The Other Averroes: Revealed Law and the Craft of Juristic Disagreement

by

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Department for the Study of Religion
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Abstract

The role of Abū l-Walīd Ibn Rushd (d. 595/1198) in the Western Medieval intellectual tradition has been well documented. Of equal recognition is the prevalent interest in his philosophy which has dominated his study in the West since the earliest attempts at translating his commentaries into Latin less than twenty years after he died. In this dissertation, I explore a significant, though less familiar, side of Ibn Rushd’s intellectual life; namely, his legal writings. Through a systematic and topical approach, I develop an in-depth study of his Bidāyat al-Mujtahid (The Jurist’s Primer). I investigate his method of legal analysis and synthesis and pay special attention to his account of the causes of juristic disagreement (asbāb al-khilāf). I argue that the Bidāya is a unique work with which Ibn Rushd sought to substantiate what he, as a young scholar, had envisioned to be the best model of engaging revealed law for legal practice; a model that cuts across different schools’ legal hermeneutics and reconciles jurists’ disagreements to establish legal unity within legal diversity. I conclude that Ibn Rushd was a scholar of imposing height in law, just as he was in philosophy, and his Bidāyat al-Mujtahid is a rich source for several practical views on issues relevant to our time, therefore, it deserves more scholarly attention.
# TABLE OF CONTENTS

Acknowledgments .................................................................................................................................................. v

Introduction .......................................................................................................................................................... 1

Chapter One: Islamic Legal Pluralism (*Khilafl*): Origins and Development

1 Modern Western Scholarship of Islamic Legal Pluralism................................................................. 10

2 Are “*Khilafl*” and “*Ikhtilaf*” Different Genres?.............................................................. 13

3 The History of *Fiqh* and *Khilafl* in Ibn Khaldūn’s *Muqaddima*............................................. 22

4 A History of *Khilafl* through its Major Writings................................................................. 39

Chapter Two: Ibn Rushd Jurist: *Bidāyat al-Mujtahid wa Kifāyat al-Muqtasid*

1 Ibn Rushd Jurist: Teachers, Students, and Influence................................................................. 44

2 *Bidāyat al-Mujtahid* in Modern Western Scholarship ......................................................... 56

3 *Bidāyat al-Mujtahid*: Title, Purpose, Introduction ............................................................... 59

4 *Bidāyat al-Mujtahid*’s Scholarly Sources.................................................................................. 76

Chapter Three: Law and Disagreement in *Bidāyat al-Mujtahid*: Questions of Method

1 *Fiqh* in Ibn Rushd’s Theory of Knowledge.................................................................................... 81

2 The Structure of Legal Synthesis in *Bidāyat al-Mujtahid*....................................................... 84

3 The *Bidāya* between Legal Formalism and Functionalism.................................................... 97

4 The *Bidāya* as a Functional Study of Islamic Law............................................................... 102
Chapter Four: Language as the Main Source of Disagreement (*Asbāb al-Khilāf*)

1. The Intricate Relationship between Revealed Law and Language ........................................ 115
2. *Asbāb al-Khilāf* in *Bidāyat al-Mujtahid*: Context and Structure ........................................ 121
3. Indicant-Based Causes of Juristic Disagreement .................................................................... 125
4. Indication-Based Causes of Juristic Disagreement ................................................................. 141

Chapter Five: Ibn Rushd at the Crossroad of the *Sharīʿa* and *Falsafa*

1. The Philosophical Division of Knowledge in Ibn Rushd’s *Darūrī fī Uṣūl al-Fiqh* ... 168
2. Vestige of Reform ..................................................................................................................... 173
3. Morality at the Intersection of the *Sharīʿa* and *Falsafa* ...................................................... 191
4. Revealed Law, Ethics and Politics in Ibn Rushd’s Political Writings ................................. 204

Conclusion ................................................................................................................................... 215

Appendix One: The Lexical Usage of “Khilāf” and “Ikhtilāf” .................................................... 220

Appendix Two: Ibn Rushd’s Preamble to *Bidāyat al-Mujtahid* ................................................ 230

Appendix Three: Does Little Impurity Soil a Small Amount of Water? ................................. 240

Appendix Four: Ibn Rushd’s Conclusion to *Bidāyat al-Mujtahid* ............................................ 249

Bibliography .................................................................................................................................. 252
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The idea of this research sparked in the summer of 2011 at the Pontifical Institute of Mediaeval Studies library while developing an itinerary of the works and studies of Abū al-Walīd Ibn Rushd (d. 595/1198). What was a marginal remark on the lack of studies on Ibn Rushd as jurist and legal scholar soon marked the beginning of a six-year long journey into the complex world of his legal thought. In this journey, I have benefited vastly and in a variety of ways from the unwavering support of several outstanding scholars, colleagues and friends.

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dissertation.
Abū l-Walīd Muḥammad b. Aḥmad Ibn Rushd (520-595 / 1126-1198), known better to the West by the Latinized name Averroes, was one of the most important and influential Muslim figures of sixth/twelfth century Iberia. His legacy in the West has been his philosophy. His commentaries on Aristotle’s corpus had earned him praise from some of the most renowned medieval Christian scholars. For William of Auvergne (d. 1249 CE), Ibn Rushd was “the most noble philosopher,” for Thomas Aquinas (d. 1274 CE), he was “the Commentator,” and for Dante (d. 1321 CE), he was “the one who made the Commentaries.”¹ The philosophical teachings of Ibn Rushd inspired and made the backbone of the school of Latin Averroism flourished in Paris and Padua, Italy.² Ibn Rushd’s reputation as the Commentator persisted all through the fourteenth, fifteenth and sixteenth centuries, despite intemperate criticism —sometimes from the same people who flattered him— which culminated in condemning him and his work.

Today, Ibn Rushd’s legacy as commentator and philosopher continues to shape his study. Since the publication of Ernest Renan’s *Averroès et l’Averroïsme* over a century ago,³ scholars have shown special interest in different aspects of Ibn Rushd’s philosophy, including physics, metaphysics, politics, psychology, logic and philosophical theology. At the same time, however, other key aspects of his intellectual labor have not received the attention they deserve, one of the

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¹ Harry Wolfson, “The Twice-Revealed Averroes,” *Speculum*, 36-3 (1961): 373-392, esp., p.374. See his reference at the opening of the article to the beginnings of the European movement of translating Arabic philosophy books. Wolfson mentions Michael Scot (d. 1232), Hermann Alemannus (d. 1272) and William of Luna as three among the first to translate Ibn Rushd’s philosophical commentaries under the patronage of Frederick II (d. 1250).


most important of which is his legal work. Because little is known of his *Bidāyat al-Mujtahid* (*The Jurist’s Primer*) and *Ḍarūrī fī Uṣūl al-Fiqh* (*The Essentials of Legal Theory*), for example, their value has been often misconceived.⁴ Even Roger Arnaldez, one of the earliest scholars to underline the role of Ibn Rushd as jurist and legal scholar, grounded his survey of the *Bidāya* in Averroes: *A Rationalist in Islam* entirely in Robert Brunschvig’s essay, “Averroès Juriste.”⁵ Oliver Leaman, on one occasion, introduced the *Bidāya* as a standard Mālikī text “so orthodox” that it “led some commentators to doubt that Averroes even wrote it.”⁶ He anticipated that the *Bidāya*’s authenticity was doubted because Ibn Rushd defends analogical reasoning (*qiyās*) in *Faṣl al-Maqāl*,⁷ whereas he confines to tradition in the *Bidāya*. As will be seen, the *Bidāya* is a genuine work of Ibn Rushd, it is not Mālikī-law centered, and it does admit *qiyās* as a way of legal reasoning.

Other scholars, while affirmed Ibn Rushd’s advocacy of *ijtihād* and *qiyās* in the *Bidāya*, attributed it to the influence of philosophy and logic, and read his support of *ijtihād* and *qiyās* as proof of his “rationalism” and a “rationalistic” aspect of his legal thought.⁸ Mohammed Arkoun went a step further and described the *Bidāya* as an attempt at subjugating Mālikī law to philosophy

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and its rational methods. Other times, it contended that Ibn Rushd endowed his legal views in the 
Bidāya with a “philosophical spirit” (rūḥ al-falsafa) and his appeal to qiyās and preponderance 
(tarjīḥ) is read as a desire to merge rational methods in Fiqh. While there is no problem calling Ibn Rushd’s jurisprudence “rationalistic,” in fact, this is the proper way to describe certain aspects of his legal work, the problem is to conceive of it as a “philosophical” endeavor. The expression “rationalistic” (ʿaqlī) should not raise serious concern if conceived of within the limit of Muslim jurists’ reception of the dichotomy of “ʿaql” and “naql.” They associated the former with various ways of analysis governed by reason and the demand of practical reality, be it qiyās, tarjīḥ or other tools of legal reasoning, such as istihsān and istiṣlāḥ. They attributed the latter to legal knowledge obtained from and depends almost entirely on tradition.

I take the difference between falsafī and ʿaqlī in the context of Ibn Rushd’s jurisprudence seriously in this dissertation. The question I ask and based on which answer I concluded that the two concepts should not be conflated is: would have Ibn Rushd called any part of his legal work philosophical? The answer is most likely no; mainly, because falsafa had, up to his age, been understood by scholars (philosophers and non-philosophers) to be a discipline grounded in a very different kind of literature with a different kind of history and authorities attached to it. It is highly unlikely that they thought of it only from within the context that it entails a rational practice as it is often the case today (a philosophical practice could simply mean a rational practice) —since the Muʿtazilites were rationalists, yet, they were not called philosophers by their coreligionists. For this reason alone, I think it is more appropriate not to use the expression “philosophical” to describe Ibn Rushd’s legal labor or any part of it.

It is not that the role of Ibn Rushd in his world, the world of Islam, has not been recognized. It is that little has been said about it, since the direct link he had to this world (i.e., his legal writings)

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have not been explored enough by Western scholars. Ibn Rushd’s place as jurist and legal scholar, it may be observed, has been overshadowed by the emphasis on him as distinguished philosopher and commentator on Aristotle. However, as is well-known and despite the fact that he did not write prolifically about Islamic law to the degree he commented on Aristotle, Ibn Rushd served as Judge (Qāḍī) in Sevilla and Cordoba and held the highest legal office under the Almohad dynasty, Chief Judge (Qāḍī al-Quḍāt). As a legal scholar, as it will be established in the course of this dissertation, Ibn Rushd attracted a large group of students and his Ḍarūrī fī Uṣūl al-Fiqh was widely circulated. His Bidāyat al-Mujtahid was described by key Muslim scholars and biographers as original, unique and of the highest quality.

It is this “other Averroes” that this dissertation strives to excavate; Ibn Rushd the jurist and legal scholar. It is my main goal to examine the legal side of Ibn Rushd’s life, works and influence, develop an rigorous study of Bidāyat al-Mujtahid, and situate it within the larger history of Islamic legal pluralism (khilāf, or juristic disagreement). Since the Bidāya is a work of khilāf and this is a genre also about which little has been written by Western scholars, I seek to provide a survey of the history of khilāf and outline its principle features and methods. I argue that the Bidāya is not a mere collection of controversial legal questions as has been thought. The Bidāya is Ibn Rushd’s serious attempt at materializing what he conceived of about two decades before he wrote it as the most complete way of engaging Islamic law in its totality. The Bidāya fulfills Ibn Rushd’s view of the legal study in its highest and most sophisticated form; a study capable of transforming jurists’ disputes from being a site of contention into a systematic craft which can institute legal unity within legal plurality and diversity.

An important question that I raise in this dissertation is: is it possible to approach Ibn Rushd as both philosopher and legal scholar? To put it differently, is it possible to reconcile Averroes the philosopher and Ibn Rushd the jurist? I am aware of my earlier remark that we should not call any part of his legal labor philosophical. What I seek to investigate is if Ibn Rushd examined revealed law against a platform or ground of which he conceived as shared with philosophy, for example, with respect to methods and techniques of analysis. Most attempts at fathoming Ibn Rushd’s views
on revealed law (sharīʿa) have been conducted by scholars interested in his philosophy.\textsuperscript{11} I explore the legal works of Ibn Rushd and examine the extent to which his reading of the role of the law in ancient Greek might have influenced his understanding of the function of the sharīʿa in his own society. To this end, I am interested particularly in his political writings, although I will also draw on the Bidāya for a link it had to his political views of the role of revealed law in society and its ethical goals. I elaborate on this issue in Chapter Five.

My approach to Islamic jurisprudence in this dissertation is predominately systematic and topical; although, it is also diachronic and critical in part. It is diachronic especially in places where I address the historical development of Islamic legal pluralism (khilāf) and Ibn Rushd’s life and work. It is critical in places where I probe the structure of his method of legal synthesis, and reflect on the role he assigns to revealed law in his political writings. Generally, my thesis has been designed to provide an inclusive account of the fundamentals of Ibn Rushd’s system of jurisprudential practice in as much as it is projected in the Ḍarūrī and elaborated in the Bidāya. At the same time, and for the same reason, however, this study does not engage deeply critically with these fundamentals. Ibn Rushd was critical of many aspects of the theory and methodology of Fiqh and khilāf in both the Darūrī and Bidāya; however, my intention is to outline and make clear his reflections on these issues. Also, although my analysis of the Bidāya is intended to be rigorous, I have not sought to cover everything in it.

My main focus in this dissertation is on Sunnism; therefore, most of the works and authors I cite are associated with Sunnī intellectual history. This is not to imply that Shīʿī jurists did not engage the genre of khilāf. Rather, it is for the strict reason that Ibn Rushd wrote entirely from and for the Sunnī legal tradition. Shīʿī works on khilāf circulated as early as the fourth/tenth century, such as the Wājib fī l-Furūḍ al-Lawāzib by Abū l-Ḥasan ʿAlī b. al-Ḥasan al-Masʿūdī (d. 364/957), and many treatises by Abū Ṭalī b. Muḥammad Ibn al-Junayd (d. 385/995) —although, as remarked

by Devin Stewart, the main motive of Shīʿī lawyers was to defend their doctrine against Sunnī’s attempts of delegitimization. Moreover, it will be noticed that I put more focus on Mālikī scholars from Islamic Iberia, despite that the Bidāya is a trans-madhhab legal study of khilāf. This has not been intentional and bears no didactic purpose. The Andalusian authors on whose works I elaborate extensively either had influence on Ibn Rushd, such as Ibn ʿAbd al-Barr (d. 463/1070) and Ibn as-Sīd al-Baṭalyawṣī (d. 521/1127), or were influenced by him, such as Ibn Juzayy (d. 741/1340).

I also do not pursue a specific system of periodization of the history of Fiqh. Although, I identify two major phases of the development of khilāf: before and after the formation of the legal schools. In fidelity of the way history was conceived of by Ibn Rushd and his coreligionists, my division is consistent with the classical distinction between two generations of scholars: the mutaqaddimūn (earlier generation) and mutaʿakhkhirūn (later generation). If we accept Shams ad-Dīn adh-Dhahabī’s (d. 748/1348) dating, we are looking at the turn of the fourth/tenth century as the end of the mutaqaddimūn period and the beginning of the mutaʿakhkhirūn. With a narrow margin, the first phase corresponds to what Wael Hallaq has identified as the formative period of Islamic law, the stage during which the Islamic legal system reached maturation, or, as Hallaq puts it, it “developed to the point at which its constitutive features had acquired an identifiable shape.”

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12 Devin Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Utah: University of Utah Press, 1998), 142-43. The institution of “ʿisma” (the infallible Imam) has, to a large extent, shaped the separate paths that Shīʿī law and Sunnī law have taken. One of their central differences concerns their sources of Islamic law. Sunnīs accept four authoritative sources of the law: the Qurʾān, Sunna, ʿijmāʿ, and qiyās (the latter is not accepted by all schools). Shīʿīs, while admitting the Qurʾān and Sunna (often the Prophet’s reports only), add the pronouncements of the current Imam. See Stewart’s comments on Al-Qāḍī an-Nuʿmān’s *The Disagreements of the Jurists: A Manual of Islamic Legal Theory* (New York and London: New York University Press, 2015), esp., xvi-xvii.


14 Crucial to Hallaq’s designation are the terms “identifiable” and “formation.” With the former, he constrains the evolution of Fiqh during its formation to major characteristics only. With the latter, he names four features which identified the Islamic legal system during this period, including a judicial structure, a positive legal doctrine, a body of legal methodology and hermeneutics, and the doctrinal legal schools. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 3-4.
The second phase, after the formation of the legal schools, spans from the fourth/tenth century until about a century after Ibn Rushd.

The present study consists of five chapters and four appendices. Chapter One presents an overview of the origins and development of juristic disagreement (khilāf) from the inception of Islam until the sixth/twelfth century. It begins with a survey of modern Western scholarship of khilāf and probes whether “khilāf” and “ikhtilāf” are different genres or two names of the same genre. My goal in this chapter is to explain the various ways in which individual disputes in legal matters have grown into a complex systematic science the mastery of which was considered by most legal authorities indispensable for earning the title faqīh (jurist). My discussion is structured in accordance with Ibn Khaldūn’s survey of Islamic jurisprudence in the Muqaddima. I engage in particular with his “Fiqh” and “Khilāfiyyāt” sections and elaborate on the role he ascribes to khilāf as a decisive factor in the development of Islamic law. I draw upon a range of classical legal and biographical sources to expound the events Ibn Khaldūn’s has only sketched.

Chapter Two puts Bidāyat al-Mujtahid in larger historical and disciplinary contexts. The first section is a concise biographical account of Ibn Rushd. It pays close attention to the legal side of his life and work, and visits new sources and reveals new information about his teachers, students and influence. The event of Ibn Rushd’s disgrace (miḥna) is examined for its possible damage on his reputation as jurist and on the subsequent reception of his legal writings. Also in this chapter, I provide a detailed preliminary discussion of the Bidāya. I review the history of its study in western scholarship, determine its scholarly sources, comment upon its methodological introduction, and analyze its title and purpose. I bring attention to the title Ibn Rushd assigned to the book, Bidāyat al-Mujtahid wa Kifāyat al-Muqtaṣid (not wa Nihāyat al-Muqtaṣid), and extend on the difference between “nihāya” and “kifāya” and the implications their confusion might have had on scholars’ understanding and exaggeration of Ibn Rushd as a “protagonist of ḵṭīḥād” and “antagonist of taqlid” as claimed by some scholars.

Chapter Three investigates the methodology of legal analysis and synthesis in Bidāyat al-Mujtahid. Since the question of method is essentially one of “doing,” my purpose is to establish
the techniques and procedures of Ibn Rushd’s systematic study of khilāf. I examine the general structure of his synthesis and explain the various steps through which he derives his conclusions and outweighs the jurists’ contesting opinions. I argue that Ibn Rushd’s approach to legal theory is grounded in functionalism, and identify and explain in this regard three manifestations of the Bidāya’s functionality and practicality. The first is a feature which I call “madhhab-detachment,” through which Ibn Rushd gives priority not to Mālik’s hermeneutics, but to any school’s legal views that are supported by unassailable textual proof (dalīl). The second is his pedagogically instructive style and interest in simplifying the methods of learning. The third is his “realistic” approach to the law, witnessed in his critique of hypothetical and unrealistic legal questions.

Chapter Four enquires into the intricate relationship between revealed law and language in the Bidāya. It focuses on the question of language as the main source of khilāf and engages rigorously with Ibn Rushd’s approach to the causes of juristic disputes (asbāb al-khilāf) at two levels: indicant-based causes (of disputes attributed to scholars’ manipulation of the indicant, the dalīl) and indication-based causes (those returned to their manipulation of the signification of the indicant, the dalāla). At the first level, I examine six circumstances, including Qurʾān readings (qirāʾāt), the rendering of a Qurʾānic text (tafsīr an-naṣṣ), schools’ approval or disapproval of certain types of indicants, problematic ḥadīth-based and qiyās-based indicants, and conflict and preponderance. At the second, I analyze five linguistic relations, including homonymy (ishtirāk), generality/particularity (ʿumūm/khuṣūṣ), literality/non-literality (ḥaqīqa/majāz), the construction of meaning in singular and complex expressions (ifrād/tarkīb), and qualified/unqualified terms (muqayyad/muṭlaq).

Chapter Five explores the crossroad of revealed law (sharīʿa) and philosophy (falsafā) in Ibn Rushd’s political and legal writings. It looks into three areas of reform that Ibn Rushd strived to mend about the study of the law. The first is his epistemological classification of Fiqh and Uṣūl based on a philosophical division of knowledge. The second concerns his inclination to encourage concision and economy in writing, prioritize comprehension over memorization, and emphasize the significance of establishing the universal rules (uṣūl) of substantive legal questions (furūʿ). The
third area pertains to the *sharīʿa* and falsafa’s emphasis on moral excellence as their ultimate goal. Here, I examine focus on Ibn Rushd’s discussion of the role of virtue and law in political life, the *sharīʿa* as a tool for political reform, and the import of his identification of Islamic governance with Plato’s theory of political transformation and the degeneration of regimes in the *Republic*.

Each of the four attached appendices extends a discussion or translation of a specific issue that is central to one of the chapters. Further to my reflection on the question of whether *khilāf* and *ikhtilāf* are different genre in the first chapter, Appendix One offers a detailed account of the premodern lexical usage of “*khilāf*” and “*ikhtilāf*” and its debate in contemporary Arabic legal circles. I conclude, here, that the presumed distinction between *khilāf* and *ikhtilāf* is a pure modern invention. It is for this reason that I have granted myself the liberty to employ both terms interchangeably throughout this dissertation —although I incline toward using *khilāf* more often. I also have allowed myself to navigate freely between various English renditions of *khilāf* and *ikhtilāf*, including such expressions as “legal dispute,” “juristic disagreement,” and “multiplicity and difference of legal opinion.” Appendix Two provides a translation of Ibn Rushd’s preamble to *Bidāyat al-Mujtahid*, on which I comment extensively in the second chapter. Appendix Three presents a translation of Ibn Rushd’s deliberation of the legal question of little impurity mixed with a small amount of water, i.e., if this water is considered pure and capable of purifying other impurities or no. I cite this discussion in the third chapter to explain the general structure of Ibn Rushd’s system of legal synthesis. Appendix Four is a translation of Ibn Rushd’s conclusion to *Bidāyat al-Mujtahid*, which I undertake in the last chapter to talk about the relation of *ḥukm* and *ḥikma* in Ibn Rushd’s emphasis on moral excellence as the highest purpose of revealed law and philosophy.
Chapter 1

**ISLAMIC LEGAL PLURALISM (KHILĀF): ORIGINS AND DEVELOPMENT**

1. Modern Western Scholarship of Islamic Legal Pluralism

The place of difference and multiplicity of legal opinion in Islam has long been acknowledged by modern scholars. One of the first times juristic disagreement (khilāf) was recognized as an independent systemic genre and not mere dispersed individual legal controversies was by Gustav Flügel in a 1861 article on the classes of the Ḥanafī jurists.\(^\text{15}\) His observation, however, is a mere passing reference to Abū Zayd ad-Dabbūsī’s (d. 430/1038) *Taʾsīs an-Naẓar* as the first book on “ʿilm al-khilāf” which he translated as “the science of theological controversy” (wissenschaft der theologischen controverse).\(^\text{16}\) About two decades later, Ignaz Goldziher spoke briefly of khilāf within the context of his discussion about the Zāhīrīs’ legal disagreements and their insignificant impact on the Sunnī tradition.\(^\text{17}\) He defined it as a comparative study of the disagreements of the orthodox schools and urged the need for a comprehensive bibliographical study of khilāf;\(^\text{18}\) a call

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\(^{18}\) Goldziher, *The Zāhīrīs*, 36 (fn. 63). Goldziher appends at the end of his book a brief illustration on the difference between what he called “differences of opinion of the Prophet’s companions” (ikhtilāf as-Ṣaḥāba) and “the science of difference of opinion in the legal schools and their Imāms” (ʿilm al-ikhtilāfāt). See his “Annotation 2,” 210-11.
that was restated by Franz Rosenthal in his 1958 translation of Ibn Khaldūn’s *Muqaddima*, but has not yet been answered.¹⁹

But, the first scholar to put the genre of *khilāf* where it actually belongs, i.e., law and not theology, was Joseph Schacht in *The Origins of Muhammadian Jurisprudence.*²⁰ Schacht drew on *khilāf* as the antithesis of consensus (*ijmāʿ*), consistently using the term “*Ikhtilāf*” and its English equivalent “disagreement.” Schacht also wrote a separate entry on *khilāf* in the second edition of the *Encyclopaedia of Islam*, where he reemphasized the idea of *khilāf* vs. *ijmāʿ*, cited few early works on the topic, and brought attention to recent attempts at mending the gap between Sunnī and Shīʿī traditions.²¹ Schacht’s emphasis on *khilāf* as the antithesis of *ijmāʿ* may be returned to his interest in Shāfīʿī’s *Risāla* and other authoritative works of *Uṣūl*, such as Mālik’s *Muwaṭṭaʾ*, where the topic of *khilāf* was engaged mainly *vis-à-vis* *ijmāʿ*.²²

Schacht’s pioneer work on Shāfīʿī’s *Uṣūl* has inspired few subsequent studies of Shāfīʿī’s reflections on juristic disagreement, including Norman Calder’s “*Ikhtilāf* and *Ijmāʿ* in Shāfīʿī’s *Risāla*,” Qodri Azizy’s “*Ikhtilāf* in Islamic Law with Special Reference to the Shāfīʿī School,”²³ and Kevin Jaques’ *Authority, Conflict, and the Transmission of Diversity in Medieval Islamic Law.*²⁴ The latter is a rigorous study of Ibn Qāḍī Shuhba’s *Ṭabaqāt ash-Shāfīʿīyya* (*The Classes of Shāfīʿī Scholars*) and its role in legitimizing and transmitting disputes within the Shāfīʿī School.

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²² According to Shāfīʿī, knowledge consists of two binary aspects: consensus and disagreement (“*fī l-ʿilm wajhān: al-ijmāʿ wa l-ikhtilāf*”). See, Shāfīʿī, *Risāla*, 16. The *Muwaṭṭaʾ*, as will be explained later, was written with the intention of determining the legal views agreed upon by Medinan scholars from those contested.


Other scholars focused on other authorities’ works on *khilāf*, such as Saghir Masumi’s piece on Abū Ja’far at-Ṭahāwī’s (d. 321/933) *Ikhtilāf al-Fuqahāʾ* (The Jurists’ Disagreements).\(^{25}\) The idea of *khilāf* as the antithesis of *ijmāʿ* has been stressed in few later works, such as *The Rise of Colleges* by George Makdisi.\(^{26}\) Most important about Makdisi’s intervention is his conception of *khilāf* as a scholastic method of learning. His view may be incidental to his broader discussion of the rise of Muslims’ interest in dialectic (*jadal*). Nonetheless, the fact of placing *khilāf* within the framework of law curricula and institutional acquisition of legal knowledge is a fascinating lead which, unfortunately, no one has picked up after him.

Survey studies that undertake the history of *khilāf* across Islamic legal schools are scarce and tend to be brief. Although not quite exactly a survey, John Walbridge’s “*‘Ilm al-Ikhtilāf* and the Institutionalization of Disagreement” is one of few works which strived to engage the subject critically.\(^{27}\) Walbridge explores juristic dispute as a phenomenon and examines the various ways in which the medieval Muslims community could maintain religious unity through a systematic toleration of disagreement. A big portion of his discussion centres around an important question: why Muslim scholars allowed diversity of opinion in sensitive areas of religion that may seem to require uniformity? Generally, despite being primarily concerned with what he calls “*‘ilm al-ikhtilāf*,” his article says little about *ikhtilāf* as “*‘ilm*” (science), i.e., about the history, governing rules and methods of the genre of juristic disagreement. It is Mohammad Kamali’s “The Scope of Diversity and *Ikhtilāf* (Juristic Disagreement) in the Sharīʿa” which provide a more complete overview of these matters about *khilāf*.\(^{28}\)

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Notwithstanding the “pietistic” spirit of Kamali’s paper, it gives one of the most inclusive overviews of the genre of khilāf. It outlines the origin of legal disagreement, its causes (asbāb al-ikhtilāf), etiquette and rules of conduct (adab al-ikhtilāf), and elaborates on two practical legal issues. Kamali also stresses the role of khilāf in the development of Fiqh and the importance of approaching it in light of ijmā’. Drawing upon Shāfi‘ī’s ʿUsūl, he identifies two types of juristic disagreements: praiseworthy (mahmūd) and legally permissible vs. blameworthy (madhmūm) and hence forbidden. He distinguishes the former as “ikhtilāf” and the latter as “khilāf” (I refute this distinction bellow). The emphasis on the practical role of legal disagreement appears also in Muhammad Masud’s essay, “Ikhtilāf al-Fuqahāʾ: Diversity in Fiqh as a Social Construction,” in which he probes the implications of legal disagreements on Muslim family law. Masud reached two main conclusions in this respect. Multiplicity of legal opinion is invaluable for contemporary Muslim family law debates, and it opens different venues for novel ways of the interpretation and reformation of Muslim family laws and practices.

2. Are “Khilāf” and “Ikhtilāf” Different Genres?

The importance of juristic disagreement for Fiqh has been observed by several modern scholars of Islamic law, whether in books where khilāf is a primary focus (Calder, Kamali, and Masud) or secondary (Goldziher, Schacht, and Makdisi). Most scholars, however, employ the terms “khilāf” and “ikhtilāf” inconsistently to entail juristic disagreement. Their inconsistency is emblematic of a serious question that has attracted attention recently, namely, are khilāf and ikhtilāf different genres or simply two names of the same? In Western studies, the only scholar who engaged this question directly may be Kamali, and he does so particularly within the context of his discussion of the unavoidability of disagreement for the practice of ijtihad and his emphasis that not every different legal opinion deserves legal admission. Kamali upholds that a juristic dispute may be


permissible only if it is supported by valid proofs and does not provide impractical injunctions. From this, he discerns two types of juristic disagreement. He calls the first “ikhtilāf” and explains as sound disagreements. He calls the second “ikhtilāf” and reads it as unsound disagreements. He argues that the jurists approve the former (ikhtilāf), but disapprove the latter (khilāf). Whereas, it is true that juristic disagreements have been categorised as praiseworthy or blameworthy (khilāf madhmūm vs. khilāf mahmūd), one should at the same time be aware that drawing a thick line between “khilāf” and “ikhtilāf” is difficult to sustain.

There are three major positions in reaction to the preference of “khilāf” or “ikhtilāf.” One group of scholars uses the term “khilāf” consistently, whereas another uses “ikhtilāf.” However, the majority uses both interchangeably. In The Zāhirīs, for example, Goldziher uses a variety of expressions to refer to the discipline of juristic disagreement, including “al-khilāfīyyāt,” “ilm al-khilāf,” “ilm al-ikhtilāfāt,” “ikhtilāfāt” and “ikhtilāf.” More or less similarly, Wael Hallaq, Masud, Masumi and Jaques alternate between “khilāf” and “ikhtilāf.” On the contrary, Schacht and few others (esp. Calder and Walbridge), employ the term “ikhtilāf” almost exclusively. Generally, however, regardless or their dissimilar preferences, no one (except for Kamali) has


32 Goldziher, The Zāhirīs, 36, x and 210, 36 and 66, 94 and 96.

33 Hallaq makes no difference between khilāf and ikhtilāf. He renders both terms often as “juristic disagreement” or simply “disagreement.” E.g., Hallaq, A History of Islamic Legal Theories (Cambridge: Cambridge University Press, 1997), 24, 24, 137, 202; as well as Authority, Continuity and Change in Islamic Law (Cambridge: Cambridge University Press, 2004), 125. The same is observed in Masumi’s “Imām Ṭaḥāwī’s Ikhtilāf,” Masud’s “Ikhtilāf al-Fuqahāʾ,” and Jaques’s Authority, Conflict. Masud speaks from the perspective of the Mālikī school and borrows his technical terms from Shāṭibī including such expressions as: “ilm al-khilāf” (72), “murūʿat al-khilāf” (78) and “ikhtilāf.”

34 Schacht notes, on one occasion, that the word “ikhtilāf” indicated inconsistency and self-contradiction. Schacht, Origins, 96 (fn. 3). He also stresses the use of the term “ikhtilāf” in his “Ikhtilāf” entry in the Encyclopaedia of Islam, though some of the books he cites are entitled khilāf, such as Al-Ishrāf ʿalā Nukat Masāʾ il al-Khilāf by the Mālikī jurist ’Abd Al-Wahhāb (d. 422/1031). Calder almost never uses the term “khilāf” in “Ikhtilāf and Ijmāʿ” in Shāfiʿī’s Risāla. Walbridge claims that “ʿilm al-Ikhtilāf” is the expression assigned by Muslim scholars to the discipline of juristic disagreement. See, Walbridge, “The Islamic Art of Asking Questions,” 70.
actually justified why “khilāf,” “ikhtilāf” or using both in alternate ways. What seems to have influenced their choices is the vocabulary of their primary sources. For example, because Schacht and Calder worked on Shāfiʿī, they used “ikhtilāf” —for this is the term Shāfiʿī uses frequently (but not exclusively) in “Risāla,” “Ikhtilāf ash-Shāfiʿī t wa Mālik” and “Ikhtilāf al-Ḥadīth.” Goldziher and Masud used “khilāf” and “ikhtilāf” interchangeably for that is exactly what the authorities they studied also did (Ibn Ḥazm in Goldziher’s and Shāṭībī in Masud’s).

A close examination of “khilāf” and “ikhtilāf” in light of the root khlf in early dictionaries shows that there is utterly no lexical difference between the two. Lexicographers identified the verb “khālafa” (opposite of “wāfaqa,” to agree) with an act of disagreement and nonconformity, and engaged both terms interchangeably. In the domain of Fiqh, a quick look at classical legal works will prove that early jurists and legal theorists cared less about the lexical dissimilarities between “ikhtilāf” and “khilāf.” Shāfiʿī, for example, uses both alternately to indicate a different opinion and disagreement on a legal or creed matter. The only distinction which he makes in this regard is between valid and invalid disagreements —for he prohibits disputing on matters already identified in the Qurʾān and/or Sunna, and permits it (through taʾwīl and qiyās) in other issues not mentioned in them. Several authorities also used both terms interchangeably, including, Marwazī (d. 294/905) in Ikhtilāf al-ʿUlamāʾ, Ṭabarī (d. 310/922) in Ikhtilāf al-Fuqahāʾ, Ṭaḥāwī (d. 321/933) in Ikhtilāf al-Fuqahāʾ, Qāḍī ʿAbd al-Wahhāb (d. 422/1030) in Al-Ishrāf ʿalā Nukat Masāʾil al-Khilāf, and Asmandī (d. 552/1157) in Ṭarīqat al-Khilāf — to only name a few.

35 See, Goldziher, The Ẓāhirīs, 63 (fn. 63). Masud draws extensively on Shāṭībī who treats “khilāf” and “ikhtilāf” in an interchangeable manner.

36 See “Appendix 1” for a detailed account of three derived word forms of the root “khlf” (khalf, khalaf and khilf) in seven authoritative Arabic lexicographies including, Kitāb al-ʿayn by Farāhīdī (d. 173/789), Tahdhīb al-Lugha by Azharī (d. 370/980), Tāj al-Lugha by Jawharī (d.393/1002), Muʿjam Maqāyīs al-Lugha by Ibn Fāris (d. 395/1005), Al-Mufradāt fi Ḍarīb al-Qurʾān by Iṣfahānī (d.502/1108), Lisān al-ʿArab by Ibn Manẓūr (d. 711/1311), and Tāj al-ʿArūs by Zabīdī (d. 1205/1790).

37 Shāfiʿī dedicated many entries to legal disagreement in Risāla. See, Muḥammad b. Idrīs ash-Shāfiʿī (d. 204/820), Al-Umm, ed. Ṭif at Fawżī ʿAbd al-Muṭṭalib (Cairo: Dār al-Wafāʾ, 2001), 1: 259-70. Shāfiʿī’s use of khilāf and ikhtilāf can be consulted in other texts, such as Kitāb Ikhtilāf Mālik wa sh-Shāfiʿī t, being vol. 8 of Umm.

More important than the *khilāf*/*ikhtilāf* issue, in my opinion, is the distinction between *khilāf* and other genres with which it shares similar features; namely what early early Muslim jurists called legal dialectic (*al-jadal al-fiqhī*). In his *Rise of Colleges*, Makdisi notes the complex relationship between *khilāf*, *jadal* and *naẓar*, and points out the extent to which they have been confused. He explains that the source of this confusion lies in the very nature of the practice of *khilāf* (juristic disagreement), since “to deal with *khilāf*, one had to be skilled in *jadal*, dialectic, and in *munāẓara, naẓar*, disputation.”39 No doubt the craft of argumentation and disputation had a pivotal role in theology and the three terms became associated with one another with time. However, it cannot be denied that many classical scholars were also aware of the implications of dialectic on the legal study and even warned against it. Ibn Rushd especially, as will be seen later, made a deliberate effort to write the *Bidāya* in a way that does not lend itself to the method and style of *kalām*.

