ḥanafī school in this time period.

Furthermore, one of the issues I take with Hallaq's account is the way he envisages how the *madhhab*'s internal pluralism and disputes are resolved in spite of the declared hierarchy within the school. All the Ḥanafī and non-Ḥanafī jurists acknowledged Ibn ʿĀbidīn to be a brilliant Ḥanafī jurist. None of the existing literature within the Ḥanafī school suspected Ibn

[62] Ibn Nujaym, *al-Baḥr*, vol. 6:140.
[63] Ibn Nujaym, *Rasāʾil Ibn Nujaym*, ed. Khalīl al-Mays (Beirut: Dār al-Kutub al-ʿIlmiyya, 1980), 33-34.

ʿĀbidīn's loyalty to the *madhhab*. Ḥanafīs did not understand the school hierarchy by making evaluations of authority and loyalty – such as the authority and loyalty of Ibn ʿĀbidīn – through a scholar's adoption (or not) of the eponym's opinions. Also, Gerber's statement that Ibn ʿĀbidīn's adoption of custom was a vehicle to secularize Islamic law is influenced by the idea that Islamic law is primarily a "religious" law. Thus, for him, recognition of customary practices as a source of law appears to be as a violation of the "religious" nature of Islamic law.

When Muslim jurists make an attempt to sanction customary practices to shape legal discourse, contemporary scholars outside of the field of Legal Studies interpret the tension with social customs and cultural practices in terms of a crisis of identity and loyalty on the part of Muslim jurists in their commitment to the *madhhab*. The dominant opinion in Legal Studies today, however, shows that if the law is in perpetual conflict with established and widespread social and cultural practices, then the law is deficient.[64] In this situation, where the law is in conflict with a dispersed custom, in order to apply the law, an enormous amount of oppression and violence will be required. This necessarily defeats the purpose of law in the first place. Muslim jurists' formulations of custom as a source of law underscore their awareness of the complexity of this relationship between law and customary practices.

Islamic Law As Jurists' Law

Joseph Schacht argues that Islamic law represented "an extreme case of jurists' law."[65] He claims that Muslim jurists were not motivated by "juridical technique or by the needs of practice. Rather, the primary motivation for Muslim jurists was religious zeal, which tempted

[64] Khaled Abou El Fadl, "Islamic Law, Gender, and Human Rights," Islam in Conversation Series, Princeton University, March 25, 2014.
[65] Joseph Schacht, *An Introduction to Islamic Law* (New York, Oxford University Press, 1982), 209.

Muslim jurists to engage in speculative explorations into the will of God."[66] Schacht maintains: "Islamic law provides the unique phenomenon of legal science and not the state playing the part of a legislator, of scholarly handbooks having the force of law (to the extent to which Islamic law was applied in practice)."[67]

Schacht's characterizations are still maintained in the field of Islamic legal studies today. For instance, Peters argues that one of central features of the *sharīʿa* is that "it is a jurists' law and that the jurists, not the state, had the exclusive authority to formulate the rules of the *sharīʿa*. They did so in a scholarly, academic debate, in which conflicting and often contradictory views were opposed and discussed."[68] In the same vein, Wael Hallaq emphasizes that Islamic law is jurists' law not only because it happened to have been constructed by jurists, but mainly because the "jurists are the carriers of the authority that sustained it for over a millennium."[69] Hallaq suggests that the usurpation of this authority by the modern nation state resulted in the legal (if not cultural and social) rupture that occurred with the introduction of so-called "modern reform".[70]

This study does not dispute the fact that the locus of Islamic legal authority is vested with the Muslim jurists. Yet, to understand this authority or legal practice in absolute terms would defy considerable evidence of the probative value of Ottoman state in the process of law-making. Ḥanafī jurists themselves did not consider a legislative role of the state to be an encroachment on

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[66] Ibid.
[67] Schacht, *An Introduction to Islamic Law*, 210.
[68] Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shariʿa is Codified," *Mediterranean Politics*, 7:3, (2002): 84.
[69] Wael B. Hallaq, "Juristic Authority vs. State Power: The Legal Crises of Modern Islam," *Journal of Law and Religion*, vol. 19, No. 2 (2003 - 2004): 245. Hallaq, Schacht, and Peters agree on the premise that Islamic law is jurists' law for entirely different reasons. Schacht seems to point out that Islamic law lacks the state legal authority as a prerequisite to be considered a state law. By contrast, Hallaq emphasized that the disharmony of Muslim social and legal life in the modern times is due to the dislocation of the legal authority of Muslims jurists and its usurpation by the modern nation state. Hallaq asserts that Islamic law fall within the exclusive authority of Muslim jurists.
[70] Wael B. Hallaq, "Juristic Authority vs. State Power: The Legal Crises of Modern Islam," *Journal of Law and Religion*, vol. 19, No. 2 (2003 - 2004): 243.

their own authority. The relationship between the Ottoman state and the Ḥanafī jurists is better understood in terms of constantly negotiated boundaries. Thus, I propose to qualify the dominant view in the secondary literature that Islamic law is primarily a jurists' law by acknowledging the increasing role of the state in the law-making process.[71]

Justification of Legal Change

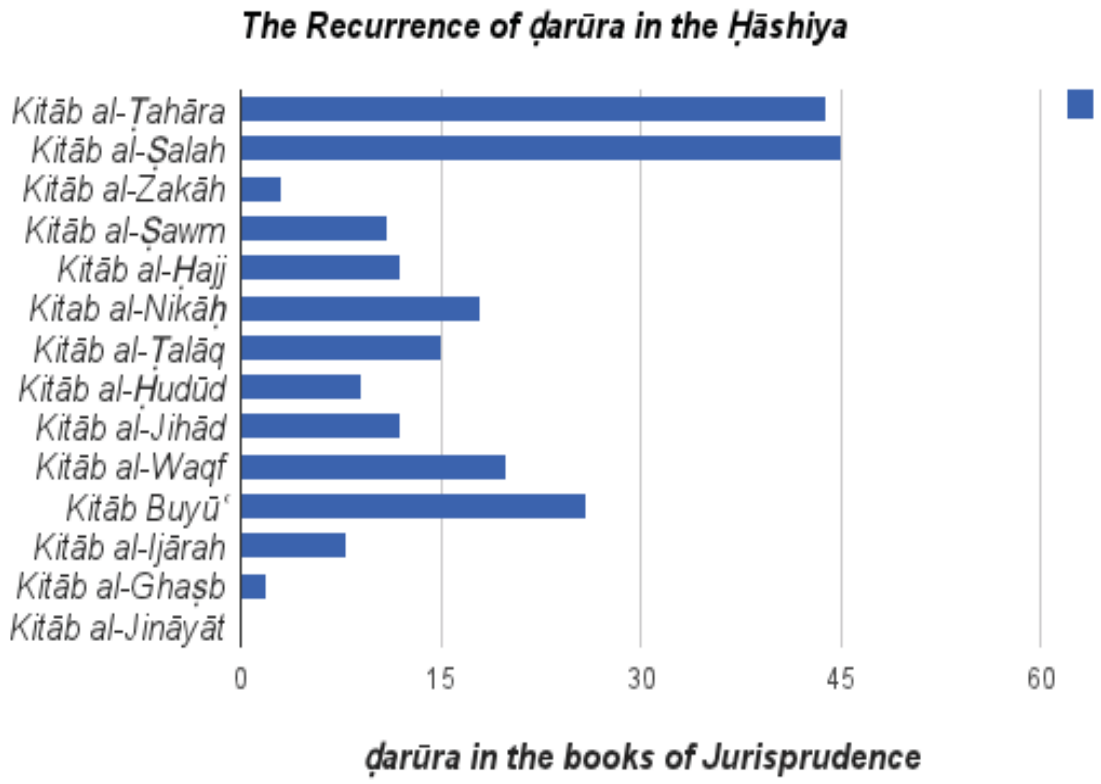

Figure 3.2

[71] Rudolph Peters in "What Does It Mean to Be an Official Madhhab? Ḥanafism and the Ottoman Empire," in *The Islamic School of Law: Evolution, Devolution, and Progress,* ed. Peri Bearman, Rudolph Peters, and Frank E. Vogel (Cambridge, Mass.: Islamic Legal Studies Program at Harvard Law School and Harvard University Press, 2006), 147-175, at 147. Alan Watson and Khaled Abou El Fadl demonstrate, a jurists' law is hardly a phenomenon unique to Islamic law. See Abou El Fadl and Watson, "Fox Hunting, Pheasant Shooting and Comparative Law," *American Journal of Comparative Law* (2000): 28.

This bar chart traces how often Ibn ʿĀbidīn refers to *ḍarūra* in a variety of *fiqh* chapters in his *Radd al-Muḥtār*. We observe a significant rise of the usage of *ḍarūra* in *Kitāb al-Ṭahāra* (44), and *Kitāb al-Ṣalāh* (45) times. The references to *ḍarūra* decline sharply in *Kitāb al-Zakāh* (3) times and *Kitāb al-ghaṣb* (usurpation) (2) times only. The references of *ḍarūra* rise again in *Kitāb al-Nikāḥ* (18) times, *Kitāb al-Waqf* (20) times, and *Kitāb al-Buyūʿ* (26) times. The references ceased in *Kitāb al-Jināyāt* (0). The aim of this chart is to show the extent of the utility of *ḍarūra* in Ibn ʿĀbidīn's legal commentary. The chart suggests that *ḍarūra* is part and parcel of the legal discourse and a built-in mechanism to overcome obstacles that might arise due to cultural practices, emergent situations, and communal need.

Cognizant of the school's methodological boundaries, Ibn ʿĀbidīn justifies admitting new opinions or revisiting an established norm within the Ḥanafī school by stating: "If Abu Ḥanīfa and his disciples were present, they would have adopted and admitted my new opinions."[72] Clearly, the change within the Ḥanafī school is justified in the name of the fundamental authorities of the school, not outside the realm of their opinions or authority. Also, Ibn ʿĀbidīn invokes the jurisprudential devices of necessity, *tarjīḥ* (to declare the preponderant opinion through the various factors that jurists consider in weighing the evidence before reaching a legal determination), and *taṣḥiḥ* (to revisit a legal opinion within the *madhhab*), and change in times (*ikhtilāf ʿaṣr wa zamān*), widespread communal necessity (*ʿumūm al-balwā*) to transform some of the *madhhab*'s persistent opinions.

Some secondary scholarship viewed the concept of *ḍarūra* as a legal tool to justify predetermined legal outcomes. For example, in his *Authority, Continuity, and Change in Islamic Law*, Wael Hallaq rightly argues that necessity (*ḍarūra*) drives doctrinal change.[73] He contends

[72] Muḥammad Amīn ʿĀbidīn, *Majmūʿat Rasāʾil Ibn ʿĀbidīn*, vol. 1 (Istanbul: Dār-i Saʿādat, 1907), 44.
[73] Wael Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2004),

that jurists justified their adopting of new practices on the basis of necessity. Hallaq asserts that the principle of *ḍarūra* finds justification in Qurʾān 2:185: "God wants things to be easy for you and does not want any hardship for you." In this regard, Hallaq demonstrates how Ibn ʿĀbidīn bypasses authoritative doctrines held by the most influential figures of the school in favor of a weak opinion.[74] Hallaq argues that Ibn ʿĀbidīn solves new emergent problems through two ways: one, by upholding custom as a sufficient justification; and two, by resorting to the notion of necessity (*ḍarūra*).[75] Hallaq claims that although the notion of necessity has been used to justify "a number of departures from the stringent demands of the law, it is, like custom, restricted to those areas upon which the explicit texts of revelation are silent."[76] Hallaq insists that necessity was a legal device used to justify "departure from the authoritative doctrine of the school, that which represents the dominant mainstream of legal doctrine and practice."[77] He insists that *ḍarūra* was a device that must have seemed handy when all other hermeneutical ventures appeared to have no prospect of success."[78]

Furthermore, in his *Sharīʿa: Theory, Practice, and Transformation*, Wael Hallaq maintains that the concept of *ḍarūra* is among the methods that the emerging nation-states in the 19th century used to restrict the scope and influence of Islamic law while strengthening their bureaucratic and legal powers.[79] He argues that the narrowing down of *sharīʿa* must be seen more as "an inherent part of the power dynamics of the evolving modern state rather than as teleological efforts to progress toward a more sophisticated legal culture".[80] Hallaq emphasizes that modern legists transformed this concept in two ways: (1) it was transposed from the realm of

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211-213.
[74] Ibid.
[75] Hallaq, *Authority, Continuity, and Change in Islamic Law*, 227.
[76] Ibid.
[77] Hallaq, *Authority, Continuity, and Change in Islamic Law*, 231.
[78] Hallaq, *Authority, Continuity, and Change in Islamic Law*, 232.
[79] Wael Hallaq, *Shari'a: Theory, practice, transformations* (Cambridge: Cambridge University Press, 2009), 447-8.
[80] Ibid.

substantive law to the realm of legal theory; (2) the scope of *ḍarūra* was widened beyond recognition.[81]

Hallaq's sentiment about the abuse of *ḍarūra* in contemporary legal discourse is valid; however, this should not overshadow the fact that *ḍarūra* is a tool of legal theory.[82] Also, from the bar chart on *ḍarūra*, it is obvious that the scope of *ḍarūra* incorporates the majority of topics in the legal literature of Ibn ʿĀbidīn. The key result of this empirical study of the concept of *ḍarūra* in the legal literature of Ibn ʿĀbidīn is that it demonstrates that the necessity is used frequently in Ḥanafī juristic discourse. The bar chart poses serious doubts about Hallaq's characterization of the realm and scope of *ḍarūra*. The doctrine of *ḍarūra* has been an essential legal device in the pre-modern legal thought. This is reflected in the discussion dedicated to *ḍarūra* in Ḥanafī legal discourse, namely in issues on civil liability (*al-ḍamān*), legal concession (*al-rukhṣa*), and the doctrine of the choice of the lesser evil (*akhaff al-mafsadatayn*).[83] Also, *ḍarūra* is present in the discussions on legal concessions (*rukhaṣ*) and resolve (*ʿazīma*) in the context of legal obligation (*taklīf*).[84]

Furthermore, Hallaq's engagement with the concept of *ḍarūra* in Ibn ʿĀbidīn's legal literature is important but his discussion fails to capture how *ḍarūra* is used in the legal reasoning of Ḥanafī jurists. Ibn ʿĀbidīn employed *ḍarūra* as a secondary legal device to justify doctrinal changes within the Ḥanafī legal school. Ḥanafīs do not use *ḍarūra* as a primary,

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[81] Ibid.
[82] The discussion on *ḍarūra* appears in Ḥanafī uṣūl works such as ʿUbayd Allāh al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001), 81; ʿAlī b. Muḥammad al-Bazdawī, *Kanz al-Wuṣūl ilā Maʿrifat al-Uṣūl* (Istanbul: al-Sharika al-Suḥāfiyya al-ʿUthmāniyya, 1890), 213.; Aḥmad al-Shāshī, Uṣūl al-Shashī (Beirut: Dār al-Kutub al-ʿIlmiyya, 2002), 164. There are also extended discussions on *ḍarūra* in *qawāʿid* works such as Zayn al-Dīn Ibn Nujaym, *al-Ashbāh wa al-Naẓāʾir*, ed. Muḥammad al-Hāfiz (Cairo: Dār al-Fikr, 2005), 84-92.
[83] Ibn Nujaym, *al-Ashbāh*, 84.
[84] ʿUbayd Allāh al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001), 81.; ʿAlī b. Muḥammad al-Bazdawī, *Kanz al-Wuṣūl ilā Maʿrifat al-Uṣūl* (Istanbul: al-Sharika al-Suḥāfiyya al-ʿUthmāniyya, 1890), 213.

independent source of law; rather, they take it into consideration only as a secondary factor in shaping their legal rulings.

Ibn ʿĀbidīn frequently justifies the shift in doctrine by change of time (*ikhtilāf al-zamān*), corruption of the people of the time (*fasād ahl al-zamān*), and general necessity (*ḍarūra*).[85] Ibn ʿĀbidīn argues that although these doctrinal shifts may be perceived to be out of the realm of the authoritative doctrinal commitments espoused by the school, these new espoused positions would have been endorsed by the authorities of the school if they had been exposed to the new customs, times, and compelling social needs.[86] The concept of *ḍarūra* is an indispensible tool of legal reasoning used by Ḥanafī jurists to admit or reject new emergent forms of social customs and dealings. It is evidence that Muslim jurists anchored their legal endeavor in social, economic, and political realties of Muslim societies in pursuit of a sustained social and political order.

Ibn ʿĀbidīn provides in his *Radd al-Muḥtār* a list of Ḥanafī terminologies that serve as markers of change of previous doctrines or opinions. Some of these markers are in themselves justificatory tools for new adopted opinions. The following set of terms is an exhaustive list employed by Ibn ʿĀbidīn: *ʿalayhi al-fatwā* (which is declared to be the opinion of the *madhhab*), *ʿalayhi ʿamal al-yawm* (practice of people in the present time), *al-ashbah* (that which is similar to what is stated by the *madhhab*); *al-awjah* (the most apparent in perspective of the indication of the proof where it clearly shows it more than others); *bihi jarā al-ʿurf* (what is known in practice among people). Ibn ʿĀbidīn states that Khayr al-Dīn al-Ramlī stresses that some words are more affirmative in nature than others and thus they should be prioritized before other opinions.[87]

[85] Ibn ʿĀbidīn, *ʿUqūd Rasm al-Muftī*, 44.
[86] Ibid.
[87] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:28.

One of the unique contractual agreements in Ḥanafī jurisprudence is the contract of *bayʿ al-wafāʾ*. This type of sale is exclusive to the Ḥanafī school. The validity of this contract was primarily justified in the name of the established custom of the Central Asian (Samarqandī) Ḥanafīs.[88] Ibn ʿĀbidīn informs us that this type of sale was permitted due to the necessity to address the common custom among the people in the lands beyond the Oxus River, namely, Bukhārā and Samarqand. The late *madhhab* opinion adopted the validity of this contract with different justificatory rationale.[89] Al-Ḥaṣkafī and Ibn ʿĀbidīn justify the *wafāʾ* sale by characterizing it as a promise on the part of the buyer, which states that at the conclusion of the transaction, the buyer returns the sold commodity and the seller returns the amount paid for the commodity.[90] The *wafāʾ* contract sanctions a condition to allow the buyer some benefits of the sold commodity.[91] The language of both Ibn ʿĀbidīn and al-Ḥaṣkafī fluctuate among the language of the sale contracts and secured pledges for describing the *wafāʾ* contract.[92] This fluctuation appears to be due the fact that Ḥanafī jurists were trying to legalize an already established commercial transaction in parts of the Ottoman provinces. Al-Ḥaṣkafī informs us this contract took different names in different provinces of the Ottoman Empire. For example, the contact is called *bayʿ al-amāna* in Egypt, *bayʿ al-ṭāʿa* in the Sham (Syria). In the final analysis, Ibn ʿĀbidīn emphasizes that *bayʿ wafāʾ* is a valid contract because it is based on a sound sale in order to satisfy the need to avoid *ribā* (usury).[93]

[88] See al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. 2: 6; Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 7:69; vol. 9:500.
[89] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 7:545.
[90] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 5:276.
[91] Ibid.
[92] Ibn Māza asserts that this type of contract is in essence a secured pledge contract (*rahn*). See Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 7: 69.
[93] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 5:277. Ibn ʿĀbidīn borrows this justification from Ibn Māza who states that people of Samarqand named this sale contract as *bayʿ al-wafāʾ* to avoid unlawful usury (*taḥruzan ʿan al-ribā*). See Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 7: 139.

Ibn ʿĀbidīn and al-Ḥaṣkafī reiterate the established maxims in the Ḥanafī school "hardship brings about ease" and "when a matter becomes difficult it would be eased" throughout their legal endeavor. Ibn ʿĀbidīn recalls a statement from the commentary on *al-Munya* by Ibn Amīr Ḥājj affirming: "From among the maxims of our authoritative scholars is to adopt ease in cases of necessity and all-encompassing public need (*balwā ʿāmma*)."[94] For example, in his discussion of the purity of water of the wells, Ibn ʿĀbidīn explains that the urine and feces of both mice and cats is ritually impure in most of the authentic narrations of the *madhhab*, which renders the water to be impure if they are found in a well. However, Ḥanafī jurists did not consider the well to be impure and thus they did not rule to drain it justifying their position based on necessity (*ḍarūra*).[95] The same ruling applies to the droppings of pigeons because it is not possible to prevent them from approaching the wells. Ibn ʿĀbidīn explains that it is an impurity that was forgiven due to necessity.[96] Although there is a difference of opinion on pigeons' droppings among scholars of the *madhhab*, what has been established in the *Hidāya* and many other authoritative works is that pigeons' droppings are not considered an impurity. This is due to the consensus of the normative practice (*al-ijmāʿ al-ʿamalī*) of domesticating pigeons in the Sacred Mosque without any dispute knowing of what comes out of them.[97]

[94] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:190.
[95] *Maʿrūḍāt Abī al-Suʿūd* were consistently incorporated in the authoritative Ḥanafī commentaries from the 17th -19th centuries. See Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:220.
[96] This ruling has been an established norm of the early and late Ḥanafīs. See al-Sarakhsī, *al-Mabsūṭ*, vol. 1: 56-7; al-Marghinānī, *Bidāyat al-Mubtadī*, vol. 1:5; Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 1: 107; Akmal al-Dīn al-Bābartī, *al-ʿInāya Sharḥ al-Hidāya*, vol. 1: 100.; Badr al-Dīn al-ʿAynī, *al-Bināya Sharḥ al-Hidāya*, vol. 1: 439.
[97] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:221.

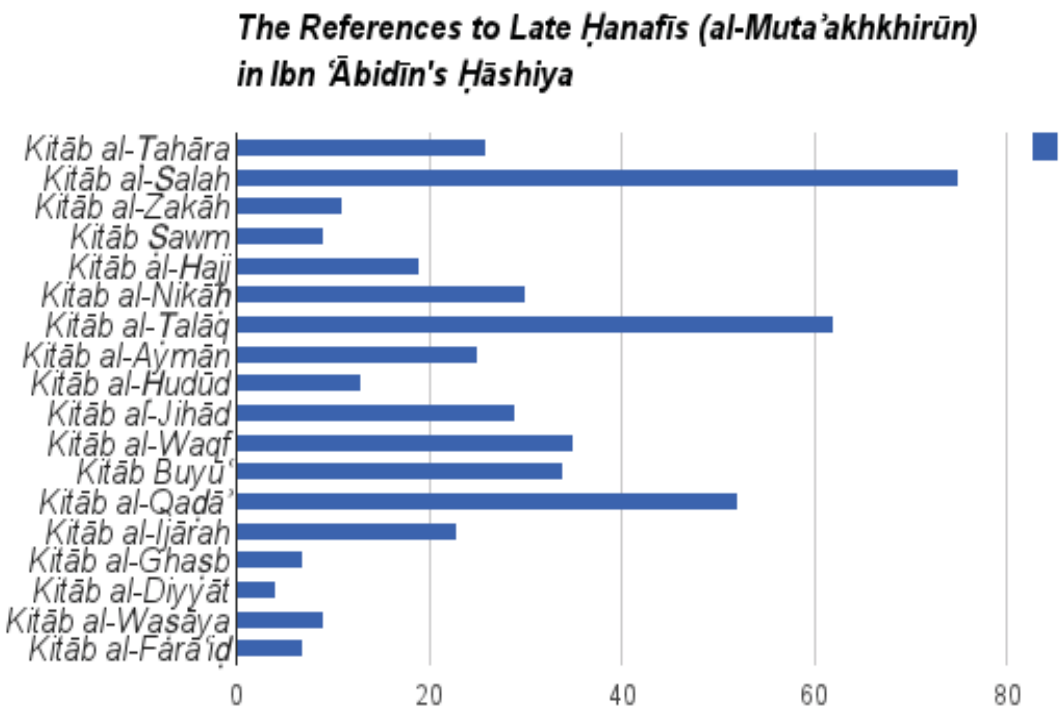

Figure 3.3

The above bar chart covers eighteen *fiqh* chapters in Ibn ʿĀbidīn's *Radd al-Muḥtār*. It traces when and how often Ibn ʿĀbidīn refers to *al-mutaʾakhkhirūn* in his legal literature. This survey specifically records the difference of legal opinions or (*madhhab al-mutaʾakhkhirīn*) which advances new positions, alter or preserve early ones in relation to *madhhab al-mutaqaddimīn*. We observe a significant rise of the opinions of *al-mutaʾakhkhirūn* in *Kitāb al-Ṣalāh* (75) times, *Kitāb al-Ṭalāq* (62) times, and *Kitāb al-Qaḍāʾ* (52) times. The references to the *al-mutaʾakhkhirūn* drops in *Kitāb Diya* (4) times, *Kitāb al-ghaṣb* (usurpation) (7) times, and *Kitāb al-Ṣawm* and *Kitāb al-Waṣāya* equally (9) times. The references climb again in *Kitāb al-Waqf* (35) times, *Kitāb al-Buyūʿ* (34) times, and *Kitāb al-Nikāḥ* (30) times. Ibn ʿĀbidīn

expresses change of early Ḥanafī doctrines and opinions in many different ways aside from stating the new opinion of the late Ḥanafīs. For instance, Ibn ʿĀbidīn frequently employs the "in our times" and "in their times" dichotomy to introduce new rulings without necessarily declaring it to be the late Ḥanafī opinion. This chart is restricted to the explicit references of the *mutaʾakhkhirūn*.

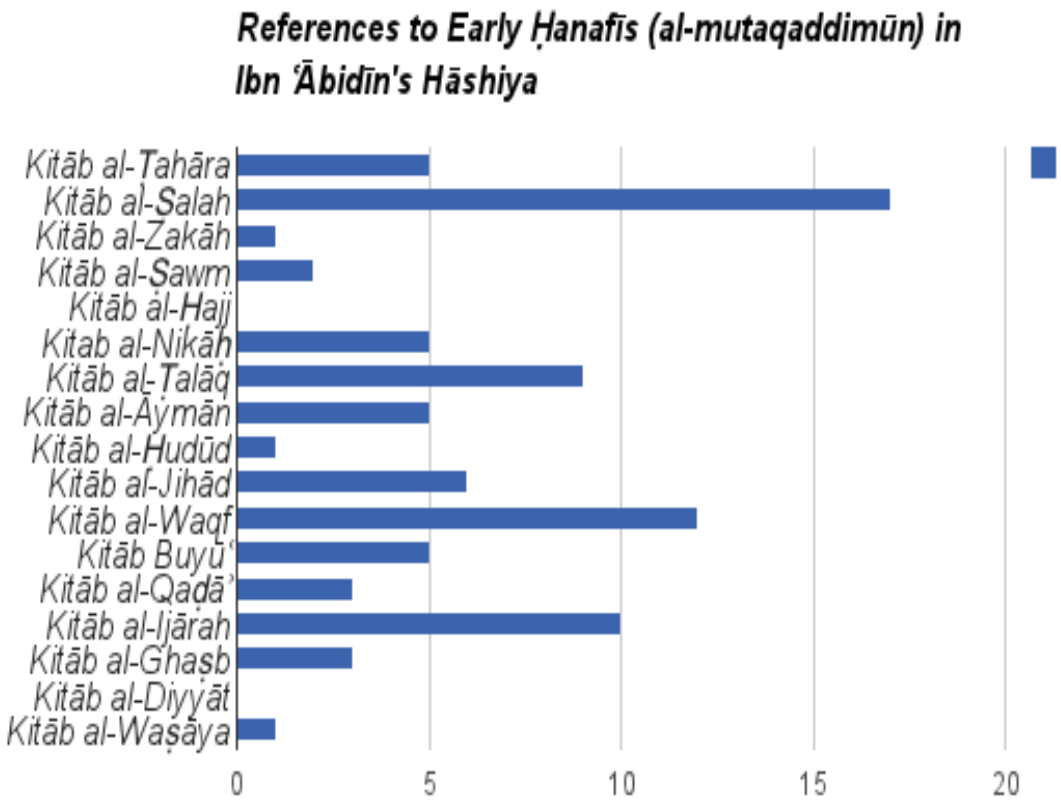

Figure 3.4

The above bar chart covers the same *fiqh* chapters in the previous figure (3.1). I trace how often Ibn ʿĀbidīn refers to early Ḥanafīs (*al-mutaqaddimūn*) in his legal commentary. This survey records the explicit references to (*al-mutaqaddimūn*). From the collected data, we observe a similar pattern with regard to the prominence of these references in specific books of

jurisprudence, where Ibn ʿĀbidīn is careful to record both the early and late Ḥanafī opinions. These books are: *Kitāb al-Ṭahāra, al-Ṣalāh*, *al-Ṭalāq*, *al-Nikāḥ*, *al-Jihād*, *Waqf*, and *al-Buyūʿ*. Overall, what is significant about these two charts is the fully-fledged nature of the early and late Ḥanafī opinions in authoritative Ḥanafī commentaries. The data shows the extent of these formulations in topics of rituals, commercial transactions, marriage, war, and criminal punishments. The references to the *mutaʾakhkhirūn*'s opinions in Ibn ʿĀbidīn's commentary are so numerous that they establish the commentary as a late legal text.

In its historical development, there were different regional networks of the Ḥanafī school in Bukhārā, Balkh, Egypt, Syria, Palestine, India and Anatolia. Although these Ḥanafīs were part of different scholarly networks and held different legal opinions, they were all regarded as members of the Ḥanafī school, both by themselves and by later generations.[98] To perpetuate the change and continuity paradigm within the Ḥanafī tradition, Ibn ʿĀbidīn employs certain techniques when he addresses emergent issues or when the social reality is significantly different from established opinion of early authorities in the school. In this regard, the concept of legal scaffolding coined by Sherman Jackson[99] is central to understanding the process by which Ibn ʿĀbidīn preserves the *madhhab* yet, at the same time, is able to perpetuate its fundamental principles in changing social and political circumstances.

The conceptual framework of legal scaffolding embodies the process of legal change in the late Ḥanafī tradition. Legal scaffolding, according to Jackson, is the dominant activity in the more advanced stages of *taqlīd*. In legal scaffolding, Jackson argues, "instead of abandoning

[98] Eyyup Said Kaya in "Continuity and Change in Islamic Law: The Concept of Madhhab and the Dimensions of Legal Disagreement in Ḥanafi Scholarship of the Tenth Century," in *The Islamic School of Law: Evolution, Devolution, and Progress,* ed. Peri Bearman, Rudolph Peters, and Frank E. Vogel (Cambridge, Mass.: Islamic Legal Studies Program at Harvard Law School and Harvard University Press, 2006), 26-40, at 39.
[99] Sherman A Jackson, "Taqlīd, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory Muṭlaq and ʿĀmm in the Jurisprudence of Shihāb al-Dīn al-Qarāfī, *Islamic Law and Society*, vol. 3, No. 2 (1996): 167.

existing rules in favor of new interpretations of the sources (which would be *ijtihād*), jurists seek adjustments through new divisions, exceptions, distinctions, prerequisites, and expanding or restricting the scope of existing laws."[100] To apply this framework, Ibn ʿĀbidīn is considered to be a *mujtahid fi al-madhhab*: thus he derives his "authority for interpretations from association with the *mujtahid-Imām* (Abū Ḥanīfa)."[101] Hence, a *mujtahid fi al-madhhab* is in effect a *muqallid*. Notably, according to Jackson's theory, *taqlīd* is not "a methodology to incorporate previous interpretations' content; rather it is an attempt to gain authority for one's interpretation by associating it with name or doctrine of already established authority".[102] It is a methodology that emphasizes "claims to static authorities as opposed to static legal tools or rulings."[103] Consequently, when Ibn ʿĀbidīn revisits doctrinal boundaries, readjusts jurisprudential canons, or reverses and rectifies maxims of the Ḥanafī school, he is simply acting within the realm of the school. Therefore, Ibn ʿĀbidīn asserts that any new espoused positions would have been endorsed by key authorities of the school if they had been exposed to the new customs, times, and compelling social-practical needs.[104]

Furthermore, Brannon Wheeler argues, "The maintenance of certain epistemological and methodological paradigm in Ḥanafī scholarship is accomplished by the manipulation of authority through the medium of certain texts. This manipulation is predicated on a particular conception of canonical authority. For Ḥanafī scholarship, the canon is not necessarily a fixed set of things, but rather the agreements that a set of things is authoritative."[105] Although Wheeler's emphasis on "manipulation of authority" does not accurately capture the modes of Ḥanafī legal authority,

[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibn ʿĀbidīn, *Majmūʿat Rasāʾil*, 44.
[105] Wheeler, *Applying the Canon in Islam*, 226-227.

it is true that certain authoritative texts are used as instructive devices for future scholars to arrive at similar conclusions. Therefore, what makes Ibn ʿĀbidīn a Ḥanafī jurist is not that he follows the opinions of Abū Ḥanīfa per se but rather his acceptance of Abū Ḥanīfa as the legal authority. By the same token, what render early and late Ḥanafīs to be within the fold of the *madhhab* is not the shared opinions within the school but rather recognizing Abū Ḥanīfa as the eponym and embracing his way of thinking about law. Once these fundamental conditions are fulfilled, Ḥanafī jurists can dispute, change, and perpetuate legal opinions within the *madhhab* framework. Through this understanding, late Ḥanafīs justified departure from the opinions of the eponym of the school, Abū Ḥanīfa.