In the light of his theory of the *khilāf*-madhhab antithesis and his emphasis on the role of dialectic in the development of *Usūl*, Makdisi maintains that law students had to master first their legal school’s theory (madhhab), the unsettled juristic controversies (*khilāf*) second, and the craft of dialectic (*jadal*) at the end. The latter provided them with the necessary argumentation tools to defend the positions of their madhhab and/or refute others’. Makdisi considers *khilāf* and *jadal* as ways of instruction to be the same. His position may be returned to his use of and influence by two authoritative sources. The first is Ibn ʿAqīl’s (d. 513/1119) *Al-Wādiḥ fī Uṣūl al-Fiqh*, which contains three books: *Kitāb al-Madhhab*, *Kitāb al-Jadal* and *Kitāb al-Khilāf*.40 The second is Ḥajjī Khalīfa’s (d. 1067/1657) *Kashf aẓ-Ẓunūn*, particularly his entry on “ʿIlm al-Khilāf,” where he

39 Makdisi, *The Rise of Colleges*, 109. It is not certain if Muslim jurists used the expression “an-naẓar al-fiqhī” in the sense Makdisi stresses (i.e., disputation); but, we know that they often used it to entail a rational process of legal speculation.

identifies khilāf with jadal and returns both to logic. Ibn ʿAqīl and Ḥajjī Khalīfa’s views seem to have influenced not only Makdisi’s understanding and appropriation of the relationship between khilāf and jadal, but his overall conception of the scholastic method in pre-modern Muslim law circles.

In a recent study of the history of legal disagreement in the Mālikī School, Muḥammad al-ʿAlamī develops an interesting view of the khilāf/ikhtilāf dilemma. Basically, he names three main approaches to juristic disagreement. The first is an umbrella genre of juristic dispute which he calls “al-khilāf al-ʿālī” (superior khilāf). The other two are subgenres that emerged from the first and are called “ilm al-ikhtilāf” and “ilm al-khilāf.” Superior khilāf is a comparative study of law that cuts within and across the dominant schools (i.e., contrary to the “madhhab” which focuses on a school’s hermeneutics). According to ʿAlamī, the books in this genre combine the methods of “ilm al-khilāf” and “ilm al-ikhtilāf.” In other words, they are both dialectical and cut across the schools. To support this argument, he cites Ibn Juzzay introducing Al-Qawānīn al-Fiqhiyya as a work that combines focusing on Mālikī law and exercising superior khilāf, “jamaʿa bayn tamhīd al-madhhab wa dhikr al-khilāf al-ʿālī.” He also draws upon Ibn Farḥūn’s assertion that Muḥammad b. Yūsuf b. Masdī’s (d. 663/1264) Iʾlām an-Nāsik bi-Aʾlām al-Manāsik is a book on the four legal Schools as well as “al-khilāf al-ʿālī.” Another example he gives is Ḥajjī Khalīfa’s (d. 1067/1657) description of Ibn Ḥazm’s Muḥallā as a book in “al-khilāf al-ʿālī.”

41 Muṣṭafā b. ʿAbd Allāh Ḥajjī Khalīfa, Kashf aẓ-Ẓunūn ʿan Asāmī l-Kutub wa l-Funūn, eds. Muḥammad Yaltkaya and Riḍ at al-Kilīsī (Beirut: Dār Iḥyāʾ ath-Thurāt al-ʿArabī, 1941), 1: 721.


45 Muṣṭafā b. ʿAbd Allāh, most known as Ḥajjī Khalīfa, Kashf aẓ-Ẓunūn ʿan Asāmī l-Kutub wa l-Funūn, eds. Muḥammad Yaltkaya and Riḍ at al-Kilīsī (Beirut: Dār Iḥyāʾ at-Turāth al-ʿArabī, 1941), 1: 721.
As for the second subgenre of superior *khilāf* which he calls “*ikhtilāf,*” it also pursues a comparative approach and seeks to explore the authorities’ controversies across the schools, but in a non-dialectical manner. ‘Alamī observes that books that may be included under this category are often entitled *Ikhtilāf al-Fuqahā’* or *Ikhtilāf al-‘Ulamā’*, such as Ţabarī’s *Ikhtilāf al-Fuqahā’* and Marwazi’s *Ikhtilāf al-‘Ulamā’.*46 Contrary to “*‘ilm al-khilāf,*” a key characteristic of “*‘ilm al-ikhtilāf,*” is that it does not make doctrinal favoritism its goal. Another is that it enjoys various methodological frameworks that allow other genres to be included under “*‘ilm al-ikhtilāf,*” such as the *muwaṭṭaʾāt, jawāmiʿ* and *sunan* (e.g., *Muwaṭṭaʾ Mālik, Jāmiʿ at-Tirmidhī,* and *Sunan Abū Dāwūd*).47 The science of *khilāf,* like the second subgenre of superior *khilāf,* is presented as equal to dialectic in both its goal and approach. For ‘Alamī, *‘ilm al-khilāf,* like *jadal,* seeks to equip legal scholars with the tools they need for defending their legal doctrines against refutation. In addition to Ibn ‘Aqīl and Ḥajjī Khalīfā who identify *khilāf* with *jadal* (cited by Makdisi), ‘Alamī cites a similar position by Ṭāshkubrī Zadah’s in *Miftāḥ as-Saʿāda* and another by Ibn Khaldūn’s in the *Muqaddima.*48

Generally, in a work of *jadal,* the scholar often writes in conversation mode; i.e., as if having a conversation with an opponent. Such expressions as “if they say… we say” (*in qālū… qulnā*) are common in legal texts. Another technique is objection and counter objection through deliberate and systematic questions and answers. Often, in dialectic oriented books, the scholar employs such formulas as, “then, we ask them why…” (*fa naqūlu lahum limadhā…*). There is little doubt that certain works of *khilāf* are fundamentally different from others, and this can be proven by a quick look at their tables of content. However, the important question for us is: how helpful is it to categorize *khilāf* writings based on the author’s style and intention? The answer is: not at

all helpful. *Jadal* proves not useful in differentiating works of *khilāf* from those of *ikhtilāf*, even if we assume, for the sake of the argument only, that the latter two are in fact distinct genres.

The value of dialectic for the study of legal theory in general and *khilāf* in particular cannot be denied. At the same time, however, to consider *khilāf* and *jadal* analogous such as did Makdisi is as unhelpful as distinguishing between *khilāf* and *ikhtilāf* based on rooted they are in dialectic such as did ʿAlamī. A careful look at the contents and chapter divisions of the very books ʿAlamī listed as representative of the dialectic mode reveals great inconsistency. Ibn Ḥazm’s *Muḥallā* and Ibn al-Qaṣṣār’s *ʿUyūn al-Adilla* which he attributes to *al-khilafl al-ʿālī* have the same structure as works that he attributes to *ikhtilāf* (e.g., Ṭabarī’s *Ikhtilāf al-Fuqahā* and Marwazī’s *Ikhtilāf al-Ulamā*). For they are strict Fiqh works, they address chapter (kitāb or bāb) by chapter specific practical areas of Fiqh, often beginning with the topic of cleanliness (*ṭahāra*). Ibn ʿAqīl’s *Kitāb al-Khilāf*, on the other hand, and which ʿAlamī includes under *ikhtilāf*, deals with theoretical issues customary undertaken in *Uṣūl* books such as *qiyyās*, *ijtihād*, and a range of linguistic relations the knowledge of which is essential for legal inference —e.g., general/specific (*al-ʿāmm wa l-κhāṣṣ*) and literal/ non-literal terms (*al-ḥaqīqa wa l-majāz*). Regarding its outline and areas of focus, Ibn ʿAqīl’s book is similar to Baṭalyawsī’s *Kitāb al-Inṣāf* which I discuss later as a “theoretical” study of *khilāf*. Another example of ʿAlamī’s inconsistency is his consideration of Ibn Rushd’s *Bidāyat*
al-Mujtahid a book of superior khilāf; although, as will be established, it is written in a non-dialectic mode.

Whether ikhtilāf and khilāf are the same genre or not is by all means a serious question. ‘Alamī’s effort to define these terms vis-à-vis those of Fiqh, Uṣūl and jadal must be appreciated. A shortcoming of his effort, however, is advancing dialectic as a marker of “ʿilm al-khilāf” and “ʿilm al-ikhtilāf,” and presuming that they are different. Contrary to this hypothesis, I suggest another way of conceiving of juristic disagreement. This way begins by excluding the genre of legal dialectic (al-jadal al-fiqhī), not the dialectic method per se, from any discussion of khilāf. Legal dialectic works may not be hard to identify anyway, since many of them display the word jadal in their title, (e.g., Juwaynī’s Al-Kāfiya fī l-Jadal and Ibn ‘Aqīl’s Kitāb al-Jadal). Secondly, and this explains Makdisi’s confusion of khilāf and jadal, one must be extra careful about certain titles with the word khilāf. In many instances, a khilāf book addresses issues similar to those dealt with in a book of jadal (e.g., Juwaynī’s Al-Kāfiya fī l-Jadal and parts of Ibn ‘Aqīl’s Kitāb al-Khilāf). What I suggest, instead, is to think of the study of khilāf in terms of two types: theoretical and practical. In other words, there is only one science of legal disagreement, whether one calls it khilāf or ikhtilāf. And this science consists of two writing genres. One focuses on the theoretical dimension of khilāf, the other undertakes its practical aspect.

“Practical” studies of khilāf are basically works that have a practical goal in view. These seek immediate action and hold it as their final goal. This goal is to outweigh legal rulings for the sake of arriving at the most proper decision and, hence, settling a juristic controversy. Under this subgenre goes works that ‘Alamī would attribute to “ʿilm al-ikhtilāf” and “al-khilāf al-ʿālī,” such as Marwazi’s Ikhtilāf al-ʿUlamā’, Ṭabarī’s Ikhtilāf al-Fuqahā’, Ṭaḥāwī’s Ikhtilāf al-Fuqahā’, Ibn al-Qaṣṣār’s ʿUyūn al-Adilla, and Ibn Ḥazm’s Al-Muḥallā. Other titles that may be included here...
are, 'Abd Al-Wahhāb’s *Ishrāf*, Māwardī’s (d. 450/1058) *Hāwī*,53 Bayhaqi’s (d. 458/1066) *Khilāfīyyāt*,54 Ibn ‘Abd al-Barr’s (d. 463/1070) *Istidhkār*,55 Juwaynī’s *Ad-Durra al-Muḍiyya*,56 Shāshī’s (d. 507/1113) *Ḥilyat al-ʿUlamāʾ*,57 Asmandī’s (d. 552/1157) *Tariqat al-Khilāf*,58 and Ibn Rushd’s *Bidāyat al-Muṭahhid*. A “theoretical” study of *khilāf*, by contrast, does not make exercising the law its ultimate end. It examines jurists’ disagreements irrespective of their worth for the execution of legal decisions and ventures into the realm of *khilāf* for rendering its position within the larger history of Islamic law. It focuses not on the contested opinions *per se*, but on various issues pertaining to the history and methods of *khilāf* as a whole. Unlike practical *Khilāf* works, the theoretical writings are scarce and appeared much later in the history of *Fiqh*. Ibn ‘Aqīl’s *Kitāb al-Khilāf* and Batālyawṣī’s *Kitāb al-Inṣāf* are two early works.

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54 Al-Ḥusayn b. ‘Alī b. Mūsā al-Bayhaqī. I am not sure if this book has survived in full, but the three volumes so far edited address the topic of ritual purification only. Bayhaqī, *Al-Khilāfīyyāt*: Bāb at-Ṭahāra, ed. Mashhūr Āl-Salmān (Riyadh: Dār as-Ṣamīʿī, 1994).

55 Abū ʿUmar Yūsuf b. ‘Abd Allāh b. ‘Abd al-Barr an-Namrī of Cordoba. Ibn ‘Abd al-Barr, *Al-Istidhkār al-Jāmiʿ li-Madhāhib Fuqahāʾ* al-Amṣār wa ʿUlamāʾ al-Aqṣār fīmā taḍammanah al-Muwaṭṭaʾ min Maʿānī ar-Raʾy wa l-Āthār wa Sharḥ dhālik Kullih bil-Ījāz wa l-Ikhtisār, ed. ‘Abd al-Muʿṭī Amīn Qalʿajī (Beirut and Cairo: Dār Qutayba and Dār al-Waʿy, 1993); and *Al-Inṣāf fī-mā bayn al-ʿUlamāʾ min al-Ikhtilāf*, ed. Muhammad Munīr (Cairo: At-Ṭibāʿa al-Munīriya, 1924). The latter work is a special study of several disputes about initiating the Qurʾān’s opening chapter (Fāṭihā) with the name of God (basmala).

56 Juwaynī, *Ad-Durra al-Muḍiyya* fī-mā Waqaʿaʾ fī al-Khilāf bayn ash-Shāfiʿī wa l-Ḥanafīyya, ed. ‘Abd al-ʿAzīm a-Dīb (Qatar: Jāmiʿat Qatar, 1986). Unfortunately, at least two of Juwaynī’s most important writings on legal *khilāf* seem to have been missing, namely: *Kitāb al-ʿAmad* and *Al-Asālīb fī l-Khilāfīyyāt*, both of which are mentioned in Juwaynī’s *Al-Burhān*. Juwaynī, *Al-Burhān* fī Uṣūl al-Fiqh, ed. ‘Abd al-ʿAzīm a-Dīb (Qatar: Jāmiʿat Qatar, 1978), 1: 481.


3. The History of *Fiqh* and *Khilāf* in Ibn Khaldūn’s *Muqaddima*

About a century and a half ago, Flügel pronounced Dabbūsī’s (d. 430/1038) *Ta’sīs an-Nazar* the first book of *khilāf* in Islam, therefore locating the birth of the genre of juristic disagreement at the turn of the fifth/eleventh century. Flügel’s assertion was, however, rebutted by Goldziher on two main grounds. The first is that scholarly interest in the question of juristic dispute was not started by Dabbūsī, but by Shāfi‘ī (d. 204/820), particularly in “*Ikhtilāf al-‘Irāqiyyayn*.” The second is that *khilāf* as genre saw the light during the third/ninth century. From the bulk of extant accessible and datable *khilāf* works, only Goldziher’s second remark is correct, since it has been confirmed that Shāfi‘ī was not the father of *khilāf*. Ibn an-Nadīm (d. 385/995) records in his *Fihrist* two *khilāf* treatises written prior to Shāfi‘ī. One is *Ikhtilāf al-Amṣār* by Abū Yūsuf (d. 182/798). The other is *Ar-Radd ‘alā Ahl al-Madīna* by Muḥammad Ibn al-Ḥasan (d. 189/804). Considering the death date of Abū Yūsuf —and if we accept Calder’s dating of Shāfi‘ī’s *Risāla* at 300/912, or even Christopher Melchert’s earlier dating at just after 256/869-70—it seems clear that Abū Yūsuf engaged systematically with *khilāf* before Shāfi‘ī.


60 Goldziher, *The Zāhirīs*, 36 (fn. 63).

61 Shāfi‘ī’s “Kitāb *Ikhtilāf al-‘Irāqiyyayn*” is the first book of the Umm’s eight volume, “*Ikhtilāf Mālik wa sh-Shāfi‘ī*.” I am indebted to Ahmad El Shamsy for clarifying that *Ikhtilāf al-‘Irāqiyyayn* was written by Abū Yūsuf and Shāfi‘ī only commented on it in the Umm.


Ibn Khaldūn (d. 808/1406) provides in the *Muqaddima* a unique account of the origin and development of *khilāf* as a legal genre. The salient significance of Ibn Khaldūn’s narrative lies in that the element of legal disagreement has made the backbone of his conception of the history of *Fiqh* and the relationship of *Fiqh* and *Uṣūl*. Ibn Khaldūn, as will be shown, consistently entwines *Fiqh* and *khilāf*, and does so in ways that pushes us to think that they were inseparable. With almost every piece of information he gives about *Fiqh* and *Uṣūl*, he makes direct and indirect references to juristic disagreement. Also intriguing about his historical account in the *Muqaddima* is that most of the legal authorities he mentions have been celebrated for their *ijtihād* and wrote about *khilāf*. As if the history of Islamic jurisprudence cannot be complete unless one takes into consideration the role disputes had played in the process of its development.

Ibn Khaldūn opens his “*Fiqh*” section with a standard definition of *Fiqh*: “Jurisprudence is the knowledge of God’s judgment of the actions of the legally competent (*mukallafīn*) by way of obligation, prohibition, commendation, discouragement and permission.” Jurisprudence is the process through which God’s rules are obtained and inferred from the Qurʾān, Sunna and other established sources (i.e., *ijmāʿ* and *qiyās*). Ibn Khaldūn wastes no time defining *Fiqh*. Right from the start, he reveals unwavering interest in legal disagreement. His second sentence corroborates that some of the legal indicants were conflicting, which by necessity led to disputes (*lā-budda min *wuqūʿihi ḍarūratan*) among the early generation of scholars. Ibn Khaldūn returns the jurists’ disagreement to four main factors:

1. Most indicants are derived from the Texts [of the Qurʾān] which are in the language of the Arabs, and the scholars’ disagreement on their implied meanings is well known.
2. The Sunna is also ascertained through different ways, and its categories are mostly in conflict with each other. This called for preponderance that resulted in inconsistent views.
3. The indicants derived from other than the Texts have been subject to dispute.

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as well. [4] And since the Texts cannot encompass all renewable occurrences, the cases not addressed in the texts are compared for similarity to those mentioned in them. And all of these are elements that provoked necessary dispute. And it is from this that legal disagreement occurred among the ancestors and the Schools’ eponyms afterward.67

To these four factors, Ibn Khaldūn adds that neither all the companions of the prophet were qualified to provide legal decisions, nor could they all be trusted in matters of the *sharīʿa*—since several of them were illiterate. He explains that initially there was a class of literate men known as “the readers” (*al-qurrāʾ*) who could read the Qurʾān and decipher its meanings. They were also conversant with issues of ambiguity, abrogation and the circumstances of the revelation (*asbāb an-nuzūl*). The Muslim community appealed to them for decisions on various legal and religious questions. With the expansion of Muslim conquests and the increased number of people trained in Fiqh, the class used to be called the “readers” became known as “the jurists” (*al-fuqahāʾ*).68

The early generation of jurists formed two different approaches to Islamic jurisprudence: *Ḥadīth* (*riwāya* and *athar*) and *Raʾy*.

The first is grounded in the prophet’s tradition and takes it as an authoritative source of the law. The second admits tradition, but also permits the exercise of *ijtihād* (i.e., through analogy). The *Ḥadīth* School originated in Medina. It was led by Mālik b. Anas first and Shāfiʿī afterward. The *Raʾy* School was initiated by Abū Ḥanīfa and thrived in Iraq where, presumably, less prophetic reports circulated.69 Throughout his discussion of the Schools and of Muslims’ adherence to them, Ibn Khaldūn notices that there were serious legal disagreements between the Ḥanbalīs and Shīʿīs in Baghdad, and the Ḥanafīs and Shāfiʿīs generally. He describes Shāfiʿī scholars as the most contributors to the *khilāf* genre.70


69 Here, Ibn Khaldūn makes a quick mention of the Ẓāhirī School, remarking especially its rejection of all forms of *ijtihād*, including analogy. He also briefly refers to the Shīʿī and Khārijī Schools. Ibid, 3: 5.

With the dominance of the four major Sunnī Schools (Mālikī, Shāfiʿī, Ḥanafī and Ḥanbalī) and people confined to adhere to them, juristic disagreement began to diminish. As Ibn Khaldūn describes:

Legal conformism (taqlīd) across the land became limited to these four [Schools]. Their adherents merely studied the works of others. People closed the gate of dispute and ended its methods after the sciences became increasingly entangled in definitions and it became difficult to attain ijtihād —for it was feared that it will be attributed to unqualified people whose opinions and faith are not trusted. So, they declared a state of inability and indigence (al-ʿajz wa l-iʿwāz) and confined the people to these [four Schools]. All that remained was transmitting the Schools’ theories. Each adherent acted in conformity with his School’s theory after its principles and the connection of its transmitted reports have been validated. Today, the jurist attains nothing but this [i.e., taqlīd]. Any one who claims to exercise ijtihād in this age is ostracized and has no followers.\footnote{Ibid, 3: 6-7.}

After this gloomy image of the state of independent judgment and legal pluralism during his day, Ibn Khaldūn further sketches each of the four dominant Schools. Two assertions in particular can be established from his narrative about khilāf as a key factor in the development of Fiqh generally and the Schools’ legal hermeneutics specifically. The first is found in his story of the life and career of some of the legal authorities he mentions. One such figure is Ibn al-Furāt, author of the well known but lost, Mālikī oeuvre, the Asadiyya.\footnote{Abū ʿAbd Allāh Asad b. al-Furāt b. Sinān (d. 218/828) who Ibn Khaldūn credits for importing the Mālikī doctrine to North Africa and the Andalus. See an extensive entry on him in, Al-Qāḍī ʿIyyāḍ Mūsā b. ʿIyyāḍ as-Sabtī (d. 544/1149), Tartīb al-Madārik wa Taqrīb al-Masālik li-Maʿrifat Aʿlām Madhhab Mālik, ed. ʿAbd al-Qādir aṣ-Šahrāwī (Al-Muḥammadīya: Maṭbaʿat Feḍāla, 1983), 3: 291-309.} Ibn al-Furāt is remembered by Ibn Khaldūn and many biographers as a sharp scholar who journeyed for years across Iraq and Egypt before settling in Tunisia where he worked as Judge. He first studied the Ḥanafī doctrine with two of Abū Ḥanīfa’s most familiar students, Abū Yūsuf and Abū l-Ḥasan ash-Shaybānī.\footnote{The first is Yaʿqūb b. Ibrāhīm b. Saʿd al-Anṣārī (d. 182/798), one of Abū Ḥanīfa’s renowned students and one of the first scholars to spread the Ḥanafī doctrine in Iraq. See his entry in, Ibn al-ʿImād, Shadharāt adh-Dhahab fī Akhbār man Dhahab, ed. Maḥmūd al-Arnāʾūṭ (Beirut: Dār Ibn Kathīr, 1988), 2: 367-71. Ziriklī lists, among other works of Abū Yūsuf, Ikhtilāf al-Amsār and Jawāmiʿ “where he mentioned scholars’ legal disagreements and the
with Mālik himself in Medina and with Abū l-Qāsim in Egypt.\textsuperscript{74} His compendium, the \textit{Asadiyya}, is the groundwork of subsequent authoritative Mālikī works, including the famous \textit{Mudawwana} by Sāhnūn (d. 240/854). Ibn al-Furāt is also known for employing legal analogy in his \textit{Asadiyya}, which has been argued to be the main reason why his oeuvre was later rejected by most Mālikī scholars.\textsuperscript{75}

The second assertion is embedded in Ibn Khaldūn’s story of three Mālikī sub-schools: the Qarawiyyīn in Morocco, the Cordovan in Spain, and the Iraqi and Egyptian.\textsuperscript{76} The beginnings of each school was characterized by independence in terms of their methods of legal analysis and synthesis. Later, however, their hermeneutical theories merged, “\textit{thumma imtazajat aṭ-ṭuruq ba’da dhālik}.”\textsuperscript{77} Elements of the Andalusian school were imparted to the Egyptian through aṭ-Ṭurṭūshī (d. 520/1126), author of the missing \textit{Al-Kitāb al-Kabīr fī Masāʾ il al-Ikhtilāf}.\textsuperscript{78} The Moroccan took from the Iraqi school through Shārimsāḥī (d. 669/1271),\textsuperscript{79} author of the \textit{Taʿlīqa}, another lost work of \textit{khilāf}. Ibn Khaldūn mentions that Shārimsāḥī taught at the Mustanṣirī School of the Abbasid Caliph Abū Jaʿfar al-Mustanṣir bi-Allāh (d. 640/1243) in Baghdad. Quite unique about this school is that it had offered legal training in the legal theories of the dominant schools (Mālikī, Shāfiʿī, legal opinion (\textit{raʾy}) most pursued.” Khayr ad-Dīn az-Ziriklī, \textit{Al-Aʿlām: Qāmūs Tarājim li-Ashhar ar-Rijāl wa n-Nisāʿ mina l-ʿArab wa l-Mustaʾrabiyyāt} wa l-Mustashriqīn, ed. Muḥammad Ramaḍān (Beirut: Dār al-ʿIlm lil-Malāyīn, 2002), 8: 193. The second is Abū ʿAbd Allāh Muḥammad b. al-Ḥasan ash-Shaybānī (d. 189/804), another close student of Abū Ḥanīfa and pioneer of the Ḥanafī School. See, Ibn al-ʿImād, \textit{Shadharāt}, 2: 408-12.

\textsuperscript{74} Abū ʿAbd ar-Raḥmān b. al-Qāsim b. Khālid b. Junāda (d.191/806) is a 20-year companion of Mālik and a pioneer Mālikī legal scholar in Egypt.

\textsuperscript{75} Ibn Khaldūn, \textit{Muqaddima}, 3: 9-11.

\textsuperscript{76} Ibid, 3: 10.

\textsuperscript{77} Ibid, 3: 11.


Ḥanafī, and Ḥanbalī) and hosted on a regular basis debates between teachers and students from the different schools. Finally, the Egyptian sub-school merged elements of the Moroccan through Ibn al-Ḥājib (d. 646/1249).

Ṭurṭūshī, Shārimsāḥī and Ibn al-Ḥājib seem to have four characteristics in common. All three traveled extensively, they were exposed to other legal traditions besides their own (Mālikī), wrote on khilāf, and have been recognized as mujtahids in the Mālikī school. Ibn Khaldūn’s emphasis on the position of juristic dispute in the origination and maturation of the legal schools is evident, and his aim at fusing Fiqh and khilāf is also unmistakable. This tendency crystallizes in the subsequent section where he provides a history of khilāf, “Al-Khilāfiyyāt.” Despite its abridged nature, Ibn Khaldūn’s brief history of khilāf is laden with and echoes essential information about that we encounter in other works. Taking departure in his account, the following pages reconstruct the history of khilāf origins and development and do so based on Ibn Khaldūn’s recognition of two main stages of khilāf evolution: before the formation of the legal schools and after their formation.

Before the Formation of the Legal Schools

Ibn Khaldūn’s succinct overview of khilāf is part of his discussion of legal theory in a section called, “Uṣūl al-Fiqh wa mā yataʿallaq bih min al-Jadal wa l-Khilāfiyyāt.” The expression “mā yataʿallaq bih,” is used in a technical sense to denote a subdivision of a discipline —in the same way the word “mutaʿalliqāt” (lit., attachments) is sometimes used. What this means is that Ibn Khaldūn considers the study of khilāf a subdivision and “attachment” (mutaʿalliq) of Islamic legal theory. By devoting a separate discussion to this subject matter, Ibn Khaldūn shows that he conceives of khilāf or khilāfiyyāt as an established genre, not as scattered individual disagreements.

80 Fn., 7 in Ibn Farḥūn, Dībāj, 1: 448-49
82 Ibn Khaldūn, Muqaddima, 3: 15-22.
which is the meaning Rosenthal’s rendition entails. On two occasions, he calls *khilāfiyyāt* a “class of knowledge” (*ṣinf min al-ʿilm*) and “jurisprudence of disagreement” (*al-fiqh al-khilāfī*). Also, by succeeding the *khilāfiyyāt* section with another on dialectic (*jadal*), he puts the two in the same category. For him, the *khilāf* practitioner and dialectician share the same goal: to support and defend their Schools’ legal conclusions against others’. Ibn Khaldūn holds categorically that *khilāf* is a science of vast benefit (*huwa la ʿumrī ʿilm jalīl al-fāʾida*), for it helps scholars recognize their Imāms’ proofs and methods of legal inference (*maʾākhid*) and prepares them to secure their arguments against refutation.

Ibn Khaldūn initiates the “*Khilāfiyyāt*” section in the same way he opened the “*Fiqh*” section; i.e., by affirming that the diversity of the jurists’ rulings was unavoidable. He reasserts that during Islam’s early days, Muslims enjoyed the highest degree of tolerance toward juristic disagreement and could embrace any decision they desired. Ibn ʿAbd al-Barr, Cordoba’s famous Mālikī jurist who lived nearly three and half centuries before Ibn Khaldūn, makes the same remark in *Jāmiʿ Bayān al-ʿIlm*. He observes that from the time of the four Caliphs to the age of the Followers and their immediate successors, disputes in matters of the law were not only common, but also widely acknowledged. He lists several cases of jurists’ acceptance and welcome of *khilāf*, including an interesting poem by Abū Muzāḥim al-Khāqānī (d. 325/937), two verses of which read:

\[
\begin{align*}
I \text{ choose from their discussions as I wish} & \quad \text{Not bragging or self-aggrandizing.} \\
(Fa-ākhudhu min maqālihim ikhtiyārī) & \quad (Wa mā anā bil-mubāhī wa l-musāmī)
\end{align*}
\]

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83 Rosenthal translates the word “*khilāfiyyāt*” as “controversial questions” and “differences of opinion” —often in the plural sense, which suggests individual controversies and not a discipline. See, e.g., Rosenthal’s translation of the *Muqaddima*, 3: 30.


85 For Ibn Khaldūn, a *khilāf* scholar must master the basic rules (*qawāʿid*) used in inferring legal rulings (*akhām*) in order to guard (*li-yahfād*) his derived rulings against an opponent’s counter proofs. Ibn Khaldūn, *Muqaddima*, 3: 20-21.

Choosing from their disputes is permitted
(Wa akhdhī bi-ikhtilāfihim mubāḥū)

For God’s mercy is all-encompassing.
(Li-tawsīʿ al-Ilāhi ʿalā l-anāmī).

In the first line, Khāqānī expresses unfailing recognition of scholars’ legal differences (ākhudhu min maqālihim ikhtiyārī). In the second, he grants himself legal permission to choose from their decisions as he desires (akhdhī bi-ikhtilāfihim mubāḥū). In defense of his argument, he contends that khilāf is part of God’s larger design of mercy (li-tawsīʿ al-Ilāhi ʿalā l-anāmī). Ibn ‘Abd al-Barr explains that this is one of two main attitudes that emerged in reaction to khilāf. The first was initiated by Al-Qāsim b. Muḥammad (d. 38/108), son of the first Caliph, Abū Bakr. Adherents of this view, one of whom is Abū Muzāḥim, accepted legal disagreements almost unconditionally and considered them a form of mercy and grace bestowed by God upon his creation. According to Ibn ‘Abd al-Barr, Al-Qāsim believed that the disagreements of the prophet’s associates are part of God’s will to expand the range of legal choices for the Muslim community, and so he thought that people may choose from two or more differing decisions as they see fits best their situation. He draws, in this regard, on a report that Usāma b. Zayd asked al-Qāsim if one should recite the Qurʾān during the prayer positions where the Imām reads silently, and he answered: “if you read, you pursue a group of the prophet’s associates. If you do not, you pursue a group of the prophet’s associates;” i.e., both ways are accepted.

The second position was disseminated by al-Layth b. Sa’d (d. 175/761), Abū Thawr, al-Awzāʿī (d. 157/774), and other proponents of speculative reasoning (naẓar). Khilāf for them is

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87 Abū ʿUmar Yūsuf Ibn ‘Abd al-Barr, Jāmiʿ Bayān al-ʿIlm, eds. Hasan Marwa and Maḥmūd al-Arnāṭ (Mecca: Al-Maktaba at-Tijāriya and Dār al-Khayr, 1992), 252-53. Abū Muzāḥim Mūsā b. ʿUbayd Allāh al-Khāqānī is a linguist, poet and is said to be one of the first to write about the art of Qurʾānic elocution (tajwīd).


89 Abū l-Ḥārith al-Layth b. Sa’d b. ʿAbd ar-Raḥmān was a highly revered legal and Ḥadīth authority in Egypt. He was a contemporary of Imām Mālik and had several legal disputes with him. Ibn Khalilikān, Wafayāṭ, 4: 127-32.

not a sign of God’s mercy in the sense that one can cherry-pick among the views. To the contrary, when different conclusions have been reached about the same issue, only one of them is deemed valid. Ibn ʿAbd al-Barr refers to Mālik’s response to a question about a legal disagreement of the Prophet’s companions that: “it is both right and wrong.” Elaborating on Mālik’s response, he explains that for a legal issue about which there is disagreement, the mujtahid must go with the decision that is supported by the strongest indicant (dalīl) from the Qur’ān, Sunna, ijmāʿ and/or qiyās. But, when the obtained indicant is similar or approximate in strength or weakness in all contesting opinions, the jurist must choose the decision that acts the closest in accordance with the teachings of the Qurʾān and Sunna. He cites the famous Ḥadīth: “Righteousness is that with which the soul feels at peace, and sin is that which brings discomfort to the heart. Leave that about which you are in doubt for that about which you are in no doubt”. He elaborates that since truth in and of itself free from contradiction, it is not possible for two conflicting decisions (e.g., prohibition and permission) to be valid at the same time. He advises that in the absence of solid proof from the legal sources, the jurist must be vigilant and exert extreme caution in the pursuit of truth. When a disputer is found correct, the other must endorse his legal opinion. As will be seen in Chapter 3, this is the approach Ibn Rushd pursues in the Bidāya. He gives primacy to the dalīl only, even if this means contradicting the Mālikī School with which he is affiliated.

The early Muslim generation’s attitude toward legal dispute has been well documented, and Ibn Khaldūn is neither the first nor the last scholar to have delved into it. Already in the 6th/12th century, i.e., about two centuries before Ibn Khaldūn, Shahrastānī (d. 548/1153) made an elaborate

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91 Ibn ʿAbd al-Barr, Jāmiʿ Bayān al-ʿIlm, 255-6. For several reports that support the opinion that not every jurist’s disagreement is valid, see esp., Ibn ʿAbd al-Barr’s next section, “The ancients’ remarks that ikhtilāf is right and wrong.” 260-69.


93 Ibn ʿAbd al-Barr, Jāmiʿ Bayān al-ʿIlm, 284.
intervention on several specious arguments (shubuhāt) and disagreements (ikhtilāfāt) in Al-Milal wa n-Niḥal.\textsuperscript{94} One such dispute concerns the very news of the death of the prophet. Ibn Hishām writes in his biography of the Prophet that ʿUmar (second Caliph) furiously rejected the news that the prophet died. He believed they were rumors disseminated by the Hippocrates (munāfiqīn) and insisted that the Prophet was elevated (rufiʿa) by and to God in the way of Jesus’ elevation as described in the Qurʾān. It was until Abū Bakr read to him Q 3:144 and 39:30 that he was convinced that the Prophet had indeed died.\textsuperscript{95}

Another example is the Prophets’ companions’ disagreement about where to inhume his body. Four different views emerged in response to this issue. The Prophet’s Meccan companions (muhājirūn) desired to bury him in Mecca, since it is his birthplace and home of his clan. His Medinese companions (anṣār) desired to bury him in Medina, since it is the city in which he took refuge and founded the Islamic state. A third group proposed to transfer the body to Jerusalem, because it is the land of revelation and city of his miraculous journey (isrāʾ wa l-miʿrāj). A fourth and winning intervention was made by Abū Bakr (first Caliph) who confirmed that he had heard the Prophet Muḥammad saying that all prophets get buried in the very spot they die (mā qubiḍa nabiyyun illā dufina ḥaythu yuqbaḍ). So, they agreed to dig a grave for Muḥammad right under his bed.\textsuperscript{96}

A third major case of dispute concerns the successorship of the Prophet after his death. This has been considered the greatest and most grievous controversy in the entire history of Islam.

\textsuperscript{94} Tāj ad-Dīn Abū l-Faṭḥ Muḥammad b. ʿAbd al-Kaʿīm ash-Shahrastānī, Al-Milal wa n-Niḥal, ed. A. Muḥammad (Beirut: Dār al-Kutub al-ʿIlmiyya, 1992), 1: 10-29. Shahrastānī uses “shubuhāt” when he addressed disputes on theological matters and “ikhtilāfāt” when he deals with juristic disagreements. His discussion is for the most part based on Ibn Hishām’s (d. 218/833) biography of Muḥammad. See, Abū Muḥammad ʿAbd al-Malik Ibn Hishām, Sīrat Ibn Hishām (Tanta: Dār aṣ-Ṣaḥāba, 1995).

\textsuperscript{95} Ibn Hishām, Sīrat Ibn Hishām, 4:363-4 (~2095); and 3rd case of khilāf in, Shahrastānī, Milal, 1: 12. The Qurʾānic verses are: 3:144, “Muhammad is but a messenger, messengers (the like of whom) have passed away before him. Will it be that, when he dieth or is slain, ye will turn back on your heels? He who turneth back doth no hurt to Allah, and Allah will reward the thankful;” and 39:30, “Lo! Thou wilt die, and lo! They will die.”