Ibn ʿĀbidīn touches on the issue of the authoritativeness of the late Ḥanafīs in relation to early authorities in the introduction to *Radd al-Muḥtār* stating: "You see the works of the late scholars are superior to the early scholars in exactitude, brevity, clarity of language, and encompassing the different opinions within the school."[106] This idea manifests in the statements of Ibn ʿĀbidīn's son, ʿAlāʾ al-Dīn Muḥammad Ibn ʿĀbidīn (d. 1889) in his *Takmila* to his father's *Radd al-Muḥtār ʿalā al-Durr al-Mukhtār*. He states: "Twenty days before my father's death, he bought his own grave. Then, he made a will to be buried between the graves of the two scholars: ʿAlāʾ al-Dīn al-Ḥaṣkafī (d. 1677) the author of the commentary on *al-Tanwīr* and Ṣāliḥ al-Jinīnī (d. 1757) the scholar of Hadith and his teacher. ʿAlāʾ al-Dīn explains that this proves that Ibn ʿĀbidīn especially cherished ʿAlāʾ al-Dīn al-Ḥaṣkafī. [This manifests] in that my father authored two commentaries on his two *fiqh* works*: al-Durr al-Mukhtār* and *al-Durr al-Muntaqā*. In addition, he authored a legal theory commentary on al-Ḥaṣkafī's *al-Manār*, and he named me on his name".[107]

[106] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:28.
[107] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 11:5-14.

This testimony to the centrality of early authorities in formulating a legal tradition reveals at the same time its contingency upon late scholars' endeavor to perpetuate this tradition. Late Ḥanafī jurists engaged in the process of legal reasoning through seeking authorities higher than themselves. On the concept of early authorities, Ibn ʿĀbidīn states:

> The early scholars' prime interest was to derive legal rulings and assess the available evidence. However, late scholars are primarily preoccupied with scrutinizing and explicating what the early scholars summarized, defining what they have left absolute, putting together what they have left separate, rendering their statements brief, and outlining the settled opinion for their differences. [The task of the late scholars] is like a hairdresser's work on a bride, whom she was brought up by her family until she became ready for marriage; the hairdresser will just beautify her and show her off to the would-be fiancés.[108]

The distinction between the late (*mutaʾakhkhirūn*) and early (*mutaqaddimūn*) Ḥanafīs is evident in Ibn ʿĀbidīn's commentary on *al-Durr al-Mukhtār*, *al-Fatāwā al-Ḥāmidiyya*, and his *Rasā'il*. For example, in the discussion of a person who lived in a house then it appeared that it was an endowed house, Ibn ʿĀbidīn states that this person will be liable for a rent rate similar to the entire period he resided in this house. He explains that this ruling is based on the late Ḥanafī position affirming that the utility of real state that is set up for profitable use incurs financially liability. This position is maintained if the house appeared to be an endowment, belongs to an orphan, or prepared for profitable usage. Ibn ʿĀbidīn reminds us that this is the declared *fatwā* of Khayr al-Dīn al-Ramlī. It is significant to pinpoint how Ibn ʿĀbidīn addresses the opinion of the early Ḥanafīs on the same issue. He justifies that the weakness of the position stated in *al-Qunya*[109], as it was confirmed in *al-Baḥr al-Rāʾiq*, that this person should not be liable for any rent for the years he lived in this house, simply because it was based on the opinion of the early Ḥanafīs. Ibn ʿĀbidīn reiterates that the obligation to pay a rent for the period spent in this house is the opinion of the late Ḥanafīs, as it was stated in *al-Isʿāf*.[110]

[108] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:29.
[109] *Bughyat al-Qunya fī al-Fatāwā* by Maḥmūd b. Aḥmad b. Masʿūd al-Qunawī (d. 1368).
[110] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4:350.; *al-Isʿāf fi Aḥkām al-Waqf* by Ibrāhīm b. Mūsā al-Ṭarabulsī (d. 1516).

From the chart on the *mutaʾakhkhirūn*, it is clear that their opinions are articulated throughout the *fiqh* chapters. Most important, the interventions of the *mutaʾakhkhirūn* not only represent a significant departure from early opinions but also target key doctrines endorsed by the eponyms of the school. For example, Ibn ʿĀbidīn explains that the authoritative opinion among the late Ḥanafī jurists is to reject the judge's ruling based on previous knowledge of a litigated case. The reason for this rejection, Ibn ʿĀbidīn argues, is the corruption of the judges in his time. This opinion is also relayed in *Jāmiʿ al-Fuṣūlayn* and *al-Ashbāh*. This opinion is a clear departure from opinions of the three eponyms of the school. Abū Ḥanīfa argues the judge's ruling should be admitted if the litigated case occurred in his province (*miṣr*) and does not involve a purely divine claim (*ḥaqq Allāh*) such as a loan, usurpation, divorce, intentional homicide, and false accusation of adultery (*qadhf*). Unlike Abū Yūsuf and Muḥammad, Abū Ḥanīfa contends that the judge who has a previous knowledge of a case that involves individual claims (*ḥaqq al-ʿibād*) while he was in a different province other than his, then he was later appointed to the province where such a case occurred, he should not pass a judgment based on his previous knowledge of the case. Ibn ʿĀbidīn explicates that there is an agreement that a judge's ruling on cases that involve divine claims such as adultery and drinking should not be executed.

The reason to disregard judges' previous knowledge of cases that involve divine claims, Ibn ʿĀbidīn insists, is that the judge is on equal footing with any lay Muslim in that no one of them can enforce the *ḥadd* (prescribed punishment) at the time of their knowledge.[111] Ibn ʿĀbidīn explains that the dispute among the *mutaʾakhkhirūn* and the *mutaqaddimūn* is restricted to admitting a judge's previous knowledge of cases that do not strictly involve divine claims. The

[111] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 5: 438. Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 7:76.

mutaʾakhkhirūn reversed this ruling and declared that the *madhhab* opinion is the rejection of admitting any type of judge's previous knowledge in a litigated case in his court.[112]

In another case, Ibn ʿĀbidīn discusses the issue of a female minor, who can discern marriage, married herself to an equal to her (*kufʾ*), yet she does not have a guardian. Ibn ʿĀbidīn argues that the marriage contract will be contingent upon the permission of the local judge once she reaches puberty. However, if this female minor was in a place where there is no local judge; yet, this place is within the jurisdiction of a provincial judge, the marriage is valid and the contract will be contingent upon this provincial judge's permission once she reaches puberty. Otherwise, it would be an invalid contract. Nevertheless, Ibn ʿĀbidīn explicates that some of the *mutaʾakhkhirūn* insisted that the marriage contract is valid and it is solely contingent upon the girl's own permission once she reaches puberty.[113]

The maxim that Ibn ʿĀbidīn is trying to articulate is that the individual who does not have a guardian and was under the jurisdiction of a judge, his/her legal actions are contingent either upon the judge's or the individual's own permission once he/she reaches puberty.[114] The essential lesson here is that late Ḥanafīs (*mutaʾakhkhirūn*) reinstate the legal capacity of the woman to conduct her own marriage even without a guardian. The *mutaʾakhkhirūn*'s opinion is different from the *mutaqaddimūn* in that it affirms the legal capacity of the woman to conduct her own marriage to an equal without a guardian.

In a third case, the late Ḥanafīs (*mutaʾakhkhirūn*) revisit a persistent early Ḥanafī (*mutaqaddimūn*) doctrine on the rejection of imposing any liability for the *manāfiʿ* (profitable utility) of usurped property.[115] However, Ibn ʿĀbidīn as well as al-Ḥaṣkafī assert that the usurper

[112] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 5:439.
[113] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 3:80; vol. 5:106.
[114] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 3: 80; vol. 5:107.
[115] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 6:207.

will be liable for the *manāfiʿ* that were hindered, damaged, or lost throughout the time the usurper held the property.[116] They point out that the authoritative opinion of the *mutaʾakhkhirūn* is that the profitable utilities of the usurped property are subject to financial liability. They specified three categories where the compensation of a similar value of usurped objects will be incurred: (1) an endowment (*waqf*), (2) or an orphan's property, (3) a property which is set up for profitable usage (*muʿadd li al-istikhdām*). In these cases, the usurper will incur a financial liability for the *manfaʿa* of their like value.[117]

There are plenty of cases that show how the late Ḥanafīs revised an understanding of legal proofs, revisited early opinions, or perpetuated the *madhhab*. It is important to point out that this late Ḥanafī tradition is what influenced early modern codification of Ḥanafī jurisprudence. The *Mecelle*, for instance, consistently adopts the opinions of the late Ḥanafīs and their revisions of the *madhhab*. In short, the *mutaʾakhkhirūn* of the Ḥanafīs are indispensable to the development of the Ḥanafī school itself and their interventions were not just a matter of temporary strategies, but rather built-in mechanisms to reinterpret the *madhhab* and keep it relevant to the ever developing social, political, and economic circumstances in the late Ottoman Empire. In the next chapter, I discuss in detail how the *Mecelle* adopted these doctrines of the late Ḥanafīs.

[116] Ibid.
[117] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 6:208.

Ibn ʿĀbidīn's Interventions

One of the challenges in dealing with Ibn ʿĀbidīn's legacy is the way secondary literature attempts to emphasize (or sometimes impose) ruptures in his legal endeavor.[118] The aim of such approaches is to cement the dichotomy between modern and premodern legal methods by essentializing certain aspects of Ibn ʿĀbidīn's opinions or methodology. It is crucial to note that legal cultures, "in the moments of enormous change, legal borrowing, and codification, tend to stress their continuity with previous established legal systems."[119] To put it differently, the evaluation of Ibn ʿĀbidīn's legal literature should explore the nature of the legal process, contours of legal authority, and the place of his judgments within the school. My objective here is not to prove the obvious, namely: that Ibn ʿĀbidīn was a significant late Ḥanafī jurist in a time of change. Instead, the prime objective is to situate his legal scholarship within the late Ḥanafī tradition so that we can make sense of the ways in which the mechanisms and the practices of the *madhhab* persist in the 19th century.

Three examples in Ibn ʿĀbidīn's commentary *Radd al-Muḥtār* show his independent character and legal personality. Ibn ʿĀbidīn's interventions in the legal literature are extensive, and are articulated within dense layers of legal opinions within the *madhhab*. It is this aspect about Ibn ʿĀbidīn that reveals his brilliance. In legal studies, it is established that the more complex and accumulative legal systems are, the more difficult it is to bring about change.[120] The first case is Ibn ʿĀbidīn's unique statement that *al-Ashbāh wa al-Naẓāʾir* by Ibn Nujaym and its commentaries are not sufficient on their own for *fatāwā* within the *madhhab*. He suggests that these works are not suitable for giving *fatāwā* due their brevity. Ibn ʿĀbidīn strongly

[118] Hallaq, "A Prelude to Ottoman Reform," 56.
[119] Avi Rubin, "Ottoman Judicial Change in the Age of Modernity: Appraisal," *History Compass* 6 (2008): 12.
[120] Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), 110-111.

recommends Ḥanafī jurists to consult other legal commentaries along with *al-Ashbāh wa al-Naẓāʾir* and its commentaries in order to avoid relying on the *Ashbāh* works alone.[121] Contrary to the apparent import of Ibn ʿĀbidīn's statements, this recommendation points to the fact that these works were popular. Ibn ʿĀbidīn himself extensively cites the *Ashbāh* works, and he composed a gloss on *al-Ashbāh wa al-Naẓāʾir* itself. The point of Ibn ʿĀbidīn's reservation is to maintain the relevance and authority of later Ḥanafī scholarship.

The second case addresses not only Ibn ʿĀbidīn's endorsement of the late Ḥanafī opinion to alleviate the strict early Ḥanafī position on the conditions of determining a missing person's death, but also his harmonization of this opinion with *ẓāhir al-riwāya*. Ḥanafīs differed among themselves about the how to determine the death of a missing person. They faced the problem that the early *madhhab* position stipulates that the death of the missing person is to be determined based on the life span of his counterparts in his own village/town. Late Ḥanafīs were aware of the fact that the life spans of people vary in the different provinces of the Ottoman Empire. Ibn Nujaym and Ibn al-Humām al-Ḥanafī confirmed that the authoritative Ḥanafī opinion in the school is that a missing person's death is determined based on the life span of his counterparts in his own village/town.

Some Ḥanafīs, however, attempted to provide approximate years to determine the death of the missing person.[122] This move was justified in consideration of the families of the missing persons. Ibn ʿĀbidīn notes that in *Kanz al-Daqāʾiq*, for example, Abū al-Barakāt al-Nasafī states that when the missing person reaches 90 years, this would be sufficient to establish his death.

[121] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:70.
[122] Early Ḥanafī commentaries discuss this issue at length. They provide narrations from Abū Yusuf and al-Ḥasan b. Ziyād that the death of the missing person is determined once he completed 100 and 120 years respectively. These attempts to provide approximate years were dismissed in the early juristic discourse as purely discretionary and lack any scriptural evidence. See al-Sarakhsī, *al-Mabsūṭ*, vol. 11:35-36; al-Marghinānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, vol. 2:424; Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 5:455-6.

Other jurists suggested 100 or 120 years. Ibn ʿĀbidīn also writes that late Ḥanafīs stated that when the missing person reaches 60 years, it would be sufficient to establish his death. Ibn al-Humām al-Ḥanafī stated that 70 years is the proper life span. Ibn ʿĀbidīn explains that late Ḥanafīs appear to have relied upon the *ḥadīth*: "The life span of my community ranges between sixty and seventy years," and so he maintains that 60 and 70 years are generally the limits of the human life span.[123] He quotes Ibn Nujaym, who wonders at how some Ḥanafī jurists can abandon the opinion in the *madhhab* (*ẓāhir al-riwāya*) that the missing person's life span should be determined based on the life span of his counterparts in his own village/town, despite the fact that it is the authoritative opinion and should be followed by those who follow Abū Ḥanīfa. ʿUmar b. Nujaym, (Zayn) Ibn Nujaym's brother, responds to this question by emphasizing the fact that tracing the missing person's counterparts is not possible and involves great difficulty.[124]

Thus, late Ḥanafī jurists decided to assess this situation based on the age and life span of the missing person alone (without taking into consideration his counterparts). Ibn ʿĀbidīn interjects to assert that there is no necessary contradiction among Ḥanafīs on this issue.[125] He elaborates that late Ḥanafī jurists' assessment of age and life span can be understood as an explanation of the *ẓāhir al-riwāya* narration. Late Ḥanafīs argued that the death of the missing person should be established when the missing person reaches 60 years of age because it is the dominant life span.[126] It is important to note that late Ḥanafīs allowed a certain role for the political authority to pass judgment in such cases to avoid the doctrinal commitments of the school.[127] Aware of the social problems that occurred due to the long waiting period for establishing the death of a missing person, late Ḥanafīs argued that the assessment of this issue is

[123] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4:396-7.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid.

to be determined by the sulṭān or the judge, who has discretionary power to pass a final judgment in this case.[128]

Ibn ʿĀbidīn reiterates that this opinion does not contradict *ẓāhir al-riwāya* because the discretionary ruling by the sulṭān or the judge will be based on circumstantial evidence, including the life span of the counterparts of the missing person. To conclude, for Ibn ʿĀbidīn, *ẓāhir al-riwāya* is not a rigid set of opinions. Instead, they can be thought of as a set of rulings open to interpretation, reconfiguration, and reincorporation into the *madhhab*. This is one of the many techniques through which Ibn ʿĀbidīn addresses the issue of supposed late Ḥanafī contradictions of *ẓāhir al-riwāya* opinions.[129] Ibn ʿĀbidīn emphasizes that judges and *muftīs* who adhere rigidly to the stated opinions in the school and ignore people's customs (*ʿurf*), needs, and circumstantial evidence in their judgments, waste people's rights and inflict gross injustice.[130]

In the third case, Ibn ʿĀbidīn revises Ibn Kamāl Paşa's opinion on the classification of actions into *sunnat al-hady* (recommended acts of worship which it is undesirable to avoid), *sunnat al-zawāʾid* (recommended habitual actions, the avoidance of which does not elicit punishment or reward), and *nafl* (supererogatory acts of worship), by providing a unique understanding of the *sunnat al-zawāʾid* (pl. *sunan al-zawāʾid*). *Sunnat al-hady* would be acts such as praying in congregation (*jamāʿa*) and announcing the call to prayer (*adhān*), and Ḥanafīs do not differ in their understanding of this category. *Sunan al-zawāʾid*, on the other hand, comprise habits such as the way the Prophet walked, stood, and sat, and are differentiated from *nafl* by some Ḥanafīs such as Ibn Kamāl Paşa.[131]

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[128] Ibid.
[129] Late Ḥanafīs insist that it should not be surprising to depart from the *ẓāhir al-riwāya* opinions when scholars agree to revise early opinions or adopt new legal positions, See *Taqrīrāt al-Rāfiʿī ʿalā Radd al-Muḥtār* (Riyadh: Dār ʿĀlam al-Kutub, 2003), 262.
[130] Muḥammad Amīn ʿĀbidīn, *Majmūʿat Rasāʾil Ibn ʿĀbidīn* (Istanbul: Dār-i Saʿādat, 1907), 45-46.
[131] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:103.

Ibn Kamāl Paşa distinguishes between *nafl* and *sunan al-zawāʾid* by arguing that *nafl* belongs to the realm of rituals and *sunan al-zawāʾid* belongs to the realm of habit, which implies different treatment of these categories in legal assessment (*ḥukm*). Although Ibn ʿĀbidīn agrees that the two categories of actions can be subsumed under ritual and habit in this way, he also asserts that there is no difference between *nafl* and *sunan al-zawāʾid* in terms of their legal classification. This is because, first of all, there are no consequences for omitting the performance of either category of act. Second, when the Prophet repeatedly performed certain actions that would be categorized as ritual, these actions became known as the Prophet's habitual behavior. These include ritual acts such as prolonging reading one's prayers or one's prostration in prayer. Ibn ʿĀbidīn insists that there is no doubt that these examples are ritual acts. Thus, he concludes that *sunan al-zawāʾid* are rituals that the Prophet consistently performed, and as such, they gained the status of habitual behavior. Ibn ʿĀbidīn boasts that such a subtle revision of the Ḥanafī understanding of these terms cannot be found in any work except in his *Radd al-Muḥtār*.[132]

Hiring to Conduct Acts of Worship: The Perfect Example[133]

This legal issue is a perfect example because it illustrates how Ibn ʿĀbidīn affirms the hierarchy of legal authority within the *madhhab*. Yet, at the same time, it shows the

[132] Ibid.

[133] Early Ḥanafī commentaries discussed this case and declared that such contractual agreement is invalid. See for example, al-Sarakhsī, *al-Mabsūṭ*, vol. 4: 158; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*, vol. 2: 223; Ibn Māza, *al-Muḥīt al-Burhānī*, vol. 7: 484. Mamluk Ḥanafī commentaries on the *Hidāya* point to the same ruling but they opt for the *istiḥsān* (juristic preference) to permit such a contractual agreemt to teach Qurʿān and jurisprudence, see for example, Badr al-Dīn al-ʿAynī, *Binãya Sharḥ al-Hidāya*, vol. 10: 278, 281, 282. Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 3: 148.

differentiation of the late and early Ḥanafī traditions.[134] Additionally, it demonstrates how the justification of necessity is being applied to alter legal opinions of the eponyms of the school. Ibn ʿĀbidīn states that a legal ruling may be narrated consistently in twenty books from the late Ḥanafī authorities; however, it could be a pure mistake that was made possible by the first jurist who transmitted it, then it became a serial error that spread in legal works. Specifically, Ibn ʿĀbidīn draws our attention to the ruling of hiring someone merely to recite the Qurʾān. He shows that the author of *al-Sirāj al-Wahhāj*[135] and *al-Jawhara al-Nayyira*,[136] two late commentaries on *Sharḥ al-Qudūrī*, claimed that the *fatwā* of the *madhhab* is the permissibility of hiring someone for just reciting the Qurʾān. Ibn ʿĀbidīn declares that these opinions might have confused the *fatwā* of the *madhhab* of the permissibility of hiring to *teach* Qurʾān with merely *reciting* it. Ibn ʿĀbidīn explains that many jurists might even claim that the *fatwā* of the *madhhab* is the permissibility of hiring to perform acts of worship in absolute terms, arguing that this is the opinion of the late Ḥanafīs. Some even argue, based on the previous opinion, the permissibility of hiring to perform *ḥajj* on ones' behalf. Ibn ʿĀbidīn emphasizes that all of these opinions are clearly erroneous.[137]

By affirming the hierarchy of legal authority within the *madhhab*, Ibn ʿĀbidīn argues that the authentic narrations (*nuqūl*) from the three eponyms, Abū Ḥanīfa, Abū Yūsuf, and Muḥammad al-Shaybānī, consistently state that hiring to perform acts of worship is invalid (*bāṭil*). However, the independent jurists (*mujtahids*) who belong to the generation of discerning (*al-takhrīj*) and declaring the preponderant opinions (*al-tarjīḥ*) proclaimed the permissibility of

[134] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:562; vol. 2,73; vol. 2:569. Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:249. Ibn Nujaym is the first Ḥanafī jurist to attribute the permissibility of hiring to do acts of worship to "late Ḥanafīs" as a distinct legal tradition. See Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 3: 64.
[135] The author is Abū Bakr b. ʿAlī b. Muḥammd al-Ḥadādī al-ʿUbāydī al-Zubāydī al-Yamānī al-Ḥanafī (d. 1397).
[136] The same author of *al-Sirāj*
[137] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol.1:562

hiring someone to *teach* the Qurʾān due to the necessity of their times. They justified their ruling by the fact that teachers used to get gifts from the treasury (*bayt al-māl*) and now these gifts are cut off. So, if hiring have not been made permissible to provide compensation to the teachers, the Qurʾān would be lost, which is in essence a loss of religion. Also, Ibn ʿĀbidīn elaborates it is necessary for the Qurʾān teachers to provide for themselves; therefore, hiring should be permitted. In addition, Ibn ʿĀbidīn points to the fact that late Ḥanafīs permitted giving compensation for calling to prayer (*adhān*) and serving as an *imam* (*imāma*) because these are rituals of the religion and should be preserved. Therefore, the early opinion of the *madhhab* was reversed due to this emergent necessity. Ibn ʿĀbidīn reiterated, "Late Ḥanafīs have made a *fatwā* on the authority of Abū Ḥanīfa and his disciples, knowing that if Abū Ḥanīfa and his disciples were present in their time, they would have passed the same judgment and reversed their previous opinion."[138]

Ibn ʿĀbidīn maintains that the primary Ḥanafī texts (*mutūn*), commentaries (*shurūḥ*), and *fatāwā* collectively affirm the invalidity of hiring to perform acts of worship, except in the cases that we have just mentioned. Ibn ʿĀbidīn expounds that these late jurists justified the shift of the *madhhab* opinion due to necessity (*ḍarūra*), which was the fear of the loss of religion and they have clearly pointed out this justification. So, it is not possible to argue that the *madhhab* of the late Ḥanafīs permits hiring to *recite* the Qurʾān without the conditioned necessity. Thus, if time passes and no one is hired to recite the Qurʾān, no harm shall be expected from this. On the contrary, the harm will be in hiring someone to recite the Qurʾān because it has become a lucrative business and professional craft used to gain money, and the reciter no longer recites for

[138] Ibn ʿĀbidīn, *Majmūʿat Rasāʾil*, 47. Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1:562., vol. 2:73.

the sake of God but for the sake of the financial compensation. Ibn ʿĀbidīn asserts that it is a pure hypocrisy to perform ritual acts for the sake of others and not God.[139]

What Ibn ʿĀbidīn is trying to achieve is to recognize the authority and contribution of late Ḥanafīs to the body of legal scholarship of the *madhhab*. Yet, he warns us that the appearance of a new opinion in one or two books within the late tradition should not mislead the person to assume that this is the *madhhab* opinion. Also, Ibn ʿĀbidīn, in the previous case, grapples with emerging forms of social customs and behaviors trying to admit and rectify some of their manifestations in society. He employed necessity in this case to reverse previous opinions articulated by the eponyms of the school themselves. In short, these revisions were only made possible through the *madhhab* paradigm in which late Ḥanafīs continued the *madhhab* tradition.

AUTHORIZING STATE INTERVENTION: IBN ʿĀBIDĪN AND MAʿRŪḌĀT ABŪ SUʿŪD[140]

The Ottoman state had an intricate and complex relationship with the Ḥanafī School. This relationship took different manifestations in the legal literature. First, Ḥanafī jurists recognized the legitimate role of the sulṭān and the ruler to dispense punishments (*siyāsa*) in their legal works such as al-Ṭursūsī's *Tuḥfat al-Turk* and Dada Efendī's *al-Siyāsa al-Sharʿiyya*.[141] Ḥanafī jurists characterized this type of the sulṭān's judicial authority as necessary to preserve the order of society as long as it does not violate principle of justice according to Islamic law. Second, Ḥanafī legal scholarship granted the sulṭān the authority to appoint and fire judges, to obligate them to follow the preponderant opinions within their schools, to prevent them from hearing

[139] Ibid.
[140] Ebussuud, 'Maruzat', in Ahmet Akgündüz, *Osmanlı Kanunnameleri*, vol. 4 (Istanbul: Fey Vakfı, 1992), 50; Colin Imber, Ebu's-suʿud: *The Islamic Legal Tradition* (Stanford: Stanford University Press, 1997), 24.
[141] Ṭursūsī, *Tuḥfat al-Turk*, 15.; Ibrāhīm b. Khalīfa (Dada Efendī), *al-Siyāsa al-Sharʿiyya*, 35

certain cases, and to order them to follow a specific policy. Third, within the framework of this authority, late Ḥanafī jurists in the early modern period assign certain probative value for the Ottoman state in the process of law-making within the *madhhab*.

Maʿrūḍāt Abū Suʿūd is a collection of legal opinions (*fatāwā*) issued by Abū Suʿūd al-ʿImādī (d. 1574) and sanctioned by Sultan Süleyman I (r. 1520-1566). In his introduction to the *Maʿrūḍāt*, Abū Suʿūd stresses, "It has been proposed to the sultan that it will be appropriate to go along the words of the scholars in some issues for the wellbeing of the state and religion. The rulers, jurists, and judges should act upon the Sultan's orders accordingly."[142] A key feature in the *Maʿrūḍāt* is the obligation (*ilzām*) for the judiciary and jurists to act upon its rules. Ibn ʿĀbidīn, like ʿAlāʾ al-Dīn al-Ḥaṣkafī, refers us to these *Maʿrūḍāt* and emphasizes their obligatory nature.

Haim Gerber describes the *Maʿrūḍāt* stating: "It is an important chapter in the history of the *fetva* institution, it is also important in the relations between law and the state in the Ottoman Empire, being in a sense the climax of the bureaucratizing drive of the Ottoman polity in the province of the law."[143] Also, the recent scholarship by Guy Burak[144] and Shahab Ahmad[145] on the Ottoman state involvement in establishing an Ottoman legal establishment shows that Wheeler's account on the formation of a Ḥanafī canon overlooks the Ottoman context, where the state was essential in the formation of the Ḥanafī canon.[146] In other words, the authoritative texts within the Ḥanafī school were no longer purely determined based on the internal processes of the

[142] Abū Suʿūd Efendī, *Maʿrūḍāt* (Ann Arbor: University of Michigan, Isl. Ms. 69, fols. 268b – 272a [5 fols., copied c. 1149/1736]). The complete text of *Maʿrūḍāt* is transcribed in modern Turkish see Ahmet Akgündüz, *Osmanlı Kanunnameleri ve Hukuki Tahlilleri*, vol. 4: 35-59.
[143] Haim Gerber, *State, Society, and law in Islam* (New York, State University of New York, 1994), 88-89.
[144] Guy Burak, "The Abū Ḥanīfah of His Time: Islamic Law, Jurisprudential Authority and Empire in the Ottoman Domains 16th-17th Centuries" (PhD diss., University of New York, 2011), 218.
[145] Shahab Ahmed and Nenad Filipovic, "The Sultan's Syllabus: A Curriculum for the Ottoman Imperial medreses Prescribed in a fermān of Qānūnī I Süleymān Dated 973 (1565)," *Studia Islamica*, 98/99 (2004):183-2.
[146] Burak, "The Abū Ḥanīfah of His Time," 217.

madhhab, but the Ottoman religious establishment had a role to determine such texts. These studies, however, are limited to the manifestation of the state influence through the formation of an imperial curriculum in Shahab Ahmad's study on the sultan's syllabus or the Ottoman state's role in the formation of a learned hierarchy that greatly influenced what is considered authoritative works in the late Ḥanafī tradition in Burak's study of Ḥanafī *muftī*s. This chapter will take this discussion to the substance of legal discourse itself by discussing how legal commentaries and *fatāwā* literature tackled the state role in shaping some of the key Ḥanafī doctrines. My goal here is not to pass a judgment on the legal nature of the *maʿrūḍāt* but to engage with how the *fiqh* commentaries and *fatāwā* literature paid attention to this work and how it influenced the opinions of the *madhhab*.

Ibn ʿĀbidīn's attention to the Ottoman legal tradition should be understood in line with al-Ḥaṣkafī's, who was a state-appointed provincial *muftī* across Greater Syria. We observe that al-Ḥaṣkafī and Ibn ʿĀbidīn (and late Ḥanafīs in the early modern period) are attentive to the legal scholarship of Ottoman jurists who were affiliated with the imperial establishment. For example, both Ibn ʿĀbidīn and al-Ḥaṣkafī cite quite frequently Shams al-Dīn Muḥammad b. Ḥusām al-Dīn al-Quhistānī's (d. 1546)[147] *Jāmi' al-Rumūz,* Yaʿqūb Paşa's *Ḥāshiyat Sharḥ al-Wiqāya,* Qiwām al-Dīn Amīr Kātib b. Amīr ʿUmar al-Itqānī's *Ghāyat al-Bayān wa Nādirat al-Aqrān*, and the opinions and works of other senior establishment members such as *Abū al-Suʿūd* Efendī's *Maʿrūḍāt*.[148] Ibn ʿĀbidīn is also attentive to the important work *al-Ṭarīqa al-Muḥammadiyya* by

[147] Al-Ziriklī, *al-Aʿlām*, vol. 7:11. Muḥammad al-Quhistānī (Shams al-Dīn). He is a Ḥanafī jurist, a Muftī of Bukhara. He authored few books. His important work is *Jāmiʿ al-Rumūz fī Sharḥ al-Nuqāya Mukhtaṣar al-Wiqāya by Sadr al-Sharīʿa* (ʿUbayd Allāh b. Masʿūd).
[148] Burak, "The Abū Ḥanīfah of His Time," 263.

Imam Birgivi (d. 1573).[149] Al-Ḥaṣkafī and Ibn ʿĀbidīn consistently incorporate the opinions of their Ottoman colleagues.