\textsuperscript{96} Ibn Hishām, 4:373 (~2106); and 4th case of khilāf in, Shahristānī, Milal, 1:12. See also, Abū ʿĪsā Muḥammad b. ʿĪsā at-Tirmidhī (d. 279/892), Al-Jāmiʿ al-Kabīr, ed. Bashshār Maʿrūf (Beirut: Dār al-Gharb al-Islāmī, 1996), 2: 327-8, (~1018)
In Shahrastānī’s words, “no sword in Islam has been unsheathed in the cause of a religious rule in the same way it has been with respect to leadership.”\(^97\) One can only imagine how serious such an event was of concern to a young Muslim community, where tribal loyalty dominated and a system of successorship had not been founded. Ibn Hishām notes the emergence of three major camps after the death of the prophet, each with their desired successor. The Medinese proposed Saʿd b. ʿAbāda. The Meccans suggested Abū Bakr (and ʿUmar by some). The Prophet’s immediate family, his cousin ʿAlī and other Meccans distanced themselves from both camps. Dissension rose between the first two camps to the extent that the Muslim community was put on the verge of a civil war. After a long and painful process of deliberation, Abū Bakr was elected first Caliph.\(^98\)

At a more legalistic level, Ibn Ḥazm (d. 456/1064) includes in the *Iḥkām fī Uṣūl a-Aḥkām* a rigorous account of legally oriented disagreements between some of the Prophet’s companions.\(^99\) In favor of *ijtihād* against *taqlīd*, he holds categorically that the disputes between ʿUmar and Abū Bakr are “so evident that even the least knowledgeable of the Ḥadīth (riwāyāt) cannot overlook.”\(^100\) He cites several cases of juristic disagreement between ʿUmar and ʿAlī, Ibn ʿAbbās and Zayd b. Thābit, and even between ʿUmar and Ibn Masʿūd, who has been distinguished as the Prophet’s closest associate and most knowledgeable of the Qurʾān’s and its context (*asbāb an-nuzūl*). He totals ʿUmar and Ibn Masʿūd’s disputes at more than one hundred.\(^101\)

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98 For an extensive description of the election process as well as related events, see Ibn Hishām, 4: 364-370, (~ 2096-2101).
Ibn Ḥazm refers, for example, to Abū Bakr and ‘Umar’s disagreement on takhmīs (granting the Muslim conquerors four fifths of the spoils). Abū Bakr permitted takhmīs on the ground of Q 8:41.102 ‘Umar, from the perspective of public interest (maslaha), prohibited it during his rule and declared the new lands endowment (waqf). His concern was that if the land were to be divided, it might cause enmity between the Muslims and the natives and give a negative image of Islam to future generations, the majority of whom will be Muslim. Based on this interpretation, ‘Umar allowed the locals to keep and work their land and made a tax (kharāj) on it due to the central government. Another example of dispute between ‘Umar and Abū Bakr that Ibn Ḥazm cites concerns taking females as prisoners. This practice was allowed during the rule of Abū Bakr. But when ‘Umar succeeded him, he commanded against this act and even freed some of the women imprisoned during Abū Bakr’s wars.103

The Ḥadīth literature is laden with reports that exhibit the Companions’ differences on a range of issues pertaining to ritual practice, finance, torts, inheritance and other divisions. An example that is often cited is Muḥammad’s command to his men on the day of the Coalition Expedition (Ghazwat al-Aḥzāb) that: “No one prays ‘Aṣr until Banū Qurayza.”104 The men headed toward the tribe, but ‘Aṣr became due before they reached it. They argued about whether they should keep going or stop to pray. One group took the prophet’s statement by the letter and decided not to stop. Another read it as a call to rush to the tribe without taking a break from the previous battle, especially since the Qurʾān already dictates that mandatory prayers ought to be performed on their specific times.105 The issue was later brought to the attention of Muḥammad who, in the words of the report, “did not rebuke any of the two groups” (lam yuʿannif ayyun minhumā). Another well known example tells about ‘Umar b. al-Khaṭṭāb’s and ‘Ammār b. Yāsir’s dispute in regard tayammum (rubbing the hands with sand/stone for ablution if water is not available).

102 Q 8:41, “And know that whatever ye take as spoils of war, lo! a fifth thereof is for Allah,”
103 Ibn Ḥazm, Iḥkām, 6: 66.
104 Muḥammad Ibn Ismāʿīl al-Bukhārī (d. 256/870), Ṣaḥīḥ al-Bukhārī (Damascus and Beirut: Dār Ibn Kathīr, 2002), 1011, esp., ḥadīth no. 4119 in bk. 64, Kitāb al-Maghāzī (Military Expeditions).
105 Reference, here, is to the end of Q 4:103, “Prayers are enjoined on believers at fixed times.”
Following Bukhārī’s narration, the two men were sent on a mission by the prophet, but it happened that both were in a state of major ritual impurity (janāba). ‘Umar decided not to pray until he finds water. ‘Ammār rolled his body in sand as a way of performing tayammum. Upon their return, they told the prophet who confirmed that validity of tayammum I the absence of water, and corrected ‘Ammār way of doing it.106

Against attempts at romanticizing and idealizing the age of the prophet, the “golden age” of Islam (aṣ-ṣadr al-a’zam), disagreement in legal matters, as seen in the examples above, was not uncommon. The early generation of Muslims, while the prophet was still alive and soon after he died, differed on a range of issues. Their disputes would later inform and play a central role in the formation of the schools’ legal hermeneutics. Part of the early authorities’ debate on khilāf and whether disagreement in legal matters is permissible or not seems to have been closely related to their discussions of ijmā’. On one side stood those in pursuit of certainty and who saw in ijmā’ the way to end disagreement. On the other side stood those who rejected the first group’s theory and deemed as infeasible on the ground, and hence permitted khilāf.107

After the Formation of the Legal Schools

In a seminal historical study of Fiqh, Muḥammad al-Ḥajwī informs that when the prophet passed away, there were about twelve thousand Companions living in Medina.108 About ten thousand of them spent the rest of their lives in the Prophet’s city. The other two thousand journeyed across the new lands. It was only under the third Caliph, ʿUthmān Ibn ʿAffān, that the Companions could

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106 That it is sufficient to pass one’s hands over clean sand, rub them and pass them over the face once. See, Ṣaḥīḥ al-Bukhārī, 96, (Ḥadīth no. 347 in Book 7, Kitāb at-Tayammum).


settle in other cities, for ʿUmar had previously restricted their long-term residence to Medina only, which Ḥajwī read as a precautionary measure taken by ʿUmar to preserve the Qurʾān which had not yet been copied.109 After ʿUmar was assassinated many of the most distinguished Companions moved to other cities, willingly or by command —for the rulers of the new cities needed them to instruct people about Islam and arbitrate in Muslims’ legal matters.110

Following Ibn Qayyim’s (d. 751/1350) detailed account of the origin and development of Islamic jurisprudence, “religion, law and science were first imparted to the Muslim community by four Companions: Zayd b. Thābit and ʿAbd Allāh b. ʿUmar in Medina, ʿAbd Allāh b. ʿAbbās in Mecca and Ibn Masʿūd in Iraq.”111 These acted as the highest trusted sources of Ḥadīth and Qurʾān to whom Muslims, including other Companions, returned for answers to a range of legal and ritual practice issues. Through their teachings, a group of learned men known as “Tābiʿīn” (Followers) was formed.112 Most of the Followers were versed in the legal theories of their masters and deeply influenced by their disputes. They carried those disputes over to their disciples, a generation known as “Atbāʿ at-Tābiʿīn” (Followers’ Followers). Juristic disagreements among the Followers were staggeringly innumerable.113 However, it is with the Atbāʿ that khilāf expanded to a striking degree.

109 Ḥajwī, Fikr, 2: 88-9. ʿUmar’s decision, according to Ḥajwī and other scholars, played an important role in limiting the scope of juristic disagreement during that time. E.g., Saʿīd al-Khinn, Athar al-Ikhtilāf fī l-Qawāʿid al-Uṣūliyya fī Ikhtilāf al-Fuqahāʾ (Beirut: Muʿassasat ar-Risāla, 1992), 36-7; and Shallī, Al-Asās fī Fiqh al-Khilāf, 42.

110 Among the prominent figures who left Medina, Ḥajwī mentions Ibn Masʿūd, ʿAbd Allāh b. ʿUmar b. al-Khaṭṭāb (d. 74/693), son of the second Caliph, Abu ʿAbd ar-Raḥmān ʿAbd Allāh b. ʿAbbū Sufyān in Syria; az-Zubayr b. al-ʿAwwām, Abū Dharr, ʿAmrū b. al-ʿĀṣ and his son in Egypt; Uqba b. ʿĀmir al-Jahnī, Muʿāwiya b. Ḥudayj, Abū Lubāba and Ruwayfī b. Thābit al-Anṣārī in North Africa. However, the majority of the prophet’s companions remained in the prophet’s city, including his wives, the four Caliphs, and Ibn ʿUmar, Ṭalḥa b. Ḥaqq, ʿAbd al-Raḥmān b. ʿAwf, and Abū Hurayra. Ḥajwī, Fikr, 2: 89.

111 Ibn Qayyim, Iʿlām, 2: 38. Zayd b. Thābit ad-Ḍaḥḥāk (d. 45/665) is a Medinese Companion known for his efforts to compile the Qurʾān. Abū ʿAbd ar-Raḥmān b. ʿAbd Allāh b. ʿUmar b. al-Khaṭṭāb (d. 74/693), son of the second Caliph, is a recognized authority in Ḥadīth and law. ʿAbd Allāh b. ʿAbbās b. ʿAbd al-Muṭṭalib (d. 67/687), a paternal cousin of the prophet, was a leading authority in Qurʾān exegesis. ʿAbd Allāh b. Masʿūd b. Ghāfil b. Ḥabīb (d. 32/650) is one of the first converts to Islam and an authority in Ḥadīth and Qurʾān exegesis.

112 For an extensive list of Muftīs and jurists among the Tābiʿīn across the Muslim lands, see, Ibn Ḥazm, Iḥkām, 5: 94-105. The same information is reiterated in Ibn Qayyim, Iʿlām, 2: 40-49. See a systematic list in, Marʿashlī, Khilāf, 34-37.

113 Ibn ʿAbd al-Barr recurrently says in Jāmiʿ al-Bayān “wa hādhā akthar min an yuḥṣā” (these are too numerous to be counted) to describe the size of juristic disagreements on a certain issue among the Followers. Similarly, Ibn
The role of *khilāf* in the formation of the legal Schools is well captured in Ibn Khaldūn’s “*Khilāfiyyāt*” section. Here, we learn that the practice of dispute was tolerated and accepted by all Schools’ founders, as they endorsed some of each other’s legal views and disagreed on others. Ibn Khaldūn points out Mālik’s support of Abū Ḥanīfa against Shāfiʿī, and of Shāfiʿī against Abū Ḥanīfa on select issues. He also confirms that Shāfiʿī was one of the first to write systematically about *khilāf* (not the first as held by Goldziher). In fact, several of his treatises in *Al-Umm* respond directly to the question of *khilāf*, both practically (esp., in the books of “*Ikhtilāf al-Ḥadīth*,” “*Ikhtilāf Mālik wa sh-Shāfiʿī*,” “*Ikhtilāf Abī Ḥanīfa wa l-Awzāʿī*,” “*Ikhtilāf ash-Shāfiʿī maʿa Muhammad b. al-Ḥasan*”) and theoretically (esp., in the *Risāla*). As for Mālik (d. 179/795), although he did not write a special work on *khilāf*, the question of juristic disagreement occupies a central place in the *Muwatṭa*’. Recurrent uniform expressions such as, “for us the established tradition (*Sunna*) upon which there has been no disagreement is such and such” and “the matter upon which there has been no disagreement is such and such” reflects his sheer interest in admitting undisputed legal views only. Like Mālik and Shāfiʿī, the subject of *khilāf* took a large space in Abū Ḥanīfa’s (d. 150/767) thought. His *Al-Fiqh al-Akbar* opens with an obvious attempt at disambiguating key legal and theological controversies, including the question of whether *khilāf* is a manifestation of God’s act of mercy.

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115 Shāfiʿī, *Umm*, esp., vols. 1, 8 and 10.
116 *Muwatṭa*’ Mālik, as the entire genre of *muwatṭaʿāt*, has been considered by some scholars a work of *khilāf*. See, Ṭalāmī, *Mustawʿib*, 41-42.
117 Mālik’s perennial expression in full is: “*al-amr al-mujtamaʿ ʿalayh al-ladhī lā ikhtilāfa fīh wa l-ladhī adraktu ʿalayh ahl al-ʿilm bi-baladinā*” (the matter upon which consensus has been reached, upon which there has been no dispute, and about which I have consulted the learned authorities in our city…). He opens several legal cases with this phrase, including legal cases number 1854, 1874, 1879, 1885 and 1889. In his edition of the *Muwatṭa*’, Aʿẓamī indexed more than 100 legal cases where Mālik used this and similar phrases. Another popular phrase is “*as-sunna al-latī lā ikhtilāf fīhā ʿindanā*,” (the established rule upon which there is no dispute among us [i.e., the scholars of Medina]. See Mālik b. Anas, *Muwatṭa*’ *al-Imām Mālik*, ed. Muḥammad Muṣṭafā al-Aʿẓamī (Abu Dhabi: Muʿassasat Zāyid bin Sulṭān al-Khayriyya, 2004), 7: 226-7.
Ibn Khaldūn substantiates in both the “Fiqh” and “Khilāfiyyāt” sections that the Schools’ eponyms were not only aware of “‘ilm al-khilāf” (ikhtilāf, or khilāfiyyāt) as a class of knowledge, but also, and more importantly, agreed that it is indispensable for future jurists to attain the rank of mujtahid. The requirements of becoming a muftī, a jurist qualified to make a legal decision (fatwā), hence worthy of the title “Faqīh,” are deliberated almost customarily in most classic Uṣūl books. Ibn ‘Abd al-Barr, for example, provides an extensive discussion of the subject in Jāmiʿ al-Bayān.\(^{119}\) Of the interesting traditions he mentions in this respect is a report by Ibn Masʿūd that the prophet said to him: “the most knowledgeable of the people is the one who is able to perceive the truth when people disagree [about it],” (aʿlam an-nās abšaruhum bil-haqq idhā ikhtalaf an-nās).\(^{120}\) Another is a statement made by some Qatāda that a jurist who has no knowledge of ikhtilāf has no knowledge of Fiqh —“lam yashimma anfuh al-Fiqh” (lit., his nose has not smelled Fiqh).\(^{121}\) He also quotes Sakhtayānī saying: “who inclines the most to issue fatwā is the least knowledgeable of the jurists’ disputes; and who forbears is the most versed in the jurists’ disputes.”\(^{122}\) He refers

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\(^{120}\) Ibn ʿAbd al-Barr, Jāmiʿ Bayān al-ʿIlm, 213.

\(^{121}\) This is most likely Abū l-Khaṭṭāb Qatāda b. Daʿāma as-Sadūsī (d. 117/735), a polymath Tābiʿī from Basra, most known as linguist and exegete. See his entry in Ibn Khallikān, Wafayāt, 4: 85-86.

\(^{122}\) Ibn ʿAbd al-Barr, Jāmiʿ Bayān al-ʿIlm, 216. Ayyūb b. Abī Tamīma as-Sakhtayānī (d. 131/748) is a Tābiʿī jurist from Basra. See his entry in Dhahabī, Al-ʿIbar fī Akhbār man Ghabar, 1: 131-2.
to other authorities who also made the knowledge of *khilāf* a condition for being able to issue *fatwā*, and names particularly Ibn ʿUyayna,\footnote{Ibn ʿUyayna (d. 198/814) was a leading authority in *Fiqh* and exegesis as confirmed by Shāfīʾī, Ibn Ḥanbal as well as others. See, Dhababī, *Ibar*, 1: 254.} Yaḥyā b. Sallām,\footnote{Yaḥyā b. Sallām b. Abī Thaʿlaba (d. 200/816) was a noted Iraqi legal authority. Ziriklī, *Aʾlām*, 8: 148.} Saʿīd b. Abī ʿUrūba.\footnote{Abū n-Nadr Saʿīd b. Abī ʿUrūba al-ʿAdwī (d. 156/773) is a pioneer of jurisprudence and religious sciences in Basra. See, Dhababī, *Ibar*, 1: 174.}

In addition, Ibn Khaldūn recognizes a shift in the function of the scholastic method of *khilāf*. He describes it as follow:

> [Initially] juristic disagreements occupied a large space in the religion of Islam. People could follow any authority they wish. However, by the time of the four Eponyms who enjoyed a high status, people were confined to them. They were forbidden from adhering to others [legal Schools] with the decline of *ijtihād*, which became arduous and the disciplines that constitute its subject matter had ramified… So, the four legal schools were established as the fundamental schools in Islam… Disputations were held among each School’s adherents to prove the validity of their respective doctrines.\footnote{Ibn Khaldūn, *Muqaddima*, 3: 21.}

This shift crystallized after the formation of the Schools. It was a form of redirecting attention from inter-doctrinal *khilāf* which addresses controversies across the Schools to intra-doctrinal *khilāf* that covers disputes within the School. Now, scholars became more interest in expounding the legal hermeneutics of their respective Schools. Intra-doctrinal studies of *khilāf* have played a key role in grounding the meta-rules (*qawāʾid fiqhiyya*) of Fiqh generally and establishing their processes of *takhrīj* particularly.\footnote{See two significant discussions of the role of *khilāf* in the establishment of the legal arts of *Qawāʾid* and *Takhrīj* in ʿAtīyya, *At-Tanẓīr al-Fiqhī*, 141-46; and Bāḥusayn, *At-Takhrīj ʿind al-Uṣūliyyīn wa l-Fuqahāʾ*, 47-182.} *Taʾsis an-Naẓar* by Dabbūsī and the *Qawānīn al-Fiqhiyya* by Ibn Juzayy are two books in this vein. Nonetheless, and despite his claim that the formation of the *madhhabs* had a damaging effect on the practice of *ijtihād*, Ibn Khaldūn asserts that plurality of legal opinion prevailed even after the dominance of *taqlīd*.
4. A History of Khilāf through its Major Writings

At the end of his “Khilāfiyyāt” section, Ibn Khaldūn lists few titles in this genre and contends that the Ḥanafī and Shāfiʿī scholars wrote more about it than Mālikīs. This, according to him, is due to the fact that:

In the Ḥanafī school, qiyyās is a principle through which several of their substantive laws are obtained… The Mālikīs, on the other hand, rely heavily on prophetic tradition and are not people of speculation. Also, because most of them [Mālikīs] are from the Maghreb and are, for the most part, Bedouins who care little for the crafts.128

This bold comparison of Mālikīs to Ḥanafīs has root in the Raʾy/Ḥadīth controversy. Ibn Khaldūn’s exclusion of Shāfiʿīs from his comparison may be because he viewed Shāfiʿī law to rely on Ḥadīth and Raʾy in more proportionate ways.129 Ibn Khaldūn cites five books of khilāf. From the Shāfiʿī School, he mentions the Maʾākhidh by Ghazālī (d. 505/1111).130 From the Mālikī School, he refers to the Talkhīṣ by Abū Bakr Ibn Ṭārīq (d. 543/1148)131 and ‘Uyūn al-Adilla by Ibn al-Qaṣṣār (d. 398/1007).132 From the Ḥanafī School, he names At-Taʿlīqa by Abū Zayd ad-Dabbūsī (d.

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132 Abū l-Ḥasan ʿAli b. Ahmad, known as Ibn al-Qaṣṣār, was a pioneer Mālikī scholar in Baghdad. His book, ‘Uyūn al-Adilla, is one of the oldest works composed in the Khilāf genre. The book is yet to be published in full. So far,
He also notes a commentary of *Uṣūl* by Ibn as-Sāʿātī (d. 694/1295), and observes that it comprises all the controversial questions related to legal theory. This is most likely Ibn as-Sāʿātī’s *Nihāyat al-Wuṣūl fī ʿIlm al-Uṣūl*, also known as *Badīʿ an-Niẓām al-Jāmiʿ bayn Kitāb al-Bazdawī wa l-Aḥkām*. All five are highly theoretical, address controversial questions in *Uṣūl*, and employ the method of dialectic.

An attentive look at the bulk of extant classical works on *khilāf* exhibits that this writing genre has matured in stages. During the third/ninth century, several *khilāf* books were written with a defensive mood, since scholars’ interest during this time seems not comparing the school’s theories for their own sake, but supporting and defending their madhhabs and/or refuting others’. Many books written around this period carry the expression “al-ḥujja ‘alā” (the proof against), or “ar-radd ‘alā” (response to), or name the two or more authorities in conflict (*ikhtilāf* so and so, or *al-ikhtilāf* bayn so and so). Books of this kind include, Ibn al-Ḥasan’s *Al-Ḥujja ʿalā Ahl al-Madīna*, and Shāfiʿī’s “*Ikhtilāf Mālik wa sh-Shaftī ṭā’i*, “*Ikhtilāf Abī Ḥanīfa wa al-Awzāʿī*, and “*Ikhtilāf ash-

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136 My goal, here, is not to develop an exhaustive list of *khilāf* works. Instead, I seek to offer a concise list of key *khilāf* works (extant for the most part) to establish the richness and vividness of the law during *Fiqh*’s formative stages. For more comprehensive lists of *khilāf* works (and my list is greatly indebted to these), see, e.g., Dīb’s eighty-title list in his introduction to Juwaynī’s *Ad-Durra al-Muḍīyya fimā Waqaʿa a fīh al-Khilāf bayn ash-Shaftī’iyya wa l-Hanafiyya*, ed. ʿAbd al-ʿĀzīm ad-Dīb (Qatar: Idārat Ilhāmāt al-Tamthīlīya, 1986), 51-82; ʿAṭiyya’s forty-title list in, Jamāl ad-Dīn ʿAṭiyya, *At-Tanẓīr al-Fiqhī* (Doha: Jāmiʿat Qatar, 1987), 136-41; and Shallī’s extensive list in Nawwār b. Shallī, *Al-Asās fī Fiqh al-Khilāf* (Cairo: Dār al-Salām, 2009), 47-53. Also, my assessment of the development of the *khilāf* writing is based on ʿAṭiyya’s in *At-Tanẓīr al-Fiqhī*, 142-3. The diachronic division that I develop and the majority of the sources I list are mine, however.
Shāfīʿī maʿa Muḥammad b. al-Ḥasan.” From the Mālikī school of law in Iraq, for example, one of the extant works is Ismāʿīl b. Ishāq’s (d. 282/896) Ar-Rad ʿalā Muḥammad b. l-Ḥasan wa sh-Shāfīʿī wa Abī Ḥanīfa.137

During the fourth/tenth century, the intensity of this defensive attitude lessened to a great degree. Several scholars were less interested in settling controversies, but sought to provide an impartial examination of the disputes. The style of writing about khilāf around this time can be described as objective and comparative, such as Marwazī’s (d. 294/906) Ikhtilāf al-ʿUlamāʾ,138 and Ṭabarī’s (d. 310/923) Ikhtilāf al-Fuqahāʾ.139 Ibn al-Mundhir’s (d. 319/931) Al-Ishrāf ʿalā Madhāhib al-ʿUlamāʾ and Al-Awsāṭ fī s-Sunan wa l-Ijmāʾ wa l-Ikhtilāf,140 Ṭaḥāwī’s (d. 321/933) Ikhtilāf al-Fuqahāʾ,141 and Ibn al-Qaṣṣār’s (d. 397/1008) ʿUyūn al-Adilla fī Masāʾil al-Khilāf bayn Fuqahāʾ al-Amersār.142

Writing on khilāf continued to flourish from the fifth/eleventh century onward. Some of the main contributions to this genre during this period include, Al-Ishrāf ʿalā Nukat Masāʾil ʿal-

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139 The legal disagreements Ṭabarī has included in this book are those of Abū Ḥanīfa, Shāfīʿī, Awzāʿī, Thawrī, as well as others.


Khilāf by ‘Abd Al-Wahhāb (d. 422/1031), Taʾsīs an-Naẓar by Dabbūsī (d. 430/1038), Al-Ḥāwī al-Kabīr by Māwardī (d. 450/1058), Muḥallā by Ibn Ḥazm (d. 456/1064), Khilāfiyyāt by Bayhaqī (d. 458/1066), Istidhkār and Inṣāf by Ibn ‘Abd al-Barr (d. 463/1070), Ad-Durra al-Mudiyya by Juwaynī (d. 478/1085). At least two of Juwaynī’s most important writings on legal khilāf seem to have been missing, namely: Kitāb al-ʿAmad and Al-Asālīb fī l-Khilāfiyyāt, both of which Juwaynī indicates in the Burhān. Juwaynī’s student, Ghazālī (d. 505/1111), also wrote extensively on khilāf. Unfortunately, at least two of his writings on the topic seem missing: Lubāb an-Naẓar and Tahṣīn al-Maʾākhidh. His third book of khilāf, Maʾākhidh al-Khilāf, may

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144 Abū Zayd ʿUbayd Allāh b. ʿUmar b. ʿĪsā ad-Dabbūsī (Ḥanafī), Taʾsīs an-Naẓar, ed. Muṣṭafā Muḥammad al-Qabbānī (Cairo: Maktabat al-Khānjī, 1994).


146 Abū Muḥammad ʿAlī b. Aḥmad Ibn Ḥazm of Cordoba (Ẓāhirī), Al-Muḥallā, ed. Muḥammad Munīr (Cairo: Aṭ-Ṭibāʿa al-Munīriya, 1933). The book might have not survived in full. However, the three volumes that have been so far edited address cleanliness (ṭahāra) only. Al-Ḥusayn b. ʿAlī b. Mūsā al-Bayhaqī, Al-Khilāfiyyāt: Bāb aṭ-Ṭahāra, ed. Mashhūr Āl-Salmān (Riyadh: Dār as-Ṣamīʿī, 1994).

147 Abū ʿUmar Yūsuf b. ʿAbd Allāh b. ʿAbd al-Barr an-Namrī of Cordoba, Al-Istidhkār li-Madhāhib ʿUlamāʾ al-Amsār, ed. Abū al-Muʿtādī Amīn Qalʾājī (Beirut and Cairo: Dār Qutayba and Dār al-Waqf, 1993); and Al-Inṣāf fī-mā bāyin al-ʿUlamāʾ. The latter work is a special study of several disputes about citing God’s name (basmala) at the beginning of the Qurʾān’s introductory chapter (Al-Fāṭiḥa). His Istidhkār is one of the two most important references in Ibn Rushd’s Bidāya. The other book is the Muntaqā by Bājjī.


be extant. To these, we can add Ḥiliyat al-ʿUlamāʾ by Shāshī (d. 507/1113), and Tariqat al-Khilāf by Asmandī (d. 552/1157), as well as Bidāyat al-Mujtahid by Ibn Rushd (d. 595/1198).

The full institution of the legal schools and the rising interest in expounding the madhhab after this stage seems to have influenced the khilāf genre in, at least, two ways. On the one hand, we find books that focused on comparing the madhhab to others, mainly to establish one’s own schools’ hermeneutics, but not necessarily to refute others’. The centrality of the legal school is seen, for example, in Ṭaḥāwī’s Mukhtaṣar Ikhtilāf al-Fuqahāʾ, Kāsānī’s (d. 587/1191) Badāʾiʿ as-Sanāʾī, Ibn Qudāma’s (d. 620/1223) Al-Mughnī. The latter work resembles the first two in that Ibn Qudāma exposits on Ḥanbalī law and compares it to other legal schools, but also their similarities (muwāfaqāt). Other scholars focused on the differences that arose within the school, either between the Imām and his associates or among the associates, such as did Ibn Juzayy in Al-Qawānīn al-Fiqhiyya.

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152 I have not been able to confirm this information myself, but I have learnt from a colleague that the manuscript of Maʾākhidh is found and it is being edited by Şükrü Özen.


154 Abū l-Fatḥ Muḥammad b. ʿAbd al-Ḥamīd al-Asmandī (a Ḥanafī not to be confused with as-Samarqandī, ʿAlāʾ ad-Dīn, d. 539/1144), Tariqat al-Khilāf fī l-Fiqh bayn al-Aʿimma l-Aslāf, ed. Muḥammad Zakī ʿAbd al-Barr (Cairo: Dar at-Turāth, 1998).


157 ʿAṭiyya rightly established that studies of khilāf within the madhhab played a crucial role in originating the genre of “legal maxims” (al-qawāʾid al-fiṣḥiyya) and settling each school’s methods and processes of takhrīj. He even considers books of takhrīj works of khilāf and reads the phase of writing about takhrīj and qawāʾid as a separate stage in the development of khilāf. See ʿAṭiyya, At-Tanẓīr al-Fiqhī wa l-Uṣūliyyīn, 141-46, esp., 143; See another discussion of the role of khilāf in the founding of the genres of Qawāʾid and Takhrīj in, Bāḥusayn, At-Takhrīj ʿind al-Uṣūliyyīn wa l-Fiṣḥīyyāʾ, 47-182.
Chapter 2

IBN RUSHD JURIST:

BIDĀYAT AL-MUJTAHID WA KIFĀYAT AL-MUQTAṢID

1. Ibn Rushd Jurist: Teachers, Students, and Influence

Abū l-Walīd Muḥammad b. Aḥmad Ibn Rushd was born in 520/1126 in Cordoba to a family of illustrious judges and erudite scholars of the Mālikī school. His grandfather is the celebrated Abū l-Walīd Muḥammad b. Aḥmad Ibn Rushd (d. 520/1226), sometimes confused with our Ibn Rushd. He was also a judge in Cordoba and his books on Mālikī law are among the most influential to date.158 His father, Abū l-Qāsim Aḥmad b. Abī l-Walīd (d. 563/1168), was appointed Judge (Qāḍī) in Cordoba in 532/1137 and Chief Judge (Qāḍī l-Quḍāt) in 537/1142 for Almoravids.159 In the footsteps of his father and grandfather, Ibn Rushd served as Judge in Seville and Cordoba and Chief Judge under Almohads. In this prestigious family and a city which intellectual ambiance earned it the name “Baghdad of the West” (Baghdad al-Gharb), Ibn Rushd studied with the leading authorities of his time, several of whom were students of his grandfather. One of his biographers, Ibn al-Abbār (d. 658/1260), identified six teachers with whom Ibn Rushd took Fiqh and Arabic linguistics,160 and other standard subjects: Abū l-Qāsim Ibn Bashkuwāl, Abū Marwān Ibn Masarra,


159 See his biography in Ibn Bashkuwāl, Ṣīla, 1: 134.

160 Ibn Rushd’s compendium on grammar has recently been edited. See, Ibn Rushd, Aḍ-Ḍarūrī fī Ṣināʿat n-Naḥw (The Essentials of Grammar), ed. Maʿṣūr ʿAbd as-Samīʿ (Cairo: Dār aṣ-Ṣaḥwa, 2010). Biographers confirmed that Ibn Rushd mastered Arabic linguistics and literature. A contemporary of Ibn al-Abbār called Ibn Saʿīd al-Maghribī (d. 685/1286) noted that his father studied directly with Ibn Rushd and memorized some of his poetry. ʾAlī b. Mūsā
Abū Bakr Ibn Samḥūn, Abū Jaʿfar b. ʿAbd al-ʿAzīz, Abū ʿAbd Allāh al-Māzarī, and Abu l-Faḍl ʿIyyāḍ.\footnote{161}

Ibn Bashkuwāl (d. 578/1182) is a polymath and prolific writer most distinguished as a leading biographer and historian of Andalusia.\footnote{162} He was a close friend of Ibn Rushd’s father and student of his grandfather. Ibn Masarra (d. 552/1157) was one of Cordoba’s respected Ḥadīth and Fiqh scholars, and student of Ibn Rushd’s grandfather.\footnote{163} Ibn Samḥūn (d. 563/1168) was a famous teacher of the Qur’ān, Arabic and arithmetic.\footnote{164} Abū Jaʿfar Ibn ʿAbd al-ʿAzīz (d. 548/1153), better known as Ibn Ḥamdīn, was the judge Ibn Rushd’s father, Abū l-Qāsim, replaced in Cordoba, and who would retake his position after Abū l-Qāsim resigned.\footnote{165} Al-Māzarī (d. 536/1141) was an eminent Mālikī scholar who left behind key works in law and jurisprudence.\footnote{166} Ibn Rushd is said to have received his ijāza.\footnote{167}


Finally, Abū l-Faḍl ʿIyyāḍ (d. 544/1149) is the Mālikī jurist known as Al-Qāḍī ʿIyyāḍ. Ibn Farḥūn quoted him saying that he spent a great deal of time learning from Ibn Rushd’s the grandfather.170

From Ibn Abī Uṣaybiʿa’s ‘Uyūn al-Anbā’, we learn of at least three persons with whom Ibn Rushd took medicine and philosophy: Ibn Bājja (Avempace), Ibn Zuhr (Avenzoar), and Ibn Hārūn at-Tirjālī. Ibn Bājja is Abū Bakr Muḥammad b. Yahyā b. aṣ-Ṣāʿigh (d. 533/1138), identified by his biographers as the highest authority in philosophy at his age.171 Ibn Zuhr is Abū Marwān ʿAbd al-Malik b. Abī l-ʿAlāʾ (d. 557/1162), often described as a prominent master of the medical sciences across Andalusia at the time.172 Ibn Abī Uṣaybiʿa spoke of him as a close friend and colleague of Ibn Rushd. He quoted Ibn Rushd in the book of Kulliyyāt (Generalities of Medicine, or the Colliget) redirecting his readers to Ibn Zuhr’s book on the particularities of medicine, the Taysīr, and confirming that it was compiled under his request for complementing his book on the generalities of medicine, the Kulliyyāt.173 Abū Jaʿfar Ibn Hārūn at-Tirjālī (d. around 575/1180) was another authority of medicine from Sevilla; “a meticulous investigator of the philosophical sciences (muḥaqiq al-ʿulūm al-ḥikamiyya),” as Ibn Abī Uṣaybiʿa has described him.174 Tirjālī was appointed as head court physician by Abū Yaʿqūb Yūsuf b. ʿAbd al-Muʾmin (d. 580/1184), the second Almohad caliph and father of Abū Yūsuf Yaʿqūb b. Yūsuf (d. 595/1199), known as Yaʿqūb al-Manṣūr, who would later nominate Ibn Rushd his personal doctor. To these three, one may add two other important figures. The first is Abū Marwān Ibn Juryūl who is confirmed by Ibn

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169 See his entry in, Ibn Farḥūn, Dhībaj, 2: 46-51.
170 See the full account in, Ibid, 2: 249.
171 Aḥmad b. al-Qāsim b. Khalīfa as-Saʿdī Ibn Abī Uṣaybiʿa (d. 668/1270), ‘Uyūn al-Anbā’ fi Ṭabaqāt al-ʾAtibbāʾ, ed. Nizār Riḍā (Beirut: Dār Maktabat al-Ḥayāt, 1965), 516. It is questionable that Ibn Rushd studied directly with Ibn Bājja since by the time the latter died, Ibn Rushd was only twelve years old which is too soon to venture in a laborious discipline such as philosophy.
173 Ibid, 531.
al-Abbār, on several occasions, to be one of Ibn Rushd’s teachers of medicine. The second is Abu Bakr Ibn Ṭufayl (d. 581/1185), an illustrious physician and philosopher most known for his philosophical novel Ḥayy Ibn Yaqẓān (Living Son of the Awake). In Al-Mu’jib fī Akhbār al-Maghrib, ʿAbd al-Wāḥid al-Murrākushī included an anecdote about Ibn Ṭufayl’s arrangement for Ibn Rushd’s first meeting with Yaʿqūb al-Manṣūr in 564/1169, the meeting which is said to have set in motion Ibn Rushd’s career in philosophy.

Abū Yaʿqūb Yūsuf and Yaʿqūb al-Manṣūr’s patronage allowed Ibn Rushd to safely, though only temporarily, enjoy practicing the law and venturing into the mysterious worlds of Greek philosophy. Over the twenty years of writing Bidāyat al-Mujtahid, for example, Ibn Rushd produced several commentaries on Aristotle’s corpus. Combining the two, however, was not without risk at a time of increasing animosity towards philosophy. On this hostile reception of ḥikma in Andalusia at the time, Maqqarī writes in Naḥf at-Ṭīb fī Ghusn Al-Andalus ar-Raṭīb (The Fragrant Breeze of Andalus’ Tender Bough):

All the sciences received attention and appreciation from them [Andalusian scholars] save philosophy and astrology. They were highly esteemed among their specialists who could not disclose it out of fear of the multitude. Every time it was reported that “so and so studies philosophy” or “works on astrology,” the multitude call him an apostate (zindīq) and pressure him. If he slips up, they stone or burn him, even before the sultan hears of his matter. Or, the sultan executes him for winning the multitude’s heart. Quite often, their kings command burning books on these subjects.
And this was exactly the fate of Ibn Rushd and his work. Towards the end of 591/1195, he was summoned before Yaʿqūb al-Manṣūr to defend himself against the jurists’ accusation of apostasy. Eventually, he was expelled to a small town called Lucena, the study of the ancient sciences was proscribed, and the books of philosophy — save those in medicine, arithmetic and astronomy — were burned. Yaʿqūb al-Manṣūr’s true motive remains unclear, especially since he was an ardent admirer of philosophy. The closest explanation that we have is that Yaʿqūb al-Manṣūr might have sought, through the religious scholars, the masses’ support for his war against the Christian army; a war he commenced that very year. By good fortune, Ibn Rushd’s disgrace lasted a short time. In about two years, he was summoned to Marrakech and granted a royal pardon. The ban on his work and the study of philosophy might have been revoked as well. Shortly after, however, precisely in Safar 595/December 1198, Ibn Rushd died at the age of 72; one month before Yaʿqūb al-Manṣūr who died in Rabīʿ al-Awwal 595/January 1199.

The damage of the “inquisition” of Ibn Rushd, Almohad’s Supreme Judge and a Sultan’s favored, was far-reaching. Ibn Rushd’s miḥna became a story told and retold to students to warn them against engaging the ancients’ sciences. In a famous letter of admonition, the well-known eighth/fourteenth century poet and polymath of Granada, Lisān ad-Dīn Ibn al-Khaṭīb (d. 776/1374) advised his sons of the following:

Beware of the ancient sciences and the abandoned culpable arts. Most of them only bring dubiety and feeble opinion… The way of revealed law is more deeply rooted in moderation and worthier than spending a lifetime in disputation. Remember Ibn Rushd, the Chief Judge and muftī of the land, seeker and provider of wisdom. They only brought him grievous wrath, and he was the highest legal authority (Imām ash-Sharīʿa). So, there is no need to plunge in them, and get trapped in their crowdedness.

Ibn al-Khaṭīb’s advice is evident: pursue the religious sciences (ʿulūm ash-sharʿ) and stay away from the ancient sciences (al-ʿulūm al-qadīma). This attitude towards philosophy was dominant

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179 Murrākushī, Muʿjib, 224-25.

180 Maqqarī, Nafḥ, 7: 400-01.
during Ibn Rushd’s time and prevailed for many centuries to come, particularly in the Islamic West. Muslims’ interest in his philosophical endeavor was renewed only during the last century, whereas his legal work (esp., the *Bidāya*) received attention much more recently. Scholars have wrestled with the question: why did Ibn Rushd’s philosophical work generated serious discussion and had lasting impact on Medieval European scholasticism, but not at home? The pressing question for us, however, is: did Ibn Rushd’s legal work have any impact on subsequent legal scholarship? For at first sight, the *Bidāya*, despite its uniqueness, as attested by his biographers and many legal experts, seems to have received little attention in the Muslim world.

Engaging such inquiry takes us to another implication of Ibn Rushd’s *mihna*, namely the damage it might have had on his legacy as jurist and, by consequence, the extent to which it impeded the continuity of his legal teachings. An invaluable testimony in this respect has been preserved in Abū l-Ḥasan an-Nubāḥī’s (d. 798/1396) *Tārīkh Quḍāt Al-Andalus*. Nubāḥī quoted someone called Ibn az-Zubayr\(^{181}\) confirming that Ibn Rushd used to draw a considerable crowd of students, and that scholars had extensively used his books. However, when his pursuit of the ancient sciences was made public, people abandoned his work and protested against him.\(^{182}\) Of those who challenged him in public, Nubāḥī mentions Ibn Rabī‘ (d. 639/1241), a renowned jurist and theologian who held office in Malaga, Sevilla and Cordoba.\(^{183}\)

Despite that Ibn Rushd attracted a wide pool of followers in the various disciplines he taught over the years, very little is known about his students. Ibn al-Abbār mentioned five of his

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\(^{181}\) This is most likely Aḥmad b. Ibrāhīm b. az-Zubayr Abū Jaʿfar ath-Thaqafī (d. 708/1308), a historian, linguist and Ḥadīth expert who settled in Malaga. See, Ziriklī, *Aʿlām*, 1: 86.


\(^{183}\) Abū ʿĀmir Yaḥyā b. Abd ar-Raḥmān b. Rabī‘. See, Ibn al-Ḥasan, *Tārīkh Quḍāt Al-Andalus*, 124. It is reported that there had been a long conflict between his family and the family of Ibn Rushd, due mainly to competition for office and social status.
law students.\textsuperscript{184} The first is Abū Muḥammad b. Ḥawṭ Allāh (d. 612/1215), an authority in Ḥadīth who taught Abū Yūsuf Yaʿqūb’s children. He worked as judge in Cordoba, Valencia, Murcia in Spain, and in Ceuta and Sale in Morocco. Ibn al-Abbār showed deep regret to have missed meeting him and requesting his *ijāza*.\textsuperscript{185} The second is Abū l-Ḥasan Sahl b. Mālik (d. 640/1242), another scholar of the religious and language sciences whom Ibn al-Abbār visited in Sevilla and received his *ijāza*.\textsuperscript{186} The third is Abū r-Rabīʿ b. Sālim (d. 634/1237) described as an unequaled authority in the Ḥadīth sciences during his time.\textsuperscript{187} He was a lifelong mentor and adviser of Ibn al-Abbār who remembered him especially for pushing him to finish the *Takmila* when he was about to quit, providing him with advice all along, and allowing him to use his personal library. Ibn al-Abbār mentions more than twenty five titles by Abū r-Rabīʿ, most of which did not survive.\textsuperscript{188} The fourth is Abū l-Qāsim Ibn at-Ṭaylasān (d. 642/1244), a Cordovan authority in the Qurʾān and Ḥadīth sciences known for his mastery of the different readings of the Qurʾān (*qirāʾāt*).\textsuperscript{189} In addition to these four students, one encounters throughout Ibn al-Abbār’s *Takmila* several other names who studied with Ibn Rushd, including Ibn Ḥabbūn al-Maʿāfirī, Ibn Khalaf al-Fihrī, Ibn Muḥārib al-Qaysī, and Ibn Muḥammad al-Asadī, as well as others.\textsuperscript{190}

Given the scarcity of evidence, we can only speculate that the *miḥna* played a role in the setting of Ibn Rushd’s star in the Muslim West, although it must not be the only factor. Another may be Ibn Rushd’s meager contribution to the religious sciences (with only two works, the *Bidāya

\textsuperscript{184} Ibn al-Abbār, *Takmila*, 2: 249.


and Ṭarūrī) compared to his contribution to philosophy. This is implicit in Ibn az-Zubayr’s note that Ibn Rushd’s popularity diminished after the dissemination of his interest in and focus on the ancient sciences (ikhtiyār al-ʿulūm al-qadīma wa r-rukūn ilayhā). It is not improbable that his opponents dismissed his legal works in their teaching circles or advised their students against them. Also, returning to Ibn Khaldūn’s remark that Mālikī scholars were by cultivation not drawn to the crafts (aṣ-ṣināʿāt) and rational methods, it may be surmise that Ibn Rushd’s students of law had less enthusiasm for khilāf. His four students that I list above were leading scholars in the Qurʿān, Ḥadīth and Fiqh. None was associated with the science of Uṣūl. Finally, the unstable political state of Muslim Iberia during and subsequent to Ibn Rushd’s age played a direct role in destabilizing intellectual life as a whole and perhaps impeded the circulation of Ibn Rushd’s legal teachings through his students. Several military conflicts took place during this time between Almohads and the Christian armies on the one hand, and Almohads and the rising Muslim opposition from within on the other. Scholars had to be constantly on the move and a large number of books was destroyed. The final days of two of Ibn Rushd’s closest students reflect this situation. Abū l-Qāsim b. aṭ-Ṭaylasān is said to have left Cordoba abruptly in the year 633/1236 after it had fallen to the Christian army. Abū r-Rabīʿ b. Sālim died fighting in a battle near Valencia.

Nonetheless, we cannot speak of Ibn Rushd’s “influence” on Islamic jurisprudence in the way his philosophical commentaries left a lasting impression on medieval European scholasticism, or in the way Ghazālī’s jurisprudence was received in Muslim Spain. However, it should be emphasized that Ibn Rushd’s legal endeavor was not entirely overlooked by his successors. Both the Bidāya and Ṭarūrī were cited in many khilāf and general Uṣūl books. Maqqārī, for example,

191 Nubāhī, Tārīkh, 111.
described them as two of the important legal texts in the Mālikī School during his time —rightly identifying the *Bidāya* with Fiqh and the Ṣaḥīḥīh with *Uṣūl*.\(^{194}\) The *Bidāya* is a primary source of few commentaries on prominent studies of the universal legal rules (*al-qawāʿid al-fiqhiyya*). One such work is Ibn Ḥusayn’s *Tahdhib al-Furūq*, an extensive commentary on *Al-Furūq* by the seventh/thirteenth century Mālikī jurist Ibn Idrīs al-Qarāfī (d. 684/1285).\(^{195}\) Ibn Ḥusayn has frequently identifies the *Bidāya* by name using expressions as “fī l-Bidāya,” “fī Bidāyat al-Mujtahid,” and “fī Bidāyat al-ḥafīd” (to distinguish it from Ibn Rushd’s grandfather’s *Muqaddimāt* and *Bayān*, both of which he also cites).\(^{196}\) Throughout his book, Ibn Ḥusayn returns to the *Bidāya*, at times borrowing entire discussions.\(^{197}\) Qarāfī himself mentions the *Bidāya* in the course of his reflection on the different legal rules with respect to usury (*ribā*), although he called it erroneously *Kitāb al-Qawāʿid* (*Book of Universal Rules*) and not *Bidāyat al-Mujtahid*.\(^{198}\)

The only early study wholly devoted to the *Bidāya*, it seems, is an uncompleted and nonextant work by the eighth/fourteenth century polymath of Granada, Muḥammad b. Yūsuf (d. 745/1344).\(^{199}\) Its title is *Maslak ar-Rushd fī Tajrīd Masāʾil Nihāyat Ibn Rushd* (*the proper method...*)

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\(^{197}\) For his views of animal slaughter (*dhakāt*), polygamy, matrimonial guardianship (*wilāya*), and dowry, see respectively, Qarāfī, *Furūq*, 1: 171-179, 231, 247-51, and 261-64. He also returns to the *Bidāya* for other issues in, 1: 25, 29, 276-77 and 370; 2: 196, 197 and 300; and 3: 56, 80 and 171.

\(^{198}\) “Qāla Ibn Rushd fī kitāb al-Qawāʿīd...” (Ibn Rushd said in the book of Qawāʿīd). Qarāfī, *Furūq*, 3:419-22. The book Qarāfī entails is *Bidāyat al-Mujtahid*. For one reason, Ibn Rushd’s grandfather does not have a book with this name and he is often distinguished by Qarāfī in the *Furūq* as “ṣāḥib al-Muqaddimāt ash-shaykh Abu l-Walīd Ibn Rushd;” (e.g., 3: 114). More importantly, the passage in Qarāfī’s book corresponds to Ibn Rushd’s discussion in the *Bidāya*, 3: 150.

of abstracting the questions of Ibn Rushd’s Nihāya), and is mentioned by Ṣalāḥ ad-Dīn aṣ-Ṣafadī (d. 764/1363) in A ‘yān al-‘Aṣr. In addition, the Yemeni legal reformist, Muḥammad b. ʿAlī ash-Shawkānī, indicates that Ibn Saʿīd al-Maghribī (d. 1119/1707) relied in writing Al-Badr at-Tamām on Ibn Rushd’s Bidāya and other works. Throughout his commentary on Ibn Saʿīd’s Al-Badr at-Tamām, Muḥammad b. Ismāʿīl aṣ-Ṣanʿānī (d. 1182/1768), another Yemeni scholar, has also made several references to the Bidāya. Finally, with respect to Ibn Rushd’s Ğar rî fi Uṣūl al-Fiqh, Badr ad-Dīn az-Zarkashī (d. 794/1392) also made use of it in Al-Baḥr al-Muḥīṭ, and Abū ʿAbbās al-Wansharīsī (d. 914/1509) quoted an full section on a matter of qiyās in his Al-Mi’yār al-Muʿrib.

It is well known that Ibn Rushd received his early legal training in the madhhab from his Father, Abū al-Qāsim. However, the person who had the strongest influence on his legal thinking and helped him cultivate a close interest in khilāf, and by extension in ijtihād, is his grandfather, Abū l-Walīd Muḥammad Ibn Rushd. Although he never met his grandfather, who died the same year he was born (520/1126), it is clear that Ibn Rushd had utmost respect for him and his work.

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205 Since both have the same name, Abū l-Walīd Muḥammad Ibn Rushd, finding the proper way to address each has not been easy. Scholars often distinguish between our Ibn Rushd and his grandfather by appending to the name of the former “the grandson” (i.e., Ibn Rushd the grandson) and to the latter “the grandfather” (i.e., Ibn Rushd the grandfather). An easier way, in my opinion, is to call the grandson “Abū l-Walīd Ibn Rushd” and his grandfather “Muḥammad Ibn Rushd,” for this is how they have been addressed by their respective copyists. For example, in the Muqaddimāt and Bayān, the copyists constantly say “Muḥammad Ibn Rushd.” In the Bidāya the copyist often says “al-Qāḍī” (the Judge), and occasionally “al-Qāḍī Abū l-Walīd.”
Ibn Rushd conveyed admiration of him in the *Bidāya* and cited his introduction to the *Mudawwana: Al-Muqaddimāt al-Mumahhidāt*. Ibn Rushd drew upon his grandfather’s *Al-Bayān wa t-Tahṣīl* and demonstrated deep knowledge of his *fatwās*.\(^{206}\) We know that Ibn Rushd received his early legal training from his father, Abū l-Qāsim. Since Abū l-Qāsim spent most of his life in the company of his father who was one of the most influential scholars at the time and whose books were widely read, one assumes thereof that our Ibn Rushd studied the books of his grandfather and absorbed his methods of legal construction as well as his tendencies of *khilāf* and *ijtihād* at an early age.

A quick comparison of the *Bidāya* and the *Muqaddimāt* and *Bayān* strikes key similarities between the grandfather and his grandson. On the one hand, they both underline *ijtihād* as the ultimate end of a law student and engage in a rigorous investigation of the legal controversies. Muhammad Ibn Rushd’s *ijtihād* tendencies are well known and manifest in many of his works, including the *Muqaddimāt* and *Fatāwā*.\(^{207}\) As for Abū l-Walid Ibn Rushd, it has been shown that the *Bidāya* is a book of *ijtihād* aimed at helping scholars attain autonomy in their legal practice. And because *ijtihād* cannot be attained without unraveling the implications of *khilāf* according to the majority of legal authorities, they both make jurists’ disagreements a primary subject of their research. Ibn Rushd makes *khilāf* literature the backdrop of his discussions in the *Bidāya*, and insists from the very beginning that his intention is to examine “the intricacies of *khilāf*” (*nukat al-khilāf*).\(^{208}\) Muhammad Ibn Rushd also pays close attention to legal controversies in the *Muqaddimāt* and *Bayān*. Part of his objective in both is analyzing “problematic issues” (*al-masāʾil al-mushkila*, i.e., juristic disagreements) in the *madhhab*.\(^{209}\) Especially throughout the *Bayān*, he


\(^{207}\) In the *Muqaddimāt*, he contributes several independent judgments. In the *Fatāwā*, he makes an intervention on a question on the qualifications of the jurisconsult (*muftī*). See *fatwā* no. 549 in, Muhammad Ibn Rushd, *Fatāwā*, 3: 1494-1505.


\(^{209}\) Muhammad Ibn Rushd, *Muqaddimāt*, 1:10; *Bayān*, 1: 25. His interest in controversial issues in the *Muqaddimāt* can be seen even in the book’s title, the full version of which is *Al-Muqaddimāt al-Mumahhidāt li-Bayān mā iqtadathi Rusūm al-Mudawwana min al-Aḥkām ash-Sharʿiyyāt wa t-Tahṣīlāt li-Ummahāt Masāʾilīlhā al-Mushkilāt*; i.e., the book is an introduction aimed to (1) explain the imports of the *Mudawwana*’s written words which imply rules and revealed judgments, and (2) explain the *Mudawwana*’s main problematic legal issues.
examines hundreds of legal controversies and considers the final judgment of many of these a matter of independent legal opinion (ijtihād). This includes some very interesting cases, such as a witness who testified that he saw two women engaged in tribadism (al-mar’a tu’khadh ma’a l-mar’a tusāhiquhā), and a man who broke a woman’s hymen with his fingers (yadfa’ al-mar’a fa-tasqūṭ ‘udhratuhā; the idea following his discussion is not that of a man “pushing” a woman and breaks her hymen, but actually using his fingers).

The influence of Muḥammad Ibn Rushd on his grandson does not stop at the cultivation of an affirmative attitude to ijtihād and khilāf. It is also discernible that Abū l-Walīd walked in the footsteps of his grandfather with respect to structuring his legal analysis and synthesis in the Bidāya. Their similarity lies especially in their shared goal of elucidating the aḥkām and the jurists’ agreements and disagreements about them, establishing their foundation in the Qurʾān, Sunna and ijmā’, and grounding substantive law in legal maxims. On custody, for example, Muḥammad Ibn Rushd begins by the textual bases of its hukm (i.e., obligation) in the Qurʾān, Ḥadīth and consensus. After outlining jurists’ agreements on this subject, he moves to talk in detail about their disagreements. Our Ibn Rushd structures his discussion of legal issues in a similar fashion (Ibn ʿAbd al-Barr is another influence on him in this regard as previously shown). He consistently begins with the textual sources of the legal categorization of the issue at hand (aṣl al-ḥukm), followed by the jurists’ agreements, then their disagreements, and finally the outweighing of their views.

Despite their similarity, however, Abū l-Walīd Ibn Rushd differs from his grandfather in at least two significant ways, which earned him his own niche among the most distinguished scholars of Islamic law. The first and most important is that unlike his grandfather who focuses on Mālikī law almost entirely (he rarely refers to other Schools, and if he does only to highlight the

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210 Muḥammad Ibn Rushd, Bayān, 16: 323 and 16: 95. See other interesting cases where he leaves the decision to the judge’s ijtihād in, e.g., 9: 205, 10: 337, 12: 247, and 14: 477.

211 This is to a large degree the goal which they set for themselves in the Muqaddimāt and the Bīdāya respectively. See, Muḥammad Ibn Rushd, Muqaddimāt, 1:9, and Abū l-Walīd Ibn Rushd, Bīdāya, 1: 9.

212 Muḥammad Ibn Rushd, Muqaddimāt, 1: 562-72, (Kitāb al-Ḥadāma).
Mālikī perspective), the *Bidāya* is a comparative work where Abū l-Walīd strived to maintain the same distance from all schools. In other words, whereas Muḥammad Ibn Rushd’s interest in *khilāf* was intra-doctrinal (i.e., with respect to disagreements within his school), Abū l-Walīd Ibn Rushd’s approach is inter-doctrinal (i.e., examines *khilāf* across the schools). The second main difference between them is that Abū l-Walīd Ibn Rushd develops a systematic account of the causes of juristic disagreement, whereas his grandfather only incidentally refers to them.

2. *Bidāyat al-Mujtahid* in Modern Western Scholarship

Yasin Dutton initiated his 1994 translation of and commentary on the preamble of *Bidāyat al-Mujtahid* with a categorical remark about the stingy attention paid by Western scholars to Ibn Rushd’s contribution to Islamic law *vis-à-vis* the exuberant interest his philosophical writings have generated.213 He identified four significant studies of Ibn Rushd’s legal work, the earliest and most important of which is Robert Brunschvig’s 1962 essay “Averroès Juriste.”214 The other three are Abdel Magid Turki’s “La Place d’Averroès Juriste dans l’Histoire du Malikisme,”215 Dominique Urvoy’s account of Ibn Rushd’s life and work as jurist in *Ibn Rushd (Averroes)*,216 and Asadullah Yate’s 1994 doctoral thesis, “Ibn Rushd as Jurist,” published in 1999 as *Ibn Rushd: Mujtahid of Europe.*217

A decade after Dutton’s statement, still very little has been written about Ibn Rushd as jurist and legal scholar. Most noticeable today is that along with the continuous interest in his

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philosophical commentaries, there has been a growing enthusiasm for his theological thought. Works such as *Al-Kashf ʿan Manāhij al-Adilla* (the *Exposition of the Systems of Proofs*), *Faṣl al-Maqāl* (The *Decisive Treatise*) and its appendix *Ḍamīma fī l-ʿIlm al-Ilāhī* (On *The Science of Metaphysics*), and, to a less extent, *Tahāfut at-Tahāfut* (The *Incoherence of the Incoherence*), \(^{218}\) have received close attention.\(^{219}\) By contrast, Western studies of Ibn Rushd’s legal writings can be counted on one hand.

In addition to the four titles Dutton listed, one can add the following: Maḥmūd Makkī’s “Contribución de Averroes a la Ciencia Jurídica Musulmana;”\(^ {220}\) Roger Arnaldez’ brief chapter, “Averroes Juriste,” in *Averroès: Un Rationaliste en Islam;*\(^ {221}\) Maribel Fierro’s “The Legal Politics of the Almohad Caliphs and Ibn Rushd’s *Bidāyat al-Mujtahid;*”\(^ {222}\) Majid Fakhry’s discussion of Ibn Rushd’s views of *qiyyās, jihād*, marriage, divorce and adultery in his *Averroes (Ibn Rushd): His Life, Works and Influence;*\(^ {223}\) and Frank Griffel’s “The Relationship between Averroes and al-


Ghazālī as it presents itself in Averroes’ Early Writings.” Most recently, a critical edition and French translation of Ibn Rushd’s Ḍarūrī fī Uṣūl al-Fiqh has been published.

The lack of attention to Ibn Rushd’s legal contribution is also evident in the absence of neither a satisfying edition and translation of Bidāyat al-Mujtahid, nor a study of the history of its manuscripts. Most prints of the Bidāya circulating today are based on the first edition and provide no critical apparatus of the book, and this includes the most reputable prints. There is very little to no information about the Bidāya’s manuscripts, and their locations and history. In Averroès et l’Averroïsme, Ernest Renan only verifies the Bidāya’s title in the Escorial’s list of Ibn Rushd’s writings. Brunschvig mentions in his article the Cairo edition of 1935, select subsequent prints, and partial translations. Anawati is one of few scholars who identifies the Fez manuscript dated 701/1301 (fol. 1190, in the Qarawiyyīn library), and informs that it was first published in Fez in 1909 and later in Cairo in 1911, 1920 and 1952.

For quite some time now, we know of another manuscript in the Royal Library in Rabat, dated 1260/1844 (fol. 2641). But, the news is an unknown manuscript of the Bidāya at the Medina Islamic University in Saudi Arabia. This is a Yemeni copy dated 622/1225, which means only

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226 E.g., the editions of ʿAbd Allāh al-ʿAbbādī (Cairo: Dār as-Salām, 1995), Mājid al-Ḥamawī (Beirut: Dār Ibn Ḥazm, 1995), and Muḥammad Ṣubḥī Ḥallāq (Cairo: Maktabat Ibn Taymiyya, 1995).

227 Ernest Renan, Averroès et l’Averroïsme: Essai Historique (Paris: Calmann Lévy, 1882), 73

228 Brunschvig, “Averroès Juriste,” 168 (fn., 1).


230 Brief description of this and other manuscripts (some of which are incomplete) is available at the Arabic Union Catalogue at: http://www.aruc.org/_Makhtoutat.aspx?PrK=432&Dep=1&lev=2#ContentPlaceHolder1, accessed on Tuesday, August 25, 2015.
twenty-seven years after Ibn Rushd died and thirty-seven years after he completed the *Bidāya*. This makes it the earliest extant manuscript of Ibn Rushd’s book. In light of this finding, a serious critical edition of *Bidāyat al-Mujtahid*, one that compares its extant manuscripts, is much needed.

3. *Bidāyat al-Mujtahid*: Title, Purpose, Introduction

Title and Purpose of the Book

Ibn Rushd’s book was known to premodern biographers and scholars by different titles, the most known of them is “*Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*,” which is the title Ibn Rushd’s first biographer, Ibn al-Abbār, gave it in the *Takmila*. The same title appears in Dhahabī’s (d. 748/1348) *Siyar A’lām an-Nubalā’,*231 Şafadī’s *Al-Wāfī bil-Wafayāt,*232 as well as in later works, such as Makhlūf’s *Shajarat an-Nūr,*233 and Ibn Ibrāhīm’s *Al-I’lām.*234 Ibn Abī Uṣaybi’a calls it “*Nihāyat al-Mujtahid fī l-Fiqh*” in ‘*Uyūn al-Anbā’, whereas Ibn al-Ḥasan calls it “*al-Bidāya wa n-Nihāya*” in his *Tārīkh Quḍāt Al-Andalus*. Amongst the legal scholars, the book has been referred to as “*Bidāyat al-Mujtahid*” or simply “*al-Bidāya*.” We find the abridged title in, for example, Ibn Ḥusayn’s *Tahdhib al-Furūq*, Shawkānī’s *Al-Badr at-Ṭāli‘*, Şan‘ānī’s *Subul as-Salām*, Zarkashi’s *Al-Bahr al-Muḥīṭ* and Wansharīsī’s *Mi’yār*. Modern editions, translations and commentaries on

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the book have adopted the title “Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid” almost exclusively, and so nearly every study of Ibn Rushd since Ernest Renan’s 1882 Averroès et l’Averroïsme.235

The book was also known by another title, the correct title actually: Bidāyat al-Mujtahid wa Kifāyat al-Muqtaṣid. It is the correct title because it is the name Ibn Rushd chose for his book as seen at the end of his chapter of contractual manumission (kitāba) where, after restating his goal in the book, confirms that: “it is most proper to name this book Bidāyat al-Mujtahid wa Kifāyat al-Muqtaṣid.”236 This is the title the Cordoban jurist Aḥmad Ibn ʿUmar (d. 656/1258) gives it in his commentary on Ṣaḥīh Muslim, Al-Mufhim.237 Ibn ʿAbd al-Malik, in the Dhayl wa t-Takmila, also calls it “al-Kifāya” on one occasion and “al-Bidāya” on another.238 Most recently, Jamāl ad-Dīn al-ʿAlawī, a well known Moroccan authority on Ibn Rushd, has given this title under his list of the works of Ibn Rushd, but without elaborating on it.239 Muḥammad Büllūz has pointed out the title issue more directly and referred to the manuscripts of Fes and Rabat being holding the original title, Kifāyat al-Mujtahid.240 The word “bidāya” (v. ibtadā) denotes a starting point and beginning. “Kifāya” (v. iktafā) entails self-sufficiency and contentment. “Nihāya” (v. intahā) refers to an end in the sense of either termination or goal. As its title suggests, the book is intended to fulfill two


236 Ibn Rushd, Bidāya, 4: 169. On another occasion, namely at the end of the Pilgrimage chapter (Ḥajj), he calls it “Kitāb al-Mujtahid.” Ibn Rushd, Bidāya, 2: 935.

237 In his discussion of the legal opinion that a water vessel from which a dog drinks must be washed seven times, he mentioned the affirmative view of Muḥammad Ibn Rushd and its critique by his grandson, our Ibn Rushd, whom he referred to as the author of Kifāyat al-Muqtaṣid (ṣāḥib Kifāyat al-Muqtaṣid). See, Abū l-ʿAbbās Ibrāhīm Aḥmad b. ʿUmar b. Ibrāhīm, Al-Mufhim limā Ashkal min Talkhīṣ Kitāb Muslim, eds. Yusuf Baddīwī et al (Beirut: Dar Ibn Kathīr and Dār al-Kalim at-Ṭayyib, 1996) 1:539.

238 Ibn ʿAbd al-Malik, Dhayl, 6: 22.


goals. One is acting as a primer and departing point for the independent scholar (mujtahid) who has acquired the necessary training to dig deeper in and beyond his school’s hermeneutics. The other is providing a satisfactory resource for the non-advanced scholar (muqtasid, i.e., muqallid).

Essentially, the difference between the “kifāya” and “nihāya” is minimal if both terms are read in the light of Ibn Rushd’s purpose in the book. Being a muqallid’s “nihāya,” the book simply means the highest destination (i.e., nihāya) confined jurists reach in their journey to solve a legal problem or establish a ruling. It promises to be satisfactory and everything they need (i.e., kifāya). The serious problem, however, arises if one thinks of the terms “bidāya” and “nihāya” —and “mujtahid” and “muqtasid”— to be antithetical, such as did Brunschvig, rendering “nihāyat al-muqtasid” as “the end” (i.e., termination and cease) of the content jurist, therefore declaring that Ibn Rushd was an enthusiastic proponent of ijtihād and a hostile opponent of taqlīd: “Averroès est partisant de l’ijtihad, hostile au taqlid.” Ibn Rushd was certainly an ardent supporter of ijtihad, like many other scholars; however, he was far from being hostile to taqlīd for he viewed the latter as an institution with an important role.

Surely Ibn Rushd ranks ijtihād higher than taqlīd; but, he does not conceive of the two as conflicting parties. Ijtihād and taqlīd for him are complementary of and essential to one another. This, for example, can be seen in the way he encouraged exerting personal opinion (ijtihād) from within the theoretical framework of one’s school. Ibn Rushd did not only encourage undertaking legal questions in accordance with one’s school’s legal hermeneutics. He even promised to write a book exclusively on Mālikī law, a project which never saw the light. This proves Ibn Rushd’s

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241 Brunschvig, “Averroès Juriste,” 173. Dominique Urvoy and Arnaldez also seem to have understood the meaning of the title of Bidāyat al-Mujtahid wa Nihāyat al-Muqtasid in this sense. For Urvoy, it means “the Beginning for he who is striving (towards a personal judgment) and the end for he who contents himself (with received knowledge).” See, Urvoy, Ibn Rushd, 64. For Arnaldez, it means “a beginning for him who makes a personal effort and an end for him who refrains from such effort.” See, Arnaldez, Averroes, 20.

242 At the end of the manumission chapter (kitāb al-kitāba), Ibn Rushd comments that for matters that are new and has not been addressed by the community of jurists, a scholar must construct his decision in accordance with his School’s eponym’s theory, “bi-ḥasab uṣūl al-faqīh al-ladhī yuftī ʿalā madhhabih.” It is at this point that he expresses his plan that after completing the Bidāya (baʿd farāghinā min kitābinā hādhā), he would like to write a book of uṣūl from the perspective of Mālikī hermeneutics. Ibn Rushd, Bidāya, 4:169.
conviction of the important place of *taqlīd* as a legal institution and intellectual model of reasoning. As philosopher, Ibn Rushd believed that people have different mental capabilities, and so, only a few can exercise *ijtihād* at the highest level; one that engages inter-doctrinal *khilāf*. Most jurists would, as it has always been, not go beyond the school’s hermeneutical borders. A small group of this class would strive to exercise *ijtihād*, within the limits of the school’s legal theory and practice. Also, as political philosopher, as will be seen in Chapter 5, Ibn Rushd was aware of the social and political significance of *taqlīd* and the extent to which this institution is central to social cohesion and political stability in his own society. So, to be fair, calling his book by the title he assigned it, *Bidāyat al-Mujtahid wa Kifāyat al-Muqtaṣid*, seems the right thing to do.

Nowhere in the *Bidāya* does Ibn Rushd assign it a date. However, at the end of the Ḥajj chapter, he declares it “was completed on Wednesday, Jumādā l-Ūla 9, 584 AH [Wednesday, July 6, 1188 CE], and it is part of *Kitāb al-Mujtahid* which I wrote about twenty years ago.” We assume then that he wrote the first part of the *Bidāya* around 563-4/1168-9, and maybe compiled the Ḥajj book over the following twenty years. It also makes us wonder: why did he exclude this central ritual topic in the first place, and why did it take him about two decades to decide to add it? For Brunschvig, the answer lies in Almohad’s political interest in promoting *jihād* at the time; an interest the *Bidāya* had to reflect. He claims that as a government official who had to reflect his state’s policy, and because the road to Mecca was not safe due to current conflicts, Ibn Rushd


244 Brunschvig, “Averroës Juriste,” 170-72. Maribel Fierro has relied on this assertion to claim that the *Bidāya* carries the political agenda of Almohads, an agenda grounded in the teachings of Ibn Tūmart’s (the founder of Almohad dynasty) and his call for the “need to go back to the original message of the Qurʾān and the Sunna and to interpret it according to a methodology which ensured true knowledge” (244). In addition to preserving Ibn Tūmart’s maxim, Fierro adds, “the Almohad character of the *Bidāya* has been detected in its support of *ijtihād* and of rational argumentation [through *qiyās*]” (245). See, Fierro, “The Legal Policies of the Almohad Caliphs and Ibn Rushd’s *Bidāyat al-Mujtahid*,” *Journal of Islamic Studies*, 10-3 (1999): 226-48, esp., 240-47. Fierro’s claim, however, seems to hang by a thin thread. For one reason, seeking support in the Qurʾān and Sunna is the groundwork of every emerging political movement, and not specific to Almohads. Also, the Qurʾān and Sunna are the basis of every legal work. For another, there is nothing special about the *Bidāya*’s emphasis on *ijtihād* and acceptance of *qiyās*. Fierro ignores, intentionally or not, signs that annul the claim that the *Bidāya* is part of “Almohadism,” signs that he himself mentions. This includes that Ibn Rushd never mentioned Ibn Tūmart and his philosophy in any of his works. Also, that Ibn Rushd points out in the opening of the *Bidāya* that the latter is a personal effort.
deemed the *ḥajj* discourse unnecessary and dropped it from his book. But, this is an unconvincing reading and is for several reasons. Firstly, Ibn Rushd could have easily produced a separate treatise which urged the priority of *jihād* over *ḥajj*. Secondly, the *Bidāya* is not directed at the multitude anyway, and only a group of specialists have the capacity to decipher its content. Thirdly, and perhaps most importantly, the *Bidāya* is a personal product. It is neither an official document, nor was it written under the request of someone. If it were, Ibn Rushd might have been obliged by custom to include a word of recognition of this patron. Ibn Rushd’s intention, so far he has frequently expressed in the *Bidāya*, is to establish for his own sake and by way of a reminder (*uthbit fiḥ li-nafsī ʿalā jihat at-tadhkira*)246 the disputed and undisputed legal questions and call attention (*unabbih*, an expression often indicative of the author’s impartial intention) to the intricacies of juristic disagreement.247 Finally, even if we accept the political reasons presumed by Brunschvig, the omission of the *ḥajj* section might still have no substantial effect, since several other *Fiqh* and *Uṣūl* works with this subject were already widely circulating.248

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246 Ibn Rushd used the same expression, “*uthbit fiḥ li-nafsī ʿalā jihat at-tadhkira*,” in the opening of his commentary on Ghazālī’s *Mustaṣfā*. See, Ibn Rushd, *Ḍarūrī fī Uṣūl al-Fiṣq*, 34.