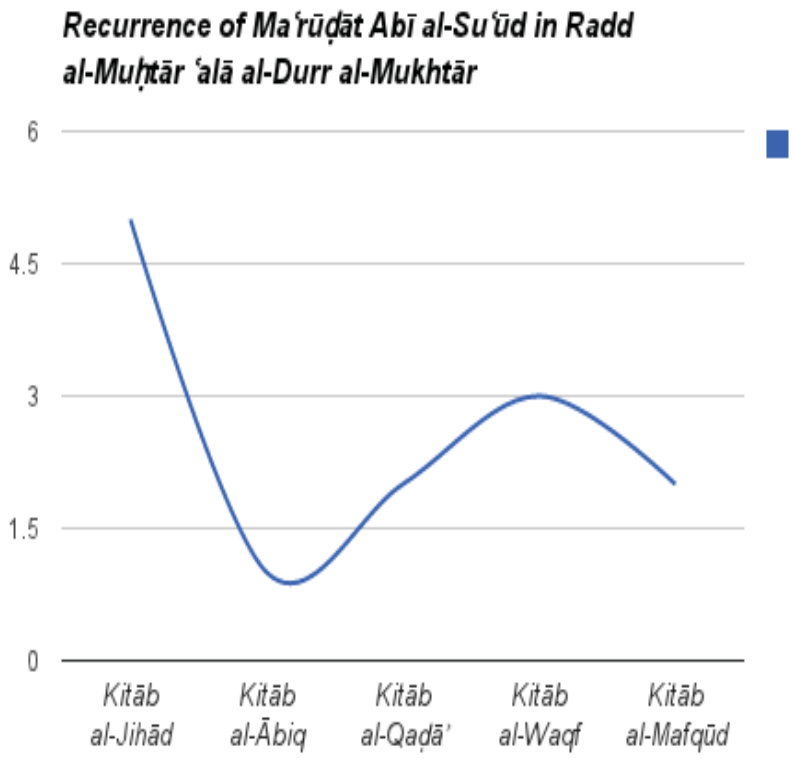

Figure 3.5

This graph maps out the movement of the curve that traces the references of *Maʿrūḍāt Abī al-Suʿūd* in the entire *Radd al-Muḥtār* of Ibn ʿĀbidīn. These references also occur in al-Ḥaṣkafī's *al-Durr al-Mukhtār*. As we observe, the curve significantly climbs in *Kitāb al-Jihād* where the *Maʿrūḍāt* is mentioned (5) times. Then, the curve drops in *Kitāb al-Ābiq* to (1) reference. The curve rises again in *Kitāb al-Waqf*, where the *Maʿrūḍāt* is cited (3) times only. The curve drops in *Kitāb al-Mafqūd* to (2) times. See appendix B and D for detailed record of the *Maʿrūḍāt*.

[149] Ibn ʿĀbidīn, *Minḥat al-Khāliq ʿalā al-Baḥr al-Rāʿiq*, vol. 5:247.

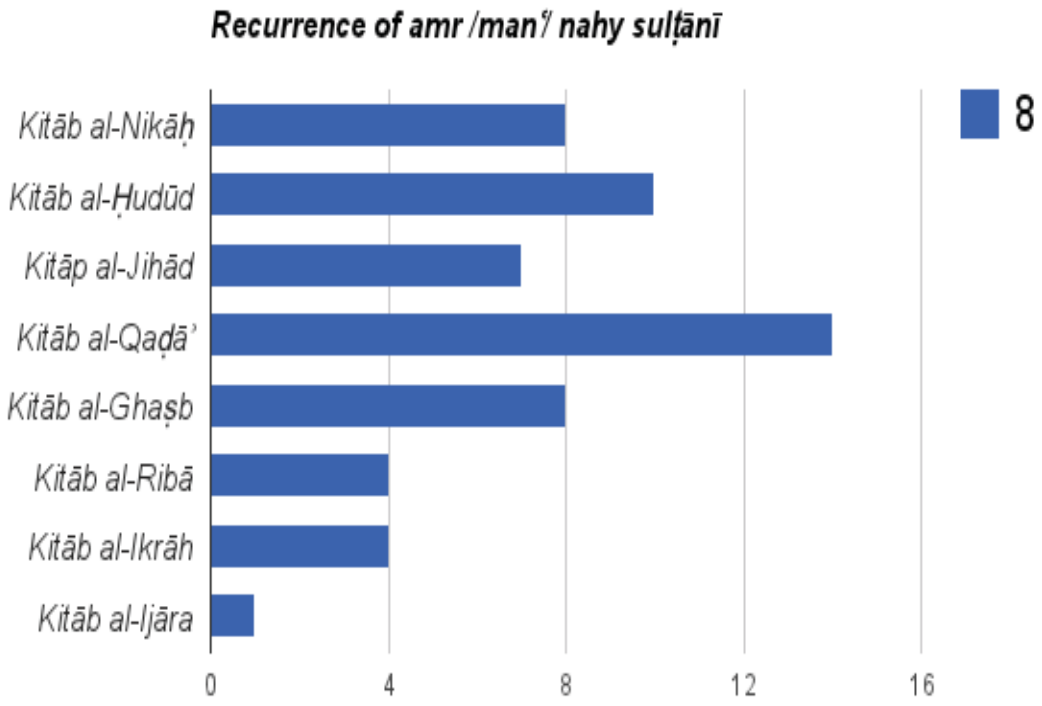

Figure 3.6

This bar chart records the recurrence of Ottoman imperial edicts in Ibn ʿĀbidīn's *Radd al-Muḥtār*. These references also occur in al-Ḥaṣkafī's *al-Durr al-Mukhtār*. The references of imperial edicts hold steadily in *Kitāb al-Nikāḥ* (8), *Kitāb al-Ghaṣb* (8), and *Kitāb al-Jihād* (7). The references to imperial edicts drops in *Kitāb al-Ribā* (4) *and Kitāb al-Ikrāh* (4). By far the most references to imperial edicts are recorded in *Kitāb al-Qaḍā'* (14). The references decline to a single mention in *Kitāb al-Ijāra*.

Case Studies

I. Setting Up an Endowment While in Debt[150]

This case study demonstrates how the late Ḥanafīs' opinion in the early modern period on setting up an endowment while in debt is significantly shaped by the will of the Ottoman state. Importantly, al-Ḥaṣkafī and Ibn ʿĀbidīn appear to accept a legislative role for the state by changing the stated opinion of the *madhhab* to follow the imperial order of the Ottoman sulṭān. In this case, Ibn ʿĀbidīn, and early and late Ḥanafīs, differentiate between healthy and sick persons who are in debt in their ability to set up an endowment. He stresses that a sick person whose debt consume his wealth disqualifies him from setting up an endowment. By contrast, Ibn ʿĀbidīn stresses that the opinion of the *madhhab* is that the endowment of a healthy person who is in debt is legally sound, even if he intended to procrastinate paying back his debt. Ibn ʿĀbidīn explains that this is because this person acts as the legal owner: being the rightful owner of his property legitimates his actions. Ibn ʿĀbidīn supports the previous statements by quoting Ibn Humām's opinion from *Fatḥ al-Qadīr* that this is a lawful endowment that cannot be nullified by the creditors unless they interdict the debtor's legal capacity.[151] In short, the creditors do not have a claim to the debtor's wealth if the debtor is healthy and sound. Ibn ʿĀbidīn points out that this is also the *fatwā* of Khayr al-Dīn al-Ramlī and Ibn Nujaym.[152]

Furthermore, al-Ḥaṣkafī informs us that, in *Maʿrūḍāt*, Abū al-Suʿūd was asked about the legality of a person who endowed his wealth to his children to avoid paying back his debts. Abū al-Suʿūd responded that it is not permissible and it is not legally established. He continues to

[150] Different iterations of this case appear in some of the late Ḥanafī works. See for example Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 6:208, *al-Fatāwā al-Hindiyya*, vol. 2:451. Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:203. Al-Ḥaṣkafī's opinion on this case appears in *Radd al-Muḥtār ʿalā al-Durr al-Mukhtār*, vol. 6:680.
[151] Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 6:208. Ibn al-Humām relies upon *Fatāwā Qāḍī Khān* to establish the invalidity of the endowment of a very sick person whose debts consume his wealth.
[152] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 6:601.

stress that judges are prevented from passing a judgment and from registering this endowment with what equals the value of the debt. Al-Ḥaṣkafī elaborates that Abū al-Suʿūd instructed jurists and judges to preserve this ruling.[153]

Ibn ʿĀbidīn states that the ruling of the *Maʿrūḍāt* is contrary to the explicit opinions narrated in the authoritative Ḥanafī *fiqh* manuals (*mutūn*) such as *al-Dhakhīra* and *Fatḥ al-Qadīr*, unless the statement in the *Maʿrūḍāt* is understood to be specific to the sick person who is in debt. Yet, Ibn ʿĀbidīn refers us to the statement of *al-Fatāwā al-Ismāʿīliyya* that the judge should not register this endowment and the endower will be forced to sell it to pay back his debt and judges are prevented from registering this endowment as stated by Abū al-Suʿūd. Ibn ʿĀbidīn argues that the statements of this *fatwā* are more accurate than Abū al-Suʿūd's because the judge is prevented by the sulṭān's order from issuing a ruling in a case. If the judge issued a ruling, it would be invalid because he is merely a deputy for the sulṭān and the one who delegates this authority has prevented him from registering this endowment. Moreover, to force the person in debt in this case to sell the endowment will be considered within the judges' authority to sell an unregistered endowment. Ibn ʿĀbidīn states that the preponderant opinion should be the invalidation of the endowment due to necessity.[154] This is also the Ottoman state policy on the issue. The point that Ibn ʿĀbidīn is attempting to make is that we should not pass judgment on the legality on the endowment itself but rather we should pay attention to the judge's role and his authority to refuse to register this type of endowment. More significant is that Ibn ʿĀbidīn follows Ottoman state policy on this issue despite the explicit *madhhab* opinion.

Furthermore, Ibn ʿĀbidīn addresses the same issue in his *al-ʿUqūd al-Durriyya fī Tanqīḥ al-Fatāwā al-Ḥāmidiyya*. He tackles a question about a man who has two lines of debts, in which

[153] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 6:602.
[154] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 6:603.

he used one them as a mortgage for his house (his only wealth), and then he decided set this house up for endowment to procrastinate paying back his debt. The question mentions that the value of his house is more than the value of the two lines of debts he owes. The question stated: "Should the judge not register this endowment (whose endower is in debt) until the endower satisfies the two lines of debts?"

In his answer, Ḥāmid al-ʿImādī reiterates the position in Ibn ʿĀbidīn's *Radd al-Muḥtār*, yet he give us a clue why the imperial edict of the Ottoman sulṭān was issued to prevent judges in the first place from registering the endowment rather than declaring it to be invalid. Al-ʿImādī and Ibn ʿĀbidīn emphasize that once the endowment is legally registered it cannot be nullified because endowment is a gift/grant (*tabarruʿ*). Also, there is a consensus that it is not a legal condition for the validity of an endowment to be set up by a person who is free of debt, unless the endower is interdicted his legal capacity due to insanity or a consuming debt based on some jurists who hold this opinion. Strictly speaking, a judge can only establish this interdiction.[155]

Unequivocally, Ibn ʿĀbidīn shifts the discussion to the stated opinion in *al-Durr al-Mukhtār* of ʿAlāʾ al-Dīn al-Ḥaṣkafī who asserts the invalidation of an endowment of a sick person, not the healthy, whose debt consumes his wealth. Yet, Ibn ʿĀbidīn informs us that ʿAlāʾ al-Dīn al-Ḥaṣkafī revisited his position on this issue based on the imperial rescript stated in *Maʿrūḍāt Abī al-Suʿūd*. He acknowledged and followed it as well as his student Ismāʿīl al-Ḥāʾik in his work on *fatāwā*. He stresses that the judges are prevented from registering the endowment of the persons in debt and the person is forced to sell it to satisfy his debt as was established by the *muftī* Abū al-Suʿūd.[156]

[155] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya fī Tanqīḥ al-Fatāwā al-Ḥāmidiyya*, vol. 1:111.
[156] Ibn ʿĀbidīn, *al-ʿUqūd al-Duriyya*, vol. 1:112.

II. The Missing Person (*al-Mafqūd*)[157]

The lexicographic definition of *al-mafqūd* is "non-existent." However, in jurists' terminology, a missing person is the one whose status as living or dead cannot be known with certainty, such that his family does not know whether to expect him to return alive or to return deceased so that they can bury him.[158] ʿAlāʾ al-Dīn al-Ḥaṣkafī considers the captive and the apostate to be among the category of the missing persons. Al-Ḥaṣkafī and Ibn ʿĀbidīn argue that these individuals are considered alive in themselves based on the argument of the presumption of their original state (*istiṣḥāb al-ḥāl*).[159] Thus, the *mafqūd*'s wife cannot be remarried and his money should be preserved. Al-Ḥaṣkafī and Ibn ʿĀbidīn based on *Maʿrūḍāt Abī al-Suʿūd*, stress that the trustee of the treasury (*bayt al-māl*) does not have the right to acquire the *mafqūd*'s money from the person who was appointed to take care of his wealth during his absence.[160]

Both al-Ḥaṣkafī and Ibn ʿĀbidīn insist that the judge will appoint a deputy to preserve his rights such as his wealth and the debts that have established by the creditors.[161] Also, the missing person's wealth should be preserved and invested, whenever necessary. If the missing person has a deputy, this deputy will have the authority to preserve his wealth but not to live in his house,

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[157] The missing person's rulings are extensively discussed in early and late Ḥanafī commentaries and treatises. See for example, Muḥammad b. al-Ḥasan al-Shaybānī, *al-Ḥujja ʿalā Ahl al-Madīna*, vol. 4:49-51; al-Sarakhsī, *al-Mabsūṭ*, vol. 11:34-35; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol. 6:196; al-Marghinānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, vol. 2:423; Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 5:453, 455, 456; ʿAbd Allāh b. Mawdūd al-Ḥanafī, *al-Ikhtiyār li Taʿlīl al-Mukhtār*, vol. 3:37, 38; al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, vol. 5:106; Akmal al-Dīn al-Bābārtī, *al-ʿInāya Sharḥ al-Hidāya*, vol. 6:148-149; Badr al-Dīn al-ʿAynī, *al-Bināya Sharḥ al-Hidāya*, vol. 7:357-360; Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 6: 141-150; Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:176-180; Ibrāhīm al-Ḥalabī, *Majmaʾ al-Anhur,* vol. 1:712.

[158] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 4. 292.

[159] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 4. 293. Both al-Ḥaṣkafī and Ibn ʿĀbidīn concede to the idea that the "presumption of the original state" is a weak argument. They are aware that this argument can only negate the certainty of a missing person's death but it cannot establish his being alive. They stress that the missing person will be considered alive in the matters that would harm him and pertains to him directly. Therefore, the missing person would be considered dead in matters that benefit him yet harm others. For example, the missing person would be considered dead if he to receive an inheritance share or to block others from receiving inheritance. See Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 4. 296.

[160] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 4. 292. This discussion is also reflected in the *Mecelle* Article 1801. See ʿAlī Ḥaydar Efendī, *Durar al-Hukkām fi Sharḥ Majallat al-Aḥkām*, vol. 4 (Cairo: Dār al-Jīl, 1991), 601.

[161] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 4. 293.

except with permission from the judge or the ruler.[162] In addition, both al-Ḥaṣkafī and Ibn ʿĀbidīn grant the judge the authority to sell the *mafqūd*'s property, especially the things that are corrupted by the passing of time. In this case, the judge should sell it and preserve the price. Al-Ḥaṣkafī recalls that in *Maʿrūḍāt Abī al-Suʿūd* the judges and the deputies of the treasury in his time are ordered (by the sulṭān) to sell the *mafqūd*'s property without any restrictions, even if it does not corrupt by the passing of time.[163] Al-Ḥaṣkafī elaborates that if the missing person appeared to be alive, he shall take back the value of his property. The *Maʿrūḍāt Abī al-Suʿūd* states: "Judges should not be asked to nullify their sale. Yet, if the property was sold with extreme injustice, the missing person, who turned out to be alive, can nullify the sale. Let this order be preserved."[164]

Ibn ʿĀbidīn offers an important discussion on Al-Ḥaṣkafī's statements on the sulṭānic order to the judges. He establishes that al-Ḥaṣkafī's acceptance of the sulṭānic order is in direct contradiction with the authoritative opinion in the *madhhab* as it was recorded in *al-Kāfī* by al-Ḥākim al-Shahīd and *al-Hidāya* by al-Marghinānī.[165] Ibn ʿĀbidīn attempts to harmonize this sulṭānic order with the declared *madhhab* opinion by arguing that this order was permission to Ḥanafī jurists to rule with an opinion from another school.[166] He explained that Ḥanafīs in the chapter on judiciary discuss the permissibility of the judge to rule with another *madhhab*'s

[162] Ibid.
[163] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 4. 295.
[164] Ibid.
[165] Ibid. The legal discourse of both al-Ḥaṣkafī and Ibn ʿĀbidīn is primarily anchored in the legal commentaries, manuals, and fatāwā collections of late Ḥanafī jurists in the Mamluk and Ottoman periods. They consulted the following works to create their own discourse: *al-Kāfī fī al-Furūʿ*, *al-Hidāya*, *Fatḥ al-Qadīr*, *Kanz al-Daqāʾiq*, *Tabyīn al-Ḥaqāʾiq*, *al-Baḥr al-Rāʾiq*, *al-Nahr al-Fāʾiq*, *Jāmiʿ al-Fuṣūlayn*, *Jāmiʿ al-Rumūz*, *Khazānat al-Muftīn*, *al-Durr al-Muntaqā*, *Jāmiʿ al-Fatāwā*, *Baḥr al-Fatāwā*, *Bughyat al-Qunya fī al-Fatāwā*, *Wāqiʿāt al-Muftīn*, *al-Yanābīʿ fī Maʿrifat al-Uṣūl wa al-Tafarīʿ*, *al-Fatāwā al-Bazzaziyya*, *Sharḥ Manẓūmat Ibn al-Shiḥna*, *Maʿrūḍāt Abī al-Suʿūd Efendī*.
[166] Ibid.

opinions.[167] Yet, Ibn ʿĀbidīn relies on Khayr al-Dīn al-Ramlī to caution us that the sulṭānic order to the judges in al-Ḥaṣkafī times is not necessarily effective for judges in a different time.[168]

III. Cash Endowment (*Waqf al-Nuqūd*) as an Anatolian Custom (*ʿurf*): Reinstated[169]

Ibn ʿĀbidīn and al-Ḥaṣkafī refer to the imperial rescript, which was issued to the judges and jurists to permit *waqf al-nuqūd* citing *Maʿrūḍāt Abī al-Suʿūd*. The motive behind this imperial edict is that this new type of endowment was not popular due to the reservation of the Shāfiʿī and Ḥanbalī jurists in some of the Ottoman provinces. Ibn ʿĀbidīn informs us that this type of endowment did not spread in Syria after the Ottoman control on its provinces in 1516. Although this endowment was a known practice in Aleppo, it spread faster in Jerusalem. This may have been due to the Ottoman immigration to the city where the new residents expected to engage in such transactions.[170]

Ibn ʿĀbidīn argues that it is permissible to set *darāhim* and *danānīr* up for endowment. He points out that since this type of endowment has become an established transaction in our times in the Anatolian lands and beyond (*jarā al-taʿāmul fī zamāninā fī al-bilād al-rūmiyya wa*

[167] Both ʿAlāʾ al-Dīn al-Ḥaṣkafī and Ibn Nujaym discuss the issue of Ḥanafī judge ruling with an opinion from another school. See Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 5: 407-409.

[168] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 4. 295. It is important to note that this opinion adopted by al-Ḥaṣkafī and partly by Ibn ʿĀbidīn reflects a unique Ottoman context. This opinion reverses early and late Ḥanafī statements that the judge cannot sell the missing person's property because his authority is limited to the preservation of his wealth. See Ghānim al-Baghdādī, *Majmaʿ al-Ḍamānāt*, vol. 1: 414; Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 6:143; Badr al-Dīn al-ʿAynī, *al-Bināya Sharḥ al-Hidāya*, vol. 7:359; al-Marghinānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, vol. 2:423; al-Sarakhsī, *al-Mabsūṭ*, vol. 11: 40.

[169] The discussions on *waqf al-darāhim* have always been part of the juristic discourse of early and late Ḥanafīs. Early Ḥanafī exclusively attribute the permissibility of such endowment to Zufar b. al-Hudhayl and his disciple Yaʿqūb al-Anṣārī. The authoritative opinion in early and Mamluk Ḥanafī commentaries was the impermissibly of cash endowments. Late Ḥanafīs during the Ottoman Empire, starting with Ibn Nujaym, declare the permissibility of such transaction. ʿAlāʾ al-Dīn al-Ḥaṣkafī was the first jurist to incorporate this opinion under Muḥammad al-Shaybānī's ruling of admitting movable commodities to be valid for endowment. See Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 6:119; Badr al-Dīn al-ʿAynī, *al-Bināya Sharḥ al-Hidāya*, vol. 7: 441; Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 6:218; Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 5:219; Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 4:363. Jon E. Mandaville , "Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire ," *International Journal of Middle East Studies*, vol. 10, 3 (1979): 289-308.

[170] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 4:363.

ghayrihā), it was justified based on Muḥammad al-Shaybānī's opinion of the permissibility of setting up endowments in every *manqūl* (movable) that is established as a basis for transaction.[171] This is the adopted opinion for *iftāʾ* in the school. Also, Ibn Nujaym declared the permissibility of this transaction without narrating any difference. However, Al-Ramlī states that to incorporate *waqf al-darāhim* under the rubric of a *manqūl* should be revised. Al-Ramlī argues that the *manqūl* can generate benefit with the existence of its exact essence (*ʿayniha*) while in the possession of the endower (*wāqif*). The *fatwā* of Ibn Nujaym of the permissibility of this transaction without narrating any difference in this matter does not indicate that it can be incorporated under al-Shaybānī's opinion of the permissibility of *waqf manqūl*, which has become an established transactional custom. This is because al-Shaybānī might himself have choses the opinion of Zufar and adopted it for *iftāʾ*.

Ibn ʿĀbidīn defends al-Ḥaṣkafī stating: "As for the *dirhams*: their value is not of their essence (*lā tataʿayyan bi al-taʿyīn*); they are of no benefit while they are in one's possession [i.e. a coin is not a useful object by itself – it is only good for purchasing something that will be useful]; however, their substitute [i.e., the commodity purchased] takes their place because they have no value to their essence. Thus, [the substitute] renders the *dirhams* as if they are still in one's possession. There is no doubt that the *dirhams* are considered to be of the category *manqūl*." Ibn ʿĀbidīn insists that there is no doubt that they are from the category of the *manqūl* and since they have become among the established transactions among the people, they are incorporated under the opinion of Muḥammad of permitting such transactions. Ibn ʿĀbidīn continues his defense that when Muḥammad al-Shaybānī cited some examples of *manqūl* he restricted these examples to what is established in transaction in his time. Ibn ʿĀbidīn refers us to *Fatḥ al-Qadīr*, where there are some scholars who included more things in the category of the

[171] Ibn ʿĀbidīn, *Radd al-Muḥtār,* vol. 4:364.

manqūl, when they saw it was established in transaction such as the unborn calf/cow and *dirhams.*

Ibn ʿĀbidīn stresses that these arguments reveal that al-Ḥaṣkafī's sound opinion of incorporating the endowment of the *dirhams* and *dinars* under the rubric of the *manqūl al-mutaʿāraf* (movable and widely understood to be used in certain ways in transactions) is based on Muḥammad al-Shaybānī's opinion. Ibn ʿĀbidīn explains that jurists singled out Zufar's opinion on this issue because he is the first one to state this opinion initially. Ibn ʿĀbidīn states that ʿUmar b. Nujaym in *al-Nahr al-Fāʾiq* declares the impermissibility of endowment of grains in the Egyptian lands because it is not an established transaction among the people. By contrast, the endowment of the *dirham* and *dīnār*, which are considered a *manqūl* and established transactional custom among the people in the Anatolian lands (*tuʿūrif fī al-diyār al-rūmiyya*), is permissible.[172]

CONCLUSION

The Islamic legal system, by its very nature, is authority-bound. Jurists rely on an authority higher than themselves to expound the law.[173] The legal endeavor of late Ḥanafī jurists in the early modern period should be evaluated with this understanding. The continuity of the Ḥanafī legal scholarship is guaranteed through commentaries on authoritative (*muʿtamad*) legal texts and the *madhhab* hierarchy. I have identified two features that differentiate late Ḥanafīs (*mutaʾakhkhirī al-ḥanafiyya*) from their predecessors, namely: (1) the manuals of jurisprudence and *fatāwā* that they rely upon in their legal scholarship; and (2) the relationship to the Ottoman

[172] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4:364. Ibn ʿĀbidīn points to many cases where the Anatolian custom was part of the legal discourse. See for example Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 3:382; vol. 4: 363; vol. 4:395.
[173] Khaled Abou El Fadl, "Soul Searching And The Spirit Of Shari'a: A Review Of Bernard Weiss's The Spirit Of Islamic Law," *Washington University Global Studies Law Review* (2002): 553-573.

state. Late Ḥanafīs insist that it is not sufficient to study the *mutūn* (legal manuals) without their authoritative *shurūḥ* (commentaries). In other words, the continuous legal endeavor of later Ḥanafīs is not in vain; rather, it gains its authoritative value through the perpetual explanation, expanding, and examining of these *mutūn*.

Ibn ʿĀbidīn confirms the authority and contribution of late Ḥanafīs to the body of legal scholarship of the *madhhab*. Also, he employs necessity to reverse previous opinions articulated by the eponyms of the school themselves. These revisions were made possible through the *madhhab* paradigm in which late Ḥanafī jurists continued the *madhhab* tradition. In short, the *mutaʾakhkhirūn* of the Ḥanafīs are indispensable to the development of the Ḥanafī school itself. Their interventions were not just a matter of temporary strategies, but rather they were based on built-in mechanisms intended to reinterpret the *madhhab* and keep it relevant to the ever developing social, political, and economic circumstances in the early modern Ottoman Empire. As an independent scholar within the Ottoman Empire, Ibn ʿĀbidīn not only was attentive to the broader legal production in Ḥanafī scholarship coming from the imperial capital, but also he incorporated the legal opinions of Ḥanafī authorities in Egypt, Palestine, Ḥijāz, and Transoxiana. The intellectual and legal milieu in the Ottoman Empire was fully interconnected in his view.

Ibn ʿĀbidīn embraces a role for the Ottoman state in the process of law-making. This manifests in his recurrent referral to *Maʿrūḍāt Abī Suʿūd* and sulṭānic commands and prohibitions. The recognition of the *Maʿrūḍāt* and imperial orders within the legal commentaries of late Ḥanafīs in the early modern period suggests that the development of Ḥanafī jurisprudence during the Ottoman Empire should not be approached through the strict dualism of *qānūn* vs. *sharīʿa*.

The ramification of this study goes beyond the simple identification of the processes of legal change and the continuation of the *madhhab* in the late Ḥanafī tradition. Essentially, it shows a complex and intricate endeavor of how Ibn ʿĀbidīn (and late Ḥanafīs in the early modern period) attempted to address the role of the state to create or omit legal norms. It articulates how the legal responses of late Ḥanafī jurists were anchored in social reality to maintain social harmony and order. This late Ḥanafī tradition was the point of departure for the modern codification of Ḥanafī jurisprudence. In the following chapter, I demonstrate how the *Mecelle*, the first Islamic Civil Code in 1876, consistently adopts the opinions of the late Ḥanafīs and their revisions of the *madhhab*.

CHAPTER FOUR

THE MECELLE: SHARĪʿA, STATE, AND MODERNITY
FASHIONING AND REFASHIONING OF ISLAMIC LAW IN THE 19TH - 20TH CENTURIES

Contemporary Islamic legal scholarship is preoccupied with the relationship between premodern articulations of *sharīʿa* and its modern formulations in the context of modernity and nation-state. A key debate in the field is whether modern civil codes in the Muslim majority countries and the codification of *sharīʿa* in the late 19th and early 20th centuries are authentic representations of Islamic law or whether they are alien legal formulations authorized by the modern nation-state under heavy European influence. This chapter explores how the creation of the *Mecelle*, the first Islamic Civil Law, in 1876 was justified in terms of the indigenous legal genres within the Ḥanafī school. Thus, I address three central questions: (1) to what extent the *Mecelle* embodies Ḥanafī norms and doctrines, (2) what are the ways in which the *Mecelle* was justified as a legitimate Islamic legal code, (3) how the *Mecelle* articulates new norms and doctrines in the name of the Ḥanafī tradition.

I argue that the *Mecelle* articles are particularly faithful to the late Ḥanafī jurisprudential norms and doctrines. The legal tradition of late Ḥanafīs (*al-mutaʾakhkhirūn*) served as the justificatory basis for the formation of the *Mecelle*, both in terms of its form and content. The *Mecelle* consistently adopts the opinions of late Ḥanafīs and their revisions of the *madhhab*. I provide evidence for this argument based on detailed tables of the content of *Mecelle* articles and references to them in the late Ḥanafī tradition.[1] Also, I demonstrate how the *Mecelle* perpetuates the role and authority of the Ottoman state in the Ḥanafī legal literature. This is reflected in the references to the sulṭānic orders and permissions.[2] The state's authority is also sanctioned by the

[1] See Appendix E.
[2] ʿAlī Ḥaydar Efendī, *Durar al-Ḥukkām fī Sharḥ Majallat al-Aḥkām*, vol.4 (Cairo: Dār al-Jīl, 1991), 598. See the following *Mecelle* Articles 1152, 1272,1276, 1280, 1281, 1287,1801.

Mecelle Article 692, which stipulates that judges must abide by sulṭānic orders to adopt specific opinions in *ijtihadic* matters (emergent cases that generate differences among jurists).[3] Most importantly, the force and weight of the *Mecelle* on the Ḥanafī juristic and judicial discourses and practice is a result of the Ottoman sulṭān's approval and support of this project.

I situate the *Mecelle*, as an Ottoman state project, within the late Ḥanafī tradition to show how the *Mecelle* was justified based on the internal and indigenous mechanisms of the Ḥanafī school itself.[4] The drafters of the *Mecelle* insisted that it was inspired by the already existing legal genre of legal maxims (*al-qawāʿid al-fiqhiyya*) within the Ḥanafī school. References in the *Mecelle* and its commentaries specifically invoke the foundational work by Ibn Nujaym al-Ḥanafī al-Miṣrī (d. 970/1562-3), *al-Ashbāh wa al-Naẓāʾir,* for justifying the legal form (i.e. pithily expressed principles) of the *Mecelle*. It is important to note that Ottoman Anatolian jurists embraced this work. For instance, Abū Saʿīd Muḥammad b. Muṣṭafā b. ʿUthmān al-Ḥusaynī al-Khādimī (d. 1762) composed *Majāmiʿ al-Ḥaqāʾiq*, a work on *uṣūl al-fiqh*, which incorporated Ibn Nujaym's legal maxims as a conclusion to his work. This does not mean that some of the *Mecelle* articles did not depart from both the early and late Ḥanafī legal norms. In fact, many articles of the *Mecelle* departed from these formulations but these changes were perpetuated through justificatory techniques within the Ḥanafī tradition. Therefore, I maintain that what is important about the *Mecelle* is not only that it represents a faithful synthesis of late Ḥanafī jurisprudential norms but also it articulates new social and legal norms in the late Ottoman Empire.

[3] ʿAlī Ḥaydar, *Durar al-Ḥukkām fī Sharḥ Majallat al-Aḥkām*, vol. 4:604.
[4] The *Mecelle* contains 1,851 articles. The first 100 articles are legal maxims based on Ibn Nujaym's and al-Khādimī's works. The first chapter of the *Mecelle* is dedicated to sale contracts (which starts with Article 101) and the legal norms pertain to this specific transaction.

Furthermore, the key function of the *Mecelle* was to satisfy the need of the growing Ottoman bureaucracy to create a reference to the judiciary and other judicial councils, who lacked traditional Islamic law training.[5] It is important to note that Syrian and Anatolian Ḥanafī scholars were the prime participants in the formation of the *Mecelle*.[6] I contend that the *Mecelle* is distinct from the premodern Ḥanafī jurisprudence in two specific features: (1) the systemic nature of the *Mecelle* project under Ottoman state supervision, (2) the function of the *Mecelle* among the Ottoman legal regimes. This chapter stresses that the *Mecelle* should be understood in the context of the Ottoman modernization project in which it was a response generated from within the Islamic legal tradition to the Tanzimat and penetration of Western laws in the Ottoman Society.[7]

To support these arguments, I engage the discursive reasoning of the drafters of the *Mecelle* to stresses its faithful adoption of late Ḥanafī legal norms and doctrines. Therefore, I pay special attention to the report that accompanied the *Mecelle,* which serves as the rationale for its creation. I discuss how the function of the *Mecelle* is different from premodern Ḥanafī jurisprudential works. I also discuss three authoritative commentaries on the *Mecelle* to evaluate how they characterized the nature and role of the *Mecelle* in the Ottoman legal system. Moreover, I explore some case studies to demonstrate the underlying departures and doctrinal shifts from early and late Ḥanafī norms.

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[5] Recep Şenturk, "Intellectual Dependency: Late Ottoman Intellectuals between fiqh and Social Science," *Die Welt des Islams*, 47 (2007): 295. Şenturk argues that the Ottoman bureaucrats saw that modern state structure was incompatible with the legal pluralism of the Ottoman Millet System in which religious communities were allowed to follow their legal traditions in their litigations. Also, he argues that late Ottoman officials were attempting to create a modern Islamic law out of the traditional structures of *fiqh*.