In any case, whatever Ibn Rushd’s motives were behind deferring the Ḥajj chapter, they need not concern us here, just as it is hopeless to dig for a presumed link between the Bidāya and a certain political agenda of the Almohad central government. Being a practical study of law concerned with people’s actions not intentions, the book will be approached here for what it reveals not for what it conceals. The practical face of Ibn Rushd’s intention is also manifest in the book’s opening paragraph where he maintains:

My intention in this book is to [1] establish for myself, by way of reminder, the undisputed and disputed questions of legal rulings along with their indicants, and [2] call attention to the intricacies of juristic disagreement which constitute the foundations and general principles [of Fiqh] so that the adept jurist is prepared for [answering] cases presented to him and about which the law is silent. [3] These questions [of legal rulings] are for the most part issues already addressed by the law or [4] very closely related to them. They are questions which are either agreed upon or widely disputed by the Muslim jurists [5] from the time of the Companions, may God be pleased with them, until the widespread of School adherence.249

I have divided Ibn Rushd’s statement of purpose into five parts. [1] The first is his intention to lay down the questions of the legal categories (masā’il al-ḥaḵām) agreed upon (muttafaq ʿalayhā) and those disagreed upon (mukhtalaf fīhā) with their proofs (bi-adillatiḥā). So, the subject matter is “masā’il al-ḥaḵām” —i.e., it is not substantive law, but the questions (masā’il, sg. mas’ala) that lend the rules that determine those substantive issues. Bidāyat al-Mujtahid covers thousands of these questions over seventy-two systemic chapters. Each chapter focuses on a specific theme, beginning with purification (ṭahāra) and ending with judgments (aqdīya). Ibn Rushd opens his discussion of almost every question with jurists’ agreements (i.e., consensus), often, using the expression: “the jurists have agreed” (ittafaq al-fuqahā’),” at times, saying Muslims (muslimūn), scholars (ʿulamā’) or people (qawm). Then, he calls on their disagreements in regard the rule in question, often, using the antithetical phrase “the jurists have disagreed” (ikhtalaf al-fuqahā’). For example, he initiates the Purification chapter with an affirmation that jurists have agreed that there

249 Ibn Rushd, Bidāya, 1: 9
are two types of purification: ritual (ḥadath) and physical (khabath). Then, Ibn Rushd draws upon their disagreements concerning specific issues related to each type, such as legal questions about the objects that can be used for wiping or the exact areas required to be washed.\footnote{Ibn Rushd, Bidāya, 1: 13. The method Ibn Rushd pursues in the Bidāya will be comprehensively elaborated and illustrated in the next chapter.}

[2] The Bidāya does not only list the jurists’ differences but also, and unlike most khilāf books, expatiates on the indicants each group develop in support of their arguments. This is what Ibn Rushd means by calling “attention to the intricacies of dispute” (unabbih ‘alā nukat al-khilāf). A widely circulating commentary on the Bidāya misspelled the term “nukat” for “nakth,” and hence reading this expression as “nakth al-khilāf.” ‘Abd Allāh al-ʿAbbādī, the editor, explained in a footnote that Ibn Rushd’s goal is to establish the invalidity of dispute “butṭān al-khilāf” on certain questions.\footnote{‘Abbādī’s fn. 2 in, Ibn Rushd, Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid (Cairo: Dār as-Salām), 1: 13. Other prints, such as Dar al-Maʿārif 1982 and Dār Ibn Ḥazm 1995 in Beirut, and Dār al-Kutub al-Ḥadītha 1975 and Maktabat Aḥmad Kāmil 2007 in Cairo, all used the term “nukat,” but none extends on its meaning.} But, the correct word can only be “nukat.” The noun “nakt” (v., nakata) refers to the action of poking the ground with a stick (or the like) land leaving a mark or impression (athar) on it.\footnote{Muḥammad b. Mukarram Ibn Manẓūr (d. 711/1311), Lisān al-ʿArab, eds. ‘Abd Allāh ‘Alī l-Kabīr et al. (Cairo: Dār al-Maʿārif, 1981), 6: 4536.} For its technical usage, Manāwī (d. 1031/1622) identifies “nukta” (pl., nukat) as “a sharp argument obtained through meticulous speculation” (masʿala laṭīfa ukhrijat bi-diqqat nazār).\footnote{Zayn ad-Dīn Muḥammad al-Ḥaddādī al-Manāwī, At-Tawqīf ʿalā Muhimmāt at-Taʿārīf, ed. ‘Abd al-Ḥamīd Śāliḥ Ḥamdān (Cairo: ‘Ālam al-Kutub, 1990), 330.} He draws a link between “nukta” as an impression made on the ground from poking it with a spear and “nukta” as a sharp argument that also leaves an impression on the scholar’s heart. In our context, the word “nukat” has the sense of “daqāʾiq” (lit., fine particles), and means the fine details of a certain issue.\footnote{‘Nukat’ in the sense of “daqāʾiq” is an expression commonly used in classical Sufi literature. It is used in this sense also in the title of a precedent Mālikī work of khilāf, namely Al-Ishrāf ʿalā Nukat Masāʿ il-Khilāf by ‘Abd al-Wahhāb.} Ibn Rushd’s concern, here, is not merely listing the scholars’ disputes, but...
also exploring their causes (asbāb) and the proofs (adillat al-āhkām) of each contestant. What he is after, however, is a specific type of juristic disagreements. It is generative injunctions; those from which legal principles can be further derived. As such, the Bidāya is a practical study of Fiqh with interest in uṣūl, not furūʿ. Ibn Rushd puts tremendous emphasis on this all through his book.

[3] Most of the legal questions into which the Bidāya looks have been addressed in revealed law (manṭūq bihā fī sh-sharʿ). In other words, these are the legal rulings pronounced in the Qurʾān (i.e., āyāt al-āhḵām) and Sunna (i.e., ḥadīṯ al-āhḵām). Bullūz has totaled the Qurʾān and Ḥadīṯ rulings in the Bidāya to over eight hundred Qurʾānic verses (two thirds of which belong to the first four chapters) and over one thousand and four hundred prophetic traditions. [4] The other type of rulings in which Ibn Rushd is interested are those “closely related” to the āhḵām prescribed in the Qurʾān and Sunna (tataʿallaq bil-manṭūq taʿalluqan qarīban). This includes almost all rulings attained by way of ijtīhād, whether collectively as in ījmāʿ and qawl al-jumḥūr (the opinion of the majority of jurists), or individually by way of qiyyās, istiḥsān or other methods of legal inference. They are considered part of the disclosed rulings (manṭūq bihā), since even if they are obtained through exerting personal opinion, they still must be grounded in the Qurʾān and Sunna. [5] Finally, Ibn Rushd determines the historical period of his research focus, which is from the age of the prophet’s companions until the dominance of taqlīd, which is basically his day, (mīn ladun aṣ-ṣaḥāba ilā an fashā at-taqlīd). He expressed interest in the views of four major groups: the

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255 This resembles a later call by Shāṭibī to focus on the sites of juristic disagreement (mawāqī` al-khilāf), and not simply memorize them (lā ḥifẓ mujarrad al-khilāf). See, Shāṭibī, Muwāfaqāt, 4: 162.


257 I understand Ibn Rushd’s use of the word “taqlīd” to be more or less specific to the idea of loyalty to a school’s legal hermeneutics, which is the second type of taqlīd in Hallaq’s outline of the evolution of this concept. See, Hallaq, Authority, 86-120, esp., 86-88. I should also emphasize that taqlīd in this dissertation is not read as a way of blind adherence to a school’s legal theory and doctrine. Rather, I conceive of taqlīd as a complex intellectual method of legal reasoning that played a primary role in the flourishing of Islamic law generally and the madhhabs specifically. Ibn Rushd was aware of this role of taqlīd and of its import for the systematization of the law. There is no doubt that Ibn Rushd assign to taqlīd a lower rank than ijtīhād. The superiority of the latter, however, must be understood from the angle that Ibn Rushd must have conceived of ijtīhād in its highest form as a universal activity that cuts across the schools. Taqlīd, on the other hand, is a particular activity which confines a scholar to one school’s theory. For a critique of the view that taqlīd is inferior to ijtīhād, see, esp., Mohammed Fadel, “The Social Logic of Taqlīd and the Rise of the Mukhtar,” Islamic Law and Society, 3-2 (1996): 193-233.
companions (qawl as-saḥāba), their successors (qawl at-tābiʿīn), the tābiʿīn’s successors (qawl atbāʿ at-tābiʿīn), and the later authorities from the dominant Sunnī schools of law.258

Basically, Ibn Rushd’s statement of purpose can be summed up in three key words: uṣūl, khilāf and ijtihād. Bidāyat al-Mujtahid, as the title suggests, is a book of ijtihād intended to help scholars cultivate the skill of providing individual legal opinion in matters not addressed in the law. Drawing on jurists’ disagreements on a range of issues is aimed in part at extending and diversifying the scholar’s knowledge of the different schools. Here, however, Ibn Rushd makes very clear that it is not about memorizing the maximum number of disputed cases, but about learning to provide rulings for new cases. The knowledge of khilāf ought to be qualitative, not quantitative. One way this principle is carried out in the Bidāya is by elaborating upon juristic disagreements along with their textual indicants and causes. Another is by examining only the disputes from which further legal rules can be deduced.

On several occasions, Ibn Rushd stresses that the Bidāya is interested primarily in legal theory (uṣūl), not substantive law (furūʿ). For example, he asserts at the beginning of the Book of Exchange (ṣarf) that:

> Since our intention is to mention the issues already addressed by the law or close to those addressed [by it], we decided to mention in this book [of Exchange] seven well-known issues that constitute principles (tajrī majrā l-uṣūl) in case the adept jurist comes across [other] issues in this vein. For we have composed this book to help the adept scholar of this discipline [i.e., Fiqh] attaining the rank of ijtihād once he had acquired adequate training in the sciences of grammar and linguistics, and the craft of legal theory. Equal to this book in volume or [even] a little less should be sufficient.259

The Bidāya discusses the widely-known questions which constitute legal principles (tajrī majrā l-uṣūl). Its goal is training the adept jurist (mujtahid) for dealing with new legal issues. Ibn Rushd

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has repeatedly stated that the furūʿ in the particular area he investigates are too numerous, so he limited his search to “generative” injunctions from which further rulings can be inferred.\(^\text{260}\) One of the expressions he uses to express this idea is: “the goal of this book is not to extend on substantive laws, but to derive legal rules” (idh kāna hādhā l-kitāb lays al-maqṣūd bih at-tafrīḥ, wa innamā l-maqṣūd fih taḥṣīl al-uṣūl).\(^\text{261}\) With this, Ibn Rushd seems to distinguishes his book from other practical studies of khilāf. Take for example Marwazī’s Ikhtilāf al-ʿUlamāʾ, Ṭabarī’s Ikhtilāf al-Fuqāḥāʾ and Ibn al-Qaṣṣār’s ʿUyūn al-Adilla.\(^\text{262}\) All three discuss and outweigh jurists’ disputes, but none makes a distinction between the furūʿ and uṣūl levels of the issues they address. Even a rigorous work such as the Ishrāf ʿalā Nukat Masāʾil al-Khilāf by ʿAbd al-Wahhāb who also aimed at returning legal controversies to their uṣūl foundations, even such a work does not draw this distinction.\(^\text{263}\) It is this feature of targeting ruling constitutive of principles that earned Bidāyat al-Mujtahid an eminent place among Fiqh studies in general and khilāf in particular.

**The Methodological Introduction**

That Ibn Rushd opens Bidāyat al-Mujtahid with an introduction to Islamic legal theory and the causes of khilāf is quite unique. On the one hand, the very fact of including a preface is unusual in books of khilāf. Marwazī’s Ikhtilāf al-ʿUlamāʾ, ʿAbd al-Wahhāb’s Ishrāf and Bayhaqī’s Khilāfiyyāt, to name a few, present no introduction, save for the customary word of praise for God and Muḥammad. Even in the few studies that open with a preamble, the latter is nothing more than one or two paragraphs stating the author’s goal and explaining the book’s title. Asmandī’s Ṭarīqat al-Khilāf and ʿAbd ar-Raḥmān al-Uthmānī’s (d. around 785/1378) Raḥmat al-Umma fī Ikhtilāf


\(^{261}\) Ibid, 3: 160.

\(^{262}\) Muṣṭafā Makhdūm, the editor of Ibn al-Qaṣṣār’s Muqaddima fī Uṣūl al-Fiqh, argued that the latter was intended as a preamble to his ʿUyūn al-Adilla. This is particularly interesting since it will make Ibn Rushd’s Bidāya not the only khilāf study that includes an introduction to Uṣūl. See, Ibn al-Qaṣṣār, Muqaddima fī Uṣūl al-Fiqh, ed. (Riyadh: Dār al-Ma‘lama, 1999), 74-75.

\(^{263}\) ʿAbd al-Wahhāb’s book is sometimes considered the origin of the genre of Qawāʿid. See an extensive note on this by the editor, ʿAbd al-Wahhāb, Ishrāf, 1: 76-99.
al-Aʾimma are two examples in this regard. On the other hand, whereas the Bidāyaʾ’s preface is larger vis-à-vis other practical studies of khilāf, it is smaller vis-à-vis theoretical works of khilāf, such as Baṭalyawsī’s Inṣāf, and it is insignificant compared to the books of Uṣūl.

Notwithstanding its compendious nature, the Bidāyaʾ’s succinct summary tells first and foremost about Ibn Rushd’s view of Fiqh as a practical domain. Since the book is a work of Fiqh, Ibn Rushd has no interest extending on theory. What he wants is to give just enough to address the three areas of uṣūl that make the backbone of his approach to ijtihād and khilāf. The first area is known as “ṭuruq al-aḥkām” and refers to the ways through which rulings were received from the prophet, including his utterance (Qurʾān and Ḥadīth), his actions and tacit approvals. The second is called “aṣnāf al-aḥkām” and refers to the five categorizations of people’s actions: the obligatory (wājib), commended (mandūb), forbidden (muḥarram), discouraged (makrūh), and permitted (mubāḥ). The third pertains to the causes of juristic disagreement (asbāb al-khilāf). He further divides the latter into six categories of dispute. Although Ibn Rushd only briefly refers to the asbāb in the Bidāyaʾ’s preamble, it is evident from the way he engages them throughout that they constitute a central role in this legal discussion. The following is an illustration of Ibn Rushd’s discussion of each of these three areas.

The ways through which legal rulings are received from the prophet are three: his verbal expression (qawl, in both the Qurʾān and Ḥadīth), action (fiʿl), and tacit approval (iqrār). As for questions not mentioned in the Qurʾān or the other three ways, Ibn Rushd confirms that most scholars agreed that the way to attaining their rulings is through analogy (qiyās). There is one exception, however, and that is the Zāhirīs who do not consider qiyās a legal principle. So, the questions the lawgiver did not address simply remain unanswered. Ibn Rushd rejects this view and argues that analogy in legal matters is necessary. He observes that the occurrences among humans are infinitely renewable, whereas the prophet’s reports and actions are not, and it is impossible to equate something infinite in number with something that is not. With this, Ibn Rushd not asserts

the validity of *ijtihād* as a legal method and admits that change is an inherent factor that the *shariʿa* must confront.

On *the Prophet’s verbal expressions* from which juristic rulings are derived with respect to revealed knowledge (*bis-sam’* vs. *bil-ʿaql*), Ibn Rushd’s names four types: three are not disputed and the fourth is. The first of the undisputed three is a general term (*lafẓ ʿāmm*) that entails a general sense, or a specific term (*lafẓ khāṣṣ*) that entails a specific sense. For the general term intended in its general sense, Ibn Rushd draws on the Q 5:3, “Forbidden unto you (for food) are carrion and blood and swine flesh (*laḥm al-khinzīr*).” He explains that Muslims agreed that the term swine (*khinzīr*) refers to all types of swine unless it means swine by a way of homonymy (*ishtirāk*), like water-swine (*khinzīr al-māʾ*). The second is a general expression which entails a specific sense. Here, he cites Q 9:103: “Take alms (*zakāt*) of their wealth (*amwāl*) to purify them and make them thrive.” Although it appears from this verse that God commanded the Prophet to takes alms from Muslims wealth generally, practically *zakāt* is not obligatory on all types of wealth, but specific types only. The third is a specific expression that entails a general sense, where inference is drawn from higher to lower (*at-tanbīḥ bil-aʿlā ʿalā l-adnā*), lower to higher, and from equal to equal. He refers to Q 17:23: “say not ‘Fie’ (*uff*) unto them,” as an example of inference from the lesser to the greater. In other words, one understands from this excerpt, in addition to the prohibition of saying “fie” to one’s parents, the prohibition of cursing, beating and whatever is

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265 Theologians distinguished between a knowledge that is obtained through revelation (*samʿī*, i.e., transmitted) and one obtained through intuition or reason (*ʿaqlī*, i.e., acquired). See, e.g., J. R. Pertos, *God’s Created Speech: A Study in the Speculative Theology of the Muʿtazilī Qāḍī l-Quḍāt Abūl-Ḥasan ʿAbd al-Jabbār Ibn Ahmad al-Ḥamadānī* (Leiden: Brill, 1976), 91-104.

266 What Ibn Rushd refers to here is a process of deducting meaning from a claim about a higher (greater, bigger, general, etc.) entity to one about a lower (lesser, smaller, specific, etc.) entity of the same genus and *vice versa*. In logic, this process is called the “*a fortiori argument*” and consists of two subtypes. The “*a minore ad maius*” is an inference from higher to lower. The “*a maiore ad minus*” is an inference from lower to higher. Hallaq has made a thorough contribution to this subject with respect to Islamic legal theory. He argues that the “*a fortiori argument*” for Muslim jurists is a matter of pure linguistics, not logic. A quick look in classical works of *uṣūl*, in fact, shows that the “*a fortiori argument*” is always mentioned under the discussion of the “significations of utterances” (*dalālat al-alfāẓ*) —Ibn Rushd does the same thing. See, Hallaq, *A History of Islamic Legal Theories*, 96-101. I should also emphasize, in this respect, that my use of the term “inference” above bears no logical connotation, and that I am using it for the sole purpose of translation convenience.
greater in degree. Ibn Rushd then explains that these verbal expressions may come in the form of a command or a predicate intended as a command, which sometimes leads to confusion about whether a term is intended to convey an obligation or commendation, or should the jurist maintain an agnostic position. Also, a verbal expression entailing abstention may take the form of proscription or a predicate intended as a proscription. Here, too, dispute arose among scholars about whether a form of proscription entails disproval, forbiddance, or neither.

Ibn Rushd adds with respect to verbal expressions that the articulation (aʿyān) of a judgment takes two different forms. The first is called the univocal Text (“naṣṣ,” lit., text). It is an utterance which entails one meaning only. Jurists agree that the univocal Text necessitates total compliance on the part of the jurist. In other words, an expression that is believed to be a naṣṣ must be taken by the letter. The second is an utterance that implies more than one sense. This is further splits into two types. The “ambiguous” (mujmal) is an expression that entails all its probable meanings in an equal manner. The “manifest” (ẓāhir, also translated as “literal”) is an expression that entails one of its probable meanings “more likely” than others. But, when the latter is considered with respect to the meaning it entails “less likely,” it is called “muḥtamal” (probable). Finally, when an expression is employed unqualifiedly (muṭlaqan), scholars consider its most manifest meaning until there is evidence that its proper meaning is the probable. Ibn Rushd informs that this has led jurists to disagree on the lawgiver’s words, particularly in regard three areas of ishtirāk: the expression of the object (ʿayn) of a ruling, the definite article which corresponds to the genus of that object, and expressions of command and prohibition.

Ibn Rushd uses the word “aʿyān” in the Bidāya in at least three ways. The first refers to “individuals” and “persons.” When used in this sense, “aʿyān” often appears in juxtaposition with its antonym “jamāʿāt” (groups), such as when he talks about individual obligations (furūḍ al-aʿyān) and collective obligations (furūḍ al-kīfāya). Ibn Rushd, Bidāya, 1: 114, 117, 166 and 209. The second denotes “assets,” “properties” or simply all “tangible things” for sale. It often appears in his discussion of finance (e.g., 3: 145, 170, 4: 16 and 53). The third denotes “things” in general and comprises almost anything that requires a legal ruling, including actions, events, special objects etc. ʿAyn as anything the jurist needs to assign (yuʿayyin) a legal ruling.
The fourth disputed type of verbal expressions from which legal rulings are obtained is “implicative speech” (dalīl al-khiṭāb).268 This includes expressions of obligation understood as negation and expressions of negation understood as obligation. Ibn Rushd gives as example the Ḥadīth: “alms are due in free-range sheep.” From this report, certain scholars deduced that no alms must be given on sheep that are not free-range.

For analogy is a key component of the exercise of ījtihād, Ibn Rushd designates to it the rest of his discussion of verbal expressions, as the first way through which rulings are obtained from the prophet. Juridical analogy (al-qiyās ash-sharʿī), he elucidates, is the application of an established ruling about a certain matter to another matter which has not been dealt with in the law, because both matters either resemble each other (called “qiyās shabah,” or analogy of resemblance) or share the same effective cause (and this is called “qiyās ʿilla,” or analogy of the effective cause).269 Ibn Rushd warns not to confuse qiyās sharʿī with a khāṣṣ expression entailing the ʿāmm. He clarifies that qiyās ought to be applied to a particular expression intended as a particular sense only, such as applying the degree of the punishment of the slanderer to the drinker of wine, and the minimum sum stolen which require the punishment of cutting the hand of a thief to the minimum value of the dower. However, the application of usury dealings to edibles or foods which can be measured or provided belongs to the particular that entails a general sense. Ibn Rushd reasserts that the new legal case must be returned to an established question by way of their similarity, not by way of the expression’s implicative function (dalālat al-lafẓ). Therefore, applying a ruling of something known to something unknown by way of the expression’s indication (tanbīh al-lafẓ) is not analogy, but part of that expression’s implication.

268 As Jonathan Brown explains, “dalīl al-khiṭāb” entails “the indirect implication from an injunction, so that if the prophet says to pay tithe on a kind of sheep one need not pay it on others.” Brown, The Canonization of Al-Bukhārī and Muslim: The Formation and Function of the Sunnī Ḥadīth Cannon (Leiden: Brill, 2007), 259-60.

269 Legal analogy (al-qiyās ash-sharʿī) is distinguished from philosophical syllogism (also called qiyās) in that the first admits premises that are probable, whereas the second accepts only premises which are certain. Hallaq, A History of Islamic Legal Theories, 139. Hallaq has contributed several studies to the integration of Greek formal logic into Islamic Uṣūl. See, e.g., Hallaq, “The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and Common Law,” The Cleveland State Law Review, 34-1 (1985-6): 79-96, esp., 85-91.
After this succinct account of the prophet’s verbal expressions (aqwāl) as source of juristic rulings, Ibn Rushd moves to his actions (afʿāl) and mentions two responses in this regard. The first, which is the view of most Muslim scholars including Ibn Rushd, agrees that the prophet’s actions are a source of the law. The second, which is the view of a minority, rejects this claim since actions lack linguistic forms (siyagh). The first group, Ibn Rushd elaborates, disagreed on the kind of ruling the prophet’s actions imply: is it obligation, or commendation? For him, the best view is the following. On the one hand, when an action appears to elucidate an ambiguous expression (mujmal) of an obligatory act, it would imply obligation. If it appears to elucidate an ambiguous expression of a commended act, it would imply commendation. On the other hand, if it appears to be not elucidating a mujmal expression and belongs to actions of devotion (qurba), it would imply commendation. But, if it does not appear to be elucidating a mujmal expression and is part of permissible acts (mubāḥāt), it would imply permissibility (ibāḥa).

On the prophet’s tacit approval (iqrār), Ibn Rushd gives no extension, but only mentions that they inform of permissibility (jawāz). Now, that he reaches the end of his summary of the four ways of deriving rulings from the prophet and elaborated on juridical analogy, he decides to include a quick note on consensus (ijmāʿ). Ibn Rushd asserts that consensus is a technique which finds support in all the four ways (i.e., verbal expressions, actions, tacit approval and implicative speech). At the same time, he reminds that it is not an independent source (aṣl) of the law. Consensus is not conclusive (qaṭʿī) on its own, but is considered conclusive based on the majority’s predominant opinion that relies on the Qurʾān and Ḥadīth.

The categories of legal rulings, for Ibn Rushd like all jurists, are five types that can be approached in terms of three main classes: commands, proscriptions, and options. The rulings directed at a legal subject (mukallaf) come to command an act, prohibit it, or keep it undecided. Commanded actions are either obligatory (wājib) or commended (mandūb). Prohibited actions are either forbidden (muḥarram) or discouraged (makrūh). The fifth are undecided actions that are permitted (mubāḥ) by default. Here, Ibn Rushd simply conforms to Muslim jurists’ attitude of grounding human action in morality, since this fivefold juridical scale is also a scale of moral
The following is a brief elaboration on each of the five juridical categories.

The **obligatory** (wājib, or fard) is an irremissible act required by Muslims, irrespective of how much they consider themselves pious and committed to Islam’s ritualistic agenda (e.g., the five daily prayers, Ramadan fasting, giving zakāt alms, etc.). The fulfillment of obligatory acts wins reward for individuals and their deliberate denial can impose punishment. The **prohibited** (mahzūr, or ḥarām) is a reprehensible act that Muslims must avoid (e.g., stealing, killing, adultery, etc.). Committing a prohibited act brings punishment, whereas refraining from it brings reward in this life and the next. One might think of obligatory and prohibited actions as identity markers. Muslims’ subscription to the obligatory acts and denial of those prohibited identify their belonging to the community, hence can bring them together with the rest or set them apart. The question of apostasy often takes place at this level.

The **commended** (mandūb, mustaḥabb, or sunan) is an act which agrees with the general ethical spirit of the sharīʿa. Although Muslims are urged to perform these commendable acts, they are not required to. For example, documenting transactions and loans is recommended by Q 2: 282, “O You who believe! When you contract a debt for a fixed term, record it in writing.” Fulfilling a recommended action brings reward, but leaving it does not inflict punishment. The **discouraged** (makrūh) is an abominable action that might be inevitable to commit, but which is better if avoided. Performing an abominable act inflicts no punishment, but denying it brings reward. A famous example is the prophet’s report: “the most abominable of permissible things in the sight of God is divorce.” Though this report is classified weak (daʿīf), there is consensus among jurists that divorce is in fact a morally discouraged act. Finally, the **permitted** (mubāḥ) is an act that, by means of its essence, is allowed, yet, towards which the law remains indifferent. It is an act which, fulfilled or not, brings neither reward nor punishment. However, permitted acts in certain circumstances may be prohibited or required in others. For example, the act of eating is

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270 For more on the five juridical rulings as morally binding as well as the relationship between Islamic law and ethics, see, Kevin Reinhart, “Islamic Law as Islamic Ethics,” *The Journal of Religious Ethics*, 11-2 (1983): 186-203.
permitted essentially. However, when one’s life depends on eating, it becomes obligatory to eat. It is on this basis that certain ascetic practices of fasting are prohibited in Islam. By the same token, eating desert is permitted. However, if it will result in missing the second prayer on Friday in the mosque, it becomes prohibited.

The causes of juristic disagreement are the last topic covered in the Bidāya’s preamble. Ibn Rushd identifies six causes of areas of disagreement. The first is the changing linguistic nature of the lafẓ with respect to four situations: the general expression that entails a specific sense, a specific entailing the general, the general entailing the general and specific entailing specific, and a lafẓ that may or may not inform of implicative speech (dalīl al-khiṭāb). The second cause of khilāf is the mushtarak, both singular and complex homonymous expressions. An example of a singular homonymous expression is “qur” which refers to both a woman’s menstrual period (ḥayd) and the period in between menses (aṭhār). Another us a command expression entailing obligation or commendation, and a negation that entails prohibition and discouragement. An example of a complex homonymous term is Q 2:160, “Except those who repent.” Ibn Rushd points out the possibility that this expression implies the transgressor (fāsiq) only, or both the transgressor and the witness. In the latter case the act of repentance does not only annul the sin of transgression, but also permits the slanderer’s testimony.

The third cause of legal disagreement pertains to the different grammatical function of an expression with respect to inflection (iʿrāb). The fourth goes back to the changing semantic nature of an expression from the literal (ḥaqīqa) to the metaphorical (istiʿāra), or from literal to non-literal forms, such as elision (ḥadhf), addition (iḍāfa), preposing (taqdīm) and postposing (taʾkhīr). The latter two forms are usually brought up under the discussion of “word order” in Arabic

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271 “Those who conceal the clear (Signs) We have sent down, and the Guidance, after We have made it clear for the people in the Book —on them shall be Allāh’s curse and the curse of those entitled to curse (2:159). Except such of them —as repent and amend and make manifest (the truth). These it is toward whom I relent. I am the Relenting, the Merciful (2:160).” The idea, here, is that if the slanderer repents, not only he is no longer considered transgressor, but also his testimony becomes accepted by the law.
grammar. The fifth cause is returned to using an expression unqualifiedly sometimes and qualifiedly at other times. Ibn Rushd refers to the term “slave” (raqaba) used in the context of manumission in an unrestrictive way to refer to all slaves, and at other times in a restrictive way to refer to believing slaves only (raqaba mūmina). The sixth and last cause of legal disputes is the conflict between various sources of legal knowledge, such as between a prophet’s act and his tacit approval, between his verbal expression and his act, between his tacit approval and verbal expression, or between one of these and analogy. I expand on these six causes in the fourth chapter, and provide a comprehensive account of the genre of “asbāb al-khilāf.”

4. Bidāyat al-Mujtahid’s Scholarly Sources

The list of the sources cited in the Bidāya that I develop in these pages have benefited greatly from Būllūz’ account. However, it differs from his in many important ways, for my goal is to provide a focused list of Ibn Rushd’s direct sources, not list the names of all authors he mentioned. My list has been researched and augmented independently from my direct reading of the Bidāya. I focus for the most part only on scholars and works from whom and from which it seemed to me that Ibn Rushd read either directly or learned of through later works. When Ibn Rushd cites a scholar and does not name his work, I make an effort to determine that work (e.g., Ibn al-Qaṣṣār’s ʿUyūn al-Adilla). I highlight scholars relevant to my discussion of khilāf by providing a brief bio for them or referring to biographical books where they can be consulted. I give a brief context for certain authoritative works that might had an impact on Ibn Rushd (e.g., Al-ʿUthbiyya).


Ibn Rushd does not only draw from an extensive pool of sources, but also pays close attention to citing them. At the end of the Ritual Purification (ṣahāra) chapter, for example, he acknowledges: “the book I have relied upon most extensively for attributing the different legal doctrines to their respective authors is Kitāb al-Istidhkār,” a book written by the influential Mālikī Ibn ‘Abd al-Barr (d. 463/1070). Generally, the sources of the Bidāya can be divided into two major groups: books of Ḥadīth and books of Fiqh. From a recent study of the prophetic traditions cited in the Bidāya, it appears that Ibn Rushd has made a good use of most authoritative Ḥadīth and Sunan books, including Ṣaḥīḥ al-Bukhārī, Ṣaḥīḥ Muslim, Sunan Abū Dāwūd, Sunan at-Tirmidhī, and Sunan an-Nasāʾī, as well as others. Ibn Rushd’s use of these books is not incidental or necessitated by his use of other legal works. A comparison of the reports quoted in the Bidāya and the Istidhkār (and other authoritative legal books) has shown that Ibn Rushd used Ḥadīth and Sunan manuals directly and not through the legal books he drew upon.

With respect to his Fiqh sources, we notice that Mālikī scholars are, perhaps justifiably, cited the most in the Bidāya. In the second place comes Shāfiʿī scholars followed by the Ḥanafīs, Ḥanbaḷīs and Ẓāhirīs. We know that Ibn Rushd received his first legal training in the Muwaṭṭa’ from his father, Abū l-Qāsim, and studied advanced law subjects with eminent Mālikī scholars. So, it is not unnatural that the Mālikī tradition prevails in the Bidāya. This is not only because it is the historical school of Andalusia and the official doctrine of Almohad dynasty in which Ibn Rushd held office of Judge. Rather, it is also, and more importantly, because the Bidāya is, in a way, a critique of Mālikī jurists and their confinement to taqlid. Nevertheless, Ibn Rushd has exhibited in the Bidāya an unambiguous sense of impartiality. Several times, he deemed rulings from other Schools valid if they present stronger proof. He also never uses honorary titles such as Imām or

274 Ibn Rushd, Bidāya, 1: 95.


276 E.g., Būllūz, Tarbiyat Malakat al-Ijtihād, 1: 163-78.
Shaykh, to describe any legal authority, companion or a school’s eponym; not even Mālik b. Anas, the founder of the Mālikī School of law.

Ibn Rushd draws on Mālik’s Muwaṭṭa’ and Mudawwana several times, and frequently quotes pioneers of Mālikī law, such as Ibn al-Qāsim (d. 191/806) and his student Saḥnūn b. Sa’īd (d. 240/854). Some of the key books he mentions include the Wāđiha and ’Utbiyya, two of the most influential books in the history of Mālikī Fiqh. Of the later Mālikī scholars, he mentions by name Ibn al-Qaṣṣār (d. 398/1007), Bāqillānī (d. 402/1013), ’Abd al-Wahhāb (d. 422/1031), and Abū Bakr b. Rizq (d. 477/1084). It is also certain that he used the Muntaqā of

277 E.g., Ibn Rushd, Bidāya, 1: 45, 2: 17, 3: 16, 4: 6 (for the Muwaṭṭa’), and 1: 59, 3: 11, 4: 15 (for the Mudawwana).
278 Abū ’Abd Allāh ’Abd-ar-Raḥmān b. al-Qāsim al-’Utaqī is distinguished as one of Mālik’s closest associates and the most knowledgeable in Fiqh. See an extensive entry in, Al-Qāḍī ʿIyyāḍ (d. 544/1149), Tartīb, 244-71. See, e.g., Ibn Rushd, Bidāya, 1: 28, 2: 21, 3: 12, and 4: 10.
279 Abū Sa’īd ʿAbd as-Salām Saḥnūn b. Saʿīd b. Ḥabīb at-Tannūkhī is the compiler of the Mudawwana, a collection of Ibn al-Qāsim’s responses to questions raised by Asad b. al-Furāt, and the second most significant Mālikī legal work after the Muwaṭṭa’. See, Saḥnūn’s biography in, Qāḍī ʿIyyāḍ, Tartīb, 3:45-88. See, e.g., Ibn Rushd, Bidāya, 2: 79, 3: 34, and 4: 32.
280 The Wāđiha fī l-Fiqh wa s-Sunan was written by Abū Marwān ʿAbd al-Malik b. Ḥabīb b. Sulaymān b. Hārūn as-Sulamī of Cordoba (d. 238/853). See his biography in, Qāḍī ʿIyyāḍ, Tartīb al-Madārik, 4: 122-41. The Wāđiha and its author are mentioned by name in, Ibn Rushd, Bidāya, 1: 60, 2: 15 (Ibn Ḥabīb), and 4: 73 (Wāđiha).
281 The ’Utbiyya was written by Abū ʿAbd Allāh Muḥammad b. Ahmad b. ʿAbd al-ʿAzīz b. Abī ʿUtba (d. 255/869). See his biography in, Qāḍī ʿIyyāḍ, Tartīb, 4: 122-41. The Wāđiha and its author are mentioned by name in, Ibn Rushd, Bidāya, 2: 52-54. Ibn Rushd refers to the ’Utbiyya with respect to a question on the sacrifice for a newborn (ʿaqīqa) and marriage. Respectively, Ibn Rushd, Bidāya, 3: 15 and 3: 82.
282 Ibn Rushd mentions Ibn al-Qaṣṣār as one of the leading khilāf experts (ahl masāʾ il-al-khilāf). Ibn Rushd, Bidāya, 3: 34 (also 2: 194 and 3: 56). Most likely, he used his ’Uyūn al-Adilla fī Masāʾ il-al-Khilāf.
283 Abū Bakr Muḥammad b. ʿAt-Ṭayyib al-Bāqillānī (d. 402/1013), a key theologian of the Ashʿarī school and a jurist of the Mālikī school in Baghdad. Ibn Rushd, Bidāya, 3:150.
285 Abū Jaʿfar Aḥmad b. Muḥammad Abū Bakr b. Rizq, as Ibn Rushd noted in the Bidāya, is one of his grandfather’s teachers (shaykhu jaddī). Ibn Rushd, Bidāya, 3: 195.
Abū l-Walīd al-Bājjī (d. 474/1081), as well as his grandfather’s (d. 520/1126) *Al-Muqaddimāt wa l-Mumahhidāt*. It is also likely that he used his grandfather’s other major work, *Al-Bayān wa t-Taḥṣīl*, since he extensively refers to the ‘*Uthbiyya*. Other influential Mālikī scholars that he names, but does not specify any of their work include Abū l-Ḥasan al-Lakhmī (d. 478/1085), Abū Bakr aṭ-Ṭurṭūshī (d. 520/1126), Abū ʿAbd Allāh al-Māzarī (d. 536/1141), and several more.

From the Shāfiʿī school, the only book Ibn Rushd cites is Juwaynī’s *Burhān*. From the way he engages other Shāfiʿī scholars, he seems familiar with others. He likely benefited from Muzanī (d. 264/877), Ibn Surayj (d. 306/918), Ibn al-Mundhir (d. 318/930), and Ghazālī.

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289 Abū Bakr Muḥammad b. al-Walīd b. Khalaf known as Abū Bakr aṭ-Ṭurṭūshī is a student of Abū l-Walīd al-Bājjī and the author of the famous *Sirāj al-Mulūk fī Sulūk al-Mulūk*. He also wrote *Al-Kitāb al-Kabīr fī Masāʾ il al-Ikhtilāf* which seems to be nonextant. See his reference in, Ibn Rushd, *Bidāya*, 3: 221.

290 Ibn Rushd, *Bidāya*, 3: 179. Māzarī, as discussed earlier, is one of the scholars from whom Ibn Rushd received ijāza.

291 Abū Muḥammad ʿAbd Allāh b. Yūsuf Abū l-Maʿālī al-Juwaynī is the eminent Shāfiʿī jurist and Ashʿarī theologian. Ibn Rushd aligns him with theologian (*ahl al-Kalām*) on one occasion (1: 185), and cites his major *Uṣūl* work, the *Burhān* (3: 138).


(d. 505/1111). From the Ḥanafī school, Ibn Rushd does not cite any book. He does, however, return to the views of Abū Yūsuf (d. 182/798) and Muḥammad b. al-Ḥasan (d. 189/804), two of Abū Ḥanīfa’s (d. 150/767) closest associates and authors of two of the earliest systematic books on khilāf. Of the later Ḥanafī scholars, he mentions Ṭaḥāwī (d. 321/933) and Abū Zayd (d. 430/1038). As for Ḥanbalī scholars, Ibn Rushd mentions only a handful. In addition to Ibn Ḥanbal (d. 241/855), the school’s eponym, he refers to Abū Bakr b. Abd ar-Rahmān (d. 273/886) who is a student of Ibn Ḥanbal. Finally, from the Zāhirī School, he mentions, in addition to its founder, Ibn al-Mughallis (d. 324/936). More frequently, however, he returns to Ibn Ḥazm (d. 456/1064) —mostly for language related issues such as the general/specific (ʿāmm/khāṣṣ) and unqualified/qualified (muṭlaq/muqayyad). It is also certain that he used firsthand the Muḥallā (maybe the Iḥkām as well), since he returns to Ibn Ḥazm for the substantiation of several prophetic traditions.

295 He calls him Abū Ḥāmid. Ibn Rushd, Bidāya, 1: 133, 3: 20, 22, 4: 35, 55 and 89. Ibn Rushd was familiar with and critical of Ghazālī’s legal work esp. through his Ḍarūrī, a commentary on Ghazālī’s Mustaṣfā.