[6] The Egyptian Ḥanafī scholars we excluded due to the political tension between the Porte and the almost-independent Egypt.

[7] Recep Senturk, "Intellectual Dependency: Late Ottoman Intellectuals between fiqh and Social Science," *Die Welt des Islams*, 47 (2007): 294.

THE CONTEXT OF THE MECELLE

The central importance of the *Mecelle* is reflected in its application as the civil code in the Ottoman imperial capital and its provinces until the collapse of the Empire.[8] For example, the *Mecelle* served as the civil code in Iraq until 1951 and in Jordan until 1952. Also, the *Mecelle* was the source for the codification for many Arab civil codes such as Egypt's in 1949, Syria's in 1949, and Iraq's in 1951.[9] Additionally, the *Mecelle* inspired civil codes in Malaysia and Afghanistan.[10] The historical context of the *Mecelle* originated from the 19th-century reform movement known as the Tanzimat. The Tanzimat period from 1839 and 1876 marks the most intensive phase of 19th-century Ottoman reformist activity. This movement lead to the creation of a new court system in the mid-1860s, namely the Nizamiyye ('regular') courts. We also witness an intensive effort at statutory codification between 1850 and the 1880s. In the years 1868–1876, the eminent reformer and jurist Ahmet Cevdet Paşa (1822–1895) led the project of compiling the first Ottoman civil code, known as the *Mecelle*. Ahmet Cevdet Paşa, who started his career as a judge in a *sharīʿa* court, was an accomplished Muslim scholar, and was also knowledgeable in French law.

It is crucial to acknowledge that the Ottoman reform movement had serious social, political, and economic consequences. M. Şükrü Hanioğlu argues that the Ottoman reform movement "generated tense dualism in every field touched by the Tanzimat."[11] This dualism was a result of "the dialectic between modernization and preserving Ottoman and Islamic traditions."[12] Hanioğlu explains, "the ideal of an overarching Ottoman identity clashed with the

[8] M. Şükrü Hanioğlu, *A Brief History of the Late Ottoman Empire* (Princeton: Princeton University Press, 2008), 74-5.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Hanioğlu, *A Brief History of the Late Ottoman Empire*, 104-5.

increasing autonomy of religious communities within the Empire; the bureaucratic centralization conflicted with political fragmentation; the conservative spirit that gave rise to the *Mecelle* contradicted the progressive drive to emulate the French penal code; new civil courts coexisted uneasily side by side with the traditional *sharīʿa* courts."[13]

The *Mecelle* came to be a pillar of the civil domain in the Nizamiyye court system and was employed in the *sharīʿa* courts as well. In 1867 the government decided to adopt the French Revolutionary principle of the separation of powers. However, a debate arose over the question of whether or not to translate the French Civil Code and apply it in the Ottoman courts. The jurists who preferred a civil code deriving from the *sharīʿa*, headed by Ahmet Cevdet Paşa, prevailed over those who advocated the adoption of the French code. This choice reflected the position of the Young Ottomans, the intellectual movement that saw no essential contradiction between Islamic law and contemporary realities.[14]

Şerif Mardin contends that the codification of the *Mecelle* was the product of a conflict between "the contending forces of foreign intervention, native reformist tendencies and Ottoman conservative reactionary forces. It was also the expression of a compromise between these forces."[15] Mardin argues that the key pressure in the 19th century, which led to state consolidation of both state and legislative power, was the slow but steady transformation of the economy and commercial relations within the Empire. He contends that due to the increase of Turkey's commerce with Europe, extra-*sharīʿa* methods of settling commercial disputes emerged.[16] Therefore, Mardin attributes the creation of the commercial courts of the Ottoman

[13] Ibid.
[14] Avi Rubin, "Legal borrowing and its impact on Ottoman legal culture in the late nineteenth century" *Continuity and Change* (August 2007): 280-2.
[15] Şerif Mardin, "Some explanatory notes on the origins of the Mecelle (Medjelle)" *Muslim World* 51 no 3 (1961): 189-190.
[16] Ibid.

Empire partly to the pressures exerted on Ottoman society by a changing commercial world and pressures from the foreign diplomatic missions of the Capital.[17]

Furthermore, the central context of some of the transformations in the *Mecelle* was the Ottoman priority to settle the demands of Christian subjects and foreign nationals residing in the Empire after the Crimean War. The Ottoman state established tribunals in which the testimony of Christians against Muslims was accepted and this new policy was soon articulated in a new Imperial Rescript, the *Hatt-ı Hümâyun* of February 18, 1856. In fact, this policy was the context for the equal acceptance of both Muslim and Christian testimony in the *Mecelle*. To meet the demands of European powers, a committee was also established to write a book, which systematized the provisions of religious law with reference to commercial transactions. Ahmet Cevdet Paşa describes this development, stating:

> The number of Europeans coming to the Empire increased day by day and especially assumed extraordinary proportions during the Crimean War. The value of commercial transactions, therefore, also grew. A single commercial court was unable to handle all the commercial disputes that came up for settlement. Foreigners could not appear before *sharīʿa* courts as the testimony of non-Muslims against Muslims and that of foreign Christians against tax-paying Christians was not valid. This was very irksome to Europeans and made them protest against *sharīʿa* courts. The ministers thereupon agreed to have that part of the *fiqh* that had reference to commercial transactions translated into a language, which could be understood by all, and to make it into a book.[18]

Ahmet Cevdet Paşa's tone in this narrative is characteristic of the complaints about the limitations of the *sharīʿa* courts in commercial transactions and litigations in the late Ottoman Empire. However, Ahmet Cevdet Paşa is clear in his commitment to the Islamic legal tradition and its ability and relevance to reshape commercial litigations. It appears that the pressures on the *sharīʿa* courts were only a symptom of the shift of military and economic power to Europe.

[17] Ibid.
[18] Ibid.

PRE-MECELLE CODES

Many codes preceded the *Mecelle*. The first appeared in 1840, directly following the 1839 Edict of Gülhane that officially initiated the Tanzimat period.[19] This code was an attempt to regularize the administration of criminal law in the Empire.[20] A decade later, in 1851, a second code of criminal law appeared. Although it was very similar to the previous code, it incorporated new rulings.[21] In 1858, the Land Law was issued. Then, in 1859, the Ottoman government promulgated a code of law inspired by the 1810 Napoleonic Criminal Code. It is important to note that around the time of the completion of the *Mecelle*, in 1876, Abdul Hamid II declared the Ottoman constitution.[22] The idea of the constitution was inspired by some of the Ottoman elite who concluded that the core of European success, beyond its technical achievements, lay in its political organization. These elites believed that this political system should allow people to influence sulṭānic policy. In this context, the project of the *Mecelle*, the codification of Ḥanafī jurisprudence, was brought into existence. It was an attempt to adhere to Islamic law in the midst of deep structural reforms in the legal, political, and social sectors within the Empire.

[19] Literally, Tanzimat means reorganization. The Tanzimat period from 1839 and 1876 marks the most intensive phase of nineteenth-century Ottoman reformist activity. The sulṭān, Europeanized Ottoman bureaucrats, and the French speakers initiated these reforms. See M. Şükrü Hanioğlu, *A Brief History of the Late Ottoman Empire* (Princeton: Princeton University Press, 2008), 72.
[20] Ruth A. Miller, " Apostates and Bandits: Religious and Secular Interaction in the Administration of Late Ottoman Criminal Law," *Studia Islamica*, No. 97 (2003), pp. 157.
[21] Ibid.
[22] M. Şükrü Hanioğlu, *A Brief History of the Late Ottoman Empire* (Princeton: Princeton University Press, 2008), 72-4.

> The positing of modernity as something absolutely outside of premodernity in this manner is a feature of many theories of modernity. Such theories not only make it impossible to fathom any process of transition from a normatively closed premodernity to a fluid and dynamic modernity, but also obscure the nature of modern norms by finding their origin in an autonomous force that lies outside of history rather than in their relation to the preexisting norms from which they necessarily emerged.[23]

The *Mecelle* (Ar. *Majalla*) is the first Ottoman attempt to codify Ḥanafī jurisprudence. The decision to draft the *Mecelle* resulted from a controversy over whether or not the Ottoman Empire should adopt the French civil code.[24] The Ottoman Council of Ministers decided to commission a work based on Islamic jurisprudence and entrusted this task to a commission under the supervision of Ahmet Cevdet Paşa (d. 1895)[25] who had been the leading advocate of this course of action.[26] The committee included ʿAlāʾ al-Dīn Ibn Ibn ʿĀbidīn (d. 1889), the late 19th century Damascene Ḥanafī authority. The *Mecelle* was written and promulgated between 1869/70 and 1877. It contains sixteen books of 1,851 articles in Ottoman Turkish.[27] It covers contracts, torts, legal liabilities, and some principles of civil procedure.[28] Officially, the *Mecelle* had jurisdiction throughout the Ottoman Empire, but in fact it was never effective in Egypt.[29]

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[23] Yaseen Noorani, *Culture and Hegemony in the Colonial Middle East* (New York: Palgrave Macmillan 2010), 16.
[24] Wael B. Hallaq, *Sharīʿa: Theory, Practice, and Transformation* (Cambridge: Cambridge University Press, 2009), 411.
[25] Al-Ziriklī, *al-Aʿlām*, vol. 1:108. Ahmet Cevedet b. Ismāʿīl b. ʿAlī b. Aḥmad Agha. He was a Turkish minister. He travelled to Istanbul and studied Arabic and sacred sciences. He studied judiciary and appointed a judge for a brief time. Then, he was appointed the head of the ministry of justice.
[26] C.V. Findley, "Medjelle." *Encyclopaedia of Islam*, Second Edition. Brill Online, 2013. Reference. University of Arizona. 4 September 2013 http://referenceworks.brillonline.com.ezproxy1.library.arizona.edu/entries/encyclopaedia-of-islam-2/medjelle-SIM_5107; Recep Senturk, "Intellectual Dependency: Late Ottoman Intellectuals between fiqh and Social Science," *Die Welt des Islams*, vol. 47 (2007): 298.
[27] There is a tradition of Ḥanafī jurisprudence authored primarily in Ottoman Turkish. This is reflected in the Ottoman *fatāwā* collections, legal epistles, or complaints filed to the Ottoman muftīs in the imperial capital.
[28] C.V. Findley, "Medjelle." *Encyclopaedia of Islam*, Second Edition. Brill Online, 2013.
[29] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity*: Cultural Memory in the Present. (Stanford: Stanford University Press, 2003): 211.

In his *İslam ve Osmanlı Hukukunda: Mecelle*, Osman Kaşıkçı[30] argues that the *Mecelle* was primarily dependent upon the Ḥanafī school. He stresses that the codification of the *Mecelle* was a response to Western legal hegemony.[31] Yet, he asserts that the Ottoman officials were influenced by Western debates on law.[32] The *Mecelle* was immediately translated into Arabic, Greek, and French under the title of "Ottoman Civil Law". It served as the civil code in force in the Ottoman Empire, and briefly in the Turkish republic, from 1869 to 1926.[33]

The *Mecelle* articulates two central issues in the late Ottoman Empire: (1) how Islamic jurisprudence responded to modernity and (2) the process by which Islamic law was able to articulate new ideals and values. The drafters of the *Mecelle* saw its creation as a rejection of Western legal hegemony over the commercial litigation within the Ottoman Empire.[34] Thus, the project of the *Mecelle* underscores the course of legal codification of Ḥanafī norms and doctrines in ways that allow insight into the process of legal development in the late 19th century. What I propose, then, is to understand the emergence of the *Mecelle*, not in terms of an epistemic break from the premodern Islamic legal reasoning, but in terms of a continuation and transformation within the Ḥanafī legal tradition. The *Mecelle* cannot exist without dependence upon and articulation with previously existing norms and legal literature. The *Mecelle* did not appear ex nihilo, as a legal framework alien and opposed to the existing legal literature and legal order, but necessarily emerged out of an existing legal genre of *qawāʿid*[35] and norms of late Ḥanafī tradition in a manner that made it an authentic representation of the legal tradition for the experts

[30] Osman Kaşıkçı's work is a key secondary source, which offers a detailed documentation of the process of the formation of the *Mecelle*. Kaşıkçı provides original documents in Ottoman Turkish which include the meeting minutes, reports, and the final proceedings of the *Mecelle* committee. He provides some insights into the role of Ḥanafī jurists and *fatāwā* literature in the formation of the *Mecelle.*

[31] Osman Kaşıkçı, *İslam ve Osmanlı Hukukunda: Mecelle* (İstanbul: Osmanlı Araştırmaları Vakfı, 1997), 52-55.

[32] Osman Kaşıkçı, *İslam ve Osmanlı Hukukunda*, 52-55.

[33] Findley, C.V. "Medjelle." *Encyclopaedia of Islam*, Second Edition. Brill Online, 2013. Reference. University of Arizona. 11 March 2013 <http://referenceworks.brillonline.com.ezproxy1.library.arizona.edu/entries/encyclopaedia-of-islam-2/medjelle-SIM_5107>

of the legal profession.[36] My focus on the *Mecelle* as a continuation of Ḥanafī legal tradition within Islamic jurisprudence results in a different approach from some of the current studies that deal with the *Mecelle* as a Western legal form opposed to the premodern Islamic legal articulations.

This study explores how the late articulations of Ḥanafī jurisprudence in the early modern period point to both the continuous internal processes of doctrinal change within the *madhhab* and the indigenous legal paradigm upon which these changes were justified. For, the *Mecelle* is not only a rich site for interrogating competing legal doctrines within the Ḥanafī school, but also it represents the backdrop against which the codification of the Ḥanafī school and the canonization of its doctrines were completed.

The *Mecelle* not only embodies the internal processes of legal change in the Ḥanafī school, but also it points to the legal, social, and economic changes within the late Ottoman Empire. These changes justify the new emerging social, economic, cultural, and legal structures and orders. Here, in my estimation, lies another aspect that drove the doctrinal changes of some of the key Ḥanafī jurisprudential norms in the late 19th century. This change is generated both from within the Muslim experience and from without. From within, social, economic, cultural, and political transformations of unprecedented magnitude put a tremendous strain upon traditional legal institutions, legal values, and legal concepts. These changes of society deeply

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[34] *al-Majallah : wa-hiya taḥtawī ʿalā al-qawānīn al-sharʿīyah wa-al-aḥkām al-ʿadlīyah al-muṭābiqah lil-kutub al-fiqhīyyah*. 2nd Edition (Qusṭanṭīnīyah : al-Maṭbaʿah al-ʿUthmānīyah, 1887), 4-5.

[35] The *Mecelle* incorporates Ibn Nujaym's *qawāʿid* from Article 2 to Article 100. These maxims pertain to the broad understanding of the Ḥanafī *fiqh* literature and its legal discourse.

[36] Murteza Bedir, "Fikih to Law: Secularization through Curriculum," *Islamic Law and Society*, vol.11. 3 (2004): 386. See Sobhi Mahmassani, *Falsafat al-Tashri fi al-Islam: The Philosophy of Jurisprudence in Islam*, trans. Farhat Ziadeh (1961 [1946]), 42-47. Although Bedir argues that the *Mecelle* did not depart from Ḥanafī jurisprudence, he does not explain how they did not depart from the Ḥanafī jurisprudence. Also, the argument in this chapter situates the *Mecelle* within the larger context of late Ḥanafī tradition. Unlike Bedir, I argue that the Ottoman state's role in the process of its formation does not render it alien to premodern Islamic law.

challenged the legal tradition as a whole, not merely a particular element in it.[37] From outside, European legal hegemony started to be felt at the heart of the Ottoman Empire by controlling litigation of most of the commercial activities and disputations involving their citizens within the Empire.

These changes manifested in all aspects of traditional societies, specifically class, gender, and familial relations.[38] Although we observe the beginning for such changes in the late 19th century, the complete picture of the volume of these transformations is ultimately crystalized in the early 20th century. For example, the concept of the family has changed to reflect a new type of social organization, namely "nuclear family". Also, the concept of marriage has shifted from its premodern import of "sexual accessibility" and "procreation" to increasingly become a consensual matter in the framework of "companionate marriage".[39] Additionally, parental power over children has been reduced and its strict hierarchy was reset to reflect new social mores.[40] The criminal laws underwent drastic changes in the late Ottoman Empire.[41] As a result of the processes of urbanization, industrialization new types of crimes emerged which induced critical changes in the nature of crimes and theories of crime and punishment and the practices of the law enforcement. These sweeping changes were understood as a crisis of tradition not simply a crisis of adaptation to the new emergent social, political, cultural, and legal institutions. Many of the laws of contracts, property, and types of legal liability were revisited in the *Mecelle* to reflect new economic, political, and social realities. The Ottoman Empire responded to these challenges by transforming its laws through radical centralization and bureaucratization.

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[37] David Luban, *Legal Modernism* (Michigan, the University of Michigan Press, 1994), 28.
[38] Luban, *Legal Modernism*, 30.
[39] Few works were authored to revisit the premodern rationale of marriage by articulating the new positions based on Islamic norms. A perfect example in this regard is *Bākūrat al-Kalām ʿalā Ḥuqūq al-Nisāʾ fi al-Islam* by Ḥamza Fatḥ Allāh, a teacher at the Khadival school in Cairo.
[40] Luban, *Legal Modernism*, 32.
[41] Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Menage (Oxford: Clarendon Press, 1973), 242.

SECONDARY LITERATURE

Ottoman legal change has been represented in some of the secondary literature mainly through the prism of westernization.[42] For example, Joseph Schacht describes the project of the *Mecelle* stating: "The experiment of the *Mejelle* was undertaken under the influence of European ideas, and it is, strictly speaking, not an Islamic but a secular code."[43] He argues, "Strict Islamic law is by its nature not suitable for codification because it possesses authoritative character only in so far as it is taught in the traditional way by one of the recognized schools."[44] Moreover, Schacht recognizes that the *Mecelle* contains "certain modifications of the strict doctrine of Islamic law, particularly in the rules concerning evidence."[45] In addition, Bernard Lewis describes the efforts of the *Mecelle* committee as: "a digest rather than a code of *Şeriat* law of the Hanafi school … one of the great achievements of Turkish jurisprudence."[46] Similarly, the idea that the *Mecelle* is not a "real" civil code but rather a collection of Ḥanafī rules found resonance in the works of Majid Khadduri and Herbert Liebensky who argued that the *Mecelle* is not a code in the European sense, but rather a "nonconclusive digest of existing rules of Islamic law".[47] The point of departure for these scholars is the rigid oppositions between *sharīʿa* and European codes, and the religious and the secular. These opinions overlook "the possibility that a fully-

[42] Avi Rubin, *Ottoman Nizamiye Courts: Law and Modernity* (New York, Palgrave MacMillan, 2011), 15; Recep Senturk, "Intellectual Dependency: Late Ottoman Intellectuals between fiqh and Social Science," *Die Welt des Islams*, 47 (2007): 284; Dora Glidewell Nadolski, "Ottoman and Secular Civil Law ," *International Journal of Middle East Studies*, 8 (1977): 518; Shirine Hamadeh, "Ottoman Expressions of Early Modernity and the 'Inevitable' Question of Westernization," *The Journal of the Society of Architectural Historians* 63 (2004): 34; Avi Rubin, "Ottoman Judicial Change in the Age of Modernity: A Reappraisal." *History Compass* 7 (2009): 123.
[43] Joseph Schacht, *An Introduction to Islamic Law* (New York, Oxford University Press, 1982), 92.
[44] Schacht, *An Introduction to Islamic Law*, 92.
[45] Schacht, *An Introduction to Islamic Law*, 93. Schacht argues that the *Mecelle* requires all traditional qualifications of a witness and his evidence, but not the quality of being a Muslim (art. 1684). Schacht's observation is accurate in that the section on testimony and evidence in the *Mecelle* do not address the religion of the witnesses. The focus is primarily on the exactitude and justice of the witness as well as his/her reputation (art. 1705). The just person is defined in the same article as the one whose good deeds are dominant over his/her bad deeds.
[46] Bernard Lewis, *The Emergence of Modern Turkey* (New York: Oxford University Press, 1968), 123.
[47] Majid Khadduri and Herbert Liebensky eds., Law in the Middle East (Washington DC, 1955), 295–6

fledged civil code could be a syncretic artifact, containing both Islamic and European features."[48] Avi Rubin insists: "What made it a 'real' civil code, comparing to the old state law collections promulgated by the sulṭāns, known as kanunnames, was its actual application as a legal standard in force in Nizamiye and Shari'a courts throughout the empire."[49]

The *Encyclopaedia of Islam* introduces the *Mecelle* by stating, "it reflects Western influence mainly in its division into numbered books, sections and articles, as in European codes."[50] Some insist that the *Mecelle* is a deviation from the authoritative opinions of the school.[51] Following the same discourse, without providing any evidence, some scholars have argued that the *Mecelle* is merely a random selection of legal doctrines from different schools of law.[52] This idea found resonance in the *Encyclopaedia of Islam* as well by emphasizing:

> *Mecelle* represents the first attempt by an Islamic state to codify, and to enact as law of the state, part of the *sharīʿa*. Further, the code, while derived from the Ḥanafī school of law, which enjoyed official status in the Ottoman Empire, did not always incorporate the dominant opinions of that school. Rather, of all the opinions ever advanced by Ḥanafī jurists, the code incorporated those deemed most suited to the conditions of the times, in accordance with the principle of *takhayyur*.[53]

These positions consistently juxtapose the *Mecelle* with the premodern Ḥanafī jurisprudence, arguing that it is a formalized legal project that was authorized by the state.[54] Wael Hallaq, for instance, argues "the transposition of Islamic law from the fairly independent and informal terrain of the jurists to that of the highly formalized and centralized agency of the state

[48] Avi Rubin, "Legal borrowing and its impact on Ottoman legal culture in the late nineteenth century" *Continuity and Change* (August 2007): 283.
[49] Ibid.
[50] Findley, C.V. "Medjelle." *Encyclopaedia of Islam*, Second Edition. Brill Online, 2013. Reference. University of Arizona. 11 March 2013 <http://referenceworks.brillonline.com.ezproxy1.library.arizona.edu/entries/encyclopaedia-of-islam-2/medjelle-SIM_5107>
[51] Abdullahi Ahmed An-Naʿim, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic law and State Law," *Modern Law Review*, 73 (1) (January 2010): 20; Wael B. Hallaq, *Sharīʿa: Theory, Practice, and Transformation* (Cambridge: Cambridge University Press, 2009), 411.
[52] Abdullahi Ahmed An-Naʿim, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic law and State Law," *Modern Law Review*, 73 (1) (January 2010): 20.
[53] Findley, C.V. "Medjelle." *Encyclopaedia of Islam*, Second Edition.
[54] Wael B. Hallaq, *Sharīʿa: Theory, Practice, and Transformation* (Cambridge: Cambridge University Press, 2009), 411.

found manifestation in the *Mecelle-ı Ahkām-ı Adliye*."[55] He points out that a committee headed by the *sharīʿa* jurist Ahmet Cevdet Paşa produced it. Yet, Hallaq paints a picture in which the *Mecelle* was a result of a struggle between forces of tradition and Westernizaton. Hallaq pinpoints that Ahmet Cevdet Paşa insisted that the law had to be "faithful to the cultural constitution of the Empire against the powerful Westernizer Ali Paşa who called for the adoption of the French Code of 1804 (known as the Code Napoleon)."[56] Hallaq contends, "One of the aims of the *Mecelle* was to provide, in the manner of a code, a clear and systematic statement of the law for the benefit of both the *sharīʿa* and Niẓāmiyye courts."[57] Hallaq claims that the opinions chosen did not necessarily reflect the authoritative doctrines in the Ḥanafī school. Moreover, he claims that these doctrines were not exclusively Ḥanafī, for some of them were imported from other schools after being generally approved by the later Ḥanafīs.[58] The *Mecelle*, for Hallaq, was "a last-ditch effort to salvage the *sharīʿa* as a law in force, but it was also an attempted remedy applied to a problem that had originated as a remedy."[59]

The main concern with Hallaq's narrative is its dismissal of the arguments made by the drafters of the *Mecelle* that it is an authentic Islamic legal genre. He reduces its significance to a mere experimental project to rescue Islamic law at the end of the Ottoman Empire. Also, he disregards the original intention of the *Mecelle* drafters as well as their justification for its formulation to the burgeoning Ottoman bureaucracy and to expedite juridical litigation and court

[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid. It is true that the *Mecelle* committee incorporated some less authoritative opinions, and they even dismissed some opinions of the eponyms for the sake of new or modified positions. However, Hallaq's comment reflects an "outsider's observation." In other words, the *Mecelle* committee members were Ḥanafī practitioners who debated many aspects of this work. I find the claims about whether their endeavor reflects authoritative norms or not to be irrelevant to the nature of the whole *Mecelle* project. My goal is to show how the *Mecelle* committee members conceived of the authoritativeness of the opinions they chose to include and exclude, not to make a judgment regarding their authoritativeness myself.
[59] Hallaq, *Sharīʿa: Theory, Practice, and Transformation*, 412.

proceedings. Likewise, Hallaq overlooks the fact that ʿAlāʾ al-Dīn Ibn Ibn ʿĀbidīn, the Damascene Ḥanafī authority, after his father Ibn ʿĀbidīn, was a member of the committee who formulated the *Mecelle*. More seriously, Hallaq neither explains how the *Mecelle* deviates from the authoritative Ḥanafī opinions nor identifies which doctrines were borrowed from other schools of law.

In addition, Abdullahi An-Naʿim, deploying the Westernization thesis, contends that the Ottoman Empire attempted to mimic the legislative style of modern European states without regard to the different nature of Islamic law. The Ottoman *Mecelle*, An-Naʿim contends, is composed of a "European form with Islamic law content."[60] Like Hallaq, he claims that the *Mecelle* includes some provisions drawn from sources other than the Ḥanafī School. Erroneously, An-Naʿim asserts that "the principle of selectivity (*takhayyur*) among equally legitimate doctrines of Islamic law was already accepted in theory for personal compliance, but it was not done in practice in terms of state legislation of general application."[61] He claims, "By applying that principle through the institutions of the state, the *Mecelle* opened the door for more wide reaching subsequent reforms."[62] Thus, for An-Naʿim, the Ottoman *Mecelle* "rendered the entire corpus of Islamic law principles more available and accessible to judges and policy makers in the process of transforming their nature and role through formal selectivity and adaptation for their incorporation into modern legislation."[63] An-Naʿim stresses that Islamic law principles began to be drafted and enacted into statutes that "were premised on European legal structures and concepts."[64] This was also done through "mixing some general or partial principles or views

[60] Abdullahi Ahmed An-Naʿim, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic law and State Law," *Modern Law Review*, 73 (1) (January 2010): 20
[61] An-Naʿim, "The Compatibility Dialectic," 20.
[62] Ibid.
[63] Ibid.
[64] Ibid.

from one school of Islamic jurisprudence with those derived from other schools, without due regard to the methodological integrity or conceptual coherence of any of the schools whose authority was invoked."[65]

An-Naʿim's account is clear in its biases. He sees Islamic law to be characteristically inapplicable within the modern nation-state. Significantly, he seems to suggest that codification is an inherently European form, yet, with an Islamic content. Nonetheless, these two key assumptions fail to identify the role of the state in enforcing the law in Islamic legal history and the fact that the drafters of the *Mecelle* justified its formulation in opposition to the European laws and legal regimes. An-Naʿim does not mention that the *Mecelle* was justified based on the indigenous Ḥanafī genre of jurisprudential canons (*qawāʿid fiqhiyya*). Essentially, An-Naʿim does not explain how the *Mecelle* is European or which doctrines were incorporated from other legal schools.

In his *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn al-Qarāfī*, Sherman Jackson emphasizes that codification is a modern phenomenon for the Muslim world. Jackson considers the failed attempt by the ʿAbbasid secretary of state, Ibn al-Muqaffaʿ (d. 759) as a serious attempt in that direction. Jackson emphasizes that the Ottoman 'civil code', *Mecelle-i ahkam-i ʿadliyye*, must be considered a modern product promulgated in 1877 under heavy European influence. Yet, Jackson states: "following the settling down of the *madhāhib*, there lurked the possibility of the emergence of an order whose operation would produce effects similar if not identical to those of codification."[66]

Jackson reiterates two key points in his narrative: (1) European influence on the formation of the *Mecelle*, and the (2) *Mecelle* is a modern product. Although I affirm Jackson's

[65] Ibid.
[66] Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-It i al-Qarāfī*, (New York, Brill, 1996), xvii.

assessment that the *Mecelle* is modern, I contend that the codification per se was not necessarily so. The work of Ibn Nujaym on legal maxims was key in the establishment of the Ottoman imperial canons and it was heavily consulted for the process of codification of the *Mecelle*. The *Mecelle* starts the first 100 Articles under the title "legal maxims". The rest of the *Mecelle* Articles are modeled on these maxims. Jackson mitigates his judgment of the Western influence on the *Mecelle* by demanding from his reader to reflect upon the relationship between the state and medieval Muslim jurists. He contends that the dynamics of this relationship and increasing role of the state in the legal process would have rendered very similar results to codification of Islamic jurisprudence in the 19th century.[67]

Ahraon Layish advances the thesis that "the codification of the *sharīʿa* by Muslim legislatures, since the middle of the nineteenth century, brought about the transformation of the *sharīʿa* from "jurists' law," that is, a law created by independent legal experts, to "statutory law," in other words, a law promulgated by a national-territorial legislature."[68] He supports the claim that the Ottoman civil code (*Mecelle*) (1869-1876) was based exclusively on the Ḥanafī school through the eclectic expedient (*takhayyur*).[69] In a pessimistic tone, Layish states that "it is doubtful whether the codification of the *sharīʿa* through the application of *sharʿī* principles and mechanisms is likely to bring about the adaptation of the *sharīʿa* to the changing requirements of a modern society."[70]

Following a similar narrative, Rudolph Peters stresses two key ideas in the formulation of the *Mecelle*, namely, (1) the state is gradually replacing the authority of the *ʿulama'* and (2) the *Mecelle* is a westernized form of Islamic law. Peters maintains that in the 19th and 20th centuries

[67] Jackson, *Islamic Law and the State*, xix.
[68] Aharon Layish, "The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt des Islams*, vol. 44, 1 (2004): 85.
[69] Ibid.
[70] Ibid.

states took the power to define the *sharīʿa*; however, it did not end the role of the *ʿulama* completely. In this light, Peters saw the scholars' co-operation with the state as crucial to legitimize the state-enacted *sharīʿa* codes. From this angle, he explains the role of Ahmet Cevdet Paşa (1822–95) in the formation of the *Mecelle*. He concludes that legal reforms in the 20th century in the Middle East were "entirely westernized by the adoption of Western substantive and adjective laws and Western notions of law. Yet, this did not end the role of *sharīʿa* in the national laws."[71]

The key problem with Peters' narrative is that it confines the *Mecelle* within the influence of European codes, describing it to be a "westernized form of Islamic law". Importantly, Peters' point of departure that Islamic law is a jurist's law and thus the state involvement in the process of law making renders it outside the traditional paradigm of Islamic law deserves revision. From this prism, Peters saw the participation of *sharīʿa* scholars in the *Mecelle* committee as a mere legitimation maneuver to support this state project. Peters overlooks the process by which the *Mecelle* was coined as an authentic representation of Ḥanafī jurisprudence by both the Ottoman learned hierarchy and Ḥanafī jurists across the Ottoman provinces. The involvement of the Ottoman state in the process of law making is one feature that characterizes the late Ḥanafī tradition, as I showed in the previous chapters. This involvement was recognized a legitimate interference to preserve the state interests and policies.

Overall, this narrative in the secondary literature fails to engage with the legal logic and discursive reasoning advanced by the drafters of the *Mecelle*. The *Mecelle*, as a systematic legal project, is modern in the sense that it responds to the emergent patterns of social, economic, and legal challenges of the mid 19th century from within the Ḥanafī tradition. Additionally, the

[71] Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shariʿa is Codified," *Mediterranean Politics*, 7:3 (2002): 91.

Mecelle as a legal project in which late Ḥanafī jurists embraced and preserved Ḥanafī norms and categories, produced a standardized judicial norms for purposes of litigation. In this context, the *Mecelle* has a 'new' function in the *sharīʿa* and Niẓāmiyye courts.

The drafters of the *Mecelle* never professed the claim that the codification of the Ḥanafī jurisprudence was inspired by Western legal influence. This claim fosters two underlying premises: (1) premodern Islamic law is alien to its modern articulations, (2) the dichotomy between the modern and the premodern is epistemic. The fact that the committee that supervised the formation of the *Mecelle* included ʿAlāʾ al-Dīn Ibn Ibn ʿĀbidīn (d. 1889), the key Damascene authority of the Ḥanafī school in the late 19th century, casts strong doubts on the claim of the foreign nature of the *Mecelle* as a legal genre. The drafters of the *Mecelle* justified its formation in relation to the internal legal genre of *qawāʿid* and the process of the legal reasoning within the Ḥanafī school.