296 Yaʿqūb b. Ibrāhīm b. Saʿd Abū Yūsuf is the writer of the nonextant Ikhtilāf al-Amṣār. E.g., Ibn Rushd, Bidāya, 1: 26, 33, 40, 58 and 100.

297 Abū ʿAbd Allāh Muḥammad b. al-Ḥasan ash-Shaybānī is the author of Al-Ḥujja ʿalā Ahl al-Madīna (the proof against the people of Medina). E.g., Ibn Rushd, Bidāya, 1: 88, 2: 134, 208 and 3: 42.


299 Ibn Rushd, Bidāya, 4: 125. This is most likely ‘Umar Abū Allāh b. ʿUmar. ‘Īsā Abū Zayd ad-Dabbūsī who is thought by Ibn Khallikān to be the originator of khilāf, “awwal man waḍaʿa ʿilm al-khilāf wa abrazahu lil-wujūd.” Ibn Khallikān, Waṣīyāt, 3: 48.


Chapter 3

LAW AND DISAGREEMENT IN BIDĀYAT AL-MUJTAHID: QUESTIONS OF METHOD

1. *Fiqh* in Ibn Rushd’s Theory of Knowledge

The way to discerning Ibn Rushd’s approach to the study of law in *Bidāyat al-Mujtahid* begins with understanding the place of *Fiqh* in his theory of knowledge. This is of importance both for situating *khilāf* within his general classification of the sciences and for answering key questions with respect to his purpose in the *Bidāya*. Namely, why did Ibn Rushd chose to write a book on *khilāf*, and what does this convey about his view of the law as a domain of theory and practice? Why did he preface the *Bidāya* with an introduction to legal theory, which is alien to both the *Fiqh* and *khilāf* writing genres? Why did he focus on the causes of legal disagreement (*asbāb al-khilāf*) and what value and role in do they have in a comparative study of law? Why did he focus predominantly on generative rulings and did not engage substantive law more extensively?

Ibn Rushd’s effort to categorize the legal knowledge is carried out in a work that he wrote about thirty years before the *Bidāya*. It is the *Ḍarūrī fī Uṣūl al-Fiqh* (The Essentials of Legal Theory), an “unorthodox” short commentary on Ghazālī’s *Al-Mustaṣfā min ‘Ilm al-Uṣūl*. In the

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304 The *Ḍarūrī* is one of Ibn Rushd’s early career works. He wrote it in 552/1158, i.e., about three decades before he completed the *Bidāya* in 584/1188. He was then thirty years old. A complete French translation of the *Ḍarūrī* has
Darūrī’s preamble, Ibn Rushd distinguishes three generic categories of knowledge that may be called: theoretical, practical, and instrumental. Theoretical knowledge is pursued with the sole goal of establishing cognizance about a certain subject. Practical knowledge is pursued with the intention of acting upon it once acquired. The instrumental is the knowledge of the principles and rules designed to guide scholars towards that which is sound (e.g., grammar for linguists, logic for philosophers).305

Following this tri-division, Ibn Rushd seems to provide the following classification of the Islamic religious sciences. Kalām, in so far it engages highly theoretical questions of belief and creed (‘aqāʾid) belongs to the first category. Fiqh, as a practical discipline interested primarily in people’s actions, belongs to the second. Uṣūl belongs to the third. Unlike the first and second types, where the end is either obtaining belief or fulfilling action, the third type takes the role of a tool and instrument aimed at securing the scholars against error in their pursuit of the theoretical or practical knowledge. What is quite intriguing about this typology is not only that it is foreign to Islamic law, but also that it is different from Ghazālī’s classification in the Mustasfā — purely rational (‘aqlī mahḍ, e.g., arithmetic and astronomy), purely traditional (naqlī mahḍ, e.g., Ḥadīth and Qurʾān exegesis), and one that is both rational and traditional (e.g., Fiqh, Uṣūl). Ibn Rushd’s tri-division of knowledge has roots in the peripatetic tradition. (See the first section of Chapter 5 for a detailed discussion of Ibn Rushd’s typology of knowledge and its philosophical sources).

Next, Ibn Rushd identifies two classes of the critical legal study (an-nazar aṣ-ṣināʾī). The first is founded upon a non-comparative approach that confines scholars to work in conformity with their respective schools’ legal hermeneutics. The second engages a comparative approach that allows them to traverse the boundaries of their schools’ legal theories.306 Ibn Rushd showed interest especially in the second approach and explains that scholars in its pursuit concentrate on

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305 Ibn Rushd, Darūrī, 34-35.
306 Ibn Rushd, Darūrī, 36-37.
the authorities’ juristic disagreements, establish their rules and canons (qawānīn)\textsuperscript{307} of obtaining injunctions, interpret their ways of inference, and justify which of their legal views are legally binding (i.e., perform tarjīḥ). He called this comparative approach “the most profitable” way (al-anfaʿ) for engaging Islamic law.\textsuperscript{308} Mainly, because, in his view, it makes the craft of Uṣūl and Fiqh “complete, universal, and independent.”\textsuperscript{309} “Complete” (tāmma) because it consists of both theoretical and practical knowledge. “Universal” (kulliyya) because it digs across the schools’ hermeneutics. “Independent” (kāfiya, self-sufficient) because it prepares jurists and enables them to attain the rank of ijtihād and break away from taqlīd.

As I will establish later, \textit{Bidāyat al-Mujtahid} is a serious and earnest endeavor at fulfilling this comparative model. Although it is not a work of legal theory, the \textit{Bidāya} is an uṣūl-oriented study of khilāf—i.e., that it sets as objective for itself to construct the legal maxims and universal rules (uṣūl in this context means legal rules, not legal theory). It is concerned mainly with the ways of legal inference (ṭuruq al-istinbāṭ), it focuses on the causes of juristic disagreement, and it strives to outweigh the authorities’ views. The \textit{Bidāya} is a unique work of law particularly because it is neither strictly practical (a book of Fiqh proper), nor strictly theoretical (a book of Uṣūl proper). The \textit{Bidāya} is a combination of both. It is Ibn Rushd’s conscientious attempt at completing and perfecting the study of Islamic law.

Generally, Ibn Rushd’s narrative in \textit{Bidāyat al-Mujtahid} consists of two parts: analysis and synthesis. Analysis comes along with his work of presenting the jurists’ legal agreements and

\textsuperscript{307} The Arabic expression qānūn (pl. qawānīn) is often translated as “general principle” or “general rule.” In this chapter, I render purposely and consistently the term “qānūn” as “canon,” since the English word maintains the plural sense that the original Arabic entails; i.e., a body of many rules deemed to be valid and essential for the study of a certain discipline or subject matter.

\textsuperscript{308} Notice the difference between Ibn Rushd’s word choice here and Ghazālī’s in the \textit{Mustaṣfā}. Ghazālī calls Uṣūl “the noblest of disciplines” (ashraf al-ʿulūm) positioning it between “purely rational” and “purely traditional” knowledge. Ibn Rushd sees it, if pursued in accordance with his approach, as “the most profitable” (al-anfaʿ) subject matter, and places it between theoretical and practical knowledge. One is tempted to think that Ibn Rushd intentionally uses language (not only in this example but throughout both the \textit{Bidāya} and \textit{Ḍarūrī}) that is less emotional and, perhaps, more pragmatic, since the law in his view is a practical domain primarily.

\textsuperscript{309} Ibn Rushd, \textit{Ḍarūrī}, 37.
disagreements and what caused them to disagree. Synthesis takes place with his endeavor to reconcile the jurists’ contesting views and grounding them in their respective indicants and general principles (uṣūl); for Ibn Rushd strives to divulge the various aspects of the established discourse around each legal question (jurists’ agreements and disagreements). Then, to make sense of all of this, Ibn Rushd brings the different parts together, and does so in ways that help outweigh a certain view. The following pages is a comprehensive examination of the methods and techniques of Ibn Rushd’s legal construction.

2. The Structure of Legal Synthesis in Bidāyat al-Mujtahid

The general structure of Ibn Rushd’s discussion in Bidāyat al-Mujtahid mirrors considerably the purpose he outlines in the introduction of the book; namely, his intention to found “the undisputed and disputed questions of legal rulings along with their indicants and call attention to the intricacies of dispute with respect to the meta principles and rules [of Fiqh].” In fact, it is in this very order that Ibn Rushd undertakes most legal questions all through. For each issue, he often begins with rulings on which the jurists have agreed (al-muttafaq ʿalayhā, undisputed rulings), then those upon which they have disagreed (al-mukhtalaf fīhā, disputed rulings), followed by the causes of their dispute (nukat al-khilāf, the intricacies of dispute), and concludes with an attempt at outweighing the views.

Throughout the Bidāya, Ibn Rushd’s discussion of most legal questions is structured based on a six-fold system. To explore any legal issue, Ibn Rushd often focuses on these six elements:

1. Aṣl al-hukm: the source or sources of the taxonomy of the case in question,
2. Mawāqiʿ al-ijmāʿ: jurists’ agreements with respect to the assigned ḥukm,
3. Mawāqiʿ al-khilāf: their disagreements with respect to the assigned ḥukm,
4. Asbāb al-khilāf: the causes of their dispute,

310 Ibn Rushd, Bidāya, 1: 9.
5. *Analysis:* then, Ibn Rushd provides an analysis of the contesting views,

6. *Jamʿ and tarjīḥ:* finally, but not always, Ibn Rushd harmonizes the conflicting reports and/or outweighs the jurists’ conclusions.

To substantiate this six-fold system of legal construction, the following pages elaborate on Ibn Rushd’s discussion of a question on water as a means of ritual purification; namely, does little impurity soil a small amount of water? This is the first of six questions addressed in the third section of *Kitāb al-Wuḍūʾ* (Ritual Ablution), which is part of *Kitāb at-Ṭahāra min al-Hadath* (Ritual Purification).[^12] It is one of the most significant passages in *Bidāyat al-Mujtahid*, not only because it fulfills Ibn Rushd’s six-fold system of legal construction, but also because it offers a concrete example of what he conceived of as an *ideal approach* to studying controversial legal questions. The following is a detailed account of the six stages of his discussion of this question.

1. **The taxonomy (ḥukm) and its textual sources:** Ibn Rushd first defines the taxonomy of the action of purification or using water for purification —whether for ritual purposes (*tahārat al-ḥadath*) or for removing physical impurities (*tahārat al-khabath*)— as “obligatory” (*wājib*).[^13] Then, he identifies the textual sources of obligating the use of water for purification purposes, and cites particularly Q 8:11 and 4:43.[^14] This is generally how Ibn Rushd opens his discussion of most legal issues: first the *ḥukm* of the action, then its basis in the Qurʾān and/or Ḥadīth.[^15] For complex subjects that constitute other subtypes, such as partnership (*sharika*), sales (*buyūʿ*) and surety


[^14]: Q 8:11, “When He made the slumber fall upon you as a reassurance from Him and sent down water from the sky upon you that thereby He might purify you, and remove from you the fear of Satan, and make your hearts strong and firm (your) feet thereby.” Q 4:43, “O ye who believe! Approach not prayers when ye are drunk till you know all that you say, nor in a state of ritual impurity —save when journeying upon the road— till ye have bathed. And if ye be ill, or on a journey, or one of you cometh from the closet, or ye have touched women, and if you find not water, perform dry ablution with clean earth and rub your faces and your hands (therewith). Lo! Allah is Benign, Forgiving.”

[^15]: For example, on the act of hunting (*ṣayd*), he confirms its permissibility and refers to Q 5:2, 96 and Q 62:10. On commodity loans (*ʿāriya*), he asserts its commendation and cites Q 107:7. For settlement (*ṣulḥ*), he affirms its permissibility and refers to Q 4:128 and a prophetic tradition. See, respectively, Ibn Rushd, *Bidāya*, 3: 5, 4: 97, and 4: 77.
(kafāla), Ibn Rushd outlines first their different subtypes, followed by the requirements of their validity, and finally the legal categorization conforming to each subtype.

2. Points of agreement: after determining the textual source of obligating the use of water for purification purposes, Ibn Rushd draws on the jurists’ unanimous agreements (ijmāʾ) on this question, referring particularly to four agreed upon circumstances or premises —“mawāqiʿ al-ijmāʾ” is the phrase Ibn Rushd uses frequently. The first is that “water” in its unrestricted sense is essentially pure and has the capacity of purifying other things. Here, he stops briefly at a dissenting view (khilāf shādhdh, remote dispute) among the first generation which argues that “sea water” (māʾ al-baḥr) cannot be admitted in the legal category of “water;” so, it cannot be used for purifying. Ibn Rushd deems this view baseless for two main reasons. First, because the unqualified meaning of the term “water” encompasses “sea water.” Second, because there is an established report by the Prophet that confirms the pureness of sea water (i.e., huwa l-ḥillu maytatuh at-ṭahūr māʿuh). The second circumstance the jurists agreed upon is that everything that dissolves in water and alters none of its three attributes (color, odor and taste) does not undermine its property of purity and purifying capability. The third is that the water which impurity alters one or more of its attributes cannot be used for purification. The fourth is that an abundant amount of water which impurity does not alter one of its qualities is pure.

3. Points of Disagreement: Ibn Rushd touches on the jurists’ disagreements with respect to six circumstances of water mixing with impurity, only the first of which is covered here: when

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316 In customary usage, the adjective “shādhdh” denotes something irregular, deviate and exception to that which is considered the norm. In its legal technical usage, it entails a legal view that is not only at variance with the dominant view, but also unsound and founded on a weak indicant. Section 27 of Ibn Ḥazm’s Iḥkām is entirely on the concept of shudhūdh. See, Ibn Ḥazm, Iḥkām, 5: 86-89. I called it a “remote disagreement” to render the image of a legal view that is remote in possibility. Ibn Rushd has, on many occasions, used the term “baʿīd” (far) to describe unsound and invalid legal opinions. See, e.g., Ibn Rushd, Bidāya, 1: 91, 2: 212, 3: 231, 4: 15, etc.

317 Ibid, 1: 30.

318 Here, too, Ibn Rushd mentions a dispute on stagnant water (al-māʾ al-ājin) and refutes it on the ground that the term “water,” when used unqualifiedly, encompasses within its semantic scope “stagnant water” as well. Ibid, 1: 30.
water is mixed with an impurity that does not alter one or more of its features. Ibn Rushd identifies three contesting groups. Mālikīs and Zāhirīs considered this water pure regardless of its amount. Shāfiʿīs and Ḥanafīs distinguished between large and small amounts of water in this case. They deemed small amounts mixed with impurity impure, and pure if the water is in large amounts. A further point of disagreement arose here on where to draw the line between a large and a small amount of water. For Abū Ḥanīfa, the water must be so abundant that if one agitates one end, the ripple does not reach the other end. For Shāfiʿī, the line is the fill of two jars of Hajr (qullatān min qilāl Hajr). As for Mālik, Ibn Rushd asserts that in some reports he paid no attention to the size and depth of water and ruled that little impurity (najāsa) soils a small amount of water even if it did not alter any of its qualities. In others, he discouraged the use of this kind of water.

Generally, Ibn Rushd cites three conflicting decisions by Mālik on the question of water mixed with impurity. Little impurity soils small amounts of water entirely, and so this water is forbidden. It soils water if it alters one of its attributes, so it is permitted on condition. Lastly, Mālik discourage the use of this kind of water in other reports. This is not the first time Ibn Rushd mentions Mālik’s contradictory views on an issue. He does it several times throughout the Bidāya and clearly intentionally. By referring to Mālik’s opposing views, Ibn Rushd stresses two things. One is the extent to which paradox constitutes the eponyms’ legal views. The other is that their conflicting views is one of the major causes of the disputes that later arose among scholars both within and across the schools. Ibn Rushd confirms that this is a familiar problem among legal scholars, and demands immediate intervention on. In certain way, the Bidāya is dedicated to this

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319 The other five circumstances are: water mixed with saffron or a similar pure substance; the leftover of water used for ritual purification; the leftover of water consumed by Muslims or animals; the leftover of water used for ritual bathing; and using dates wine for ritual ablution.

320 Hajr is a village near Medina perhaps known to early Arabs for making sizeable jars. Ibn Rushd measured two jars at 500 rotls. According to the authors of Mu’jam Lughat al-Fuqahā’ (Dictionary of Jurists’ Terminology), “qullatān” (lit. two jars) weigh 160.5 liters, and 1 rotl (raṭl) equals 407.5 grams, save silver. 1 rotl of silver equals 1428.4 g. See, Muḥammad Qalʿaṣṭi and Ḥāmid Qanībī, Mu’jam Lughat al-Fuqahā’ (Beirut: Dār an-Nafāʾis, 1988), 223, 368 and 450.

321 E.g., Ibn Rushd, Bidāya, 3: 158.
very problem since Ibn Rushd strived all through to develop an approach by which the conflicting views of the eponyms can be reconciled.

4. The Causes of Disagreement: the cause of the scholars’ disagreement on the question at hand for Ibn Rushd is the discrepancy between the manifest expressions of certain prophetic traditions (ta’āruḍ ẓawāhir al-aḥādīth). He cites two reports narrated by Abū Hurayra and which some scholars considered textual proof that little impurity soils small amounts of water. In the first, Muḥammad appears to command his associates to wash their hand (presumably the right one) before dipping it in the water vessel after waking up from sleep.\(^\text{322}\) In the second, he seems to prohibit them from bathing in still water if it had been urinated in it.\(^\text{323}\) Ibn Rushd confirms that the manifest expressions of the reports make one surmise (yūhim bi-ẓāhirih, from the verb wahama, lit., to fancy)\(^\text{324}\) that little impurity pollutes a small amount of water.

Then, he elaborates on two reports that, unlike Abū Hurayra’s, denote that little impurity does not soil small amounts of water. The first is narrated by Anas ath-Thābit and it is about a Bedouin who went up to a side of the mosque to urinate. People stormed at him, but the Prophet deterred them. After the man finished, the Prophet asked his companions to take a pitcher of water and pour it on the man’s urine.\(^\text{325}\) From this report, it was understood that the purity of water overpowers the impurity of the urine. The second is a report by Saʿīd al-Khudarī that the Prophet

\(^{322}\) Earlier in the Purification chapter, Ibn Rushd quotes this tradition: “When one of you wakes up from sleep, he should wash his hand before dipping it in the [water] vessel, for none of you knows where he had it.” In other versions, the prophet said: “wash it three times.” Ibn Rushd, Bidāya, 1: 16.

\(^{323}\) Bukhārī mentions this tradition part of a longer report on istijmār (cleaning one’s private parts using stones). See, Bukhārī, Ṣaḥīḥ al-Bukhārī, 53 (ḥadīth no. 162).

\(^{324}\) In their scale of what they conceive of as “certain knowledge” (maʾrīfā yaqīniyya), legal scholars rank “wahm” lower than “opinion” (ẓann) and “doubt” (shakk) —often considered synonymous. So, for a legal matter about which certainty (yaqīn) cannot be attained, a jurist may hold one of two attitudes: ẓann or wahm. The ẓann is a probable and preponderant (rājiḥ) opinion which is binding. The wahm is an improbable and non-preponderant (marjūḥ) opinion which is not legally binding. For more on the concepts of opinion and certainty in Islamic law, see Bernard Weiss, The Spirit of Islamic Law (Athens, Georgia: University of Georgia Press, 1998), esp., 88-112. For the expression “tawahhum,” see a brief entry in Al-Mawsūʿa l-Fiqhiyya al-Kuwaytiyya (Kuwait: Wizārat al-Awqāf, 1983-2006), 14: 203.

\(^{325}\) The version that Ibn Rushd quotes is recorded in, Ṣaḥīḥ Muslim, 1: 236 (ḥadīth no. 99).
was informed that the water which has had been supplied is drawn from the well of Buḍāʿa, a well where “dog flesh, menstrual cloths and people’s dirt are cast” (biʾrun yulqā fīhā luḥūm al-kilāb wa l-maḥāʾ iḍ wa ’ufrat an-nās). The prophet then said: “water is pure and nothing soils it.”

5. Analysis: that the literature of the debate of whether little impurity soils a small amount of water has been expounded (i.e., textual sources, consensus, disagreements and their causes), Ibn Rushd moves to analyze rigorously more complex areas of the scholars’ disputes. It is this very part which he calls in the preamble “the intricacies of dispute” (nukat al-khilāf). Ibn Rushd explains that scholars strived to harmonize the conflicting reports about the question of little impurity mixing with water. As they pursued different methods, they reached different conclusions. Mālikīs and Ṣāḥīḥīs permitted the use of a small amount of water mixed with little impurity. They read the Bedouin’s tradition and Abū Saʿīd’s report (on Buḍāʿa’s well) literally, and considered Abū Hurayra’s reports having no rational sense (ghayr maʿqūlay al-maʿnā) —i.e., their meaning is not accessible through reason. So, the call to washing the hand before dipping it in the vessel, for example, is perceived as a command to perform a ritual (ʿibāda), and not a rational indication that the water can be impure.

326 “Buḍāʿa,” a well named most likely after the person who dug and/or owned it, was located on the north west of the Prophet’s Mosque in Medina.

327 This tradition appears in a slightly different version in few commentaries on Sunan Abū Dāwūd. For example, in Maʿālim as-Sunan, Khaṭṭābī (d. 388/998) quotes Abū Dāwūd’s report on Saʿīd al-Khudari that, “the prophet was asked: O God’s messenger, how do we use for ritual ablution water from the well of Buḍāʿa, which is a well in which menstrual cloths, dogs’ flesh and filth is cast? And the messenger of God replied: water is pure, nothing soils it.” Nonetheless, the manifest sense in both versions is one; that the prophet had no problem using (for drinking or cleaning) water from a well where people threw filth. Khaṭṭābī warns not to understand “yuṭraḥ fīhā” (yulqā in Ibn Rushd’s, i.e. cast in it) in the sense that Buḍāʿa’s well had been used by the people to dump dirty substances. He holds that this is most inconceivable, since water had a very special place among the Arabs due to its scarcity (which other reports support). So, it makes no sense why they would spoil a well in such a manner. He explains that the well was dug at the bottom of a hill, and people used to cast off filth further up. When it pours heavily, the torrential rainwater flows down the hill, dragging some of the dirt into the well. He adds that the prophet said that “water is pure, never soils” because the color, odor and taste of the water drawn from Buḍāʿa’s well did not change. Abū Sulaymān Ḥamad b. Muḥammad b. Ibrāhīm al-Khaṭṭābī, known as al-Khaṭṭābī (d. 388/998), Maʿālim as-Sunan, wa huwa Sharḥ Sunan Abī Dāwūd, ed. Muḥammad R. aṭ-Ṭabbākh (Aleppo: Al-Maṭbaʿā al-Ilmiyya, 1932), 1: 37-38.
Shāfiʿīs and Ḥanafīs discouraged (*karraha*) the use of this kind of water. They thought of Abū Hurayra’s as an indication of discouragement, and read the Bedouin’s tradition and Abū Saʿīd’s report by the letter (i.e., permitting the use of this water). For more textual support, Shāfiʿī returned to another tradition by ʿAbd Allāh b. ʿUmar, which confirms that the Prophet permitted predators’ and riding animals’ leftover of water if the amount is equal to two jars (*qullatayn*). Abū Ḥanīfa, on the other hand, resorted to analogy, and so, made the sanitation of the water contingent upon the movement of impurity through it. He maintained that if one believes that the impurity did not circulate through the water, it ought to be considered pure and hence can be used for purifying.

In Ibn Rushd’s view, the Bedouin’s report nullifies Shāfiʿī and Abū Ḥanīfa’s conclusions. He points out that Shāfiʿī scholars themselves were not fully convinced and sought a solution in distinguishing between two actions: pouring water over the impurity, and casting impurity in the water. In the first situation, like the Bedouin’s report, the water remains pure and keeps its purifying capacity even if it is a small amount (a pitcher). In the second, like Abū Hurayra’s report, the water does not remain pure and cannot be used for purification. Despite that most jurists considered the latter an arbitrary distinction (*taḥakkum*), Ibn Rushd insists that it makes a valid argument with one respect at least. He explains it as follows. Scholars have agreed upon two things in regard the present question of water. First, a large amount of water can not be affected by little impurity if the latter does not circulate through all of it. Second, if a certain amount of impurity were to be cast in a certain amount of water, it is probable that it would circulate through it and make it impure. Departing from these premises, Ibn Rushd suggests that if that small amount of water is poured gradually over the impurity, it would eliminate it and the soiled spot will be pure as the last drop of water touches it. By way of analogy, this situation is equal to that of little impurity mixed with a large amount of water.

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328 Ibn Rushd’s version of this tradition is recorded in *Sunan Abū Dāwūd* as well as other Ḥadīth manuals. See, e.g., Abū Dāwūd Sulaymān b. al-Ashʿath (d. 275/889), *Sunan Abū Dāwūd*, ed. Muḥammad ʿAbd al-Ḥamīd (Beirut: Al-Maktaba a-ʾAṣriyya, 1996), 1: 17.
6. Personal Opinion: we come to the last stage of Ibn Rushd’s six-fold system of legal construction; his personal effort to outweigh and harmonize the established views. Generally, when Ibn Rushd reveals his position on a certain issue, and which he does not do often, he uses such expressions as: “the most suitable approach for me is” (awlā l-madhāhib ʿindī hiya), or “the most preponderate view maybe” (laʾalla l-arjāh huwa). On the current question of little impurity mixing with water, he concludes:

For me, the most appropriate and best way to harmonize [the reports] is to read Abū Hurayra’s report and others with a similar meaning in the sense of discouragement, and read Abū Saʿīd and Anas’ in the sense of permissibility. For this interpretation preserves the manifest implication of the reports —i.e., Abū Hurayra’s two reports are intended [to instruct about] the effect of impurity on water. The definition of “discouragement,” for me, is that from which the soul refrains in distaste and considers filthy. Therefore, what the human being refrains from drinking must not be used in rituals devoted to God the Sublime, and what is refrained from applying to the body. It [also] must not be applied to the surface of the body, just as it is disliked for consumption.329

Ibn Rushd admires the Shāfiʿīs’ distinction between water poured over impurity and the latter cast in water, although he does not endorse their position in its entirety. And his suggested approach to harmonize the conflicting reports (awlā l-madhāhib ʿindī wa ahsanuhā ṭarīqatan fī l-jamʿ) is not based on qiyās (Ḥanafī approach). However, what is intriguing about this passage is his definition of the term “discouragement” (karāhiya), which reveals the extent to which he conceives of Fiqh as a domain of practice grounded in a fluid and changing human experience, not transfixed in the school’s legal theory. For Ibn Rushd, a small amount of water mixed with little impurity must be discouraged if that water is distasted by people and considered dirty (taʾfuh an-nān wa tā annahu khabīth). As such, and since taste is a subjective experience which differs in place and time, he puts the law of this matter on a flexible surface that attends to the reality of change. At the same time, however, and this is important, the solution he proposed is given from within the established

329 Ibn Rushd, Bidāya, 1: 32.
legal tradition. It is for this reason, perhaps, that he excludes the qiyās-based argument of the Ḥanafīs, (at least on this particular legal question).

Ending this section, Ibn Rushd states that this is everything he planned to say about the scholars’ disagreements on this issue and their efforts of preponderance. Ibn Rushd wished he could have addressed all legal issues in the Bidāya in the rigorous way he pursued in coving the question at hand (wadidnā law salaknā fī kullī masʾalatin hādhā l-maslak). But, he knows that such arduous task and might never be completed in his life (ḥādhā yaqtaḏī ṭūlan wa rubbamā ’āqa ’anh az-zamān). Being pragmatic and prudent (al-aḥwat), he, therefore, decides to stick to the goal he intended first (naʿumm al-gharaḍ al-awwal al-ladhī qaṣadnāh; i.e., to help scholars cultivate the skill of ijtihād and do it in a succinct way). He promises that if God makes this task easy and extended his life, he will come back to it—which did not happen. It is unquestionable that Ibn Rushd considers the six-fold system he used to construct his legal discussion of the question at hand the most useful for fulfilling the Bidāya’s highest goal of cultivating ijtihād. Yet, at the same time, he was aware of the difficulty of writing exhaustively on every single question given his disturbed age (politically as seen in Chapter 1) and commitments (esp., commenting on Aristotle corpus).

With this conclusion, Ibn Rushd reveals two main ways of legal investigation: an ideal way and a practical way. The first is a model of excellence which he only hoped he could pursue throughout the Bidāya. This model conforms to the highest standards of critical analysis (naẓar šināʾī). As he explained in the Ğarārī, scholars who employ this method not only examine their predecessor’s ijmāʿ and khilāf, but also decide which of their views preponderate regardless of their madhhab affiliation —commitment must be paid not to a school’s hermeneutic, but to the indicant (dalīl). They must take a firm stand on by affirming a view, negating it, or holding an agnostic position. In fact, taking a firm stand is one of the things that distinguish the Bidāya from 330

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330 Ibn Rushd, Bidāya, 1: 33.
other *khilāf* books. For example, in *Ikhtilāf al-ʿUlamāʾ*, Marwazī (d. 294/905) presents the scholars’ disagreements about an issue, but he rarely gives his own opinion.

The second approach, which Ibn Rushd applies throughout the bulk of the book, is a model inspired by practicality. At stake, here, is not perfection, but completion. One key feature of this model is succinctness and economy in writing. Like the ideal model, the practical also focuses on the textual sources of the *ḥukm*, the jurists’ agreements and disputes and the causes of their disputes. Unlike it, however, the practical model may include stages five (analysis) and six (*jamʿ*/*tarjīḥ*) and may not. Ibn Rushd has shown interest in harmonizing conflicting reports and outweighing the legal scholars’ conclusions in the *Bidāya*. However, he did not always do it. There are times where he presented the scholars’ views equally without outweighing any of them. And there are times where held an agnostic position.

Generally, in several of his writings, Ibn Rushd exhibits deep concern not to exhaust his readers with superfluous information. For example, unlike several theological and legal books, he initiates his *Tahāfut at-Tahāfut*, *Manāhij al-Adilla* and *Faṣl al-Maqāl* with a brief statement on his purpose. In the *Bidāya*, as he promised, he conveys his prefatory discussion of *Uṣūl* “in the most succinct way (*bi-awjaz mā yumkinunā dhālik)*.” It is the argument of this dissertation that practicality is constitutional of the *Bidāya*, and succinctness, as will be seen shortly, is one of its features. The following pages examine the various aspects of the “practical” character of the *Bidāya*. My aim is to show the ways in which the *Bidāya* is more than just a mere sophisticated book of *khilāf*. It is Ibn Rushd’s ambitious effort to redefine the role and function of Islamic law. Before delving into the various manifestations of practicality in the *Bidāya*, however, it is beneficial to draw a quick comparison between the structure of legal synthesis of Ibn Rushd and that of the acclaimed Mālikī jurist of his own town, Ibn ʿAbd al-Barr. The choice of Ibn ʿAbd al-Barr is a natural choice, since his *Istidhkār* is the most important source in the *Bidāya*.

331 Ibn Rushd, *Bidāya*, 1: 9
It has been established that the book on which Ibn Rushd depends most heavily for citing the Schools’ legal disagreements is *Kitāb al-Istidhkār* by Ibn ‘Abd al-Barr.\(^{332}\) A close look at the *Istidhkār*, however, shows that the latter’s influence on the *Bidāya* goes beyond simply providing a comprehensive source for the schools’ controversies. The book and its author also left a visible impression on Ibn Rushd’s approach to law generally and *khilāf* specifically, despite some salient differences between the two. Particularly, Ibn ‘Abd al-Barr appears to be more loyal to the Mālikī tradition of writing on *khilāf* than Ibn Rushd is. This is evident in the way Ibn ‘Abd al-Barr makes Mālik’s *Muwaṭṭa* —in most of his legal writings actually, not only the *Istidhkār*— the center of attention. Ibn Rushd, as illustrated in Chapter 3, does not make Mālikī law the focal point of his discussion.

The structure of legal analysis and synthesis in the *Istidhkār* consists of eight main stages.\(^{333}\) For each legal issue, Ibn ‘Abd al-Barr (1) cites the report (or reports) relevant to it from Mālik’s *Muwaṭṭa*, (2) elaborates on the *Ḥadīth*’s chain of transmission, at times referring the reader to his *Tamhīd*\(^{334}\) for more details, (3) mentions the report’s different versions, if it had been narrated by more than one Companion, (4) explains the verbal expression of the different versions of the report, (5) interprets the implications of the report and points out the derivative legal questions which can be further obtained from it, (6) refers to Mālikī scholars’ disagreements with respect to each inferred question, (7) compares them to other authorities’ conclusions. It is at this stage that he includes his critique of the contesting views (including Mālik’s). Here, he focuses especially on the proofs (*adilla*) of each group and stresses which one is weak (*ḍaʿīf*) and which is

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\(^{332}\) Ibid, 1: 95.

\(^{333}\) Cf., Büllūz’ four-fold system. Büllūz, “Kitāb *Bidāyat al-Mujtahid*,” 1: 163-64. For my comparison of Ibn Rushd and Ibn ‘Abd al-Barr, I have relied entirely on Ibn Abd al-Barr’s *Istidhkār*.

Finally, he outweighs the views in conflict and, based on the strength of their arguments and indicants, determines which is the most demonstrable and, hence, sustainable.\(^ {335} \)

This approach is known as “\textit{al-jamʿ wa t-tarjīḥ}” (harmonization and preponderance). It is a method of legal synthesis by way of reconciling or outweighing the opposing views. It stands contrary to “\textit{isqāṭ}” (omission), a process at the end of which the researcher rejects all the views and either coins a new view or abstains (\textit{waqf}). In the \textit{Bidāya}, Ibn Rushd conceives of the \textit{jamʿ}, \textit{tarjīh} and \textit{isqāṭ} as three of the most important legal methods of analysis.\(^ {336} \) Like Ibn ’Abd al-Barr, the approach of his first choice is harmonization, followed by preponderance, then omission.\(^ {337} \) This is no surprise since Ibn Rushd believes that jurists ought to operate within the established legal institution, not without it. As shown in Chapter 3, he almost never develops a new view, but often chooses the best of what has already been formulated and refines it if needed.

Furthermore, Ibn Rushd’s emphasis on the legal indicant (\textit{dalīl}) as the first and foremost determining measure of preponderance, which is part of the approach of \textit{jamʿ}, also has its root in the \textit{Istidhkār}. Frequently, Ibn ’Abd al-Barr insists that the categorization of a certain action (i.e., obligation, prohibition, permission, etc.) becomes legally binding only if it is supported by undisputed proof, “\textit{illā bi-dalīlin lā muʿāriḍa lah}.”\(^ {338} \) The \textit{dalīl} for both of them must be a clear text from the Qur’ān, Sunna or \textit{ijmāʿ}. This text is the only measure for outweighing a legal decision, not the school’s theory.\(^ {339} \) Although he seems to be more faithful to the \textit{madhhab} than

\[^{335}\text{For an illustration of the way Ibn ’Abd al-Barr constructs his legal discussion in the \textit{Istidhkār}, see, three examples in Qal’ajī’s edition in, Ibn ’Abd al-Barr, \textit{Istidhkār}, 1: 81-94.}\]

\[^{336}\text{See his reference to these three in e.g., Ibn Rushd, \textit{Bidāya}, 2: 53.}\]

\[^{337}\text{Occasionally, Ibn Rushd says: “for me, the proper method and best way of harmonization is.” E.g., Ibn Rushd, \textit{Bidāya}, 1: 32.}\]

\[^{338}\text{The same expression is repeated few times in the book. E.g., Ibn ’Abd al-Barr, \textit{Istidhkār}, 3: 35, 4: 113 and 5: 456.}\]

\[^{339}\text{Ibn ’Abd al-Barr’s emphasis on the importance of the \textit{dalīl} is reiterated on several occasions (1: 323, 2: 340 and 2: 399). In the same fashion, Ibn Rushd accentuated the indispensable role of the \textit{dalīl} throughout the \textit{Bidāya}. See, e.g., his refutation of the several views on the basis that they are not grounded in a solid \textit{dalīl}. Ibn Rushd, \textit{Bidāya}, 1: 47, 112, 2: 124, 163, 3: 70, 225, 4: 17, and 60. I should emphasize, here, that a \textit{dalīl} for Ibn Rushd, as can be seen in many of the interventions cited above, is a clear proof from the Qur’ān, Sunna and \textit{ijmāʿ} only. Views derived through \textit{qiyās} and other ways of reasoning such as \textit{istihsān} and \textit{maslaha} are not considered \textit{dalīl}.}\]

Ibn Rushd, Ibn ʿAbd al-Barr critiqued Mālikī views and did not hesitate to embrace other schools’ views that seemed more demonstrable. One scholar has recently shown that Ibn ʿAbd al-Barr in the *Istidhkār* has objected to more Mālikī views than any other school of law.\(^{340}\)

In the midst of the countless legal controversies and for the purpose of determining the views with the strongest *dalīl*, scholars had to dig deeper into what exactly caused the jurists to disagree. Both Ibn ʿAbd al-Barr and Ibn Rushd paid close attention to this issue, although the *Bidāya* contributes to more rigorously. Generally, Ibn ʿAbd al-Barr discerns, at least, two major groups of the causes of *khilāf*. The first concerns the prophetic tradition and includes disputes caused by being unaware of a report, a report transmitted in different verbal expressions, and the conflict of two or more reports about the same legal issue — e.g., one permitting an action, the other commanding/prohibiting it. The second pertains to the signification of the indicant’s expression, including all issues of ambiguity (e.g., an expression that may be read in a general and particular sense, qualified/unqualified, literal/non-literal, etc.).\(^{341}\)

This area of inquiry has become known as “*asbāb al-khilāf*” (the causes of disagreement) and gradually evolved into an independent subgenre of Islamic law. Scholars’ interest in the *Asbāb* can be returned to a key factor and distinguishing feature of Islamic law: its inordinate dependence on the science of linguistics. Although, what really makes *Asbāb* a field worthy of our attention is that it is distinctive of the Mālikī tradition of Andalusia. This is not to say that the causes of juristic disagreement were not known to scholars from other Schools. But, as an established systemic genre, much of the credit goes to the Andalusian scholars (a list of major works on the *Asbāb* will be provided shortly).