THE MECELLE REPORT: CONTINUITY OF LATE ḤANAFĪ TRADITION

The front cover of the *Mecelle* declares that it contains the *sharʿī* codes (*al-qawānīn al-sharʿiyya*) and juridical rulings (*aḥkām ʿadliyya*) which, the *Mecelle* insists, are consistent with the authoritative manuals of Ḥanafī jurisprudence that were edited by a committee composed of established scholars and meticulous jurists. The *Mecelle* cover announces that the Sublime Porte approved the *Mecelle* and the imperial rescript established it as the canon, exemplar (*dastūr*) to be acted upon. [72] The *Mecelle* is commenced with the report that was filed to the late ʿAlī Paşa, the Grand Vizier (*al-Ṣadr al-Aʿẓam*) on 1st of Muharram 1286 (April 13th, 1869) justifying and situating the significance of its formation among the different legal regimes in the Ottoman

[72] *al-Majallah : wa-hiya taḥtawī ʿalā al-qawānīn al-sharʿīyah wa-al-aḥkām al-ʿadlīyah al-muṭābiqah lil-kutub al-fiqhīyyah*. 2nd Edition (Qusṭanṭīnīyah : al-Maṭbaʿah al-ʿUthmānīyah, 1887), 1.

Empire. The report was signed by the principal of the *Dīwān al-Aḥkām al-ʿAdliyya*, Aḥmet Cevdet Paşa; the inspector of the Imperial Endowments, al-Sayyid Khalīl; a member of Shūra al-Dawla, Sayf al-Dīn; a member of Dīwān al-Aḥkām al-ʿAdliyya: al-Sayyid Aḥmad Khulūsī; a member of Dīwān al-Aḥkām al-ʿAdliyya, al-Sayyid Ahmad Ḥilmī; a member of Shūra al-Dawla, Muḥammad Amīn al-Jundī; and a member of the Committee, ʿAlāʾ al-Dīn Ibn Ibn ʿĀbidīn. The filed report is dated in 8th Dhūl Ḥijja 1285/ 10th March 1869.

The report asserts that Islamic jurisprudence is the locus of the matters related to everyday life. It explains that *fiqh* is divided into personal statutes (*munākaḥāt*), transactions (*muʿāmalāt*), and criminal punishments (*ʿuqūbāt*). These same three categories, the report insists, are the principles of laws of the civilized nations. The report declares that the category of transactions (*muʿāmalāt*), in this legal scheme, is called the Civil Law.[73] The report confirms that Islamic jurisprudential norms are adequate to address all commercial cases that might be tried in courts.[74] Aware of the legal developments and legal regimes in Europe, the report attributes the three legal categories (*munākaḥāt*, *muʿāmalāt*, and *ʿuqūbāt*) to both the Islamic and European systems.

The report does not claim that the legal systems of Europe are to be the model for the *Mecelle*. Instead, the report insists that Islamic jurisprudence is sufficient to address any of the emerging commercial activities and disputations. The report states:

> The sublime Porte has, historically and recently, enacted many laws similar to the Civil Law and although these laws are insufficient to explicate all commercial activities, the cases that fall under the commercial transactions from the science of *fiqh* is sufficient and satisfy the recurrent needs in this regard and [avoiding] what is observed of some problems occur in referring claims to *sharʿ* and *qānūn*.[75]

[73] *Mecelle*, 2.
[74] Ibid.
[75] *Mecelle*, 3.

Furthermore, to affirm the sovereignty of the *sharīʿa*, the report reiterates that the principal origin of laws and the imperial legal regulations Islamic jurisprudence is their authoritative reference. It emphasizes that legal cases that are litigated according to the imperial statutory law (*niẓām*) are decided based on Islamic law. The *Mecelle* emphasizes that European laws should not be a reference in any litigations within the Ottoman Empire because the imperial rescript did not enact these laws; therefore, they do not constitute a source of law in the courts of the Ottoman state.[76]

Additionally, the report touches on a key problem facing the different judicial bodies that were created in the Ottoman Empire, namely, the lack of traditional legal training. The report establishes that the science of *fiqh* is a "sea without a shore" and the process of deducing the core necessary principles of the cases to solve these problems is contingent upon a scientific skill and legal craft, especially in the Ḥanafī school. The report explains that the *madhhab* has many independent legal scholars (*mujtahidūn*), yet they differ based on their generation and authoritativeness, adding to that the plurality of the opinions [in the *madhhab*]. The report laments that the Ḥanafī school has not been standardized, in contrast to the Shāfiʿī school. In the Ḥanafī school, the report claims, the jurisprudential cases still suffer divergence and thus distinguishing the sound authoritative opinion among these divergent opinions and applying the new emergent cases based on them is extremely difficult.[77]

To justify changes of key Ḥanafī doctrines and norms in the *Mecelle*, the report relies on the concepts of custom, changes of time, and necessity, which are part and parcel of the premodern Ḥanafī legal discourse. This process confirms that the doctrinal shifts in the *Mecelle* were perpetuated from within the *madhhab* and were a continuation of an organic internal

[76] *Mecelle*, 4.
[77] *Mecelle*, 4.

mechanism. In this context, the report emphasizes that changes of time effect changes in legal rulings of cases that are based on tradition (*ʿāda*) and customary practice (*ʿurf*). The report provides the following case. According to early Ḥanafī jurists, if someone wanted to purchase a house, it would have been sufficient for the buyer to see one of its rooms to finalize the sale. However, late Ḥanafī jurists insisted that it is necessary for the buyer to see each room in the house individually. The report asserts that this shift of opinion is not based on the introduction of new evidence but it rises from the change of tradition and custom in the matters of constructing and building houses. The report explicates that the old tradition in building houses used to have very similar rooms and styles, thus, to see one of the rooms would be considered a valid sight of all rooms in the house. In this age, however, the *Mecelle* report explicates, the established custom of the day is that a house would have different rooms with different styles and spaces. Therefore, it is necessary to see each one of these rooms at the time of purchase.[78] The new guiding principle that was formulated due to this change of custom is the attainment of a sufficient knowledge of the purchased item. The drafters insist: "The shift of legal ruling in this case is not enabled due to a change of a legal principle but rather a change for the legal ruling based on the change of circumstances of the time."[79]

The report asserts the importance of codification in the following manner. First, it points out that the exhaustion of the knowledge of all of Ḥanafī *fatāwā* in the previous times was already an extremely difficult task. The efforts of legal scholars could not encompass all the jurisprudential cases and accommodate all *intra-madhhabic* differences.[80] Second, the report introduces the importance of legal maxims in the process of legal reasoning and judicial proceedings. It explains that Ibn Nujaym gathered many of the jurisprudential canons and

[78] *Mecelle*, 4.
[79] *Mecelle*, 4.
[80] *Mecelle*, 4-5.

overarching legal principles under which the particular cases of jurisprudence are treated. The report insisted that Ibn Nujaym's work opened up a new window that would facilitate the knowledge of the particular cases in the school.[81] Third, the report claims, in our time, it is rare to find those who possess this deep *sharʿī* knowledge in all fields, let alone that it is not possible to appoint members in the Niẓāmiyye courts that has the ability and skill to review manuals of jurisprudence at the time of need to solve emergent problems. Also, it has become difficult to find enough judges for the *sharīʿa* courts that already exist in the kingdoms of the Empire.[82] For these reasons, the report justifies the necessity for the creation of the *Mecelle*. The *Mecelle* was considered an easy text to read, free from any legal disputation, and contained the most preponderant opinions. In other words, Ottoman state officials, judges, members of the new Niẓāmiyye courts, and administrative employees can rely upon the *Mecelle*.[83] The drafters stress that in the process of formulating the *Mecelle* they were cognizant of the Ḥanafī *madhhab* doctrinal boundaries and its authoritative opinions:

> We were assigned, despite our weakness and inability, to be responsible for completion of this great project and good sign to satisfy the current commercial activities and transactions based on the jurisprudential canons fulfilling the needs of this age. Upon the Imperial will, we gathered in the *Diwān al-Aḥkām* and took the initiative to organize the *Mecelle* containing the many cases and matters that are frequently recurrent and represent an urgent necessity from the jurisprudential commercial activities. They are gathered from the legal authentic opinions of the Ḥanafī scholars and they were divided into various chapters and were labeled "*al-Aḥkām al-ʿadlīyya*".[84]

The report informs us that after the completion of the introduction and first book of the *Mecelle*, a copy of both were given to the Ottoman religious establishment (*mashyakhat al-Islām*), and other copies were sent out to those who have the skill and enough knowledge in the science of *fiqh* from among the authoritative figures.[85] The reason for these scholarly screenings

[81] *Mecelle*, 5.
[82] *Mecelle*, 5.
[83] *Mecelle*, 5.
[84] Shams al-Din Sami, *Kamus-i Turkī*, 930 (The Ottoman Turkish word *ʿadliyya* does not have a religious connotation).
[85] *Mecelle*, 6.

is to confirm both the legitimacy of this work as a representative of Islamic legal literature and the accuracy of its Ḥanafī content.

FROM FIQH TO MECELLE: JUDICIAL AND RELIGIOUS NORMS

Upon reading this report, it becomes clear to the reader that the *Mecelle* was created to fulfill a specific judicial function within the Ottoman bureaucracy. Also, it appears that legal maxims and books of *fatāwā* were essential in the formulation of the *Mecelle*. These works are the sites where legal doctrines are anchored in social reality. Most importantly, they are the loci for revised opinions and norms of the Ḥanafī school. Therefore, it is important to acknowledge that the *Mecelle* drafters relied upon key *fatāwā* works in the Ḥanafī tradition such as *al-Fatāwā al-Ḥindiyya*, *al-Tatarkhāniyya*, and *al-Fatāwā al-Anqrāwiyya*. The 12th-century *Fatāwā* Qaḍī khān, in particular, was singled out in the *Mecelle* report as one of its sources. The reason for this acknowledgement is that Qāḍī khān's *Fatāwā* were heavily consulted and incorporated consistently in the legal commentaries and manuals of late Ḥanafīs in the Mamluk and Ottoman periods.[86] In addition, Qāḍī khān's *Fatāwā* were consulted and some of its norms were adopted

[86] ʿAbd Allāh b. Maḥmūd b. Mawdūd al-Ḥanafī, *al-Ikhtiyār lī Taʿlīl al-Mukhtār*, vol. 1:129, 171; Akmal al-Dīn al-Bābārtī, *al-ʿInāya Sharḥ al-Hidāya*, vol. 1: 81, 157, 258, 288, 305, 320, 384; vol. 2:6, 40, 110, 482; vol. 3: 126, 166, 288, 290; Badr al-Dīn al-ʿAynī, *al-Bināya Sharḥ al-Hidāya*, vol. 1:213, 257, 270, 283, 361, 384, 406, 407, 422, 423, 428, 434, 436, 459, 467, 481, 490, 495, 497, 504, 516, 518, 526, 531, 536, 548; al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq*, vol. 1: 8, 10, 18, 19, 22, 23, 24, 27, 28, 29, 30, 32, 34, 35, 37, 39, 44, 49, 50, 52, 53, 58, 70, 73, 74, 76, 77, 78, 91, 92; Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 1: 94, 106, 114, 125, 128, 134, 135, 148, 153, 191, 208, 244, 246, 247, 248, 253, 259, 268, 277, 302, 324, 366, 379, 393, 401, 429, 470, 476, 492, 502, 508; Ibrāhīm al-Ḥalabī, *Majmaʿ al-Anhur*, vol. 1: 85, 148, 160, 322, 437; vol. 2: 17, 31, 40, 45, 69, 104, 132, 151, 172, 201, 237, 252, 255, 256, 288; Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol. 1:16, 18, 24, 30, 31, 27, 38, 40, 49, 58, 60, 67, 68, 69, 72, 74, 76, 77, 80, 82, 88, 89, 92, 94, 95, 99, 101, 102, 103, 104, 107, 108, 109, 112, 113, 116, 120, 121, 122; Niẓām of Burhānpūr, *al-Fatāwā al-Hindiyya*, vol. 1,2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40; Ghānim al-Baghdādī, *Majmaʿ al-Ḍamānāt*, vol. 1: 8, 9, 10, 14, 16, 18, 21, 24, 26, 27, 32, 36, 37, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 58, 60, 61, 62, 63, 65, 66, 67, 69 70; Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 1: 70, 77, 132, 135, 139, 161, 209, 220, 225, 228, 237, 274, 304, 318, 328, 346, 389, 405, 445, 464, 488, 490, 499, 534, 553, 572, 585, 587.

in a few Articles in the *Mecelle*.[87] The *tarjīḥāt* (declaring new preponderant opinions) and *taṣḥīḥāt* (revisions of earlier opinions) in this late Ḥanafī text were among the tool of the *Mecelle* committee's strategy for dealing with the tumultuous social, economic and political changes of the 19th century.[88]

One of the most important aspects of the *Mecelle* is that it signifies the creation of a legal genre that is solely dedicated to judicial reasoning and court procedures. The *Mecelle* is not a substitution of the process of legal reasoning but it offers a framework through which judges and state employees can reason about the filed cases. It is through this understanding we can grasp the treatment, function, and role of the codified Ḥanafī legal norms in a single project. While the *Mecelle* elaborates on the important function of *fiqh* to preserve human life, perpetuate civilization, and to protect social and moral order, the *Mecelle* appears to have an entirely different function. The *Mecelle* encapsulates the 'judicial' (*qaḍāʾī*) aspect of *fiqh*.[89] In other words, the purely religious and ethical considerations are not the objective of the codification of the Ḥanafī legal doctrines.[90] The six categories that qualify human actions in the Ḥanafī *fiqh* – obligatory (*farḍ*), duty (*wājib*), prohibited (*ḥarām*), recommended (*mandūb*), reprehensible (*makrūh*), and permitted (*mubāḥ*) – are not incorporated into the process of legal reasoning in the judicial process.[91] The main function of the *Mecelle* was to influence judicial reasoning and to expedite court proceedings. The categories of 'recommended' and 'reprehensible' are more intertwined with the *fatāwā* discourse. Most importantly, these ethical categories are designed to

[87] See for example, *Mecelle* Articles 64, 483, 841, 844. For detailed discussion of these Articles see ʿAlī Ḥaydar, *Durar al-Ḥukkām fī Sharḥ Majallat al-Aḥkām*, vol. 2:556; vol. 2:113, 208, 301; vol. 4: 124, 592..
[88] ʿAlī Ḥaydar, *Durar al-Ḥukkām fī Sharḥ Majallat al-Aḥkām*, vol. 2:407, 410, 423.
[89] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 5:365.
[90] Late Ḥanafīs discuss the differences between the role of the *muftī* and the judge. They insist that *fatwā* cannot be utilized by judges in all types of cases litigated before them. Ibn ʿĀbidīn states that the *muftī* address the conscience of the believers (*diyāna*), while the judges rule according to the *ẓāhir* (material consequences of one's actions). See Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 5: 365.
[91] The other Islamic legal schools identify only five categories for qualifying human actions. They combine the *farḍ* and *wājib* in one single category.

address the conscience of the believers (*diyāna*) and to promote piety and good behavior. Islamic legal practice already distinguishes between these two categories of legal classifications: judicial and moral/religious.[92] Therefore, Islamic law recognizes the fact that "the individual may violate a religious duty without subjecting oneself to the sanction of the judicial prosecution."[93] The *Mecelle*, as a legal project, specifically addresses the needs of the judiciary and the new 'secular' and *sharīʿa* court systems in the Ottoman Empire in the late 19th century. The intent of the drafters of the *Mecelle* was not to reproduce a *fiqhī* text but to stipulate standardized criteria for judicial reasoning.

In addition, the *Mecelle* discusses the role and function of *fiqh* in society in Article one. This discussion is very illuminating because it confirms the distinct functions of *fiqh* and the *Mecelle.* Article one states that the *fiqhī* issues are either related to the Hereafter, namely, *al-ʿibādāt* (ritual acts) or they are concerned with worldly affairs, namely, *munākaḥāt* (personal statutes), *muʿāmalāt* (transactions), and *ʿuqūbāt* (punishment).[94] The *Mecelle* asserts that since human beings, unlike animals, are civil by their nature that is their intrinsic nature drive them to live in communities and not on their own. Therefore, human beings need cooperation and collaboration among themselves to preserve civilization.[95] However, due to the fact that every individual seeks what he aspires for and would fight whoever competes with him to reach his goal, it was necessary to establish laws to maintain justice and order among individuals from any disturbance. This will require supporting laws in the matters of personal statutes, which is the

[92] Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1998), 35-36., Talal Asad, Formations of the Secular, 246. I agree with Asad that we should not identify the ethical dimension of *fiqh* in its relation to the law in terms of "disembodied conscience". I confirm Asad's thesis that the ethical/religious dimension of *fiqh* is "set doctrinally outside the jurisdiction of an earthly court of law. Muslim jurists simply regarded it to be legally inviolable."
[93] Murteza Bedir, "Fikih to Law: Secularization through Curriculum," *Islamic Law and Society*, vol.11. 3 (2004): 380.
[94] *Mecelle,* 11.
[95] *Mecelle*, 11.

(*munākaḥāt*) division of science of *fiqh*.[96] Also, human beings need laws to protect civilization, which is maintained by co-operation and collaboration, (*muʿāmalāt*) division of *fiqh*. Finally, human beings require laws of punishment for the continuity of civilization on this ordered manner, which is the (*ʿuqubāt*) division of *fiqh*.[97] The *fiqh* in this understanding relates to both matters of the Hereafter, which are ritual practices (*ʿibādāt*), as well as matters of worldly affairs, which are *munākaḥāt*, *muʿāmalāt*, and *ʿuqūbāt*. The order of society is achieved through these three categories. In other words, it is through *fiqh* that the moral, social order is guaranteed and the civilization is maintained and sustained. It is important to point out that these assertions reveal an understanding of the function of the *fiqh*. The *fiqh* is to preserve the moral order in society and social harmony.

THE MECELLE: CHANGE AND CONTINUITY OF ḤANAFĪ LEGAL DOCTRINES

The *Mecelle* report enumerates few examples in which the opinions of the Ḥanafī school has shifted from its premodern and classical articulations to reflect new legal and social norms. The justification for such changes varies among the cases provided. Murteza Bedir rightly argues, "All of the provisions formulated by the *Mecelle* Committee in the 19th century were more or less in conformity with the recognized opinions of the Ḥanafī school."[98] Yet, Bedir asserts that the formulation of the preferred opinions (*rājiḥ*) that ended up in the *Mecelle* was driven by 'new considerations'. Bedir claims that the authors of the *Mecelle* articulated this new idea in the report that accompanied the *Mecelle,* stating, "*nasa erfak ve arsın maslahatına evfak*" or " that which is easiest for the people and the most suitable for contemporary needs".[99] Bedir

[96] *Mecelle*, 12.
[97] *Mecelle*, 12.
[98] Ibid., 388.
[99] Ibid.

contends that the drafters of the *Mecelle* "used this maxim as the sole justification for their singling out a particular opinion and promulgating it as the law on a given case."[100]

I disagree with Bedir's assessment that the doctrinal shifts in the *Mecelle* were solely driven by people's needs. In fact, the *Mecelle* report gives us a unique glimpse into the logic and discursive reasoning of the deliberations within the *Mecelle* committee on this issue. The *Mecelle* shifts from the hierarchical authoritative positions of the Ḥanafī school to alternative positions within the same school based on the criterion of the *maṣālih al-nās* (people's interests), *taysīr muʿāmalāt al-nās* (facilitating people's transactions), *muraʿāt maṣlaḥat al-waqt* (taking into consideration the interests of the due time), and *muraʿāt al-ʿurf* (considering customs and tradition).

Strictly speaking, these techniques are no different from the premodern Ḥanafī jurisprudence. Also, the revisions of late Ḥanafīs of authentic narrations in the *madhhab* (*ẓāhir al-riwāya*) were carefully incorporated in the *Mecelle*. It is only in this context that we can make sense of and appreciate the drafters' insistence:[101]

> Because we have not departed from the doctrinal boundaries of the Ḥanafī school, and since the greater part of those articles published in the Mecelle are consistent [essentially true in spirit] with the currently valid and observed opinions of the House of Religious Edicts (fetva hane), there is no need for a discussion about them. The opinions of certain key jurists of the Ḥanafī school are more suitable to the peoples [needs] and to the interest of this age and thus we have admitted them within the *Mecelle* [as well as the *madhhab*], and we give below the our justification and reasons [*report of the mecelle*].[102]

[100] Ibid.
[101] Kuyucaklızade Mehmet Âtıf and Hoca Eminefendizade Ali Haydar. *Mecelle-yi Ahkâm-ıAdliye* (Istanbul, 1901), 6.
[102] This specific paragraph does not appear in all the Arabic versions of the *Mecelle* that I had access to, despite the fact that it appears in the original Ottoman Turkish version of the *Mecelle*. However, it appears that the two English translations of the *Mecelle* that I consulted include this specific paragraph. They have depended upon original Turkish versions or Greek and French translations of the original Ottoman Turkish. See *Mecelle-i ahkâm-i adliye* (Istanbul: Matbaa-yi Osmaniye, 1882), 12. One of the most accurate English translations on the *Mecelle* is: The *Medjelle or the Ottoman Civil Law*, trans. W. E. Grigsby (London: Stevens and Sons Limited, 1895), viii. I thank Greg Key for his insights on this passage and for working with me to decipher its nuances.

The *Mecelle* drafters shifted many opinions of the school not in violation to the school norms but rather they utilized the authority they acquired to effect these transformations in the *madhhab*. In Articles 85 and 197, the *Mecelle* stipulates that the sale of non-existent things is void. The current situation, the *Mecelle* committee elaborates, is that things such as flowers, artichokes, vegetables, and fruits that do not grow at the same time are valid for sale if some of the crop appeared and some of it did not appear. Since it is not possible for the crop to grow altogether at the same time, people held the custom in contracting sale in all of their crops the existent and the to grow in one commercial deal. Thus, Muḥammad b. al-Ḥasan al-Shaybānī permitted his type of sale based on juristic preference (*istiḥsān*) justifying it by arguing that the existent should be considered the basis [of the commercial transaction] and the non-existent to be secondary to the *aṣl*. This opinion was the basis of the *fatwā* by the Bukhāran Shams al-Aʾimma al-Ḥulwānī (d. 1056), and Abū Bakr b. Faḍl (d. 1118). To force people to give up one of their established customs is not possible. It is a priority to consider their transactions to be valid rather than attributing them to invalidity, therefore, the drafters of the *Mecelle* determined to choose Muḥammad's opinion to be the preponderant opinion in this case, as it was stated in Article 207.[103]

Similarly, the *Mecelle* committee shifted many early Ḥanafī doctrines, justifying the shift by the change of time and customs. For example, according to the Imam Abū Ḥanīfa, the person who is engaged in a manufacturing contract (*istiṣnāʿ*) has the right to withdraw from the contract; however, Abū Yūsuf argues if the person found the manufactured product in accordance to the criteria that were stipulated and approved in the contract, he cannot withdraw from the contract. As a clear shift from Abu Ḥanīfa's position to Abū Yūsuf, the *Mecelle* asserts that due to the current situation "in our times," there are many factories where canons, ships, and

[103] *Mecelle*, 8.

the likes are manufactured through manufacturing contracts, thus, it became clear that giving the choice to the buyer alone to finalize or nullify it would result in violating substantial interests of one of the contracting parties. In this situation, it is incumbent to choose the opinion of Abū Yūsuf considering the interests of "our time," as it was declared in Article 392 of the *Mecelle*.[104]

COMMENTARIES ON THE MECELLE: AFFIRMING ITS LATE ḤANAFĪ CHARACTER

The publication of the *Mecelle* prompted many authors to compose commentaries on it. Those authors usually start off their works by justifying the necessity of the *Mecelle* project and explaining its functions and the key jurisprudential canons incorporated within its articles. Lawyers, scholars, and judges who had direct contact with the legal and judicial litigation within the Ottoman Empire were the primary compilers of these commentaries. Moreover, we observe that these commentators not only unanimously affirm that the *Mecelle* was based on authoritative late Ḥanafī commentaries. It appears that the *Mecelle* commentaries garnered their legitimacy as well as the license to be published after their approval by the Ottoman legal establishment. These commentaries usually refer the reader to late Ḥanafī works to make the connection between the *Mecelle* Articles and late Ḥanafī jurisprudence. Many of them cite *al-Durr al-Mukhtār* and its commentaries, *al-Bahr al-Rāʾiq*, *al-Nahr al-Fāʾiq*, *Majmaʿ al-Anhur*, and Abū Saʿīd al-Khādimī's *Majāmiʿ al-Ḥaqāʾiq*.

Here, I will limit myself to three key commentaries which are regarded as authoritative in the field, namely, *Mirʾāt al-Majalla, Sharḥ al-Majalla, and Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām.* I explore how these commentaries discussed the project of the *Mecelle,* and how the commentators saw the relationship between *Mecelle* and the late Ḥanafī legal tradition. Also, I

[104] *Mecelle*, 9.

discuss how these commentaries understood the role of legal maxims in the process of legal reasoning.

In *Mirʾāt al-Majalla*, the Ottoman *muftī* Masʿūd Efendī (d. 1894) offers significant insights. In his introduction, he stresses that the recent intellectual and scientific efflorescence in the Ottoman Empire has resulted in reviving the science of *fiqh* in order to deduce the key principles for addressing current problems. Masʿūd Efendī reiterates the key issues that the *Mecelle* report tackles, such as the necessity of legal maxims to be a point of reference for legal reasoning. Masʿūd Efendī points out that a scholarly organization under the supervision of Ahmet Cevdet Paşa incorporated Ibn Nujaym's legal maxims, the recurrent cases in the commercial transactions, and the many opinions of authoritative Ḥanafī jurists. This project of collecting all of these together was labeled *Mecelle-ı Ahkām-ı ʿAdliyye*. Masʿūd Efendī stresses unless there is a clear textual proof, the codes of the *Mecelle* should not be the sole references for the judges and jurists in their rulings. Yet, the importance of legal maxims is the standardization (*ḍabṭ*) of legal reasoning in emergent cases, and enabling the individual to conduct his commercial activities in line with Islamic law. The commentary of Masʿūd Efendī heavily consulted two legal genres: (1) late Ḥanafī *fiqh* manuals such as *Ḥāshiyat al-Ḥamawī*, *Sharḥ Majmaʿ al-Anhur*, *al-Durr al-Mukhtār,* and al-*Durr al-Muntaqā*, and others; and (2) Ḥanafī *fatāwā* works such as *al-Fatāwā al-Ḥindiyya*, *al-Tatarkhāniyya*, *al-Fatāwā al-Anqrāwiyya*, and *Ṣurrat al-Fatāwā*.[105]

The second commentary, *Sharḥ al-Majalla*, was authored by ʿAbd al-Sattār Efendī (d. 1886), son of the key Syrian authority Ibrāhīm al-Atāsī. The introduction to this commentary was written by Ahmet Cevdet Paşa who stresses that the *Mecelle* is a collection of the revised

[105] Masʿūd Efendī, *Mirʾāt al-Majalla*, Trans. Yūsuf Āsāf (Cairo: al-Maṭbaʿa al-ʿUmūmiyya, 1894), 4.

(*muṣaḥḥaḥa*) cases in the *madhhab,* and the refined particular legal cases. Emphasizing the importance of legal maxims, Ahmet Cevdet Paşa asserts that these are the universal principles (*uṣūl*) under which all legal topics can be easily treated. The one who has a command of the *uṣūl* will be able tackle particular legal cases (*furūʿ*). Yet, these universal principles may be specified through other principles, or they may have some exceptions. Thus, no one can understand the meaning of these maxims except the person who has the skill and knowledge of the science of *fiqh*.[106] ʿAbd al-Sattār Efendī emphasizes that the *Mecelle* incorporated recurrent legal cases in commercial transactions, which were extracted and collected from the authoritative manuals of jurisprudence.[107] He also points out that the universal legal maxims are established in authoritative books of jurisprudence, and they are utilized as proofs in the minds of jurists and judges and as a framework through which jurists and judges can address detailed cases.[108]

In his *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*, ʿAlī Ḥaydar (d. 1935), a significant Ottoman judge and lawyer, reiterates that the scholars of law agree that the science of *fiqh* is a "sea without a shore," and that the extraction of the key principle is contingent upon a "sublime skill and established knowledge."[109] Ḥaydar follows the *Mecelle* by asserting that the authoritative Ḥanafī commentaries have plenty of differences. In his opinion, summarizing the preponderant opinions with the supporting evidence and collecting them in a significant work like the *Mecelle* is one of the most difficult matters that needs research and investigation. Ḥaydar explains that due to his career in the Ottoman judicial system, he was able to record some of the key and subtle cases by collecting them in a commentary on the *Mecelle*. Ḥaydar emphasizes that the *Mecelle* was extracted from *fiqh*; thus, the commentary on it should explicate its articles

[106] ʿAbd al-Sattār Efendī, *Sharḥ al-Majalla*, Trans. Elias Matar (Nizārat al-Maʿārif, 1882), 2.
[107] Abd al-Sattār Efendī, *Sharḥ al-Majalla*, 3.
[108] Ibid.
[109] ʿAlī Ḥaydar, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām,* Trans. Fahmī al-Ḥusaynī (Beirut: Dār ʿĀlam al-Kutub, 2003), 7.

based on *fiqh* manuals. Also, it should be in agreement with the opinions that were chosen by the *Mecelle* drafters. Ḥaydar points out that the scholars and jurists in the High Fatwā Council reviewed this work. Ḥaydar's commentary was approved because it "agrees with *al-sharʿ al-sharīf*."[110]

We observe that Ottoman Ḥanafī jurists, and especially their *fatāwā* works, have significantly influenced later Ḥanafī re-articulations of the law, which are clearly reflected in the *Mecelle* articles. Ottoman Ḥanafī jurists were immensely ingrained in the Ḥanafī legal tradition, and they were able to employ the techniques of the tradition to revisit, suspend, or introduce legal rulings. The ideational framework for the *Mecelle* is important for evaluating the Ḥanafī texts consulted and whether or not the *Mecelle* is faithful to the Ḥanafī tradition.

THE PROCESS OF LEGAL CONTINUITY AND CHANGE IN THE MECELLE

The following case studies pinpoint the process by which the *Mecelle* drafters embraced and preserved Ḥanafī norms and categories while transforming key doctrines to produce standardized judicial rules for purposes of litigation. The transformations that were introduced in the *Mecelle* were justified from within the Ḥanafī legal tradition and in the name of its authorities. Many of these doctrines in the *Mecelle* – which clearly rescind early Ḥanafī doctrines – were incorporated in the late Ḥanafī tradition as part of its organic doctrinal development.

[110] Ibid.

I. *Aḥkām al-ghaṣb* (Rules of Usurpation)[111]

Although the introduction of the *Mecelle* alludes to a few cases of legal change within the Ḥanafī school, I located many other subtle transformations within the *Mecelle* articles. One of the central aspects of the *Mecelle* is that it lucidly confirms a process of legal change by which doctrines of Ḥanafī school were changed, shifted, or altered, relying upon a similar techniques of the late Ḥanafī legal literature in the early modern period, to address new social reality.

In the introduction to the chapter on wrongful appropriation (*ghaṣb*), the definition of *ghaṣb* in the *Mecelle* does not reflect its classical authoritative provisions stated by Abū Ḥanīfa and Abū Yūsuf. Instead, the stated definition in the *Mecelle* endorses the opinion of Muḥammad b. al-Ḥasan al-Shaybanī over the professed opinion of the school.[112] The *Mecelle*, unlike the classical definition, defines *ghaṣb* in Article 881 as the act of taking and seizing *māl*[113] of someone without his/her permission. It explicates that the one who wrongfully takes another's property is called usurper (*ghāṣib*), the seized *māl* is called usurped (*maghṣūb*), and the valid owner of the usurped property is the one whose property is usurped (*maghṣūb minhu*).[114] Clearly, the *Mecelle* turns away from the definition of *ghaṣb* coined by Abū Ḥanīfa and Abū Yūsuf, who conditioned the ability of the usurper to effect legal actions (selling, buying, etc) into the usurped objects in order to be considered a *ghaṣb* (*izālat yad muḥiqa*).[115] By contrast, Muḥammad b. al-Ḥasan al-Shaybānī has only stipulated the act of seizing *māl* without the owner's permission.