\(^{341}\) Ibid, 2: 952-53.
3. The *Bidāya* between Legal Formalism and Functionalism

In his introduction to “Fiction and Formalism: Toward a Functional Analysis of *Uṣūl al-Fiqh,*” Sherman Jackson refers to an excerpt in the *Bidāya* which, in his view, reflects Ibn Rushd’s awareness of two conflicting tendencies toward the law: responding to the practical needs of society and observing consistency with the school’s hermeneutic which has been dominant. The issue, here, is that theory became *the* source of legal authority, and the jurists and lawyers’ role became little to nothing more than corroborating that theory’s credibility and preserving its integrity, instead of employing it to *make* the law.

The passage in questions is part of Ibn Rushd’s discussion of usurious sales in Chapter 2 of the Book of Sales (*Kitāb al-Buyūʿ*). Particularly at stake is whether usury rulings of *ribā l-fadl* apply to certain foods once processed (*dakhalathu š-ṣanʿa*), as in the case of bread and dough vs. wheat. Citing Mālik’s view on processed foods that can or cannot be exchanged with unequal amounts, Ibn Rushd notes a discrepancy. Mālik had allowed the exchange of bread with excess on one occasion, and forbade it on another. Also, he deemed grilled meat (*al-laḥm al-mashwiyy*) and cooked meat (*maṭbūkh*) to be part of the same group (i.e., they may not be exchanged with excess), whereas he considered roasted wheat (*al-ḥinṭa al-maqluwwa*) and non-roasted wheat of different groups (i.e., they may be exchanged with excess). Ibn Rushd surmises that Mālik was asked about these analogous issues at different points of time. But, because he did not pursue a specific method to discern them, he gave different answers based on what came to his mind each time. Subsequent

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344 The general rule dictates that trading with interest certain goods (gold, silver, barley, wheat, dates and salt) of the same generic category is strictly prohibited. Ibn Rushd quotes a famous report by ʿUbāda b. ʿṢāmit that he heard the Prophet saying: “it is prohibited to sell gold for gold, silver for silver, barley for barley, wheat for wheat, dates for dates and salt for salt, except in equal amount and for the same substance. One who makes an increase or accepts it has dealt in usury.” The same tradition appears in various versions in, ʿṢaḥīḥ Muslim, e.g., 3: 1210-12. The tradition cited by Ibn Rushd corresponds to Muslim’s report no. 1587.
Mālikī scholars struggled to reconcile Mālik’s inconsistent views and systematize his approach on this issue, but all in vain.

Jackson has read Ibn Rushd’s intervention in this passage as an acknowledgement of a “perduring effort to balance the exigencies of legal practicality with the dictates of theoretical consistency;” i.e., that the legal scholars were trapped between complying with their schools’ established readings of the law and addressing the issues at hand as following the immediate circumstance. The problem for Ibn Rushd, as far he has asserted many times in the book, is the lack of a canon (qānūn) with which the eponyms’ inconsistent views can be harmonized. We have seen that already in the Ḍarūrī, Ibn Rushd insists that a scholar of khilāf must establish the authorities’ meta-principles of legal construction in order to be able to make sense of their conclusions. Throughout the Bidāya, he strives to found the canons and rules that governed the eponyms’ views on most controversial issues. It may be for its focus on universal legal rules that Qarāfī mistakenly entitled the Bidāya the Book of Rules (Kitāb al-Qawā‘id).

We can only agree with Jackson that by the day of Ibn Rushd, the prevailing attitude among most jurists was maintaining consistency with the School’s hermeneutic. Ibn Rushd himself draws a vivid image of this situation when he restricted the title “Faqīh” (jurist, law expert) to those trained to exercise ijtihād. In the Transactions chapter (Kitāb as-Ṣarf), he holds categorically that:

It is this rank [of ijtihād] that earns him [i.e., jurist] the title “Faqīh,” not memorizing the legal questions—even if they were the utmost number a human being could memorize. Scholars (mutafaqqiha) today, as we see, believe that if one memorizes more [legal] issues becomes more knowledgeable of Fiqh. It occurred to them what occurred to someone who believed that the [true] shoemaker is someone who owns a huge number of shoes, not the one who can make them. [Although,] it is evident that the person who owns so many shoes will be visited by a person for [one of] whose foot he

345 Jackson, “Fiction and Formalism,” 177-78.
346 Ibn Rushd, Darūrī, 37.
347 Qarāfī, Furūq, 3: 419-22.
cannot find in his collection anything that fits. Then, he will necessarily return to the [true] shoemaker who makes for every foot a suitable shoe.\textsuperscript{348}

Most important for Ibn Rushd is the skill and ability to supply a ruling for every new situation. Only the mastery of \textit{ijtihād} empowers the legal scholar to attain this goal. Hence, only \textit{ijtihād} entitles him to be called “\textit{Faqīh}.” Ibn Rushd seems to conceive of \textit{Fiqh} as a renewable domain, and of legal theory an exhaustible field. It may be for this reason that he has endeavored in the \textit{Bidāya} and \textit{Ḍarūrī} to present \textit{Uṣūl} as a “tool” and “instrument” for defining the taxonomies, and not as a source of the law in itself. In this light, we can presume that the \textit{Bidāya} was written with the intention of resisting and cautioning against the drift of fixating \textit{Uṣūl} within a stable theory.

Jackson has quoted from the \textit{Bidāya} to show that Ibn Rushd was aware of this conflict between the “formalistic” and “functional” tendencies toward \textit{Uṣūl}. A classical legal formalistic approach means “restricting the loci of meaning to the observable features of language.”\textsuperscript{349} It refers to the historical development of legal theory into a complex linguistic enterprise where language and its various systems were appealed to as the ultimate source of meaning. Unlike functionalism, legal formalism draws on legal theory not to \textit{produce} doctrine, but to \textit{validate} it.\textsuperscript{350} This formalistic attitude led to the rise of undivided commitment to the uniformity of a legal hermeneutic. This, for the most part, is true of Islamic legal theory, since a glimpse at the table of contents of \textit{Uṣūl} books confirms scholar’s enormous emphasis on language and the linguistic foundation of the law.\textsuperscript{351}

\textsuperscript{348} Ibn Rushd, \textit{Bidāya}, 3: 210-11.

\textsuperscript{349} Jackson, “Fiction and Formalism,” 191 and 195.

\textsuperscript{350} Jackson, “Fiction and Formalism,” 194. Jackson recognizes exceptions to this dominant formalistic approach, and calls them: “‘safety-net’ principles like \textit{istiḥsān} (equity), \textit{maṣlaḥa} (public benefit) and \textit{sadd al-dharaʾiʿ} (blocking the means), whose apparent aim is to reverse the negative or unanticipated effects of a strict formalist reading.” Jackson, “Fiction and Formalism,” 195.

\textsuperscript{351} It is common that a book of \textit{Uṣūl} includes a lengthy discourse on the ways of inference (\textit{ṭuruq al-istinbāṭ}). Under this rubric, scholars often cover several linguistic rules that are deemed essential for decoding the intention (\textit{maʿnā}) of the lawgiver. The discussion of such lexical categories as homonymy and polysemy (\textit{ishtirāk}), literality and non-literality (\textit{ḥaqīqa/majāz}), singular and complex meaning construction (\textit{ifrād/tarkīb}), particular/general (\textit{khuṣūṣ/ʿumūm}) has become an integral part of all works of \textit{Uṣūl} regardless of the scholar’s \textit{madhhab} affiliation.
Although Jackson does not state openly that Ibn Rushd favors this “functional” method, it is clearly implied in his discussion. Both functionality and practicality are central features of Ibn Rushd’s legal analysis in the Bidāya and there should be no doubt about it. As a book of and on ijtihād, the Bidāya is expected to be practical in that it submits to the immediacy of change. Otherwise, it will be a text of taqlīd. At the same time, however, neither in the excerpt cited by Jackson nor anywhere in the Bidāya does Ibn Rushd suggest abandoning established laws or incurring radical change. His main interest is explaining the authorities’ views and stressing the import of learning the ways through which their legal categories were obtained.

One question after Jackson’s stimulating reflection is: to what extent is the Bidāya divorced from legal formalism? To what degree does Ibn Rushd found his legal conclusions on practicality, rather than on established theory? To answer this question, one should examine Ibn Rushd’s views of the role and place of language in law. This is an interesting line of query that deserves a study of its own. For our purposes, it suffices to say that, like his predecessors, Ibn Rushd also considered language and grammar the core of the hermeneutical praxis. His narrative in the Ḍarūrī and Bidāya echoes this position well. Reflecting on Ghazālī’s chapter division of the Mustaṣfā, for example, he deems the third volume of the book, which undertakes a range of linguistic rules pertinent to legal inference, the only chapter worthy of study under the subject matter of Uṣūl proper.

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352 I tend to use the term “practical” more than “functional,” because it allows for entertaining the idea of practice as both at the practical and theoretical levels. I understand the term “functional” to be derivative of the former and to refer to a study that is grounded in function rather than structure. I call the Bidāya a “practical” study mainly for the inclusiveness of this term, and because it does not reject structure entirely (i.e., functional).

353 Ghazālī’s Mustaṣfā constitutes four volumes. The first on the taxonomies or categorizations (aḥkām), the second on the textual proofs (adilla; in the Qurʾān, Sunna and ijmāʿ), the third on the ways of inference (ṭuruq al-adilla), the fourth on the qualities of the independent scholar (mujtahid). Ghazālī divided this book in such a way that he thought it is best for the study of Uṣūl. In his view, the student should first learn about the categories (aḥkām), then textual indicants of these categories (adillat al-aḥkām), then the ways the categories are inferred (ṭuruq istinbāṭ al-aḥkām), and finally the requirements of ijtihād (shurūq al-mujtahid). He captures this process in an interesting way, depicting the aḥkām as a desired fruit (ath-thamara l-maṭlūba), the adilla as the fruit tree (al-muthmir), the ways of inference as the process of picking the fruit (ṭarīq al-istithmār), and the mujtahid as the fruit picker (al-mustathmir). See, Ghazālī, Mustaṣfā, 1: 18-20.

354 Ibn Rushd, Ḍarūrī, 36. Ghazālī includes in the third volume of the Mustaṣfā a detailed discussion of the forms of signification (manẓūm, maṭḥūm, maʿqūl), various forms of ambiguity (muṭlaq, āmm, muṭlaq, mushtarak, majāz),
Furthermore, most of the causal agents to which Ibn Rushd returns scholars’ disputes are language based (Chapter 4 extends an elaborate discussion of asbāb al-khilāf). Nonetheless, however, whenever he critiques or objects to a language-based interpretation, his alternate reading rarely goes beyond the language theory in question. Simply put, when Ibn Rushd seeks to mend a legal decision about which there was dispute with respect to the semantic nature of its terms (e.g., general or specific, restricted or unrestricted, etc.), he often reacts from within that very hermeneutical system and rarely develops a new law. In the few places where he felt compelled to contribute an unprecedented view, he articulated it with hesitation and humility. For example, in response to a claim that the waste of all animals (faḍālāt, e.g., bird droppings, cattle dung, deer musk, etc.) is pure and hence not prohibited, he humbly articulates: “Had it been permitted to come up with a view that has never been given in the authoritative books, even though this is a controversial matter, one would say that animals’ waste which stinks and disgusts is not the same as that which does not, especially a waste that has a good scent.” On the few occasions where Ibn Rushd produced a novel opinion, he ensures to express it plainly using the phrase: “no one has taken this position before (lam yaqul bihi aḥad).” Generally, Ibn Rushd does not demonstrate special interest in creating new laws. He insistently repeats in the Bidāya that his ultimate end is to preponderate the conflicting views, and only on matters that have already been addressed by the law (al-manṭūq bihā).

Ibn Rushd’s stress on the linguistic structure of the law and reluctance to provide new rulings come unsurprising if read against the basic theological conception that the revelation (esp., the Qur’ān) is God’s “speech” expressed in human language through the Prophet —this does not mean that Ibn Rushd believed it is God’s speech literally. The primal manifestation of this speech is the uttered word (al-lafẓ). And it is only through the lafẓ that the meaning of God’s word can be

the imperative (amr) and negation (nayh), as well as other topics. The entire book is dedicated to language issues, including its last section which undertakes the method of analogy (qiyās).

355 Ibn Rushd, Bidāya, 1: 88. For acceptable animal wastes, Ibn Rushd gives the examples of ambergris (ʿanbar) and musk (misk).

356 E.g., Ibn Rushd, Bidāya, 3: 38, 121, 171, 187, and 4: 197.
established. The knowledge of the processes and techniques of deciphering this meaning, which begins by mastering the different functions and forms of the *lafẓ*, is the domain and highest end of a legal scholar—in fact, this knowledge is assumed to be a prerequisite for becoming jurist (*Faqīh*). It has been established that the *lafẓ*, by extension its *ma’nā* (meaning), has played a pivotal role in the maturation of the schools’ hermeneutical systems. In addition, recent scholarship has shown that the domination of the modes through which the *lafẓ* operated in Arabs speech also was an effective way of guarding the revelation against falling into the pitfalls of subjectivism.  

To put it differently, the command of Arabic and its systems has been perceived as a guarantor of objectivity in the hermeneutical practice. In the *Bidāya*, objectivity and impartiality are key attributes and can be seen in the ways in which Ibn Rushd has engaged with those issues for which he provided an independent opinion.

### 4. The *Bidāya* as a Practical Study of Islamic Law

The following pages expand on the practicality of Ibn Rushd’s legal analysis and synthesis in *Bidāyat al-Mujtahid*. I focus on two main areas of Ibn Rushd’s practical tendency: detachment from the Mālikī *madhhab* and his method of legal realism. What I call “legal realism” is sometimes described as Ibn Rushd’s “scientific approach in the *Bidāya*” and which was mandated by his focus on nurturing the sense of *ijtihād* in the readers of his book. Büllüz, for example, explains as part of this “scientific method” emphasis on *istidlāl* and *taṣīl*, systematization, and using the technique of summary (providing a summary at the end of a discussion, not concision of writing that I speak about).  

As much as I stress Ibn Rushd’s practicality, I also emphasize that he is by no means the “liberal” jurist some modern scholars thought he was or wanted him to be. No doubt, Ibn Rushd

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357 Bernard Weiss, “Exotericism and Objectivity in Islamic Jurisprudence,” *Islamic Law and Jurisprudence*, ed. Nicolas Heer (Washington: Washington University Press, 1990), 53-71. Here, Weiss argues that whether it is *qiyyās*, *ijmāʿ* or an *ijtihād* procedure (*istiḥsān*, *istiṣlāḥ*), all hermeneutic approaches revolve around the *lafẓ*. For in these, the scholar is guided by the verbal indicant.

associates the most useful legal approach with an *ijtihād*-oriented study that admits plurality and difference of legal opinion and gives priority to practicality over formalism. Nonetheless, it should not be undermined that he rarely brings a radical change to an established law. Ibn Rushd, as I hope these pages will illustrate, is more interested in clarifying the ways of obtaining the law along with the causes of the jurists’ disagreements than in creating new ones.

**Madhhab Detachment**

*Madhhab* detachment is a goal which Ibn Rushd expresses and successfully fulfils in the *Bidāya*. It is impressive how someone who had served as judge of the Mālikī jurisdiction under Almohads maintains to keep himself at the same distance from all schools. Few times in *Bidāyat al-Mujtahid*, when Ibn Rushd felt being absorbed in the Mālikī tradition, he stops at once and reminds that his goal are the principle rules needed to derive further laws on all schools. At one occasion, to stay focused on this general task, he promises to write a book on Mālikī legal principles. Ibn Rushd does not use honorary titles to address Mālik or any authority, except for adding after the name of the prophet customary phrases, such as “peace be upon him.” More importantly, Ibn Rushd gives the Mālikī school no primacy over others.

The *Bidāya* is not a book of Mālikī law; simply, because it does not make the latter its center of investigation. In theory, *khilāf* is a comparative genre where the different schools are expected to be undertaken at the same distance. In reality, however, this is not what is seen in most *khilāf* works. Compare, for example, three of the most important inter-doctrinal studies of *khilāf* prior to the *Bidāya*: *Al-Ishrāf ʿalā Nukat Masāʾil al-Khilāf* by ʿAbd al-Wahhāb (d. 422/1030), *Ṭarīqat al-Khilāf fī l-Fiqh bayn al-Aʿimma l-Aslāf* by Asmandī (d. 552/1157), and *Al-Maʿānī l-

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359 Ibn Rushd, *Bidāya*, 1: 200, 2: 63 and 3: 210. Ibn Rushd’s emphasis on issues already addressed and avoidance of hypothetical issues is also indicative of his practical tendency.

360 At the beginning of *Kitāb al-Qadhf* (Defamation), he says: “If God were to extend our age, we will write a critical study of Mālikī substantive law, since it is the School adhered to in this peninsula, which is the peninsula of Andalus.” Ibn Rushd, *Bidāya*, 4: 226.
Badīʿa fī Ikhtilāf ahl ash-Sharīʿa by Ṣardafī (d. 792/1390). In the Ishrāf, Ṭāb al-Wahhāb makes Mālikī law the axis around which his analysis revolves. He opens his discussion of every question with Mālikī views, then compares them to others. Contrarily, Ibn Rushd opens with the most known view, be it Mālikī, Shāfiʿī, Ḥanafī, etc. In Ṭarīqat al-Khilāf, Aṣmandī’s main goal is vindicating and defending Abū Ḥanīfa’s conclusions. The book, for the most part, compares Ḥanafī and Shāfiʿī disputes and occasionally those of Abū Ḥanīfa and his close associates. Ṣardafī’s Maʿānī clearly assigns the Shāfiʿī doctrine the highest position, and reads other schools theories to show how sound and valid Shāfiʿī views are. A quick comparison between the Bidāya and these works shows clearly the extent to which Mālikī law is not its centre of attention. Furthermore, the type of subjective pronouns a scholar uses can be indicative of either his independence from or adherence to a school. In the Bidāya, Ibn Rushd uses the singular pronoun to express “his” (not the Mālikī school’s) view of a certain issue. He often uses the phrase “for me” or “in my view” (ʿindī) — vs. “for us” or “according to our School” (ʿindanā). Another expression that he uses is “the most preponderate [position] for me is” (al-arjaḥ ʿindī) and “the most appropriate view for me” (al-awlā ʿindī).

Madhhab detachment in the Bidāya appears also in Ibn Rushd’s emphasis on the indicant (dalīl) as the sole and highest arbitrator. It is neither the sophistication of an argument, nor the school’s theory that determines preponderance. It is the substantiality and unassailability of the textual proof. Ibn Rushd holds firmly that a legal decision that is founded on a weak or no indicant is invalid and, hence, must be dismissed (suqūṭ al-hukm ḥattā yathbut bi-dalīl). And this is the stand he takes toward a range of authoritative legal decisions, such as one by Ibn Ḥanbal on a man who engaged in sexual intercourse with his wife during her menses. Whereas Mālik, Shāfiʿī and Abū Ḥanīfa agreed that this man should simply ask God forgiveness, Ibn Ḥanbal said the man must also give one dinār (or half in certain situations) to charity. Ibn Rushd rejects Ibn Ḥanbal’s

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362 Ṣardafī decisively posits in the preamble that he draws first on Shāfiʿī injunctions. Ṣardafī, Maʿānī, 1: 12.

363 Ibn Rushd, Bidāya, 1: 65.
view on the basis that the report he provided is invalid (ghayr ṣaḥīḥ). It is for the same reason — the absence of a valid indicant — that Ibn Rushd did not hesitate to bypass several laws of his own Mālikī school. This attitude is not incidental in the Bidāya, but key to Ibn Rush’s method of synthesis all through.

For example, on the question of whether a major female can be forced into marriage by her legal guardian, Ibn Rushd, against Shāfiʿī and Mālik’s afformatory decisions, aligns with Abū Ḥanīfa and refuses coercing her. He justifies this choice by the fact that “the textual sources attest more to the validity of Abū Ḥanīfa’s argumentation” (al-uṣūl akthar shahada li-taʿlīl Abī Ḥanīfa). For the same reason, he supports the Ḥanafī reading of the sentence of “nukūl al-liʿān” (refusal of repudiation). Mālik, Shāfiʿī and Aḥmad agreed that if a woman refuses to repudiate her husband’s accusation of adultery, she gets stoned if they had consummated their marriage and lashed if they had not. Abū Ḥanīfa ruled that she must be imprisoned until she repudiates in the spirit of this prophetic report: “the blood of an individual Muslim can not be shed except in three events: adultery (zinā baʿda iḥṣān), apostasy (kufr baʿda īmān) and retaliation for murder (qatlu nafsin bi-ghayri nafs).” Supporting Abū Ḥanīfa, Ibn Rushd adds that since most jurists did not impose fines on the person who refuses to repudiate in financial matters, it is then more proper to not incur the death penalty in cases of nukūl. He also reminds of the general rule that capital punishment in Islam is strictly conditioned on the accessibility of inviolable evidence and

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364 See the full account in, Ibn Rushd, Bidāya, 3: 33-34. This debate concerns specifically a non-virgin female of legal age (ath-thayyib al-bāligh, vs. al-bikr al-ghayr al-bāligh) and is brought up customarily in Fiqh studies under the topic of legal guardianship in the chapter of marriage (nikāḥ).

365 Liʿān, “mutual repudiation,” takes place when a husband accuses his wife of adultery without having witnesses. According to Q 24:6-9, the husband ought to pledge four times that he is truthful, followed by a fifth where he invokes God’s rage upon himself if lying. The wife has the right to repudiate the accusation by swearing four times that she is innocent, followed by a fifth where she calls down God’s wrath upon herself if her husband is truthful. If the woman completes the oath, she is considered innocent. If she refuses to swear (nukūl al-liʿān), the judge pronounces her guilty and subjects her to the punishment of adultery. The disputes Ibn Rushd mentions address the implications of the latter situation; when the woman refuses to repudiate.

366 Scholars has agreed on the validity of this tradition, although it comes in different expressions. The version to which Ibn Rushd refers corresponds to the narration of Al-Ḥākim an-Nīsābūrī in the Mustadrak. See, Abū ’ Abd Allāh Muḥammad b. ’ Abd Allāh al-Ḥākim an-Nīsābūrī (d. 405/1014), Al-Mustadrak ’alā aṣ-Ṣaḥīḥayn, ed. Muṣṭafā ’Abd al-Qādir al-ʿAṭṭā (Beirut: Dār al-Kutub al-ʾIlmiyya, 1990), 4: 390.
testimony. Therefore, since refusing to repudiate is neither a testimony nor evidence, the woman must not be executed. Ibn Rushd reassuringly concludes that: “it is more appropriate to follow Abū Ḥanīfa in this matter, God willing.”

From the Shāfiʿī school, Ibn Rushd approves the decision that if a man marries a woman during her ‘idda they must be separated and may remarry after she fulfils it. Mālik called for separating the couple and ruled that they can never remarry. Ibn Rushd considers the textual proof provided by Mālik weak and holds that “the principle is that she is not forbidden for him unless there is a clear indicant from the Qurʾān, Sunna or the community’s ijmāʿ.” Another example of Ibn Rushd’s defense of Shāfiʿī against Mālik pertains to the question of granting the right of protection (ḥurma) to the family and property of a Muslim convert. The question is: should the family and property of a convert who does not live in the conquered territories be protected under the law of ḥurma or are they to be considered war booty? Mālik’s answer is that the right of protection ought to be given to the convert’s wife and children only, not his property. Ibn Rushd rejects this ijtihād because it contradicts the spirit of the prophet’s report: “I have been ordered to fight against people until they testify that there is no God but Allāh. If they pronounce it, they gain from me protection for their lives and property, unless they commit a punishable act.” For him, converts live in a state of Islam not disbelief (kufr), which is the sole condition upon which his property would be seized. Therefore, neither their family nor property should be taken away.

Ibn Rushd pursues this strategy of relying solely on the strength of the textual proof both with the dominant Sunnī schools (Mālikī, Shāfiʿī, Ḥanafī, Ḥanbalī) and those that had less influence (esp., the Zāhirī school) or lost most of their spark by his age (e.g., Al-Layth Ibn Saʿd’s

368 The ‘idda is the waiting period that a woman ought to observe after divorce (or after the death of her husband, but not in the context of the issue above).
369 Ibn Rushd, Bidāya, 3: 70-71.
370 The expression of this Ḥadīth is almost the same as that of report no.36 in Ṣaḥīḥ Muslim. Cf., Ṣaḥīḥ Muslim, 1: 53.
school). A recent study has shown that Ibn Rushd endorsed rulings from twelve schools. He supported about one hundred rulings from the Shāfiʿī school, eighty from the Ḥanafī, seventy from the Ḥanbalī, and about the same number from the Zāhirī school. Although it is not his goal in the Bidāya to engage his personal views, Ibn Rushd has endeavored on few occasions to coin his own based on the available textual sources. A timely relevant example is the consumption of meat prepared by non-Muslims, or what is known today as “ḥalāl meat.” Particularly at stake is the legal status of eating the meat of animals slaughtered not in accordance with the prescriptions of the Sharīʿa?

This question is discussed in the last section of Kitāb adh-Dhabāʾiḥ (Book of Slaughtered Animals). In the order of his six-fold system of legal construction, Ibn Rushd first outlines the jurists’ agreements on a range of issues and the groups of people whose slaughtered animals Muslims are permitted to consume. Then, he talks about controversial matters and the groups whose animals were proscribed. Ibn Rushd examines this question in light of Muslim jurists’ disagreement on the slaughtered animals of ten different groups: the People of the Book (ahl al-kīāb, mainly the Christians and Jews), the Magus (majūs, Zoroastrians), the Sabians, women, children, the mentally ill, drunk people, people who do not pray, thieves, and people who misappropriate others’ property. Of import to our current discussion is the group of the People of the Book.

Ibn Rushd informs that scholars have agreed that the slaughtered animals of the People of the Book are by principle permitted in accordance with Q 5:5, “The food of those who have received the Scripture is lawful for you, and your food is lawful for them.” He mentions several specific situations about which the jurists disagreed, including: if the slaughter was performed on behalf of and/or authorized by a Muslim; if the slaughterer is a Christian from the tribe of Banū Taghlib or he is an apostate; if it is not known if God’s name was pronounced prior to the slaughter;

372 Ibn Rushd, Bidāya, 2: 212.
if the purpose of the slaughter is unknown; if it is known that he mentioned other than God’s name on the slaughtered animal, such as the animals they offer to their churches and synagogues, or slaughter in their holidays; if the animal is forbidden by the Torah (e.g., animals that walk on claws according to the Q 6:146); or they forbade themselves (e.g., animals with a birth malformation for the Jews).\(^{373}\)

Ibn Rushd briefly elaborates on each of these situations and clarifies the causes that led scholars to disagree about them. He returns their disputes to the fact that they demanded that if the slaughter is performed by people of the Scripture, it ought to conform to one or more of the basic terms of the Islamic ritual of slaughter; i.e., making the intention (niya), mentioning the name of God (tasmiya, “bism Allāh”), and directing the animal towards the Kaʿba in Mecca (istiqbāl al-qibla).\(^{374}\) On this particular view, Ibn Rushd extends a very interesting reflection, the full text of which reads:

The Judge said: The truth is that that which they were forbidden and that which they forbade for themselves are voided in the age of Islam, since its revealed law abrogates all preceding laws. [Therefore,] their doctrine of lawful slaughter must not be taken into account. Also, it must neither be stipulated that their doctrine should be similar to that of the Muslims’, nor that they should adopt Muslim laws. If that were to be stipulated, it would not be allowed to eat their meat in any respect. That is because their doctrine in this matter has been abrogated, and it will not be accepted of them to embrace ours. God the Exalted has made this law specific to them. Therefore, their meat, and God knows best, is allowed for us unqualifiedly. Otherwise, the permission granted by the verse [Q 5:5] will be annulled altogether. Ponder over this for it is evident, and God knows best.\(^{375}\)

\(^{373}\) The examples included in between brackets are Ibn Rushd’s, which shows that he had some degree of knowledge of ritual slaughter in Judaism as well. Besides referring to 6:146 which indicates that the Torah forbids animals all that walks in claws (which corresponds to Deuteronomy 14: 12–18), his other example of the Jews forbidding for themselves the meat of animals born with malformation is also accurate and conforms to the general Jewish rule that the animal must be free from disease.

\(^{374}\) Ibn Rushd addresses these in a previous section, and briefly touches on the controversies around the three stipulations (niya, tasmiya and qibla). See, Ibn Rushd, Bidāya, 2: 210-11.

\(^{375}\) Ibid, 2:214.
The opening phrase “the Judge said” (qāl al-Qāḍī) suggests a pause by Ibn Rushd and/or his copyist. There are several instances like this in the Bidāya and it often signals the beginning of a personal remark. Given the coexistence of Muslims, Jews and Christians in Andalusia during Ibn Rushd’s time, the question of “ḥalāl meat” must have stirred controversy and which urged Ibn Rushd to make this intervention. Most intriguing about his position, however, is the fact that he considered permitted animal species slaughtered by the People of the Book allowed for Muslims unqualifiedly. This is unlike any of his predecessors’ views, for even the most “liberal” of them permitted Muslims to eat the meat in question with provisions.

Like other legal scholars, Ibn Rushd grounds his legal views in the Qurʾān. On this issue of meat prepared by non-Muslims, he grants priority to Q 5:5 over other Qurʾānic and Ḥadīth indicants. Unlike other scholars, he objected to comparing Muslim ritual slaughter laws to the Christians and Jews’. So far, he understood the problem, since the sharīʿa abrogated all previous law and Muslims are bound by their sharīʿa only, it makes no sense to condition the lawfulness of the meat of the People of the Book on their observance of Muslim laws of slaughter. It makes no sense to demand that they observe Muslims’ requisites of ritual slaughter (i.e., niya, tasmīya and qibla), for even if they do, their slaughter would be invalid —because the sharīʿa abrogated their laws. For these reasons, Ibn Rushd concludes that animals slaughtered by the People of the Book are permitted for Muslims to consume and without qualifications. The same goes for the animals’ skin and fat on which there was another dispute.

The way Ibn Rushd has reached this conclusion is yet another illustration of his ability to reread the law and bring change to it from within the established Islamic legal institution and in conformity with its textual sources. And this complicates the relationship between formalism and functionalism in the Bidāya. As the passage quoted above reveals, functionalism in the Bidāya does not necessarily mean providing an entirely new reading, hence developing a new injunction. Here, as in other places in the book, Ibn Rushd reconciles the previous conflicting views through

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376 The copyist refers to Ibn Rushd as “the Judge” in about 60 places, in most of which Ibn Rushd makes an independent reflection. Cf., e.g., Ibn Rushd, Bidāya, 1:12, 37, 53, and 140.
a fresh reading guided only by the strength of the indicant provided in support of the ruling of the action in question. It is often this (i.e., the availability of a strong indicant) that derived Ibn Rushd to support a legal view, reject another, develop his own, or remain agnostic towards it.

Legal Realism

In addition to Ibn Rushd’s detachment from the madhhab, practicality in the Bidāya manifests in a measured inclination to cover “realistic” questions only and ignore those he deems fanciful and improbable. The realistic approach is carried out in two ways at least: dismissing unwaveringly unrealistic questions, and incorporating his knowledge of the natural sciences (esp., medicine and astronomy) to amend specific legal decisions. One place the first aspect is attested is his discussion of the entitlement of clientage (walā’) when the manumitter is a Christian.\(^{377}\) In other words, to whom the freed person should present walā’: the Muslim community at large, or his Christian manumitter? Looking at the debate of this question in the books of Fiqh, one notices that scholars dug further into several hypothetical subcases, such as if the manumitter and/or the freed person converts to Islam after fulfilling the manumission. Ibn Rushd mentions these hypothetical cases, however —and he does this for all issues that he deems impractical— only to refute them. On this question of a Christian manumitting his slave, he dismisses the entire debate on the ground that “these are hypothetical issues that no longer take place. For it is not in the Christians’ religion to enslave others, nor is it part of the Jews’ religion in accordance with what they believe today and claim to be part of their traditions.”\(^{378}\)

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\(^{377}\) This is Issue 4 of a subsection on “Clientage” (walā’) at the end of the Inheritance chapter (Farāʿīd). Ibn Rushd, Bidāya, 4:146-47. Walā’ is a legal institution that governs the relationship between the manumitter and the freed slave, where the latter assumes the position of a “client” (mawāli, pl. mawālī) of the former. Ibn Rushd includes this issue under the heading of Inheritance for it addresses questions about the freedman person’s right to inherit the manumitter if he converts to Islam. For more on walā’, see, e.g., Patricia Crone, Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate (Cambridge: Cambridge University Press, 1987).

\(^{378}\) Ibn Rushd, Bidāya, 4: 147.
Another instance of his renunciation of impractical questions is his falsification of the belief that a man can produce breast milk. This is the last of nine legal issues in a subsection on the inhibitors of breastfeeding. It is part of his comment on the legal requisites of a breastfeeding female.\textsuperscript{379} Although, comparatively, this is a legal question of slight significance in the scholars’ scale of the things that impede breastfeeding (mawāni‘ ar-radā‘), it is nonetheless constitutive of their debates of the subject.\textsuperscript{380} Ibn Rushd considers the jurists’ command against feeding a man’s breastmilk to children a “peculiar and odd decision” (qawl shādhdh). He ascertains that a man’s breastmilk “does not exist, let alone assigning it a law.”\textsuperscript{381} He further explains that it is rare for men’s breasts to produce milk. If it occurs, the produced substance is called “milk” by way homonymy only, since this substance does not have the same composition of a woman’s breastmilk. Ibn Rushd assures, this time as an experienced physician, that such cases (this one and another on the breast milk of a dead woman included in Ibn Qudāma’s Mugnī) might have never taken place and existed only in the jurists’ hypothetical discussions.

Ibn Rushd’s training in the natural sciences appears to be of use in other places in Bidāyat al-Mujtahid. For example, his astronomical knowledge gleams in his discussion of the rules of moon sighting —to determine the start and end of the Islamic calendar months, for the in the case at hand, the end of Ramadan).\textsuperscript{382} The legal question, here, is: at what point of the day sighting the moon is considered legally valid? Ibn Rushd mentions two contesting groups. The first said that if the crescent is sighted at any point during the day, the next day will be counted the first day of the new month. The second group argued that the crescent spotted before noon is a continuation of the previous night, and so fasting continuous for another day. But, if it was seen in the afternoon, it signals a new night, and fasting ends and tomorrow is counted the first day of the month of

\begin{footnotesize}
\begin{enumerate}
\item Ibid, 3: 64.
\item Possibly, Ibn Rushd’s criticism is directed at the Ḥanbalī school. Ibn Qudāma (d. 620/1223), e.g., extends in his Mugnī reflections on the breast milk of a dead woman and that of a man. Ibn Qudāma, Mugnī, esp., 8: 175-76 (on the breast milk of a man), and 8: 179-80 (on the breast milk of a dead woman). Ibn Qudāma claims the legal scholars prohibited both kinds of breast milk.
\item Ibn Rushd, Bidāya, 3: 64.
\item Ibid, 2: 47-48. Ibn Rushd uses “moon” (qamar) and “crescent” (hilāl) alternately.
\end{enumerate}
\end{footnotesize}
Shawwāl. The cause of this dispute, for Ibn Rushd, is that both groups relied on tradition to answer a question that can be answered only by empirical investigation (*tark iʿtibār at-tajriba fīmā sabīluh at-tajriba*). He clarifies that by both analogy and empirical observation, it is improbable (*baʿīd*) to see the moon if the sun has not yet set. Then, after a brief astronomical explanation, he concludes that discussing the legal validity of moon sighting ought to take into account whether the sun has or has not set, not whether the moon appears before or after noon. The language which Ibn Rushd uses to sustain his position belongs unquestionably to the jargon of astronomy. His emphasis on things such as the size of the moon with respect to its proximity from the sun (*al-kubr wa s-ṣughr*) and the observer’s angle of vision (*qaws ar-ruʿya*) shows that he was aware of the astronomers’ discussion of crescent sighting for determining the beginning and end of the month.\(^{383}\)

Ibn Rushd’s reputation as a proficient physician is demonstrated in the ways he mended the legal discussion of issues of medical nature. On one occasion, he criticizes the jurists’ dispute on whether vaginal bleeding during pregnancy is menstrual or non-menstrual.\(^{384}\) Jurists needed to know this in order to be able to determine whether the woman in question must perform ritual actions of worship (if non-menstrual) or she remains exempt (if menstrual). Ibn Rushd refers to Galen and Hippocrates by name and explained that at times the bleeding is menstrual, especially if the woman is healthy and strong and the fetus is in the first phase of its formation. Other times, it is non-menstrual for it is the results of the woman’s weakness and the illness of the fetus. Ibn Rushd clarifies that though the blood is often non-menstrual, this is a highly complex issue, since female bleeding habits vary among woman and may be inconsistent in the same woman.\(^{385}\) Ibn Rushd’s medical expertise is attested also in his elaboration on the jurists’ commendation of not


\(^{384}\) Ibn Rushd, *Bidāya*, 1: 58-59. Jurists, including Ibn Rushd, identify three main types of vaginal bleeding: menstrual bleeding (*hayd*), non-menstrual bleeding (*istiḥāda*; a flow of blood that occurs as a result of illness during or immediately after menstruation, yet it is not menorrhea), and postnatal bleeding (*nafās*).