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[111] This is a legal term refers to the unlawful assumption of the use of property which belongs to another, an interruption, or the disturbing a man in his right and possession. It also refers to the act of wrongful appropriation.
[112] *Mecelle*, 147.
[113] The *Mecelle* defines *māl*, in Article 126, as what a man naturally inclines to and which can be saved/stored to the time of need whether it was movable or immovable. In Article 127, the *Mecelle* offers two definitions for *al-māl al-mutaqawim*; first, it denotes what is permissible to be utilized; the second, it refers to the acquired secured property, thus, the fish in the water is not a *mutaqawim māl*, yet once it is acquired it becomes *mutaqawim* by securing its possession.
[114] *Mecelle*, 129.
[115] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 9: 260; Al-Baghdādī, *Majmaʿ al-Ḍamānāt*, vol. 1:287.

This change of the concept of *ghaṣb* as a legal concept does not only express the continuous internal development of the school but also it addresses the new social realities and commercial activities within the Ottoman Empire.

At the same time, the *Mecelle* adheres faithfully to key late Ḥanafī doctrines and norms. For instance, Article 887 of the *Mecelle* reinstates the Ḥanafī doctrine in the cases of duress, wrongful appropriation, and spoilage. Article 887 states, "causing damage by direct causality (*mubāsharatan*) is to cause direct damage to the object itself.[116] The one who causes this damage is called *mubāshir*." This doctrine is further explained in Article 888 in which the *Mecelle* defines secondary causality (*tasabbuban*) as causing one thing to inflict damage on another thing with [full knowledge of how such an action would cause damage]. The one who causes this action is called *mutasabbib*. For instance, the one who cuts the rope of a hanged lamp (which is tied to it) would be the cause for its fall on the ground and thus its damage by secondary causation. In this example, the person cuts the rope by direct execution (*mubāshara*) while he damaged the lamp by a secondary causation (*tasabbub*).[117]

By the same token, the *Mecelle* follows the late Ḥanafī formulations in Article 890. It demands the return of the exact usurped *māl* to its valid owner at the location of wrongful appropriation. Yet, if the valid owner of the *māl* and the usurper met by a sheer accident in a different place (country) and the seized *māl* is with the usurper, the owner would have the option either to recuperate his *māl* at this location or to request to reacquire his *māl* in the location of the wrongful appropriation. In this case, the usurper will shoulder the financial cost of transporting the usurped object.[118] Additionally, the *Mecelle* establishes the central doctrine of transgression (*al-taʿdī*), which is the sole criterion that triggers financial liability in the late Ḥanafī legal

[116] Khādimī, *Manāfiʿ al-Daqāʿiq*, 308.
[117] *Mecelle*, 129,130.
[118] *Mecelle*, 130.

reasoning. In Article 898, the *Mecelle* insists that if the usurper changed some of the intrinsic features of the usurped material by spending some of his money on it,[119] the valid owner would have the choice: (1) to give the value of extra money and recuperate his exact usurped thing, (2) to hold the usurper financially liable for whole value of the object. For example, if the usurped substance is a garment and the usurper dyed it, the valid owner would have the choice either to ask for financial compensation for the garment or he may give the usurper the value of dying and restore his garment.[120]

The *Mecelle* adopts late Ḥanafī revisions of the persistent early Ḥanafī doctrines on the rejection of imposing any liability for the *manāfiʿ* (profitable utility). It also incorporates late Ḥanafī opinion on the issue of *zawāʾid* (natural outgrowth) of the usurped objects. For instance, Article 903 affirms that the *zawāʾid* of the usurped substances belongs to its valid owner.[121] If the usurper consumed them, he will be held financially liable for them. For instance, if the *ghāṣib* consumed the baby of a usurped animal that was born during his possession of the animal, he will be liable for it. The same applies to the case of the fruits of a usurped garden. The *Mecelle* gives a third example of a usurped apiary, the valid owner would also reclaim the value of what was produced while the apiary in possession of the usurper. Noticeably, the *Mecelle* affirms financial liability for both the *manāfiʿ* and *zawāʾid* of the usurped objects.

Moreover, these remedial rules of wrongful appropriation of property are addressed in Article 905 in the *Mecelle*. It states that the usurper must return the usurped property to its owner without changing it or decreasing its value. Yet, if the value of the property decreased due to an action by the usurper, he would be financially liable for its value. Also, if someone destroyed the location of the usurped house or it was damaged because of his residence, which resulted in the

[119] Al-Kalībūlī, Muḥammad b. Sulaymān, *Majmaʿ al-Anhur fī Sharḥ Multqā al-Abḥur*, vol. 4:96.
[120] *Mecelle*, 131.
[121] Ibn ʿĀbidīn, *Radd al-Muḥtār ʿalā al-Durr al-Mukhtar*, vol. 9: 286; *al-Fatāwā al-Hindiyya*, vol. 5:150-151.

decrease of its value, the usurper would be liable for the decreased value. Also, if a house were burned down by fire that was lit by the usurper, he would be financially liable for its value while it was constructed.[122]

The most important shift, in my view, is the transformation of the definition of *ghaṣb* in the *Mecelle*. This transformation is not a break with the *madhhab*'s fundamental norms; rather, it is a shift from the opinions of Abū Ḥanīfa and Abū Yūsuf to the opinions of Muḥammad al-Shaybānī. Thus, this change arose from within the internal plurality and hierarchy of the school opinions.[123]

II. Financial Liabilities

The issue of incurring financial liability based on utility/usage (*ḍamān al-manāfiʿ*) is treated in Article 596 of the *Mecelle*. It stipulates if someone utilized the *māl* belonging to another person without his permission, the person who utilized the *māl* would be considered a usurper (*ghāṣib*). However, he does not have to incur liability for the *manāfiʿ* of the *māl*. Yet, if the *māl* belongs to an endowment (*waqf*) or an orphan (*yatīm*), the compensation of its like value will be incurred, regardless of the circumstances. Similarly, the *māl* that is set up to be ready for profitable usage/utility (*muʿadd li al-istikhdām*), incurs financial liability for the *manfʿa* of its like value, except when it is used with an understanding (*taʾwīl*) of ownership (*milk*) or contractual agreement (*ʿaqd*). For example, if someone stays in another's house for a time without a lease contract, the one staying in the house would not necessarily incur any liability to compensate the owner. However, if the house is an endowment or belongs to an orphan – whether or not there is an interpretation of ownership or contractual agreement – the one staying

[122] *Mecelle*, 151.
[123] Ḥanafīs adopt the definition of *ghaṣb* based on the opinion of Abū Ḥanīfa and Abū Yūsuf. See for example, Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 6:177.

in the house incurs liability for the *manāfʿ* of its like value. The same applies if someone rents animals without the permission of their owner.

However, Ḥanafīs include two articles that mitigate such a financial liability in case of the obscurity of financial partnership and ownership. This may explicate the Ḥanafī reluctance to impose any financial liability for such utilization in their early legal literature. In Article 597, the *Mecelle* affirms that there is no financial liability to be incurred for utilizing *māl* interpreted as an ownership, even if it was ready for usage. For example, if one of the two business partners used the common *māl* independently without the permission of his partner, the other partner should not seek compensation for the usage of his share because he used it as if it was his own property. Similarly, in Article 598, the *Mecelle* maintains that financial liability is not incurred for utilizing a *māl* interpreted to be part of a contractual agreement, even if it was ready for usage. For example, when someone sells a shop that is jointly owned, without the permission of his financial partner, then the buyer of the shop acts legally in making the purchase, and would act legally in selling, renting, etc., the property. However, after completion of the sale to the buyer, if the financial partner does not approve of the sale and insists on maintaining ownership of his share of the shop, then in this case, the partner has no right to demand any compensation for the usage of his share, even if it was "prepared for profitable use" (*muʿadd liʾl-istikhdām*). This is because the buyer used it based on his interpretation of what the sale contract entailed (i.e., ownership), thus, no compensation for using it is incurred.[124]

The *Mecelle*, in the previous four Articles (596, 597, 598), demonstrates how the early Ḥanafī opinion of refusal to impose the *ḍamān* of the utilities (*manāfiʿ*) in the Ḥanafī legal thought was dismissed in favor of the late Ḥanafī revisions. It appears that Ibn ʿĀbidīn and al-Baghdādī's discussion on this issue and their re-evaluation of the *madhhab* opinions by

[124] *Mecelle*, 92.; Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 6:207.

introducing three exceptions, were necessary to show both the influence of the late Ḥanafī doctrines and norms and the interconnectedness between the *Mecelle* and this late tradition. In fact, Ibn ʿĀbidīn extends these exceptions to incorporate the endowed places of residence as well as those of worship.[125] The early opinion in the *madhhab* is that the utilities of the usurped property are not subject to financial liability. However, al-Baghdādī and Ibn ʿĀbidīn incorporate three exceptions to this rule: (1) *māl al-yatīm*, (2) *māl al-waqf*, (3) what is set up for profitable use (*muʿadd li al-istikhdām*).[126]

III. Secondary Causality: Revisited

The *Mecelle* in the section on causing damage by secondary causality (*al-itlāf tasabbūban*) adopts the late doctrine of the school on this matter.[127] In Article 922, the *Mecelle* affirms that the person who damaged another's *māl* or caused to decrease its value by secondary causality that is his actions were a cause that resulted in damaging the *māl* or deceasing its value, he will be liable for it.[128] The *Mecelle* provides the following examples: a person will be liable if he blocked the water from his neighbor's land and it resulted in the desiccation of the crops, if he opened another's paddock that resulted in the escape of his animals or their loss, if he opened the cage of bird that resulted in the escape of the bird.[129]

In Article 923, the *Mecelle* entertains the concept of intentionality as a factor to influence legal liability by stressing that there is no liability if an animal was scared by the sound of the person's hunting rifle, it was released from the tether, and during its escape it fell on the ground

[125] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 9: 299.
[126] Al-Baghdādī, *Majmaʿ al-Ḍamānāt*, vol. 1:305. Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 9: 272, 299.
[127] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 6:177; 597. Ibn ʿĀbidīn states: " the person who damages another's property by secondary causes is liable for the damage."
[128] *Mecelle*, 154.
[129] *Mecelle,* 154.

and broke one of its limbs or died. Yet, the *Mecelle* stresses that if the hunter intentionally used the rifle to scare the animal, he would be liable for it.[130] In Article 924, the *Mecelle* conditions aggression (*taʿdī*) as an obligatory reason for incurring liability as it has been stressed earlier that the liability of the *mutasabbib* is conditioned on his pursuing of an action that results in such harm with due claim. For instance, if someone dug a well in a public road without the permission of the ruler and another's animal fell in it and died, he would be liable. Yet, if he dug the well in his own property and died, he would not be liable.[131] In the final analysis, the *Mecelle* introduces the elements of intentionality as well as aggression to incorporate the secondary causality in their legal liabilities.[132]

IV. Duress (*Ikrāh*): Reconstructed

Faithful to the *madhhab*, the *Mecelle* defines duress in Article 948 as compelling someone to do an act without a valid claim and without his/her consent by ways of intimidation. This person is called *mukrah* (coerced) and the one who compels him to do the act is *mujbir* (coercer), the act is called *mukrah ʿalayh* (the act upon which he forced to execute), and the necessitating motive for threat is *mukrah bih* (that with which duress was effected).[133] The *Mecelle* discusses the types of duress in Article 949 stating that duress is one of two types: (1) *ikrāh mulji*ʿ (compelling duress) which refers to [compulsion] by extreme bodily harm (*ḍarb*) that results in annihilation of life or loss of a limb, (2) *ikrāh ghayr mulji*ʿ (non-compelling duress), which necessitates grief and pain, threatening by either batter or jail time.[134]

[130] *Mecelle,* 154.
[131] *Mecelle*, 155.
[132] *Mecelle*, 155.
[133] *Mecelle*, 160.
[134] *Mecelle*, 160.

The *Mecelle* confirms the *madhhab* norm by stipulating a condition for a legally considered duress. In Article 1003, the *Mecelle* declares that the person who compels another to execute an action should be able to inflict what he has threatened. Thus, the compulsion of a person who will not be able to cause and do what he threatened will not be considered. Equally important is the Article 1004, in which the *Mecelle* conditions that the person who is coerced should be threatened by the infliction of the coercer's threat. In other words, the coerced should have a probable reason to believe that the coercer will inflict his threat, if he did not comply with his commands.[135]

The doctrinal changes of the Ḥanafī formulations of duress are reflected in Article 1006. This article does not authorize the sale, purchase, letting, conveyance, compromise about property, an admission, postponement of a debt, ceasing the right of pre-emption, or any contracts that were approved by the coerced due to a valid duress, whether it was *mulji*ʿ or *ghayr mulji*ʿ. Yet, the *Mecelle* recognizes the validity of these contracts if the coerced approved them after the cessation of duress. This position shifts from both the early and late Ḥanafī opinions that the commercial transactions of the coerced are already legally valid (*nafīdha*); however, they are not legally enforced (*lāzima*) except after the coerced party consents.[136] In other words, early and late Ḥanafīs (before the *Mecelle*) view two phases of legality of a contact: *al-nafādh* (validity) and *al-luzūm* (obligation) that the legal acts of the coerced are judged against. Most importantly, Ḥanafīs view enforceability as a phase beyond legal validity.[137]

Faithfully adhering to the *madhhab* opinion, article 1007 states that the *mulji*ʿ duress will be considered in both verbal (*qawlī*) and effectual (*fiʿlī*) transactions; however, the *ghayr mulji*ʾ duress is considered in the verbal transactions only and it is not considered in effectual

[135] *Mecelle*, 167.
[136] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 9:180.
[137] Ibid.

transactions. Thus, if someone says to another: "Destroy the property of such and such; otherwise I will kill you or cut off one of your limbs," and the coerced person destroys it, the duress is legally valid and the coercer will be the sole agent financially liable for the damage. Nonetheless, if the coercer told him: "Destroy the property of such and such, otherwise, I will physically harm you, or jail you," then the coerced person destroyed it, the duress is not considered in this situation and the financial liability (*ḍamān*) will be incurred upon the who executed the action of destruction.[138]

V. Injustice (*ghubn*) and Deceit (*taghrīr*) in Sale Contracts

The *Mecelle* adheres to the late Ḥanafī legal norms in the discussion on the issue of injustice and deceit in sale contracts. Ibn ʿĀbidīn dedicated a legal treatise on this issue to articulate the *madhhab* opinion amid some confusion in the literature on this issue.[139] The *Mecelle* faithfully echoed, to the letter, Ibn ʿĀbidīn's review of this legal issue in the *madhhab*.[140] In Article 356, the *Mecelle* states, "The existence of flagrant injustice in the sale contract but without deceit, does not give the deceived party the right to annul the sale contract. Yet, the existence of such injustice in a sale of orphan property will render the sale invalid. The same rule applies to the property of endowments and Treasury." To clarify the previous discussion, Article 357, states, "if one of the parties in a sale contract deceived the other, and it was established that the sale suffered a flagrant injustice. Then, it is for the one who is deceived to annul the sale."[141]

[138] *Mecelle*, 168.
[139] He authored a short legal treatise titled "*Taḥbīr al-Taḥrīr fi Ibṭāl al-Qaḍāʾ biʾl Faskh biʾl Ghubn al-Fāḥish bilā Taghrīr*".
[140] Ibnʿ Ābidīn, *Radd al-Muḥtār*, vol. 5:267.
[141] *Mecelle,* 54.

The main import of these two Articles is to reinstate the late *madhhab* opinion, which permits the annulment of the sale contract that suffers flagrant injustice and deceit in sale transactions. The justification for such annulment is the necessity to accommodate people's need and to show clemency. Ibn ʿĀbidīn is formidable in asserting that the annulment of sale contracts due to flagrant injustice should be allowed exclusively in the context of deceit (*gharar*). For him, a sale contract may suffer injustice, which may be inherent to transactions because of disparity of prices and people seeking profits, therefore, the contract will not be annulled. Yet, it is only when the factor of injustice (*ghubn*) is accompanied by deceit (*gharar*) the sale contract will be annulled.[142] The central issue in this sale is the existence of deceit (*al-gharar*) or lack of it. The *Mecelle* articles on this issue faithfully embody the late Ḥanafī opinions.

VI. The Prerequisites for Valid Testimony (*shurūṭ al-shahāda*): Revisited

In the discussion of the required qualification of the witness, the *Mecelle* requires all traditional qualifications of a witness, but not the quality of being a Muslim.[143] In a complete departure from the premodern Ḥanafī legal thought,[144] the section on testimony and evidence in the *Mecelle* do not address the religion of the witnesses. The focus is primarily on the exactitude and justice of the witness as well as his/her reputation in Article 1705. The just person is defined in the same article as the one whose good deeds are dominant over his/her bad deeds.[145] This is the first time in Islamic jurisprudence when the religious identity of the witness is not considered in the conditions of a valid testimony. Although Islamic jurisprudence acknowledges the testimony of non-Muslims in courts, it consistently resisted the testimony of non-Muslims

[142] Ibnʿ Ābidīn, *Radd al-Muḥtār*, vol. 5:267.
[143] *Mecelle,* 344. See also the footnote in Joseph Schacht, *An Introduction to Islamic Law* (New York, Oxford University Press, 1982), 93.
[144] Ibnʿ Ābidīn, *Radd al-Muḥtār*, vol. 5:472.
[145] *Mecelle,* 344.

against Muslims.[146] The *Mecelle* shifted these norms and introduced more egalitarian conditions for valid testimony in front of the judge. It also reflects the frequent complaints of the European powers that their citizens can not litigate in front of the *sharīʿa* courts because their testimony are not accepted against Muslims in case of any litigations.

VII. Written Proofs: Admitted Without Reservations

The *Mecelle* settles completely the issues of accepting written proofs as sufficient legal evidence in courts. The late Ḥanafī tradition specifically addresses this issue in their legal manuals. For instance, Ibn ʿĀbidīn shows the gradual acceptance of some types of written proofs such as imperial edicts, sulṭānic decrees, endowment registers and court records. Ibn ʿĀbidīn explains that ʿAlāʾ al-Dīn al-Ḥaṣkafī accepts these types of written documents as legal proofs once they are cleared from fraud or forgery.[147] This is also the same position of the most of the Ottoman jurists.[148] However, Ibn ʿĀbidīn points out that Khayr al-Dīn al-Ramlī showed resistance to accept the written document as sufficient proof to an endowment.[149] Importantly, the process by which Ibn ʿĀbidīn is able to accept some of these written documents as legal proofs is by introducing exceptions to the rule.[150]

By contrast, the *Mecelle* discusses this issue under the title "Written Proofs," in which it stipulates the acceptance of all authentic written proofs in four Articles. First, in Article 1736, the *Mecelle* states that a decree or seal alone has no validity, but if these are free from every suspicion or forgery or imitation, they have full demonstrative proof, in other words, they are

[146] Ibnʿ Ābidīn, *Radd al-Muḥtār*, vol. 5:472.
[147] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4: 413.
[148] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4: 414.
[149] Ibid.
[150] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 4: 413. Ibn ʿĀbidīn discusses these issues under the title: " A written document is not relied upon except in certain issues".

sufficient for a delivery of a judgment based upon them without there being a necessity for any other proof. Second, in Article 1737, the *Mecelle* stresses that imperial assignments/certificate Berats and the books of the management of the Land Registry Office have full demonstrative force, as being secure against every kind of fraud. Third, in Article 1738, the *Mecelle* accepts the court registers are valid if they were exact and cleared from any corruption have full demonstrative force. Fourth, in Article 1739, the *Mecelle* declares that the endowment certificate is not valid as a proof. But it was registered in an authentic court records, as stated in the previous Article, it has the full demonstrative force.

CONCLUSION

The *Mecelle* is indispensable for the study of legal reform and codification movement across the Arab and Muslim world in the 19th – 20th century. It served as the civil code in the Ottoman imperial capital and its provinces till the collapse of the Empire. The *Mecelle* was the source for the codification for many Arab civil codes such as Egypt in 1949, Syria in 1949, and Iraq in 1951. The drafters of the *Mecelle* insisted that it was inspired by the already existing genre of legal maxims (*al-qawāʿid al-fiqhiyya*) within the Ḥanafī school. The *Mecelle* underlines the course of legal change of some of the Ḥanafī norms and doctrines in the late 19th century. The emergence of the *Mecelle* should be understood, not in terms of an epistemic break from the premodern Islamic legal reasoning, but in terms of a continuation and transformation within the structure of a legal tradition.

The *Mecelle* necessarily emerged out of an existing genre of *qawāʿid* in a manner that made it an authentic representation of the legal tradition for the experts of the legal profession. Moreover, the *Mecelle* itself was circulated among legal authorities and the Ottoman religious

establishment to approve it and endorse its formation, as an indispensible process to gain its legitimacy. I have shown that the articles of the *Mecelle* are not randomly selected norms or doctrines from the Ḥanafī legal tradition as has been claimed by some secondary scholarship. The fact that central doctrines codified in the *Mecelle* as well as its predominant articles are faithful to the late Ḥanafī opinions attests to our argument. Still, some legal doctrines of the premodern Ḥanafī jurisprudence were transformed in the *Mecelle* through the internal mechanisms and rationalization of the *madhhab* such as customs, changes of times, necessity, and people's needs. These shifts, I stress, should be understood within the Ḥanafī doctrinal development because they are justified in the name of the *madhhab* and its authorities.

The *Mecelle* represents a shift in the function of the law within the Ottoman Empire in the late 19th century. This function changed to reflect new emergent state institutions. In this context, Ḥanafī jurisprudence was called to address this transformation and to fulfill this role. The *Mecelle* as a systematic codification of a legal tradition successfully incorporated and introduced new 'modern' concepts and premises, such as: the systemic distinction between public and private property, the restriction of the absolute authorities (*wilāyat*), revisiting key remedial rules and legal liabilities (*ḍamānāt*), and introducing new types of contractual agreements (*ʿuqūd*). The *Mecelle* introduces these changes subtly by rooting them into the legal tradition itself, reflecting a new legal and moral order of society.

Additionally, one of the purposes of the *Mecelle* was the standardization of legal and judicial reasoning. The *Mecelle* was the first step in the process of developing a written law that was designed to assist judges to render similar legal judgments for similar issues. The *Mecelle* was a response to the Tanzimat and the penetration of Western laws in the Ottoman society. While I affirm that the context that shaped the discussions around the *Mecelle* is intertwined with

the questions of Western hegemony, the key issue in the minds of the drafters of *Mecelle* was how to formulate an Islamically informed response to Western hegemony.[151] The *Mecelle* is not only a manifestation for such debates and a response for these questions but also a successful strategy to meet the demands of the bureaucracy in the Ottoman Empire.

As I explained earlier, the treatment of duress appears subtly modified in the *Mecelle* compared to its discussion in Ibn ʿĀbidīn's *Radd al-Muḥtār*. The *Mecelle*, unlike the early Ḥanafī opinions, stresses that threatening someone with jail time constitutes *mulji*ʿ duress due to the severity of the jail punishment at the time of the Ottoman Empire. Also, I observe that that the legality of sale contracts under duress were transformed from the Ḥanafī jurisprudential manual's insistence (e.g. Ibn ʿĀbidīn's *Radd al-Muḥtār*) on the distinction between the contracts that can be rescinded and the contracts that cannot be rescinded under duress. These distinctions disappear altogether from the *Mecelle* while at the same time it declares any contractual agreements under duress to be legally invalid, regardless of the type of duress.

Furthermore, I assert that the project of the *Mecelle* is particularly faithful to the late Ḥanafī doctrines and norms. The drafters of the *Mecelle* imagined themselves within the *madhhab*, as active participants and contributors to it.[152] For instance, the *Mecelle* adopts Ibn Shubruma's opinions, leaving behind Abū Ḥanīfa's opinion, on stipulating conditions in sale contracts on the basis of customary practice of contractual agreements among craftsmen. This shift in the Ḥanafī doctrine reflects an Iraqi perspective, in which Ibn Shubruma was affirmed an authority, like Abū Ḥanīfa. In fact, some late Ḥanafīs invoke Ibn Abī Laylā's and Ibn

[151] Recep Senturk, "Intellectual Dependency: Late Ottoman Intellectuals between fiqh and Social Science," *Die Welt des Islams*, vol. 47 (2007): 294.
[152] The *Mecelle* committee shifted the *madhhab* opinion from Abū Ḥanīfa, Abū Yūsuf, and Muḥammad to the opinions of Zufar. See for example Articles 475, 692, 729, and 1542. They also shifted the *madhhab* opinion from Abū Ḥanīfa and Muḥammad to the opinion of Abū Yūsuf. See for example Article 1589.

Shubruma's opinions to depart from Abū Ḥanīfa's opinions.[153] As I have shown, the *Mecelle* embodies the daunting and complex process in which the legal and doctrinal change targeted a nucleus of legal concepts and values to be replaced with 'new' norms and doctrines for which the Ḥanafī tradition was the point of departure. Importantly, these changes and transformations are not achieved in opposition to the legal tradition. Rather, this tradition, in its various articulations, is invoked to address the foreign legal hegemonies by asserting, revising, and rescinding its own norms and doctrinal boundaries. For instance, the premodern Islamic jurisprudence maintains that the public interests take precedence over private interests.[154] The *Mecelle* reintroduces these categories of the public and private in terms of independent spheres, each having a set of rules to be considered. The concept of private ownership is clearly matured and systematically recognized in the *Mecelle*.[155]

To justify the role of the state in its creation, the *Mecelle* report asserts that if the Muslim ruler commands his subjects to act upon one of the *ijtihādic* opinions, it is incumbent for them to act upon his dictum.[156] It is apparent here that the ruler has a role in the process of law making not only in enforcing the law but also in its formation. The problem with attributing any legal or doctrinal change in the Ḥanafī school in the late 19th century to the influence of European codes is that it overlooks the process by which transformation of legal doctrines is entrenched in legal tradition itself. Also, what is modern about the transformation of Ḥanafī legal doctrines in the *Mecelle* is not that it imitates European codes, but the underlying premises that the *Mecelle* is trying to articulate from within the tradition. Most importantly, the point of departure for Muslim lawyers has always been Islamic legal tradition. In short, the *Mecelle*, at its core, is a Muslim

[153] Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 5: 602 Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 6:441.
[154] *Mecelle*, 14.
[155] *Mecelle*, 91, 200, 206, 210, 214.
[156] *Mecelle*, 10.

response to modernity and its moral and legal order. It was a response that was argued and justified from within the tradition.

CONCLUSION

In this study, I proposed to understand "late Ḥanafī jurists of the early modern period" in terms of their distinct identities, opinions, and norms that shaped the Ḥanafī legal discourse during the Ottoman Empire. I demonstrated the different ways in which late Ḥanafīs (*mutaʾakhkhirī al-ḥanafiyya*) asserted their authority in relation to early Ḥanafī scholarship. This is reflected in their recurrent references to late Ḥanafī opinions, consensus, figures, issues, and controversies. The authority and contribution of late Ḥanafī jurists to the body of legal scholarship of the *madhhab* was also confirmed through their revisions of the early Ḥanafī opinions and doctrines – not excluding Abū Ḥanīfa's opinions. The interventions of the late Ḥanafīs were not just a matter of temporary strategies, but rather they were based on built-in mechanisms intended to reinterpret the *madhhab* and keep it relevant to the ever developing social, political, and economic circumstances in the early modern Ottoman Empire (Chapters 1 - 3). This study utilized the "late Ḥanafī" tradition as a category of analysis in order to pinpoint a sustainable trajectory within Ḥanafī legal scholarship of the early modern period. The conclusions derived from this approach were sufficient to characterize a larger phenomenon in the legal literature. The prime objective was to make sense of the ways in which the mechanisms and the practices of the *madhhab* persisted in the 16th -19th centuries.

The Islamic legal system, by its very nature, is authority-bound: that is, jurists rely on an authority higher than themselves to expound the law. The continuity of the late Ḥanafī legal tradition was guaranteed through commentaries on authoritative (*muʿtamad*) legal texts, and the *madhhab* hierarchy. There are three features that distinguish late Ḥanafīs in the early modern period, namely: (1) the specific manuals of jurisprudence and *fatāwā* that they rely upon in their legal scholarship; (2) their regional networks and learning centers; and (3) their relationship to

the Ottoman state. Late Ḥanafīs insist that it is not sufficient to study the *mutūn* (legal manuals) without their authoritative *shurūḥ* (commentaries). The continuous legal endeavor of later Ḥanafīs is not in vain. It gains its authoritative value through the perpetual explanation, expansion, and examination of these *mutūn*.

The ramifications of this study go beyond the simple identification of the processes of legal change and the continuation of the *madhhab* in the late Ḥanafī tradition. The late articulations of the Ḥanafī school in the early modern period are particularly important because of their direct encounter with the Ottoman state and their relevance to the debates on codification in the modern period. The development of Ḥanafī jurisprudence during the Ottoman period cannot be fully understood through the prism of the state *qānūn* vs jurists' *sharīʿa*. This approach, which tends to view Ḥanafī legal developments through the religious and secular dichotomy, does not capture the inner workings of Ḥanafī jurisprudence in the early modern period and its encounter with the Ottoman state. Thus, by making the *madhhab* and its juristic discourse the center of this study, I challenged the reading of late Ḥanafī school formulations primarily from the prism of the "state *madhhab*," where the hegemony of the state and its interventions in the lawmaking process is overstated. By engaging the legal logic of Ḥanafī jurists themselves, I was able to explore the micro-dynamics of the Ḥanafī juristic discourses, which allowed me to identify a series of practices, norms, and encounters through which early modern Ḥanafism was formulated, imagined, and sustained.

In this regard, although late Ḥanafī jurists (in the Mamluk and Ottoman periods) affirm the role of the sulṭān in managing legal and judicial affairs, they did not necessarily agree with Ottoman state policies. These jurists rejected, accepted, and expanded certain policies and decisions by the Ottoman state. Ibn Nujaym (and late Ḥanafīs in general) criticized abusive state

practices, and corruption among local officials and judges (Chapter 1). Late Ḥanafī jurists in the early modern period were attempting to create a legal order in which state policies were taken into consideration and granted authoritative space, but did not determine the final results of their legal endeavor. Ḥanafī jurists were not apologists for the actions of the Ottoman state.

The Ottoman state edicts and sulṭānic orders were consistently incorporated, for the first time, in the authoritative Ḥanafī legal commentaries, treatises, and *fatāwā* literature from the 17th and 19th centuries. These Ḥanafī legal works recurrently refer to the Ottoman sulṭān's commands and prohibitions. They also point to Abū al-Suʿūd Efendī (d. 1574), in particular, citing his legal opinions and his treatise, *Maʿrūḍāt*. I demonstrated how the Ḥanafī juristic discourse assigns certain probative value and authority to the Ottoman state, in which the state was able to settle juristic disputes, order specific opinions to be adopted for the *fatwā*, and to establish state orders as authoritative and final reference (Chapters 2 and 3). This value and authority assigned to sulṭānic orders and edicts in Ḥanafī authoritative works in the early modern period demonstrates a turn in Ḥanafī legal culture that allowed the imperial establishment to regulate a wide range of legal issues. These interventions by the Ottoman state were incorporated in the authoritative Ḥanafī legal commentaries, treatises, and *fatāwā* collections to mark a new paradigm of legal reasoning, where the state is starting to be part and parcel of the creation and enforcement of the law. This description of the state's role in the legal literature calls into question the dominant view in the secondary literature that Islamic law is primarily a jurists' law. This description ("jurists' law") overlooks the Ḥanafī legal articulations of state authority in the Ottoman period.

My reading of the works of late Ḥanafīs provides a window through which we revisit the emphasis in the secondary literature on court archives as the proper medium to know how Islamic law was actually applied. To confine the practical aspects of Islamic law to adjudication

is a mischaracterization of the practice of Islamic law in the Ottoman period. In fact, it is difficult to understand the juridical reasoning in many cases unless the reader is aware of the background of such issues in the authoritative commentaries in the *madhhab*. Also, the assumption that books of jurisprudence address the theory while the *fatāwā* and judiciary engage social reality is not reflective of the nature of the legal discourse in late Ḥanafī scholarship.

The late Ḥanafī tradition was the point of departure for the early modern codification of Ḥanafī jurisprudence (Chapter 4). The *Mecelle* consistently adopted the opinions of the late Ḥanafīs and their revisions of the *madhhab*. It was also this late tradition that was the reference for the colonial administrators to justify the codification of Ḥanafī jurisprudence. For instance, in British India, colonial authorities relied on al-Ḥaṣkafī's *al-Durr al-Mukhtār*, Ibn ʿĀbidīn's *Radd al-Muḥtār*, and Marghinānī's *Hidāya* and its commentaries, and Qāḍī Khān's *Fatāwā* as the codes for adjudication.[1] The codification of Ḥanafī jurisprudence marked a paradigm shift in the concept of *fiqh* and nature of legal practice in Muslim jurisdictions. The emergence of the *Mecelle* should be understood not in terms of an epistemic break from premodern Islamic legal reasoning, but in terms of a continuation and transformation within a legal tradition. The *Mecelle* necessarily emerged out of an existing genre of *qawāʿid* in a manner that made it an authentic representation of the legal tradition for the experts of the legal profession. The drafters of the *Mecelle* insisted that it was inspired by the already existing genre of legal maxims (*al-qawāʿid al-fiqhiyya*) in the Ḥanafī school.

Moreover, the *Mecelle* itself was circulated among legal authorities and the Ottoman religious establishment to approve it and endorse its formation as part of an indispensible process

[1] Nawab Abdur Rahman A. F. M., *Institutes of Mussalman law, a treatise on personal law according to the Hanafite school, with references to original Arabic sources and decided cases from 1795 to 1906* (Calcutta: Thacker, Spink and co., 1907): 1-5.

to gain its legitimacy. I have shown that the articles of the *Mecelle* are not randomly selected norms or doctrines from the Ḥanafī legal tradition as has been claimed by some secondary scholarship (Chapter 4). The fact that central doctrines codified in the *Mecelle* as well as its articles were faithful to late Ḥanafī opinions attests to my argument.

The *Mecelle* represents a shift in the function of the law within the Ottoman Empire in the late 19th century CE. This function changed to reflect new emergent state institutions. In this context, Ḥanafī jurisprudence was called to address this transformation and fulfill this role. The *Mecelle* as a systematic codification of a legal tradition successfully incorporated and introduced new 'modern' concepts and premises, namely: the systemic distinction between public and private property, the restriction of absolute authorities (*wilāyat*), key remedial rules and legal liabilities (*ḍamānāt*), and new types of contractual agreements (*ʿuqūd*). The *Mecelle* introduces these changes subtly by rooting them in the legal tradition itself, reflecting a new legal and moral order of society (Chapter 4).

The *Mecelle* was the first step in the process of developing a written law that was designed to assist judges to render similar legal judgments for similar issues. It was also a response to the Tanzimat and the penetration of Western laws into Ottoman society. While I affirm that the context that shaped the discussions around the *Mecelle* was intertwined with questions of Western hegemony, the key issue in the minds of the drafters of *Mecelle* was how to formulate an Islamically-informed response to Western hegemony. The *Mecelle* is not only a manifestation of such debates and a response to these questions, but also it was a successful strategy to meet the demands of the bureaucracy in the Ottoman Empire. In short, the *Mecelle*, at its core, was a Muslim response to modernity and its moral and legal order. It was a response that was argued and justified from within the tradition.

Wael Hallaq recently argued in his *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* that "the political, legal, and cultural struggles of today's Muslims stem from a certain measure of dissonance between their moral and cultural aspiration, on the one hand, and the moral realties of a modern world, on the other – realties with which they must live but that are not of their own making."[2] Hallaq offers a significant contribution, especially through his insights on the incompatibilities between modern nation states and Islamic governance, the problems of modernity, and the central moral domain of the *sharīʿa*. These issues are indispensible for any scholarship on the status of *sharīʿa* in contemporary times. Hallaq shifts the discussion on the *sharīʿa* and Muslim governance from the primacy of the political to the indispensible nature of the moral. He argues, in congruence with Talal Asad's analysis of the Egyptian state, [3] that the modern state necessitated the separation of the legal from the moral, and shifted the moral authority of revelation to the individual and to the political authority of the state.

In his discussion of the incompatibilities and ruptures between legal systems in modern nation states and premodern *sharīʿa*, Hallaq restates his thesis on the epistemic separation between Islamic law and state. He contends that the sulṭān "possessed no real sovereignty."[4] The sulṭān "was not the source of law and thus he had no significant legal will."[5] Although Hallaq recognizes that the *sharīʿa* granted Muslim rulers of the premodern period certain power (*siyāsa sharʿiyya*), he asserts that the "executive ruler stood apart from the "legislative" and even judicial powers, being in many respects subservient to their commands."[6]

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[2] Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Colombia University Press, 2013), 3.
[3] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity*: Cultural Memory in the Present. (Stanford: Stanford University Press, 2003): 245-6.
[4] Hallaq, *The Impossible* State, 65.
[5] Hallaq, *The Impossible* State, 66.
[6] Hallaq, *The Impossible* State, 64.

Some points of departure in Hallaq's account about "premodern *sharīʿa*" are important issues for future research to disentangle. This account appears to create a "classical *sharīʿa*" that is clearly defined, and against which modern Muslim experiences are tested and judged. For instance, the relationship between political authority and legislative power, and the differences among morality, ethical cultivation, and law are usually collapsed into categories for comparison with modern articulations of these same issues without properly discerning how these issues evolved and were negotiated historically in Muslim discourse. Hallaq dismisses any modern articulations of *sharīʿa* by arguing: "the Sharīʿa practices of the modern state in Islamic countries are simply irrelevant to the arguments of this book and cannot - and thus must not - be invoked as a measure by which premodern paradigmatic Sharīʿa is understood, evaluated or judged."[7]

A future investigation is necessary to explore the linkages, dynamics, and struggles of the articulation of Islamic law within civil law strictures in the 20th century. For instance, ʿAbd al-Razzāq al-Sanhūrī (d. 1971), a key legal figure who influenced legal codes in most Arab countries, draws extensively in his book *Maṣādir al-Ḥaqq* on the legal literature of late Ḥanafīs. The point here is not simply to identify the doctrines and norms that were incorporated in legal texts and Civil Codes in the majority Arab and Muslim countries. Instead, the point is to explore the reconfigurations, ruptures, and continuities of the role and function of Islamic jurisprudence in the new emerging nation states.

[7] Hallaq, *The Impossible* State, 3.

APPENDICES

APPENDIX A

Examples of Early and Late Ḥanafī Opinions in Ibn Nujaym's *al-Baḥr al-Rāʾiq*

Early Ḥanafī Opinions	Late Ḥanafī Formulations
vol. 1:79 [1] [وَمَا كَانَ مِنْ الْمِيَاهِ فِي الْغُدْرَانِ أَوْ فِي مُسْتَنْقَعِ مِنْ الْأَرْضِ وَقَعَتْ فِيهِ نَجَاسَةٌ نَظَرَ الْمُسْتَعْمَلُ فِي ذَلِكَ، فَإِنْ كَانَ فِي غَالِبِ رَأْيِهِ أَنَّ النَّجَاسَةَ لَمْ تَخْتَلِطْ بِجَمِيعِهِ] هَكَذَا فِي أَكْثَرِ كُتُبِ أَئِمَّتِنَا فَثَبَتَ بِهَذِهِ النُّقُولِ الْمُعْتَبَرَةِ عَنْ مَشَايِخِنَا الْمُتَقَدِّمِين مَذْهَبُ إمَامِنَا الْأَعْظَمِ أَبِي حَنِيفَةَ وَأَبِي يُوسُفَ وَمُحَمَّدٍ رَضِيَ اللَّهُ عَنْهُمْ أَجْمَعِينَ فَتَعَيَّنَ الْمَصِيرُ إلَيْه	وَأَمَّا مَا اخْتَارَهُ كَثِيرٌ مِنْ مَشَايِخِنَا الْمُتَأَخِّرِين بَلْ عَامَّتُهُمْ كَمَا نَقَلَهُ فِي مِعْرَاجِ الدِّرَايَةِ مِنْ اعْتِبَارِ الْعَشْرِ فِي الْعَشْرِ فَقَدْ عَلِمْت أَنَّهُ لَيْسَ مَذْهَبَ أَصْحَابِنَا، وَأَنَّ مُحَمَّدًا، وَإِنْ كَانَ قَدَّرَ بِهِ رَجَعَ عَنْهُ كَمَا نَقَلَهُ الْأَئِمَّةُ الثِّقَاتُ الَّذِينَ هُمْ أَعْلَمُ بِمَذْهَبِ أَصْحَابِنَا
vol. 1:268 [2] لَا يَحِلُّ لِلْمُؤَذِّنِ وَلَا لِلْإِمَامِ لِحَدِيثِ أَبِي دَاوُد «وَاتَّخِذْ مُؤَذِّنًا لَا يَأْخُذُ عَلَى الْأَذَانِ أَجْرًا» قَالُوا: فَإِنْ لَمْ يُشَارِطْهُمْ عَلَى شَيْءٍ لَكِنْ عَرَفُوا حَاجَتَهُ فَجَمَعُوا لَهُ فِي وَقْتٍ شَيْئًا كَانَ حَسَنًا وَيَطِيبُ لَهُ وَعَلَى هَذَا الْمُفْتِي لَا يَحِلُّ لَهُ أَخْذُ شَيْءٍ عَلَى ذَلِكَ لَكِنْ يَنْبَغِي لِلْقَوْمِ أَنْ يُهْدُوا إلَيْهِ، كَذَا فِي فَتْحِ الْقَدِيرِ وَهُوَ عَلَى قَوْلِ الْمُتَقَدِّمِين	أَمَّا عَلَى الْمُخْتَارِ لِلْفَتْوَى فِي زَمَانِنَا فَيَجُوزُ أَخْذُ الْأَجْرِ لِلْإِمَامِ وَالْمُؤَذِّنِ وَالْمُعَلِّمِ وَالْمُفْتِي كَمَا صَرَّحُوا بِهِ فِي كِتَابِ الْإِجَارَاتِ وَفِي فَتَاوَى قَاضِي خان الْمُؤَذِّنُ إذَا لَمْ يَكُنْ عَالِمًا بِأَوْقَاتِ الصَّلَاةِ لَا يَسْتَحِقُّ ثَوَابَ الْمُؤَذِّنِينَ قَالَ فِي فَتْحِ الْقَدِيرِ فَفِي أَخْذِ الْأَجْرِ أَوْلَى. اهـ.
vol. 1:275 [3] التثويب عِنْدَ الْمُتَقَدِّمِين هُوَ مَكْرُوهٌ فِي غَيْرِ الْفَجْرِ وَهُوَ قَوْلُ الْجُمْهُورِ كَمَا حَكَاهُ النَّوَوِيُّ فِي شَرْحِ الْمُهَذَّبِ لِمَا رُوِيَ أَنَّ عَلِيًّا رَأَى مُؤَذِّنًا يُثَوِّبُ فِي الْعِشَاءِ فَقَالَ أَخْرِجُوا هَذَا الْمُبْتَدِعَ مِنْ الْمَسْجِدِ وَعَنْ ابْنِ عُمَرَ مِثْلُهُ وَلِحَدِيثِ الصَّحِيحَيْنِ << مِنْ أَحْدَثَ فِي أَمْرِنَا هَذَا مَا لَيْسَ مِنْهُ فَهُوَ رَد>>	التَّثْوِيبِ لَيْسَ لَهُ لَفْظٌ يَخُصُّهُ بَلْ تَثْوِيبُ كُلِّ بَلَدٍ عَلَى مَا تَعَارَفُوهُ إمَّا بِالتَّنَحْنُحِ أَوْ بِقَوْلِهِ الصَّلَاةَ الصَّلَاةَ أَوْ قَامَتْ قَامَتْ؛ لِأَنَّهُ لِلْمُبَالَغَةِ فِي الْإِعْلَامِ، وَإِنَّمَا يَحْصُلُ بِمَا تَعَارَفُوهُ فَعَلَى هَذَا إذَا أَحْدَثَ النَّاسُ إعْلَامًا مُخَالِفًا لِمَا ذُكِرَ جَازَ، كَذَا فِي الْمُجْتَبَى وَأَفَادَ أَنَّهُ لَا يَخُصُّ صَلَاةً بَلْ هُوَ فِي سَائِرِ الصَّلَوَاتِ وَهُوَ اخْتِيَارُ الْمُتَأَخِّرِين لِزِيَادَةِ غَفْلَةِ النَّاسِ وَقَلَّمَا يَقُومُونَ عِنْدَ سَمَاعِ الْأَذَان
vol. 4:326 [4] وَإِذَا حَلَفَ لَا يَدْخُلُ هَذِهِ الدَّارَ فَوَقَفَ عَلَى سَطْحِهَا مِنْ غَيْرِ دُخُولٍ مِنْ الْبَابِ بِأَنْ تَوَصَّلَ إلَيْهِ مِنْ سَطْحٍ آخَرَ فَإِنَّهُ يَحْنَثُ، وَقِيلَ فِي عُرْفِنَا لَا يَحْنَثُ، وَمَا فِي الْمُخْتَصَرِ قَوْلُ الْمُتَقَدِّمِين	وَمُقَابِلُهُ قَوْلُ الْمُتَأَخِّرِين وَوَفَّقَ بَيْنَهُمَا فِي فَتْحِ الْقَدِيرِ بِحَمْلِ مَا فِي الْمُخْتَصَرِ عَلَى مَا إذَا كَانَ لِلسَّطْحِ حَضِيرٌ وَحُمِلَ مُقَابِلُهُ عَلَى مَا إذَا لَمْ يَكُنْ لَهُ حَضِيرٌ أَيْ سَاتِر
vol. 5:114 [5] كَتَبْت فِي فَتْوَى رُفِعَتْ إلَيَّ فِي شِرَاءِ السُّلْطَانِ الْأَشْرَفِ بِرسْبَايْ الْأَرْضَ مِمَّنْ وَلَّاهُ نَظَرَ بَيْتِ الْمَالِ هَلْ يَجُوزُ شِرَاؤُهُ مِنْهُ وَهُوَ الَّذِي وَلَّاهُ فَكَتَبْت إذَا كَانَ بِالْمُسْلِمِينَ حَاجَةٌ وَالْعِيَاذُ بِاَللَّهِ تَعَالَى جَازَ ذَلِكَ. كَأَنَّهُ أَجَابَ لَا يَجُوزُ كَمَا لَا يَخْفَى وَهُوَ مَبْنِيٌّ عَلَى قَوْلِ الْمُتَقَدِّمِين	أَمَّا عَلَى قَوْلِ الْمُتَأَخِّرِين الْمُفْتَى بِهِ لَا يَنْحَصِرُ جَوَازُ بَيْعِ عَقَارِ الْيَتِيمِ فِيمَا ذُكِرَ بَلْ فِيهِ وَفِيمَا إذَا كَانَ عَلَى الْمَيِّتِ دَيْنٌ لَا وَفَاءَ لَهُ إلَّا مِنْهُ أَوْ رَغِبَ فِيهِ بِضَعْفِ قِيمَتِهِ فَكَذَلِكَ نَقُولُ لِلْإِمَامِ بَيْعُ الْعَقَارِ لِغَيْرِ حَاجَةٍ إذَا رَغِبَ فِيهِ بِضَعْفِ قِيمَتِهِ عَلَى الْمُفْتَى

وَاخْتَارَ الْمُتَأَخِّرُونَ أَنْ لَا يَرْكَبُوا أَصْلًا إلَّا إذَا خَرَجُوا إلَى قَرْيَةٍ وَنَحْوِهَا أَوْ كَانَ مَرِيضًا وَحَاصِلُهُ أَنَّهُ لَا يَرْكَبُ إلَّا لِضَرُورَةٍ فَيَرْكَبُ ثُمَّ يَنْزِلُ فِي مَجَامِعِ الْمُسْلِمِينَ إذَا مَرَّ بِهِمْ كَذَا فِي فَتْحِ الْقَدِيرِ وَفِيهِ وَإِذَا عُرِفَ أَنَّ الْمَقْصُودَ الْعَلَامَةُ فَلَا يَتَعَيَّنُ مَا ذُكِرَ بَلْ يُعْتَبَرُ فِي كُلِّ بَلْدَةٍ مَا يَتَعَارَفُهُ أَهْلُهُ وَفِي بِلَادِنَا جُعِلَتْ الْعَلَامَةُ فِي الْعِمَامَةِ فَأَلْزَمُوا النَّصَارَى الْعِمَامَةَ الزَّرْقَاءَ وَالْيَهُودَ بِالْعِمَامَةِ الصَّفْرَاءِ وَاخْتَصَّ الْمُسْلِمُونَ بِالْبَيْضَاءِ اهـ	vol. 5: 123 [6] وَالْكُسْتِيجُ عَنْ أَبِي يُوسُفَ خَيْطٌ غَلِيظٌ بِقَدْرِ الْأُصْبُعِ يَشُدُّهُ الذِّمِّيُّ فَوْقَ ثِيَابِهِ دُونَ مَا يَتَزَيَّنُونَ بِهِ مِنْ الزَّنَانِيرِ الْمُتَّخَذَةِ مِنْ الْإِبْرَيْسَمِ كَذَا فِي الْمُغْرِبِ وَقَيَّدَهُ فِي الْمُجْمَعِ بِالصُّوفِ وَقَيَّدَ بِالْخَيْلِ لِأَنَّ لَهُمْ أَنْ يَرْكَبُوا الْحُمُرَ عِنْد الْمُتَقَدِّمِينَ عَلَى سُرُوجٍ كَهَيْئَةِ الْأُكُفِ وَهُوَ جَمْعُ إكَافٍ وَهُوَ مَعْرُوفٌ وَالسَّرْجُ الَّذِي عَلَى هَيْئَتِهِ هُوَ مَا يُجْعَلُ عَلَى مُقَدِّمِهِ شِبْهُ الرُّمَّانَةِ وَالْوِكَافُ لُغَةً وَمِنْهُ أَوْكَفَ الْحِمَارُ كَذَا فِي الْمُغْرِبِ وَالْإِكَافُ الْبَرْذَعَةُ ذَكَرَهُ الْعَيْنِي
وَاخْتَلَفَ الْمُتَأَخِّرُونَ فِيمَا إذَا قَالَ الْمُدَّعَى عَلَيْهِ أَبْرَأَنِي الْمُدَّعِي مِنْ الدَّعْوَى الَّتِي يَدَّعِي عَلَيَّ مِنْهُمْ مَنْ قَالَ هُوَ إقْرَارٌ بِالْمَالِ كَمَا لَوْ قَالَ أَبْرَأَنِي مِنْ الْمَالِ الَّذِي ادَّعَاهُ وَمِنْهُمْ مَنْ قَالَ لَا يَكُونُ إقْرَارًا؛ لِأَنَّ الدَّعْوَى تَكُونُ بِحَقٍّ وَبِبَاطِلٍ، كَذَا فِي فَتْحِ الْقَدِيرِ	vol. 6: 249 [7] وَفِي الْبَزَّازِيَّةِ مِنْ الدَّعْوَى دَعْوَى الْبَرَاءَةِ عَنْ الدَّعْوَى لَا يَكُونَ إقْرَارًا بِالدَّعْوَى عِنْد الْمُتَقَدِّمِينَ وَخَالَفَهُمْ الْمُتَأَخِّرُونَ وَدَعْوَى الْبَرَاءَةِ عَنْ الْمَالِ إقْرَارٌ وَقَوْلُ الْمُتَقَدِّمِينَ أَصَحُّ اه
وَقَوْلُ الْمُتَقَدِّمِينَ أَحْسَنُ وَخَالَفَهُمْ بَعْضُ الْمُتَأَخِّرِينَ	vol. 7: 206 [8] ادَّعَى عَلَيْهِ عِنْدَ الْقَاضِي مَالًا فَلَمْ يُقِرَّ، وَلَمْ يُنْكِرْ، وَقَالَ أَبْرَأَنِي الْمُدَّعِي عَنْ هَذِهِ الدَّعْوَى وَعَنْ حَلِفِهِ يُنْظَرُ إنْ كَانَ الْمُدَّعِي بَرْهَنَ عَلَى دَعْوَاهُ حَلَفَ هُوَ عَلَى عَدَمِ الْإِبْرَاءِ، وَإِنْ لَمْ يَكُنْ لَهُ بَيِّنَةٌ يَحْلِفُ الْمُدَّعَى عَلَيْهِ عِنْدَ الْمُتَقَدِّمِينَ
vol. 1: 321 [9] وَالصَّلَاةُ عَلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ (سنة في التشهد) و هُوَ قَوْلُ عَامَّةِ السَّلَفِ وَالْخَلَفِ، وَقَالَ الشَّافِعِيُّ إنَّهَا فَرْضٌ تَبْطُلُ الصَّلَاةُ بِتَرْكِهَا، وَقَدْ نَسَبَ قَوْمٌ مِنْ الْأَعْيَانِ الْإِمَامَ الشَّافِعِيَّ فِي هَذَا إلَى الشُّذُوذِ وَمُخَالَفَةِ الْإِجْمَاعِ مِنْهُمْ أَبُو جَعْفَرٍ الطَّحَاوِيُّ وَأَبُو بَكْرٍ الرَّازِيّ وَأَبُو بَكْرِ بْنُ الْمُنْذِرِ وَالْخَطَّابِيُّ وَالْبَغَوِيُّ وَابْنُ جَرِيرٍ الطَّبَرِيُّ وَهَذِهِ عِبَارَتُهُ: أَجْمَعَ جَمِيعُ الْمُتَقَدِّمِينَ وَالْمُتَأَخِّرِينَ مِنْ عُلَمَاءِ الْأُمَّةِ عَلَى أَنَّ الصَّلَاةَ عَلَيْهِ غَيْرُ وَاجِبَةٍ فِي التَّشَهُّدِ وَلَا سَلَفَ لِلشَّافِعِيِّ فِي هَذَا الْقَوْلِ وَلَا سُنَّةَ يَتَّبِعُهَا اهـ	vol. 3:325 [9] سَرَّحْتُك فَارَقْتُك (من كنايات الطلاق) وَجَعَلَهُمَا الشَّافِعِيُّ مِن الصَّرِيحِ لِوُرُودِهِمَا فِي الْقُرْآنِ لِلطَّلَاقِ كَثِيرًا قُلْنَا الْمُعْتَبَرُ تَعَارُفُهُمَا فِي الْعُرْفِ الْعَامِّ فِي الطَّلَاقِ لِاسْتِعْمَالِهِمَا شَرْعًا مُرَادًا هُوَ بِهِمَا كَذَا فِي فَتْحِ الْقَدِيرِ، وَفِي الْكَافِي وَلَنَا الصَّرِيحُ مَا لَا يُسْتَعْمَلُ فِي غَيْرِ النِّسَاءِ وَهُمْ يَقُولُونَ سَرَحَتْ إبِلِي وَفَارَقَتْ غَرِيمِي وَمَشَايِخُ خُوَارِزْمَ مِنْ الْمُتَقَدِّمِينَ وَمِنْ الْمُتَأَخِّرِينَ كَانُوا يُفْتُونَ بِأَنَّ لَفْظَ التَّسْرِيحِ بِمَنْزِلَةِ الصَّرِيحِ يَقَعُ بِهِ طَلَاقٌ رَجْعِيٌّ بِدُونِ النِّيَّةِ كَذَا فِي الْمُجْتَنَى، وَفِي الْخَانِيَّةِ

APPENDIX B

Examples of *Maʿrūḍāt* in al-Ḥaṣkafī's *al-Durr al-Mukhtār*

Kitāb al-Jihād, vol. 4:157
وَالسَّلَبُ لِلْكُلِّ إنْ لَمْ يُنَفِّلْ لِحَدِيثِ «لَيْسَ لَك مِنْ سَلَبِ قَتِيلِك إلَّا مَا طَابَتْ بِهِ نَفْسُ إمَامِك» فَحَمَلْنَا حَدِيثَ السَّلَبِ عَلَى التَّنْفِيلِ قُلْت: وَفِي مَعْرُوضَاتِ الْمُفْتِي أَبِي السُّعُودِ هَلْ يَحِلُّ وَطْءُ الْإِمَامِ الْمُشْتَرَاةَ مِنْ الْغُزَاةِ الْآنَ حَيْثُ وَقَعَ الِاشْتِبَاهُ فِي قِسْمَتِهِمْ بِالْوَجْهِ الْمَشْرُوعِ؟ فَأَجَابَ: لَا تُوجَدُ فِي زَمَانِنَا قِسْمَةٌ شَرْعِيَّةٌ لَكِنْ فِي سَنَةِ 948 وَقَعَ التَّنْفِيلُ الْكُلِّي
Kitāb al-Jihād, vol. 4:209
وَفِي مَعْرُوضَاتِ الْمُفْتِي أَبِي السُّعُودِ مِنْ كِتَابِ الصَّلَاةِ سُئِلَ عَنْ مَسْجِدٍ لَمْ يَبْقَ فِي أَطْرَافِهِ بَيْتُ أَحَدٍ مِنْ الْمُسْلِمِينَ وَأَحَاطَ بِهِ الْكَفَرَةُ فَكَانَ الْإِمَامُ وَالْمُؤَذِّنُ فَقَطْ لِأَجْلِ وَظِيفَتِهِمَا يَذْهَبَانِ إلَيْهِ فَيُؤَذِّنَانِ وَيُصَلِّيَانِ بِهِ فَهَلْ تَحِلُّ لَهُمْ الْوَظِيفَةُ؟ فَأَجَابَ بِقَوْلِهِ: تِلْكَ الْبُيُوتُ تَأْخُذُهَا الْمُسْلِمُونَ بِقِيمَتِهَا جَبْرًا عَلَى الْفَوْرِ وَقَدْ وَرَدَ الْأَمْرُ الشَّرِيفُ السُّلْطَانِيُّ بِذَلِكَ فَالْحَاكِمُ لَا يُؤَخِّرُ هَذَا أَصْلًا
Kitāb al-Ābiq, vol. 4:288
قُلْت: لَكِنْ رَأَيْت فِي مَعْرُوضَاتِ الْمَرْحُومِ أَبِي السُّعُودِ مُفْتِي الرُّومِ أَنَّهُ صَدَرَ أَمْرٌ سُلْطَانِيٌّ بِمَنْعِ الْقُضَاةِ عَنْ إعْطَاءِ الْإِذْنِ بِبَيْعِ عَبِيدِ الْعَسْكَرِيَّةِ. وَحِينَئِذٍ فَلَا يَصِحُّ بَيْعُ عَبِيدِ السَّبَاهِيَةِ فَلَهُمْ أَخْذُهَا مِنْ مُشْتَرِيهَا وَيَرْجِعُ الْمُشْتَرِي بِثَمَنِهِ عَلَى الْبَائِعِ. وَأَمَّا عَبِيدُ الرَّعَايَا فَكَذَلِكَ إذَا كَانَ بِغَبْنٍ فَاحِشٍ وَإِلَّا فَلِلرَّعَايَا الثَّمَنُ وَبِذَلِكَ وَرَدَ الْأَمْرُ أَيْضًا انْتَهَى بِالْمَعْنَى فَلْيُحْفَظْ فَإِنَّهُ مُهِم
Kitāb al-Waqf, vol. 4:364
قُلْت: بَلْ وَرَدَّ الْأَمْرُ لِلْقُضَاةِ بِالْحُكْمِ بِهِ كَمَا فِي مَعْرُوضَاتِ الْمُفْتِي أَبِي السُّعُود ومَكِيلٍ وَمَوْزُونٍ فَيُبَاعُ وَيُدْفَعُ ثَمَنُهُ مُضَارَبَةً أَوْ بِضَاعَةً فَعَلَى هَذَا لَوْ وَقَفَ كُرًّا عَلَى شَرْطِ أَنْ يُقْرِضَهُ لِمَنْ لَا بَذْرَ لَهُ لِيَزْرَعَهُ لِنَفْسِهِ فَإِذَا أَدْرَكَ أَخَذَ مِقْدَارَهُ ثُمَّ أَقْرَضَهُ لِغَيْرِهِ وَهَكَذَا جَازَ خُلَاصَة
Kitāb al-Waqf, vol. 4:388
قُلْت: لَكِنْ فِي مَعْرُوضَاتِ الْمُفْتِي أَبِي السُّعُودِ أَنَّهُ فِي سَنَةِ إحْدَى وَخَمْسِينَ وَ تِسْعِمِائَةٍ وَرَدَ الْأَمْرُ الشَّرِيفُ بِمَنْعِ اسْتِبْدَالِهِ، وَأَمَرَ أَنْ يَصِيرَ بِإِذْنِ السُّلْطَانِ تَبَعًا لِتَرْجِيحِ صَدْرِ الشَّرِيعَةِ انْتَهَى فَلْيُحْفَظْ
Kitāb al-Buyūʿ, vol. 5:167
قُلْت: وَفِي مَعْرُوضَاتِ الْمُفْتِي أَبِي السُّعُودِ لَوْ ادَّانَ زَيْدٌ الْعَشَرَة بِاثْنَيْ عَشَرَ أَوْ بِثَلَاثَةَ عَشَرَ بِطَرِيقِ الْمُعَامَلَةِ فِي زَمَانِنَا بَعْدَ أَنْ وَرَدَ الْأَمْرُ السُّلْطَانِيُّ وَفَتْوَى شَيْخِ الْإِسْلَامِ بِأَنْ لَا تُعْطَى الْعَشَرَةُ بِأَزْيَدَ مِنْ عَشَرَةٍ وَنِصْفٍ وَنُبِّهَ عَلَى ذَلِكَ فَلَمْ يَمْتَثِلْ مَاذَا يَلْزَمُهُ؟ فَأَجَابَ يُعَزَّرُ وَيُحْبَسُ إلَى أَنْ تَظْهَرَ تَوْبَتُهُ وَصَلَاحُهُ فَيُتْرَك
Kitāb al-Qaḍāʾ, vol. 5:356
قُلْت: سَيَجِيءُ تَضْعِيفُهُ فَرَاجِعِهِ وَفِي مَعْرُوضَاتِ الْمُفْتِي أَبِي السُّعُودِ لَمَّا وَقَعَ التَّسَاوِي فِي قُضَاةِ زَمَانِنَا فِي وُجُودِ الْعَدَالَةِ ظَاهِرًا وَرَدَ الْأَمْرُ بِتَقْدِيمِ الْأَفْضَلِ فِي الْعِلْمِ وَالدِّيَانَةِ وَالْعَدَالَة

APPENDIX C

Examples of Early and Late Ḥanafī Opinions in Ibn ʿĀbidīn's *Radd al-Muḥtār*

Early Ḥanafī Opinions	Late Ḥanafī Formulations
وَرَجَّحَ فِي الْهِدَايَةِ نَدْبَهَا، قِيلَ: وَهُوَ ظَاهِرُ الرِّوَايَةِ نَهْرٌ. وَتَعَجَّبَ صَاحِبُ الْبَحْرِ مِنْ الْمُحَقِّقِ ابْنِ الْهُمَامِ حَيْثُ رَجَّحَ هُنَا وُجُوبَهَا، ثُمَّ ذَكَرَ فِي بَابِ شُرُوطِ الصَّلَاةِ أَنَّ الْحَقَّ مَا عَلَيْهِ عُلَمَاؤُنَا مِنْ أَنَّهَا مُسْتَحَبَّة	[vol. 1:109] مَا ذَكَرَهُ الْمُصَنِّفُ مِنْ أَنَّ الْبُدَاءَةَ بِالتَّسْمِيَةِ سُنَّةٌ هُوَ مُخْتَارُ الطَّحَاوِيِّ وَكَثِيرٌ مِنْ الْمُتَأَخِّرِين
عَدَمَ حِلِّ أَخْذِ الْأُجْرَةِ عَلَى الْأَذَانِ وَالْإِمَامَةِ رَأْيُ الْمُتَقَدِّمِين	[vol. 1:392] وَالْمُتَأَخِّرُونَ يُجَوِّزُونَ ذَلِكَ عَلَى مَا سَيَأْتِي فِي الْإِجَارَات
وَمَسْأَلَةُ الِاسْتِفْتَاحِ وَنَحْوِهِ لَيْسَتْ مَرْوِيَّةً عَنْ الْمُتَقَدِّمِين	[vol. 2:16] وَإِنَّمَا هِيَ اخْتِيَارُ بَعْضِ الْمُتَأَخِّرِين
وَالظَّاهِرُ أَنَّ مَنْعَ الْمُتَقَدِّمِينَ مَبْنِيٌّ عَلَى مَا كَانَ فِي زَمَانِهِمْ مِنْ الْمُجَازَفَةِ فِي وَصْفِهِ مِثْلَ السُّلْطَانِ الْعَادِلِ الْأَكْرَمِ شَاهِنْشَاهْ الْأَعْظَمِ مَالِكِ رِقَابِ الْأُمَم	[vol. 2:149] الدُّعَاءَ لِلسُّلْطَانِ عَلَى الْمَنَابِرِ قَدْ صَارَ الْآنَ مِنْ شِعَارِ السَّلْطَنَةِ فَمَنْ تَرَكَهُ يُخْشَى عَلَيْهِ؛ وَلِذَا قَالَ بَعْضُ الْعُلَمَاءِ: لَوْ قِيلَ إنَّ الدُّعَاءَ لَهُ وَاجِبٌ لِمَا فِي تَرْكِهِ مِنْ الْفِتْنَةِ غَالِبًا لَمْ يَبْعُد
لَا عِبْرَةَ بِالْجَمَالِ وَلَا بِالْعَقْلِ فِي الكفاءة قَالَ قَاضِي خَانْ فِي شَرْحِ الْجَامِعِ. وَأَمَّا الْعَقْلُ فَلَا رِوَايَةَ فِيهِ عَنْ أَصْحَابِنَا الْمُتَقَدِّمِين	[vol. 3:93] وَاخْتَلَفَ فِيهِ الْمُتَأَخِّرُونَ (أي العقل) هَلْ يُعْتَبَرُ فِي الْكَفَاءَةِ أَوْ لَا
لَوْ سَكَنَ الدَّارَ سِنِينَ يَدَّعِي الْمِلْكَ ثُمَّ اسْتُحِقَّتْ لِلْوَقْفِ لَا تَلْزَمُهُ أُجْرَةُ مَا مَضَى ضَعِيفٌ، كَمَا جَزَمَ بِهِ فِي الْبَحْرِ؛ لِأَنَّهُ مَبْنِيٌّ عَلَى قَوْلِ الْمُتَقَدِّمِين	[vol. 4:352] وَوُجُوبُ الْأُجْرَةِ قَوْلُ الْمُتَأَخِّرِينَ كَمَا نَصَّ عَلَيْهِ فِي الْإِسْعَافِ، أَفَادَهُ الْخَيْرُ الرَّمْلِي
وَقْفُ الْفَأْسِ وَالْقَدُومِ كَانَ مُتَعَارَفًا فِي زَمَنِ الْمُتَقَدِّمِين	[vol. 4:364] وَلَمْ نَسْمَعْ بِهِ فِي زَمَانِنَا فَالظَّاهِرُ أَنَّهُ لَا يَصِحُّ الْآنَ وَلَئِنْ وُجِدَ نَادِرًا لَا يُعْتَبَرُ لِمَا عَلِمْت مِنْ أَنَّ التَّعَامُلَ هُوَ الْأَكْثَرُ اسْتِعْمَالًا
الصَّوَابُ أَنَّ هَذَا مُفَرَّعٌ عَلَى قَوْلِ الْمُتَقَدِّمِين	[vol. 4:408] أَمَّا عَلَى مَا عَلَيْهِ الْمُتَأَخِّرُونَ فَعَلَى الْغَاصِبِ أَجْرُ الْمِثْلِ اهـ
[vol. 3:257] وَلَمْ يُوجَدْ فِيهَا نَصٌّ عَنْ الْمُتَقَدِّمِينَ وَلَا عَنْ الْمُتَأَخِّرِين	[vol. 3:784] مَا نَقَلَهُ عَنْ ابْنِ الْكَمَالِ قَوْلٌ ثَالِث خَارِجٌ عَنْ قَوْلَيْ الْمُتَقَدِّمِينَ وَالْمُتَأَخِّرِين

APPENDIX D

Examples of *Maʿrūḍāt Abī al-Suʿūd* in *Radd al-Muḥtār*[1]

Maʿrūḍāt Abī al-Suʿūd
[vol. 4: 215] ثُمَّ رَأَيْت فِي مَعْرُوضَاتِ الْمُفْتِي أَبِي السُّعُودِ، أَنَّهُ وَرَدَ أَمْرٌ سُلْطَانِيٌّ بِالْعَمَلِ بِقَوْلِ أَئِمَّتُنَا الْقَائِلِينَ بِقَتْلِهِ إذَا ظَهَرَ أَنَّهُ مُعْتَادُهُ وَبِهِ أَفْتَى
[vol. 4: 293] لَكِنْ نَقَلَ ابْنُ الْمُؤَيَّدِ عَنْ جَامِعِ الْفُصُولَيْنِ: لَوْ أَخَذَ الْقَاضِي وَدِيعَةَ الْمَفْقُودِ مِمَّنْ هِيَ بِيَدِهِ وَوَضَعَهَا عِنْدَ ثِقَةٍ لَا بَأْسَ بِهِ اهـ وَهَذَا يُخَالِفُ مَا فِي المعروضات،
[vol. 4: 388] وَرَأَى الْقَاضِي أَنْ يَضُمَّ إلَيْهِ مُشَارِفًا يَجُوزُ لَهُ ذَلِكَ كَالْوَصِيِّ إذَا ضُمَّ إلَيْهِ غَيْرُهُ حَيْثُ يَصِحُّ اهـ وَهَذَا حَاصِلُ مَا يَأْتِي عَنْ المعروضات
[vol. 5: 356] وَفِي مَعْرُوضَاتِ الْمُفْتِي أَبِي السُّعُودِ أَيْ الْمَسَائِلُ الَّتِي عَرَضَهَا عَلَى سُلْطَانِ زَمَانِهِ، فَأَمَرَ بِالْعَمَلِ بِهَا
[vol. 4: 214] عَقْدَ الذِّمَّةِ لَا يُنْتَقَضُ بِمَا ذَكَرُوهُ مَا لَمْ يُشْتَرَطْ انْتِقَاضُهُ بِهِ فَإِذَا اُشْتُرِطَ انْتَقَضَ، وَإِلَّا فَلَا إلَّا إذَا أَعْلَنَ بِالشَّتْمِ أَوْ اعْتَادَهُ لِمَا قَدَّمْنَاهُ وَلِمَا يَأْتِي عَنْ الْمَعْرُوضَاتِ وَغَيْرِهَا
[vol. 4: 215] وَيَنْبَغِي تَقْيِيدُهُ بِمَا إذَا ظَهَرَ أَنَّهُ مُعْتَادُهُ كَمَا قَيَّدَهُ بِهِ فِي الْمَعْرُوضَاتِ
[vol. 4: 397] وَبِهِ أَفْتَى فِي الْخَيْرِيَّةِ مِنْ الْبُيُوعِ وَذَكَرَ أَنَّهُ أَفْتَى بِهِ ابْنُ نُجَيْمٍ وَسَيَأْتِي فِيهِ كَلَامٌ عَنْ الْمَعْرُوضَاتِ

[1] Ibn ʿĀbidīn records al-Ḥaṣkafī's references to the *maʿrūḍāt*. He also engages with the *maʿrūḍāt* in different issues.

APPENDIX E

Thematic tables of the *Mecelle* Articles[2]

I. Sale Contract (*al-Bayʿ*)

Ḥanafī Fiqh Sources	The *Mecelle* Articles
عقد البيع	عقد البيع
مجمع الأنهرفي شرح ملتقي الأبحر البيع مبادلة مال بمال وينعقد بإيجاب و قبول	المادة:١٠٥ البيع مبادلة مال بمال ويكون منعقدا و غير منعقد
رد المحتار علي الدر المختار الإيجاب و القبول معبر بهما عن كل لفظين ينبأن عن معني التمليك ماضيين كبعت و اشتريت مجمع الأنهرفي شرح ملتقي الأبحر وينعقد البيع بإيجاب و هو كلام أول المتعاقدين حال إنشاء البيع و قبول و هو كلام ثاني من يتكلم في تلك الحال	المادة:١٦٨ الإيجاب و القبول في البيع عبارة عن كل لفظين مستعملين لإنشاء البيع في عرف البلد أو القوم
رد المحتار علي الدر المختار يصح البيع بشرط يقتضيه العقد كشرط الملك للمشتري وشرط حبس المبيع لإستيفاء الثمن الفتاوي الهندية الشرط الذي يشترط في البيع لا يخلو إما ان كان شرطا يقتضية العقد و معناه أن يجب بالعقد من غير شرط فإنه لا يوجب فساد العقد كشرط تسليم المبيع علي البايع و شرط تسليم الثمن علي المشتري	المادة:١٨٦ البيع بشرط يقتضية العقد صحيح و الشرط معتبر، لو باع بشرط أن يحبس المبيع إلي أن يقبض الثمن فهذا الشرط لا يضر في البيع بل هو بيان لمقتضي العقد
المحيط البرهاني ان كان الشرط شرطا لا يلايم العقد إلا أن الشرع ورد بجوازه كالخيار و الإجل أو لم يرد الشرع بجوازه ولكنه متعارف كما إذا اشتري فعلا و شراكا علي أن يحدوه البايع جاز البيع استحسانا الفتاوي التاتارخانية وإن اشتري حرما علي أن يخرز البايع له خفا أو قلنسوة يشرط أن يبطن له البايع من عنده فالبيع جائز للتعامل محيط السرخسي لو اشتري خفا به خرق علي أن يخرزه البائع أو ثوبا من خلقاني وبه خرق علي أن يخيطه و يجعل عليه الرقعة جاز الفتاوي الظهيرية لو اشتري كرباسا بشرط القطع و الخياطة لا يجوز لعدم العرف	المادة:١٨٨ البيع بشرط متعارف يعني الشرط المرعي في عرف البلدة صحيح و الشرط معتبر، مثلا لو باع الفروة علي أن يخيط بها الظهارة أو القفل علي أن يسعره في الباب أو الثوب علي أن يرقعه يصح البيع و يلزم البائع الوفاء بهذه الشروط

[2] These tables show how the *Mecelle* Articles follow the legal norms of the late Ḥanafī tradition.

مجمع الانهر في شرح ملتقي الأبحر يصح (البيع) بشرط لا يقتضيه العقد و لا نفع فيه لأحد من المتعاقدين و المبيع المستحق للنفع بأن يكون أدميا كشرط أن لا يبيع الدابة المبيعة ...لأن هذا الشرط لا يؤدي إلي النزاع ولا يحتمل الربو لعدم النفع الزائد فيصح العقد و يبطل الشرط هو ظاهر من المذهب و عن أبي يوسف أنه يفسد البيع	المادة:**١٨٩** البيع بشرط ليس فيه نفع لأحد العاقدين يصح و الشرط لغو، متلا بيع الحيوان علي أن لا يبيعه المشتري لأخر أو علي شرط أن يرسله في المرعي صحيح و الشرط لغو
رد المحتار علي الدر المختار لا ينعقد بيع المعدوم بيع الثمار قبل الظهور لا يصح اتفاقا مجمع الأنهر في شرح ملتقي الأبحر اتفاق كلمتهم أن بيع المعدوم لا يصح	المادة:**٢٠٥** بيع المعدوم باطل فيبطل بيع ثمرة لم تبرز أصلا
المبسوط لو باع الثمار وقد ظهر البعض دون البعض فظاهر المذهب أنه لا يصح وكان شمس الأئمة الحلواني و الفضلي يفتيان بالجواز في الثمار و الباذنجان استحسانا لتعامل الناس و الاصح أنه لا يجوز تبيان الحقايق لو برز بعضها دون بعض لا يصح في ظاهر المذهب و صححة السرخسي و أفتي الحلواني بالجواز لو الخارج أكثر	المادة:**٢٠٧** ما تتلاحق أفراده يعني أن مالا يبرز دفعة واحدة بل شيئا بعد شئ كالفواكه و الازهار و الورق و الخضروات إذا كان برز بعضها يصح بيع ما سيبرز مع ما برز تبعا له بصفقة واحدة

II. Hire & Leasing (*al-Ijāra*)

Ḥanafī Fiqh Sources	The *Mecelle* Articles
كتاب الإجارة	كتاب الإجارة
مجمع الأنهر شرح ملتقي الأبحر ألإجارة في اللغة اسم للاجرة وهي ما يستحق علي عمل الخير	المادة:٤٠٥ الإجارة في اللغة بمعني الأجرة وقد استعملت في معني الإيجار أيضا وفي اصطلاح الفقهاء بمعني بيع المنفعة المعلومة في مقابلة عوض معلوم
رد المحتار علي الدر المختار أما ركنها فالإيجاب و القبول بالألفاظ الموضوعة في عقد الإجارة مجمع الأنهر في شرح ملتقي الأبحر	المادة:٤٣٣ تنعقد الإجارة بالإيجاب و القبول كالبيع
مجامع الحقائق للخادمي الكتابة المرسومة كالنطق	المادة:٤٣٦ كما أن الإجارة تنعقد بالمشافهة كذلك تنعقد بالمكاتبة وبإشارة الأخرس المعروفة
جامع الفصولين تنعقد الإجارة بالتعاطي وفي غير الطويل تنعقد الإجارة بالتعاطي	المادة:٤٣٧ تنعقد الإجارة بالتعاطي أيضا كالركوب في باخرة المسافرين و زوارق الموانى و دواب الكراء من دون مقاولة فإن كانت الأجرة معلومة اعطيت و إلا فأجرة المثل
رد المحتار علي الدر المختار المتولي و الوصي لو أجر بدون أجر المثل يلزم المستأجر تمام أجر المثل وأنه يعمل بالأنفع للوقف	المادة:٤٤١ الإجارة بعد ما انعقدت صحيحة لا يسوغ للاجر فسخها بضم الخارج علي الاجرة لكن لو أجر الوصي أو المتولي عقار اليتيم أو الوقف بأنقص من أجرة المثل تكون الإجارة فاسدة و يلزم أجرة المثل
رد المحتار علي الدر المختار وإذا ملك المستأجر العين المستأجرة بميراث أو هبة أو نحو ذلك بطلت الإجارة	المادة٤٤٢ لو ملك المستأجر عين المأجوربإرث أو هبة يزول حكم الإجارة
رد المحتار علي الدر المختار أن يكون المعقود عليه وهو المنفعة معلومة علما يمنع المنازعة فإن كان مجهولا جهالة مفضية إلي المنازعة يمنع صحة العقد وإلا فلا	المادة:٤٥١ يشترط في الإجارة أن تكون المنفعة معلومة بوجه يكون مانعا للمنازعة
رد المحتار علي الدر المختار فالفاسد يجب فيه أجر المثل ولا يزاد علي المسمي إن سمي في العقد مالا معلوما و إن لم يسم يجب أجر المثل بالغا ما بلغ	المادة:٤٦١ الإجارة الفاسدة نافذة لكن الاجر يملك فيها أجر المثل ولا يملك الاجر المسمي

III. Financial Liabilities (*ḍamānāt*)

Ḥanafī Fiqh Sources	The *Mecelle* Articles
بيان الضمانات	بيان الضمانات
رد المحتار علي الدر المختار منافع الغصب لاتضمن إلا في ثلاث مال اليتيم ومال الوقف و المعد للاستغلال جامع الفصولين منافع الغصب لاتضمن إلا في ثلاث مال اليتيم ومال الوقف و المعد للاستغلال بهجة الفتاوي منافع الغصب لاتضمن إلا في ثلاث مال اليتيم ومال الوقف و المعد للاستغلال	المادة: ٥٩٦ لو استعمل أحد مالا بدون إذن صاحبة فهو من قبيل الغاصب لايلزمه أداء منافعه ولكن إن كان مال وقف أو مال يتيم فعلي كل حال يلزم أجر المثل وان كان معد للاستغلال فعلي أن لايكون بتأويل ملك عقد يلزم ضمان المنفعة يعني أجر المثل. مثلا لو سكن أحد في دار أخر مدة بدون عقد إجارة لا تلزمة الاجرة لكن إن كانت الدار وقفا أو مال يتيم فعلي كل حال يعني إن كان ثم تأويل ملك وعقد او لم يكن يلزم أجر مثل المدة التي سكنها، وكذلك إن كانت دار كراء ولم يكن ثم تأويل ملك وعقد يلزم أجر المثل وكذا لو استعمل أحد دابة الكراء بدون إذن صاحبها يلزم أجر المثل
الفتاوي البزازية لأنه أمين فلا يضمن إلا بما ضمن به الأمين و المودوع وهو التعدي و التقصير الفتاوي الانقروية لايضمن إلا بما هلك بصنعه أو تقصيره في حفظة تنوير الأبصار لايضمن بالهلاك من غير تعد	المادة: ٦٠١ لا يلزم الضمان إذا تلف المأجور في يد المستأجر ما لم يكن لتقصيره أو تعديه أو مخالفته لمأذونيته
الفتاوي التاتارخانية و تنقيح الفتاوي الحامديه سئل في المستأجر إذا ساق الدابه سوقا شديدا غير معتاد وعنف في السير حتي هلكت بغير إذن صاحبها ولاوجه شرعي فهل يضمن قيمتها، الجواب نعم لم قال في الفتاوي العتابية فإن عنف في السير ضمن إجماعا	المادة: ٦٠٢ يلزم الضمان علي المستأجر لو تلف المأجور او طرأ علي قيمته نقصان بتعديه مثلا لو ضرب المستأجر دابة الكراء فماتت منه أو ساقها بعنف وشدة فهلكت لزمه ضمان قيمتها
الفتاوي الهندية لو استأجر ثوبا ليلبسه مدة معلومة فليس له أن يلبس غيره للتفاوت في اللبس و ينصرف إلي اللبس المعتاد في النهار وأول الليل إلي وقت النوم و أخره عند القيام لا ينام فيه بالليل وإن فعل وتخرق ضمن وإن سلم حين جاء وقت لبسه برئ عن الضمان	المادة: ٦٠٣ حركة المستأجر علي خلاف المعتاد تعد ويضمن الضرر و الخسار الذي يتولد منها، مثلا لو استعمل الالبسة التي استكراها علي خلاف عادة الناس وبليت يضمن كذلك لو احترقت الدار المأجورة بظهور حريق فيها بسبب اشعال المستأجر النار أزيد من العادة و سائر الناس يضمن
تنقيح الفتاوي الحامديدية حمل حديدا بدل الحنطة ضمن درر الحكام شرح غرر الاحكام وان سمي في الحمل نوعا وقدرا ككريرله أي للمستأجر حمل مثله في الضرر وإن تساويا وزنا والأخف كالسمسم و الشعير لا الاضراركالملح و الحديد حتي إذا استأجرها ليحمل عليها قطنا سماء فليس له أن يحمل عليها مثل وزنه حديدا لانه ربما يكون أضر بالدابه لأن الحديد يجتمع في موضع من ظهرها و القطن ينبسط علي ظهرها	المادة: ٦٠٥ مخالفة المستأجر مأذونيتة بالتجاوز إلي ما فوق المشروط توجب الضمان بالعدول إلي ما دون المشروط أو مثله لا توجبة، مثلا لو حمل المستأجر خمسين أقة حديد علي دابة استكراها لان يحملها خمسين أقة سمن وعطبت يضمن واما لو حملها حمولة مساوية للدهن في المضرة أو أخف وعطبت لا يضمن

VI. Pledge (*al-Rahn*)

The *Mecelle* Articles	Ḥanafī Fiqh Sources
كتاب الرهن	كتاب الرهن
المادة: ٧٠١ الرهن حبس مال و توقيفة في مقابلة حق يمكن استيفاؤه منه و يسمي ذلك المال مرهونا و رهنا	مجمع الأنهر في شرح ملتقي الأبحر حبس شئ بحق يمكن استيفاؤه منه
المادة: ٧٠٩ يشترط أن يكون الرهن صالحا للبيع فيلزم أن يكون موجودا و مالا متقوما و مقدور التسليم في وقت الرهن	رد المحتار علي الدر المختار الرهن مال
المادة: ٧١٠ يشترط أن يكون مقابل الرهن مالا مضمونا فيجوز أخذ الرهن لإجل مال مغصوب ولا يصح أخذ الرهن لأجل مال هو أمانة	مجمع الأنهر في شرح ملتقي الأبحر يراد بالحق هنا ما يعم الدين الواجب حقيقة و هو الظاهر كالدين في الذمة أو حكما كالأعيان المضمونة بنفسها مثل المغصوب بخلاف الأعيان غير المضمونة كالودائع رد المحتار علي الدر المختار
المادة: ٧١٥ الزائد الذي يتولد من المرهون يكون مرهونا مع الأصل	مجمع الأنهرفي شرح ملتقي الأبحر نماء الرهن للراهن ويكون رهنا مع الأصل
المادة: ٧١٨ للراهن و المرتهن أن يفسخا الرهن باتفاقهما لكن للمرتهن حبس الرهن و امساكه إلي أن يستوفي ماله في ذمة الراهن بعد الفسخ	مجمع الأنهرفي شرح ملتقي الأبحر للمرتهن أن يحبس الرهن بعد فسخ عقده اي عقد الرهن حتي يقبض دينه إلا وقت أن يراه أي المرتهن عن الدين لأن الرهن لا يبطله بمجرد التفاسخ بل يرده علي الراهن بطريق الفسخ فإنه يبقي ما بقي القبض و الدين
المادة: ٧٢٥ كل من الراهن و المرتهن إذا صرف علي الرهن ماليس عليه بدون إذن الأخر يكون متبرعا وليس له أن يطالب الأخر بما صرفه	رد المحتار علي الدر المختار كل ما يجب علي أحدهما فأداء الأخر كان متبرعا إلا أن يأمره القاضي به ويجعله دينا علي الاخر فحينئذ يرجع عليه

V. Deposit for Safe-Keeping (*al-Wadīʿa*)

Ḥanafī Fiqh Sources	The *Mecelle* Articles
كتاب الوديعة	كتاب الوديعة
مجمع الأنهرفي شرح ملتقي الأبحر الوديعة ما يترك عند الامين للحفظ مالا كان أو غيره	المادة:٧٦٣ الوديعة هي المال الذي يوضع عند شخص لأجل الحفظ
درر الحكام شرح غرر الأحكام شرطها كون المال قابلا لاثبات اليد عليه لأن الايداع عقد استحفاظ و حفظ الشئ بدون إثبات اليد عليه محال، فإيداع الطير في الهواء و المال الساقط في البحرغير صحيح البحر الرائق شرح كنز الدقائق حكم الوديعة كون المال أمانة عند المستودع مع وجوب الحفظ و الأداء عند الطلب	المادة:٧٧٥ يشترط كون الوديعة قابلة لوضع اليد عليها و صالحة للقبض فلا يصح إيداع الطير في الهواء
	المادة:٧٧٤ لكل من المودع و المستودع فسخ عقد الإيداع متي شاء
مجمع الأنهرفي شرح ملتقي الأبحر الوديعة أمانه فلا يضمن المودع الوديعة بغير تعد بالهلاك سواء أمكن التحرز عنه أو لا الفتاوي الانقروية الوديعة أمانة لا تضمن إلا بالتعدي البحر الرائق شرح كنز الدقائق أمانة فلا تضمن بالهلاك سواء أمكن التحرز عنه أو لا هلك معها للمودع شيء أو لا تغييرا	المادة:٧٧٧ الوديعة أمانة في يد الوديع بناء عليه إذا هلكت بلا تعد في المستودع و بدون صنعه و تقصيرة في الحفظ لا يلزم الضمان إلا إذا كان الإيداع بإجرة علي حفظ الوديعة فهلكت أو ضاعت بسبب يمكن التحرز منه لزم المستودع ضمانها. مثلا لو وقعت الساعة المودعة في يد الوديع بلا صنعة فانكسرت لا يلزم الضمان ، أما لو وطئت الساعة بالرجل أو وقع من اليد عليها شئ فانكسرت لزم الضمان كذلك إذا أودع رجل ماله عند اخر واعطاه أجرة علي حفظه فضاع المال بسبب يمكن التحرز منه كالسرقة يلزم المستودع الضمان
الفتاوي الانقروية المتعدي هو الذي يفعل بالوديعة ما لا يرضي به المودع	المادة:٧٧٩ فعل ما لا يرضي به المودع في حق الوديعة تعد في الفاعل
رد المحتار علي الدر المختار منافع الوديعة لصاحبها.	المادة:٧٩٨ منافع الوديعة لصاحبها. مثلا نتاج حيوان الوديعة أي فلوه و لبنة و شعرة لصاحب الحيوان
تنقيح الفتاوي الحامدية وإن مات وصارت دينا فإن كانت من ذوات الأمثال وجب مثلها وإلا فقيمتها	المادة:٨٠٣ الوديعة إذا لزم ضمانها فإن كانت من المثليات تضمن بمثلها وإن كانت من القيميات تضمن بقيمتها يوم لزوم الضمان

IV. Trusts and Trusteeship (*al-ʿĀriya*)

The *Mecelle* Articles	Ḥanafī Fiqh Sources
كتاب العارية	كتاب العارية
المادة:٧٦٥ العارية هي المال الذي تملك منفعته لأخر مجانا أي بلا بدل و يسمي معارا و مستعارا	مجمع الانهر في شرح ملتقي الأبحر العارية هي تمليك منفعة بلا بدل رد المحتار علي الدر المختار تمليك المنافع مجانا
المادة:٨٠٤ الإعارة تنعقد بالإيجاب و القبول وبالتعاطي	رد المحتار علي الدر المختار أفاد بالتمليك لزوم الإيجاب والقبول ولو فعلا أي كالتعاطي في القهستاني حاشية الطحطاوي علي الدر المختار عقد التبرع إنما يتوقف علي الايجاب و القبول ، و القبول ليس بشرط عند أصحابنا استحسانا ، ولو فعلا كالتعاطي كما في القهستاني
المادة:٨٠٥ سكوت المعير لا يعد قبولا، فلو طلب شخص من اخر إعارة شئ فسكت صاحب ذلك الشئ ثم أخذه المستعير كان غاصبا	رد المحتار علي الدر المختار ولهذا قال في القبول صريحا غير شرط بخلاف الإيجاب التتارخانية : إن الإعارة لا تثبت بالسكوت
المادة:٨٠٦ للمعير أن يرجع عن الإعارة متي شاء	مجمع الأنهر في شرح ملتقي الأبحر للمعير أن يرجع عن الإعارة متي شاء رد المحتار علي الدر المختار وله أن يرجع متى شاء لما تقرر أنها غير لازمة المحيط البرهاني وللمعير أن يرجع فيها متي شاء
المادة:٨٠٧ تنفسخ الإعارة بموت المعير و المستعير	المحيط البرهاني و تبطل بموت أحدهما أيهما مات
المادة:٨١٣ المستعير يملك منفعة العارية بدون بدل فليس للمعير أن يطلب من المستعير أجرة بعد الإستعمال	تنوير الأبصار العارية تمليك المنافع مجانا الفتاوي الهندية تمليك المنافع للمستعير بغير العوض و ما هو معلق بالمنفعة عرفا و عادة

حاشية الطحطاوي فتاوي الأنقروي العارية أمانة في يده إذا هلكت من غير تعد لا يضمن، لو ضرب المستعير الدابة أو كبحها أو ركض ضمن عنده خلافا لهما ، ولو استعار دابة إلي موضع فسلك لها طريقا ليس بالجادة ضمن رد المحتار علي الدر المختار ولا تضمن بالهلاك من غير تعد ولو استعار ذهبا فقلده صبيا فسرق الذهب من الصبي فإن كان الصبي يضبط حفظ ما عليه من اللباس لم يضمن وإلا ضمن لأنه إعارة والمستعير يملكها	المادة: ٨١٤ إذا حصل من المستعير تعد أو تقصير بحق العارية ثم هلكت أو نقصت قيمتها فبأي سبب كان الهلاك أو النقص يلزم المستعير الضمان. مثلا إذا ذهب المستعير بالدابة المعارة إلي محل مسافته يومان في يوم واحد فتلفت تلك الدابة أو هزلت و نقصت قيمتها لزم الضمان و كذا لو استعار دابة ليذهب بها إلي محل معين فتجاوز بها ذلك المحل ثم هلكت الدابة حتف أنفها لزم الضمان و كذلك إذا استعار إنسان حليا فوضعه علي صبي و تركه بدون أن يكون عند الصبي من يحفظه فسرق الحلي، فإذا كان الصبي قادر علي حفظ الأشياء التي عليه لا يلزم الضمان ، و إن لم يكن قادرا لزم المستعير الضمان

VII. Gift Giving (*al-Hiba*)

Ḥanafī Fiqh Sources	The *Mecelle* Articles
كتاب الهبة	كتاب الهبة
مجمع الانهرفي شرح ملتقي الابحر هي تمليك عين بلا عوض رد المحتارعلي الدر المختار هي تمليك العين مجانا أي بلا عوض	المادة: ٨٣٣ الهبة هي تملك مال لاخر بلا عوض ، و يقال لفاعله واهب و لذلك المال الموهوب و لمن يقبله موهوب له ، والايهاب قبول الهبة
مجمع الانهر في شرح ملتقي الأبحر وتصح بإيجاب و قبول و تتم بالقبض الكامل رد المحتارعلي الدر المختار و شرطها في الموهوب أن يكون مقبوضا و ركنها الايجاب والقبول لايشترط رد المحتار علي الدر المختار و تتم الهبة بالقبض الكامل	المادة: ٨٣٧ تنعقد الهبة بالايجاب و تتم بالقبض
درر الحكام في شرح غرر الاحكام و تصح بإيجاب كوهبت فإنه صريح فيها و نحلت أيضا كذلك يقال نحلة كذا أي أعطاه إياه بطيب نفسه بلا عوض و كذا اعطيتك وبعض ألفاظ في معني التمليك مثل واعمرتك	المادة: ٨٣٨ الايجاب في الهبة هو الألفاظ المستعملة في معني تمليك المال مجانا كأكرمت ووهبت و أهديت و التعبيرات التي تدل علي التمليك مجانا ايجاب للهبة أيضا كإعطاء الزوج زوجتة قرطا أو حليا و قوله لها خذي هذا وعلقيه

رد المحتار علي الدر المختار و تصح بإيجاب كوهبت و نحلت و أطعمتك هذا الطعام، وحاصلة : أن اللفظ إن أنبأ عن تملك الرقبة فهبة	
فتاوي قاضيخان إذا قال رجل لصاحب الثوب أعطينه فقال اعطيتك ،عن محمد أنها تكون هبة البحر الرائق شرح كنز الدقائق لأن جوازه باعتبار الرضا ، وقد وجد ، وقد ويلزم البيع بالتعاطي بناه في الهداية على أن المعتبر في هذه العقود هو المعنى والإشارة إلى العقود التمليكية مثل الهبة	المادة: ٨٣٩ تنعقد الهبة بالتعاطي أيضا
رد المحتار علي الدر المختار في كالنكاح والخلع والهبة والرهن ونحوها ، فإن الوكيل فيها كالرسول	المادة: ٨٤٠ الإرسال و القبض في الهبة و الصدقة يقوم مقام الإيجاب و القبول لفظا
فتاوي قاضيخان أذا أكرهت علي الهبة فوهبت لا تصح و يسمع دعواها بدائع الصنائع في ترتيب الشرائع الإكراه على الهبة يوجب فسادها كالإكراه على البيع المبسوط الإكراه على الهبة إكراها على التسليم ، ثم بسبب الإكراه تفسد الهبة	المادة: ٨٦٠ يلزم في الهبة رضاء الواهب فلا تصح الهبة التي وقعت بالجبر و الإكراه
رد المحتار علي الدر المختار يصح الرجوع في الهبة بعد القبض مع انتفاء مانعه مجمع الأنهر في شرح ملتقي الأبحر يصح الرجوع في الهبة بعد القبض كلا أو بعضا رد المحتار علي الدر المختار وإذا رجع أحدهما بقضاء أو رضا كان فسخا لعقد الهبة من الأصل وإعادة لملكة القديم لاهبة الواهب	المادة: ٨٦٤ للواهب أن يرجع من الهبة و الهدية بعد القبض برضا الموهوب له و ان لم يرض الموهوب له راجع الواهب الحاكم و للحاكم فسخ الهبة و ان لم يكن ثمت مانع من موانع الرجوع
رد المحتار علي الدر المختار ولا يصح الرجوع إلا بتراضيهما أو بحكم الحاكم فتاوي قاضيخان رجل وهب لرجل ثوبا فسلمه إليه ثم اختلسة منه فاستهلكة ضمن الواهب قيمة الثوب للموهوب له لأن الرجوع في الهبة لايكون إلا بقضاء أو رضا	المادة: ٨٦٥ لو استرد الواهب الموهوب بعد القبض بدون حكم الحاكم و قضائه و بدون رضي الموهوب له يكون غاصبا و بهذه الصورة لو تلف أو ضاع في يده يكون ضامنا

حاشية الطحطاوي علي الدر المختار ولا يصح الرجوع إلا بتراضيهما او بحكم الحاكم فلو استردها بغير قضاء ولا رضي كان غاصبا حتي لو هلكت في يده يضمن قيمتها للموهوب له	
مجمع الأنهر في شرح ملتقي الأبحر الزوجية مانعة من الرجوع لأن المقصود فيها الصلة رد المحتار علي الدر المختار الزوجية تمنع من الرجوع في الهبة فتاوي قاضيخان إذا وهب أحد الزوجين لصاحبه لا يرجع في الهبة و إن انقطع النكاح بينهما	المادة:٨٦٧ لو وهب كل من الزوج و الزوجة صاحبه شيئا حال كون الزوجية قائمة بينهما فبعد التسليم ليس له الرجوع

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