\(^{385}\) Ibid, 1: 57.
expediting the burial of a drowned person until making sure he actually died. Ibn Rushd insists that the same should be applied to several other death-causing conditions, such as blood clotting (intibāq al-ʿurūq). On another occasion on the same issue, he asserts that physicians advise that people who die of stroke (“maskūtīn” from “sakta” which translates as stroke) must not be buried before three days.

Another aspect of Ibn Rushd’s practicality is his pedagogically instructive style in the Bidāya. From cover to cover and for every major legal topic, Ibn Rushd moves gradually from the general to the particular, and the elementary to the intricate. Despite that Ibn rushd declares in the preamble that he is interested in establishing legal rules and maxims (uṣūl), he presents his ideas in a fairly accessible language and far from exhaustion —succinctness as a key feature of his writing style has been elaborated. Also, constructing discussion rigorously and systematically reflects Ibn Rushd’s view of khilāf as a craft (sināʿa); as a critical discipline that is governed by rules and systems. Ibn Rushd strived to provide a “critical investigation” (naẓar ṣināʿī) in the Bidāya. In fact, it is his goal to do so, as far as he articulates in the preamble and stresses it many times throughout the book. For example, at the beginning of the Book of Prayer (Kitāb aṣ-Ṣalāt), he asserts that his purpose is undertaking the question “critically and systematically” (sināʿiyān wa jāriyan ’alā niẓām).

Critical and systemic investigation for Ibn Rushd is more than a mere author-centered mode of writing. It is, as he called it, “nawʿ min at-taʿlīm;” a type of instruction and a reader-centered educational activity.

It is in this light that we notice another characteristic of Ibn Rushd’s writing style in the Bidāya; namely, the absence of dialectic (jadal) which is common, if not typical, of the majority of khilāf works. The popular formula “in qālū… qulnā” (if they say… we say) as well as other forms of dialectical expression are never used in the Bidāya. Ibn Rushd’s endeavor to freeing the

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386 Ibid, 1: 238-39. According to most jurists across the Schools, it is recommended to bury the dead as soon as possible. This is known as “ta jīl” (hurried burial) vs. “ta khir” (unnurtured burial).

387 Ibn Rushd, Bidāya, 1: 129. The different parts of this systemic and critical approach are expounded in a previous section on the general structure of Ibn Rushd’s legal discussion in the Bidāya.
genre of juristic disagreement from dialectic is supported by his emphasis on the textual indicator as the sole arbitrator in favoring a legal view over another. Simply put, Ibn Rushd had no intention in arguing with anybody, nor was he interested in settling a controversy. The *Bidāya* is neither a book on *Mālikī* law, nor was it written to vindicate or establish a school’s theory. The *Bidāya* was written with the intention to train jurists in the “most useful” (*al-anfa‘*, the term he used to describe this method in the *Ḍarūrī*) ways to study Islamic law.
Chapter 4

LANGUAGE AS THE MAIN SOURCE OF DISAGREEMENT
(ASBĀB AL-KHILĀF)

1. The Intricate Relationship between Revealed Law and Language

The fifth section of Shāfiʿī’s epistle on legal theory, the Risāla, elaborates on the implications of revealing the Qurʾān in the Arabic language.\(^{388}\) Shāfiʿī’s intervention, here, is for the most part a response to the claim that the Qurʾān contains both Arabic and non-Arabic language. He denies such allegations altogether and extends a discussion on how no part of the Qurʾān was coined in other than Arabic.\(^{389}\) In a dialectical manner, he assumes that what the proponents of such a view intended is that the Qurʾān includes Arabic expressions of which not every Arab is cognizant. In response, he considers Arabic the vastest of all languages in structure and vocabulary and that only a prophet can encompass it in its entirety. However, despite its inconceivably vast scope, Shāfiʿī explains, it remains impossible that there would be a part of the Arabic language that none of its speakers understand. For him, Arabs’ knowledge of their language is similar to the legal scholars’ knowledge of the prophetic tradition. Whereas no scholar alone possesses the complete knowledge of the Sunna, it is nonetheless attained when the works of all the scholars are combined.


\(^{389}\) Shāfiʿī especially refers to Q 41:44 and 16:1-3 as clear textual proof that no part of the Qurʾān was revealed in a non-Arabic language. Other verses that he cites include Q 26:1-3 and 192-95, 42:7, and 13:37. He also mentions other Qurʾānic verses that urge the prophet to warn his own people and town in their own language, such as Q 43:44, 26:214 and 42:7. See, Shāfiʿī, Umm, 1: 19.
After arguing that Arabic is the only tongue in which the Qurʾān was revealed, Shāfiʿī makes learning it the duty of every member of the Muslim community. Those from the multitude with limited knowledge of Arabic (ʿāmma, with specific reference to non-Arabs) should learn as much as they can, because they need Arabic to pronounce the shahāda, recite the Qurʾān, make invocations to God, and so on. Jurists, on the other hand, ought to delve into the intricacies of the Arabic language and fully comprehend the complexities of its structures and systems. According to Shāfiʿī, the knowledge of Arabic’s vast scope is indispensable to the hermeneutical endeavor of disambiguating the meaning of the Qurʾānic text. He urged scholars to learn specific semantic and grammatical features, including the different circumstances of the application of the general (ʿāmm) and specific (khāṣṣ), homonymy and polysemy (ishtirāk), among others. He even warns that the error of the legal scholar who is not versed in Arabic linguistics is inexcusable (ghayr maʿdhūr).  

Shāfiʿī’s remarks on the interdependence of language and law and his emphasis on the role of linguistics for legal hermeneutics was reiterated in almost every subsequent work of Uṣūl across the schools. It became customary to include in books of legal theory extensive chapters on semantic variations, some of which Shāfiʿī had addressed and others he had not. Some of the main features of Arabic speech often undertaken in separate chapters include, the general/specific (ʿāmm/khāṣṣ), qualified/unqualified (muṭlaq/muqayyad), literality/non-literality (ḥaqīqa/majāz), positive/negative command (amr/nahy), and homonymy (ishtirāk). Shāfiʿī’s account of the revelation of the Qurʾān in Arabic did not only resonate with legal scholars. It also influenced the way linguists conceived of the Arabic language and its systems in general, and the law/language relationship in particular. A prominent linguist of the fourth/eleventh century, Ibn Fāris (d. 395/1004), designated several sections of the Ṣāḥibī to the question of revealing the Qurʾān in Arabic. He also

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390 Shāfiʿī, Umm, 1: 20-22. The first few chapters of the Risāla address the above semantic features, particularly in the light of the issue of abrogation.

391 Abū l-Ḥusayn Aḥmad Ibn Fāris Ibn Zakariyyā ar-Rāzī al-Qazwīnī, from present day Qazvin in Iran, is described by Dhahabī as a leading expert in Adab, versed in Mālikī law, a true disputant and theologian, and proponent of the Kūfān School of grammar in Iraq. Dhahabī, Siyar, 17: 103-06.
emphasized several of Shāfiʿī’s observations on the relationship between law and language, such as the idea that only a prophet can encompass the scope of Arab speech (kalām al-ʿarab) and that advanced training in Arabic linguistic is mandatory for law students.\(^{392}\)

Arabic and its sciences soon were the highest source from which the law (Fiqh) derives authority and, at the same time, its medium of execution. The exuberant dependency of Islamic law on Arabic linguistics has long being acknowledged by modern scholars, although there is still much more to excavate. Goldziher, over a century ago, Gotthold Weil and Ulrich Haarmann all pointed out the centrality of the study of language to the law.\(^{393}\) Bernard Weiss’ “Language and Tradition in Medieval Islam” is perhaps the most perceptive essay written on the subject.\(^{394}\) Several insights can be derived from this essay, but two are particularly important to the present chapter. The first insight concerns the very use of the expression “language” (lugha). According to Weiss, what scholars intend by “lugha” within the context of the law/language debate is not Arabic broadly. It is the “language” that was spoken during the Prophet’s time; the “language” in which the Qurʾān was revealed and the prophetic tradition was first recorded. Weiss calls it “the established speech habits” of the Prophet and his people. It is the “speech habits” which scholars call “kalām al-ʿArab” (Arab speech). Accordingly, the second important thing to know is that the legal scholars and language experts alike conceived of this “language” as a conventional system that cannot be grasped outside its historical context. kalām al-ʿArab for them is a body of linguistic information that can be obtained only from within tradition, not by any way of reasoning.

Like his predecessors, Ibn Rushd also believed in and stressed the indispensability of the study of linguistics to Islamic law. His emphasis on the interdependence of law and language can

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\(^{393}\) Cited in Carter, “Language and Law,” 139.

be seen in at least three works, including the Bidāya, the Ḩarūrī fī Uṣūl al-Fiqh, and the Ḩarūrī fī Ṣināʿat an-Naḥw (The Essentials of Grammar). In all three, he holds that the knowledge of language and its systems has priority over the knowledge of Fiqh and Uṣūl. Simply put, students of law must be trained in the Arabic language and its sciences before they learn about Islamic law. In Chapter 4 of his commentary on Ghazālī’s Mustaṣfā (on ijtihād and taqlīd), for example, Ibn Rushd declares the knowledge of Arabic speech and grammar an essential requirement for anyone who aspires to exercise fatwa and hence becoming a mujtahid.

One can simply not develop a rigorous understanding of a legal text from the Qurʾān, Sunna or ijmāʿ if lacking the necessary linguistic tools which will help rendering the meaning of that text; however, not in any way, but in accordance with Arab speech. In the Ḩarūrī fī Ṣināʿat an-Naḥw, Ibn Rushd asserts that the value of studying grammar lies especially in that it helps comprehending “God’s Book, His messenger’s Sunna and all other knowledge that is acquired through speech, whether practical or theoretical.” In the Bidāya, the central role of language appears especially in Ibn Rushd’s conscientious examination of the causes of juristic disagreement (asbāb al-khilāf). Generally, it is under this legal subgenre (i.e., Asbāf) that the question of the relationship between law and language is most discussed in books of khilāf—particularly those produced by Andalusian Mālikī scholars.

395 According to Ibn al-Abbār and Dhahābī, the Ḩarūrī fī Ṣināʿat an-Naḥw (Essentials of Grammar) is Ibn Rushd’s only work on language. The book is not dated and none of Ibn Rushd’s modern biographers (Renan, Badawi or Anawati) assigned it a date. However, from its style and structure and since the mastery of linguistics precedes advanced legal training, it can be suggested that he wrote it around the time he wrote the Ḩarūrī fī Uṣūl al-Fiqh in 552/1158, about three decades before he completed the Bidāya (584/1188). Like many of his early career works, the Ḩarūrī fī Ṣināʿat an-Naḥw is compendious and concentrates on the meta-principles and canons of the discipline in question.

396 Ibn Rushd has declared on one occasion that having substantial knowledge of Islamic law’s sources, i.e., Qurʾān, Sunna and ijmāʿ, is useless if one does not have sufficient knowledge of the language systems that would help grasping these sources. He maintains that scholars must use only grammatical Arabic (lā yalḥan). Ibn Rushd, Ḩarūrī fī Uṣūl al-Fiqh, 138. He repeats the same idea in the Bidāya. See, Ibn Rushd, Bidāya, 4: 169.

The question of the *Asbāb* had been undertaken before Ibn Rushd as can be seen in certain major *Uṣūl* works and few independent studies. The first specialized study of the causes of jurists’ disputes may be the *Inṣāf* by the polymath, Ibn as-Sīd al-Baṭalyawsī (d. 521/1127). Written in 507/1113, the *Inṣāf* remains one of the most rigorous systematic theoretical studies of *asbāb al-khilāf*. In it, Baṭalyawsī investigates eight generic groups of the causes of *khilāf*: homonymous and polysemous terms (*al-ishtirāk fī l-alfāẓ wa l-maʿānī*), literal/non-literal (*haqīqa/majāz*), singular/complex (*mufrad/murakkab*), general/particular (*ʿāmm/khāṣṣ*), Ḥadīth transmission (*riwāya*), *ijtihād* and analogy (*qiyās*), abrogation (*naskh*), and legal permissiveness and liberality (*al-ibāḥa wa t-tawassu*). For each group of the causes, Baṭalyawsī first identifies their types and subtypes of ambiguity. Under each type, he scrutinizes the main legal cases that stirred up dispute among the schools. For each case, he highlights each group’s argument and elaborates on their textual and linguistic proofs.

Baṭalyawsī’s main contribution in the *Inṣāf* lies in his laborious work of illustrating the linguistic background of controversial cases, for he examines their use in Arab speech (particularly in poetry) prior to and after the revelation. By drawing attention to the profound role of Arabic in juristic disagreement, Baṭalyawsī emphasizes two points: that a substantial part —perhaps the most substantial part if we keep in mind that seven of eight generic causes which he mentions are in one way or another language based— of legal issues must be returned to the language question. In fact, the goal of his book, as he tells us, is to show that “the juristic method is in need of the science of *Adab*, founded on the principles of Arab speech” (*aṭ-ṭarīqa l-fiqhiyya muftaqira ilā ʿilm al-Adab, muʾassasa ʿalā uṣūl kalām al-ʿArab*). The *Inṣāf*, which seems to be written as a textbook, is a good demonstration of engaging the linguistic science and *Adab* in the study of legal theory.

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398 Baṭalyawsī is an Andalusian polymath and prolific writer nicknamed Baṭalyawsī after his birth place Baṭalyaws, present-day Badajoz, south-west of Spain on the borders of Portugal. See his biography in, Ibn Khallikān (d. 681/1282), *Wafayāt*, 3: 96-98; and Maqqarī, *Nafḥ*, 1: 643-50.


400 It should be cautioned against reading “*ʿilm al-adab*” as “literary science” or “the science of literature” such as Rosenthal read it in his translation of the *Muqaddima*. *Adab* in its medieval context has very little, if anything at all, in common with literary science as we know it today (i.e. the study of the history of literature, literary criticism and literary theory). According to Ibn Khaldūn, the science of *Adab* does not research a specific subject, but is
Before Baṭalyawsī, sections on asbāb al-khilāf are occasionally included in Uṣūl books. Ibn Ḥazm of Cordoba (d. 456/1064) wrote a section on the topic in his Al-Ḥkām fī Uṣūl al-Aḥkām. He entitled it “Faṣl fī Bayān Sabab al-Ikhtilāf al-Wāqi‘ bayn al-A’imma.”401 Ibn ‘Abd al-Barr of Cordoba (d. 463/1070) also covered the topic in Jāmi‘ Bayān al-ʿIlm in his section: “Bāb Jāmi‘ li-mā yalzam an-Nāzir fī Ikhtilāf al-ʿUlamā’.” After Baṭalyawsī, the most important study of the Asbāb is Ibn Taymiyya’s (d. 728/1328) Rafʿ al-Malām ʿan al-Aʾimma l-Aʿlām.402 Compared to the Inṣāf, however, Rafʿ al-Malām is less exhaustive and looks almost exclusively into disagreements caused by conflicts in regard the Ḥadīth. Contributions in the form of short sections in Uṣūl books include, “Al-Qawl fī Sabab Ikhtilāf al-ʿUlamā’” in Subkī’s (d. 771/1370) Al-Ashbāh wa n-Naṣa’ir,403 various discussions throughout the “Book of Ijtihād” in Shāṭibī’s Muwāfaqāt,404 and “Fī Asbāb al-Khilāf bayn al-Mujtahidīn” in Ibn Juzayy’s (d. 741/1340) Taqrīb al-Wuṣūl ilā ’Ilm al-Uṣūl.405 A late full study of the Asbāb is Al-Inṣāf fī bayān Asbāb al-Ikhtilāf written by the Indian reformist, Dahlawī (d. 1176/1762), better known as Shāh Waliyy Allāh.406 In our times, interest in

sought to help students master poetry and prose (al-manẓūm wa al-manthūr) in conformity with the conventional ways of Arab speech. Ibn Khaldūn informs that part of the Adab training students memorize excerpts from range of “classical” sources, including rhymed prose, poetry, grammatical problems, history of pedigrees (ansāb), etc. The goal of this exercise is to make students cultivate the linguistic habits which will help them discern “proper” Arabic and, hence, grasp its true meaning. See, Ibn Khaldūn, Muqaddima, 3: 248.

401 Ibn Ḥazm, Ḥkām, 2: 124-34.


404 Shāṭibī, Muwāfaqāt, 4: 118-174.

405 Muḥammad b. Muḥammad Ibn Juzayy al-Kalbī, Taqrīb al-Wuṣūl ilā ’Ilm al-Uṣūl, ed. Muḥammad ash-Shanqīṭī (Cairo: Maktabat Ibn Taymiyya, 2002), 124-7. Despite this work’s compendious nature, it provides a useful list of sixteen causes, seven of which address disagreements pertaining to the indicants (adilla) from the Qurʾān, but mostly from the Ḥadīth. The other causes deal with issues of language and signification (dalāla). Ibn Juzayy’s comprehensive Uṣūl work, Al-Qawānīn al-Fiqhiyya, addresses more directly the question of khilāf, but it makes no mention of its causes.

the *Asbāb* has been revived and several studies on the subject have been published over the past four decades at least.\(^{407}\)

From the above overview, one concludes that *asbāb al-khilāf* have occupied an important place in jurists’ discourse of legal theory. Andalusian scholars of the Mālikī school in particular seem to have been more involved with the subject, and Ibn Rushd was no exception. His focus on the causes of juristic disagreement, as will be illustrated shortly, is his way of manifesting the complex relationship between law and language. It is also a feature that makes the *Bidāya* one of the most distinguished works of Islamic law. In the pages that follow, I reconstruct, in a rigorous and systematic manner, Ibn Rushd’s account of the *Asbāb*. I maintain his own division of the *Asbāb* into six generic groups. Elaborating on each category, I draw at the same time upon Baṭalyawsī’s *Inṣāf* to provide the necessary theoretical support for Ibn Rushd’s practical discussions.

### 2. *Asbāb al-Khilāf* in *Bidāyat al-Mujtahid*: Context and Structure

Ibn Rushd’s pursuit of *asbāb al-khilāf* in the *Bidāya* is the continuance of a long line of scholarly interest in juristic disagreement by key Andalusian figures. Of the authorities from whom he learnt, although indirectly, the alphabets of this branch of legal knowledge, one name especially comes to the forefront: Abū l-Walīd al-Bājjī of Cordoba (d. 474/1081), whom Ibn Khaldūn credits, along with Ibn al-ʿArabī of Sevilla (d. 543/1148), for introducing the science of *khilāf* in the Andalus.\(^{408}\) Bājjī’s *Muntaqā* is the second of two works from which Ibn Rushd’s *Bidāya* benefited most

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\(^{408}\) Ibn Khaldūn, *Muqaddima*, 3:21. We don’t know if Ibn Rushd read Ibn al-ʿArabī’s work, although one is invited to believe so since Ibn al-ʿArabī was a leading jurist and commentator on the Qurʾān and his books were widely circulated by Ibn Rushd’s age in Andalusia.
immensely (the other is Ibn ʿAbd al-Barr’s *Istidhkār*). However, as seen in Chapter 2, the scholar who had the greatest influence on Ibn Rushd’s legal training and led him at an early age to cultivate interest in *khilāf* and *ijtihād*, is his grandfather, Abū l-Walīd Muḥammad Ibn Rushd.

Of the Andalusian scholars who expressed interest in *asbāb al-khilāf* and seem to have an imprint in the *Bidāya*, Muḥammad b. ʿAlī al-Māzarī (d. 536/1141) especially comes to mind. In addition to the fact that Ibn Rushd cites Māzarī’s *Sharḥ at-Talqīn* several times,⁴⁰⁹ we know that Māzarī was a student of Ibn Rushd’s grandfather, Muḥammad Ibn Rushd. We also know that he might have taught our Ibn Rushd at some point — since he issued an *ijāza* for him (see Chapter 2). However, like Muḥammad Ibn Rushd, Māzarī explored the *Asbāb* in as much as they concerned the Mālikī school, and his discussion is by no means systematic and thorough. Of the authoritative sources from which Ibn Rushd might have learned about the *Asbāb* in their inter-doctrinal context, one can suggest with confidence two titles: Ibn Ḥazm’s *Muḥallā* and Ibn ʿAbd al-Barr’s *Istidhkār*; although, both of their discussions of the causes of *khilāf* is incidental, brief and does not address all legal issues. Unlike any of his sources, what Ibn Rushd has provided is a meticulous, consistent and systematic process of categorizing, analyzing and synthesizing the causes of *khilāf* almost for every legal question he undertook and throughout the book. Since he included prefatory theoretical remarks on the *Asbāb* at the end of his preamble, Ibn Rushd shows that he conceives of this legal subgenre as an integral part of *Uṣūl*. The full text of his theoretical intervention on the *Asbāb* reads:

> As for the causes of juristic disagreement, they are six by genus. One is the wavering of expressions between these four types [i.e., expressions form which the legal categories are derived and which he mentioned earlier]. I mean between a general term intended in the general [sense] and specific intended as specific, the general intended as specific, the specific intended as general, and [a term that] may or may not inform of implicative speech.

> The second is homonymous [single and complex] expressions. A single expression is, for example, the term “*qur*” which denotes the menstrual period and the period

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⁴⁰⁹ Māzarī, *Sharḥ at-Talqīn*, ed. Muḥammad as-Sallāmī (Beirut: Dār al-Gharb al-Islāmī, 2008), which is a rigorous commentary on Qāḍī ʿAbd al-Wahhāb’s *Talqīn*. 
between menses. [Also,] an expression of command may entail obligation and commendation, and an expression of negation may entail prohibition and discouragement. A complex homonymous expression is, for example, God’s word “except those who repent” [Q 2:160], which may refer to the transgressor only or to the transgressor and the witness, in which case repentance annuls the [sin of] transgression and permits the slanderer’s testimony.

The third is the difference in [the grammatical functions of an expression with respect to] inflection.

The fourth is the wavering of an expression’s [semantic meaning] between the literal and the metaphorical and between the literal and certain non-literal forms including elision, addition, preposing and postposing.

The fifth is rendering an expression unqualifiedly at times and qualifiedly at other times. For example, in the context of manumission, the term “slave” is used at times unqualifiedly [i.e., all slaves]. At other times, it is restricted by belief [i.e., believing slaves only].

The sixth is the conflict of two things within any of the categories of expressions from which the rules are obtained, the conflict of the [reports with respect to the Prophet’s] acts and tacit approvals, the conflict of analogies, and the conflict that arises from these three types. I mean the contradiction between the verbal expression and action, tacit approval and analogy, the contradiction between the action, tacit approval and analogy, and the contradiction between the tacit approval and analogy.  

Ibn Rushd outlines six generic groups of the causes of juristic dispute: generality/particularity (ʿumūm/khuṣūṣ), homonymy (ishtirāk), inflection (iʿrāb), literality/non-literality (haqīqa/majāz), qualifiedness/unqualifiedness (taqyīd/iṭlāq), and contradiction (taʿāruḍ). One recognizes from this sketch that five of the six groups of the Asbāb are language-oriented. Even the sixth category is partially grounded in language, as we see in the case of a contradiction between a rule obtained by way of generality and another that is derived by way of analogy. Throughout the Bidāya, Ibn Rushd refers to other areas and sub-areas of khilāf, some of which are language focused whereas others pertain to issues concerning the indicant itself. For this reason, it is most useful to approach asbāb

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410 Ibn Rushd, Bidāya, 1: 12.
al-khila’f in the Bidāya by classifying the causes of disagreement into two main groups: “indicant-based” and “indication-based” causes or sources.

The first taxonomy includes disagreements caused by the scholar’s direct engagement with the indicant (dalīl). For example, when a scholar did not hear of a certain tradition, heard another version, his school does not accept the actions of the companions as proof, or pursues a different recitation of a Qur’ānic term, etc. For structural reasons, I include Ibn Rushd’s sixth category of the Asbāb, “contradiction” (taʿāruḍ), under the first heading, since here he covers several indicant-based problematic questions. The second taxonomy includes disagreements that instigated by the scholar’s relationship with the signification of the indicant (dalāla ad-dalīl). Here, I examine four key linguistic relations: generality/particularity, homonymy, literality/non-literality, qualifiedness/unqualifiedness expressions. Also for structural reasons, I have made few adjustments to Ibn Rushd’s division. On the one hand, I do not designate a separate section to inflection, since the issue of iʿrāb comes up in my discussion of other linguistic groups. On the other, I include a new section entitled “Complex and Single Expressions” on a grammatical process of inference known as “al-ifrād wa t-tarkīb” (I explain why later). Also, although Ibn Rushd spoke of the issue of qualified/unqualified expressions as an independent class of the asbāb, I do not designate to them a separate section. The muṭlaq and muqayyad are derived forms of the general/particular, and they have always been addressed under this generic category (see, e.g., Ghazālī’s Mustaṣfā). Finally, I should emphasize that a cause of disagreement may belong at the same time to indicant and indication based causes. Take for example the different readings (qirāʾāt) of “أرجلكم” (your feet) in Q 3:6. This term is vowelized as “arjulikum” in one reading and as “arjulakum” in another. Those who attribute the source of disagreement in this instance to the reading itself (for they count qirāʾāt as indicant or dalīl), they view it as a dalīl-based cause. Those who return it to the rule of conjunction (ʿaff) in the verse, consider it dalāla-based cause.

411 Q 3:6, “O ye who believe! When ye rise up for prayer, wash your faces, and your hands up to the elbows, and lightly rub your heads and your feet up to the ankles.” Jurists who read “arjulakum” concluded that the verse requires washing the feet, whereas those who read “arjulikum” said they can be lightly rubbed only. See Ibn Rushd’s discussion of this disagreement in the Bidāya, 1: 22.
3. Indicant-Based Causes of Juristic Disagreement

The generic causes of *khilāf* that Ibn Rushd points out in the *Bidāya* and which may be considered *dalīl*-based are six. The first, also the least cited in the *Bidāya*, is the different readings of the Qurʾān (*qirāʾāt*). The example of Q 3:6 listed above is the only one cited. The second is a category that comes up frequently in the *Bidāya* and which Ibn Rushd calls “*tafsīr an-naṣṣ*” and “*māfhiʿum an-naṣṣ*;” rendering a Qurʾānic text’s implication. The third concerns the admissibility or inadmissibility of certain types of proofs and legal principles. The fourth covers a range of issues concerning the Ḥadīth. The fifth is on *qiyās*, and the sixth on the conflict and preponderance of the indicants. In the following pages, I elaborate on the last four. My discussion of each is intended to be concise, since my goal is to give a broad idea of *dalīl*-based causes in the *Bidāya*, not to exhaust all examples.

*The In/Admissibility of Certain Types of Indicants*

With respect to juristic disagreements caused by schools’ admissibility or inadmissibility of certain types of indicants and methods of reasoning (*istidlāl*), Ibn Rushd mentions five types. One is “*al-ahwāl al-latī nuqilat ʿanhu*,” Prophet Muḥammad’s transmitted circumstances, not his own words. For example, in the absence of a rule on the duration of travel prayer (*salāt al-qaṣr*) —the question was: for how long the license of shortening prayer is good?— some scholars resorted to traditions that record the prophet’s travels. Different traditions present different information, and so jurists’ conclusions were inconsistent. One group allowed three days, a second four days, whereas a third

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412 Generally, it is not clear how Ibn Rushd distinguishes between the broad usage of *tafsīr* and *taʿwil*. Although, he seems to use the former in legal contexts —*tafsīr* is more frequent in the *Bidāya*— and uses *taʿwil* to address scriptural hermeneutics in matters of belief (*ʿaqāid*) —the term *taʿwil* is foundational in his theological works. Ibn Rushd mentions several cases where disagreement was the outcome of the scholar’s different renderings of the Qurʾānic texts (*tafsīr an-nuṣūṣ*). See, e.g., Ibn Rushd, *Bidāya*, 1: 153, 207, 3: 22, 50-51, and 4: 226.
rejected this method of reasoning altogether and disqualified this type of tradition from the group of indicants that can be employed as valid proof.  

The second problematic kind of proof are the laws of previous messengers that the Qurʾān talks about (sharʾ man qablanā). An instance of a contested question is service marriage (an-nikāḥ bil-ijāra); a contractual marriage where the husband is stipulated to provide some service for the woman’s guardian instead of the dowry. The name “an-nikāḥ bil-ijāra” comes from the fact that the husband becomes “hired” (maʾjūr) by the wife’s father or guardian. We read in Q 28:27, for example, that Moses was asked by his future father-in-law that he would like to marry him to one of his daughters if he works for him for eight to ten years. Scholars who admitted ancestor laws as applicable indicants and a valid way of reasoning permitted service marriage, whereas those who did not accept “sharʾ man gablanā” as proof rejected an-nikāḥ bil-ijāra.

The third type is the companions’ transmitted statements and actions (aqwāl/afʿāl aṣ-ṣaḥāba). A well-known controversial question is that of a man who marries a woman during her wait period (ʿidda; in this particular case, for reasons of menstruation, divorce or the death of her husband). The only text that touches on this issue is a transmitted statement by the second Caliph, ʿUmar Ibn al-Khaṭṭāb, that if a couple marries during the woman’s ʿidda, they ought to be separated immediately. The statement adds that if they had not consummated the marriage, they can remarry after the ‘idda; but if they had consummated it, they become forbidden for each other and cannot remarry. Although Mālik embraced this view, Ibn Rushd rejected it on the ground that prohibition (taḥrīm; i.e. forbidding the couple from remarrying) should be made only if there is clear proof from the Qurʾān, Sunna or ijmāʿ—which is not the case.

413 Ibid, 1: 180-81. See also, 2: 189 on a person who dreams of killing his son on Abraham’s site in Mecca, and 4 :183 on taking the life of a male for the life of a female in retaliation (qatl adh-dhakar bil-unthā).

414 Q 28:27. “He said: Lo! I fain would marry thee to one of these two daughters of mine on condition that thou hirest thyself to me for (the term of) eight pilgrimages.”

415 Ibn Rushd, Bidāya, 3:70. For other examples where a companion’s transmitted statement is the main cause of disagreement, see, Ibn Rushd, Bidāya, 1:233 (on prostration while reading the Qurʾān, i.e., sujūd al-Qurʾān), and 3:73 (on canceling the marriage if the husband or wife has physical defects, i.e., radd an-nikāḥ bil-ʿuyūb). For disagreements incited by a companions’ action, see, Ibn Rushd, Bidāya, 1:190 on whether nosebleed (ruʿāf, epistaxis) necessitates repeating prayer, 1:251 on the positioning and order of a deceased male and female during
The fourth type of contentious proofs is “sadd adh-dharāʾ iʾ,” translated often as blocking the means. One of the questions Ibn Rushd discusses at this level is if a woman inherits her husband if he divorced her on his deathbed. For Mālik, she is entitled to inheritance, whereas she is not for Shāfiʿī. For Abū Ḥanīfa, the divorcee inherits if the man died before the end of her wait period. For Ibn Ḥanbal, she inherits as long as she did not remarry.416 At stake, here, is the motive of the divorce, since the husband may be accused of divorcing his wife to deny her inheritance. In order to prevent such uncharitable acts, some scholars decided to nullify the husband’s right of divorce. And this is the meaning of “sadd adh-dharāʾ iʾ,” to block and negate a legal right if it is thought that this right is used to reach an unlawful end. Scholars who admitted sadd adh-dharāʾ iʾ qualified the woman in question for inheritance, and the other way around.

The fifth type is called “dalīl al-khiṭāb.” This a legal principle was rejected by the Zāhirīs, but accepted by the Ḥanafīs, Shāfiʿīs and Mālikīs. Ghazālī, in the Mustasfā, calls it “al-mafhūm” and “mafhūm al-khiṭāb” (i.e., implicative speech).417 Ibn Rushd talks about it in the Bidāya as a problematic method of legal reasoning (istidlāl) and defines it as a process through which a scholar understands from a text’s explicit obligation of an action the implicative negation of another action and vice versa. For example, a scholar derives from the indirect implication of the prophetic report that requires paying tithe on grazing sheep (sāʾimat al-ghanam) that one must not pay it on other kinds of sheep.418 For one obtains from an expression’s implication an injunction that is different from the one it actually explicitly bears, this process was also called “dalīl al-mukhālafā.”

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417 Ghazālī, Mustasfā, 3: 413-34
418 Ibn Rushd, Bidāya, 1:10-11. For the cases of disagreement caused by scholars’ reaction to it, see, Ibn Rushd, 1: 131, 161, 263 and 3: 22.
Ẓāhirīs especially reject this way of *istidlāl*. For them, a binding rule must be derived from a text’s explicit expression only, not its implied speech.\(^{419}\)

**Qiyās-Based Problematic Indicants**

Generally, the scope of *qiyās* within the context of Islamic law goes beyond analogy to encompass non-analogical ways of reasoning, such as juristic preference (*istiḥsān*), public interest (*istiṣlāḥ* or *maṣlaḥa mursala*), and the principle of the presumption of continuity (*istiṣḥāb*). *Qiyās* in its analogical form is talked about often in two ways: “*qiyās al-ʿilla*” (causative inference) and “*qiyās ad-dalāla*” (indicative inference). In “*qiyās al-ʿilla*,” a scholar’s goal is to determine the effective cause (ʿilla, the ratio) of the rule of the original case, then establish the causal relationship between the original and new legal cases. Muslim legal theorists identify other subtypes of “*qiyās al-ʿilla*,” such as concealed *qiyās* (khafiyy) and perspicuous *qiyās* (jaliyy). In “*qiyās ad-dalāla*,” a scholar’s target is not the ʿilla, explicit or implicit, but the shared factor between the original and new cases. This form of inference is also known as “*qiyās ash-shabah*,” an analogy between the old and new cases by way of their resemblance in some respect. This is a highly controversial type of *qiyās* as will be shown.\(^{420}\)

As far as Ibn Rushd is concerned in the *Bidāya*, three areas of the application of *qiyās* can be identified as sites of disagreement. The first is the very fact of permitting *qiyās* and/or one of its subtypes. This can be seen in the *Bidāya* in the objections made by the Zāhirīs to rules derived through *qiyās*, since the Zāhirī school does not accept *qiyās* as an authoritative source of the law. Ibn Rushd also reflects on several *qiyās*-based disputes of scholars who accept the method of *qiyās*, but reject one or more of its subtypes. Ḥanafīs, for example, decline analogy between conflicting


\(^{420}\) For an overview of the various functions of *qiyās* (analogical and non-analogical) in Islamic law, see, Hallaq, *A History of Islamic Legal Theories*, 83-115.
premises (*qiyās al-ḍuḍād*). On the question of a person who misses prescribed prayer deliberately, most scholars deemed this person a sinner (i.e., must offer penance) and required making up the missed prayer or prayers. Basically, they looked at a similar rule of someone who forgets to pray on time, and drew analogy between the act of missing unintentionally and intentionally. Unlike the dominant view, and because they refuse analogy between contradictory premises, the Ḥanafīs argued that the person in question is a sinner (i.e., must offer penance), but does not have to make up the prayer. The Zāhirīs also considered this person a sinner and did not require the makeup; but since they reject *qiyās* altogether.⁴²¹ Another example of “*qiyās al-ḍuḍād*” is what Ibn Rushd calls at times “*qiyās al-kafrāt*,” analogy of instances of penance. On the rule of a person who missed making up for days of Ramadan before the next Ramadan entered, Shāfiʿīs, Mālikīs and Ḥanbalīs, unlike the Ḥanafīs, looked at the rule of the person who breaks fast on purpose and concluded that if someone misses making up *ṣiyām* on time must make it up after the current Ramadan and give penance.⁴²²

The second most problematic area of the application of *qiyās* in the *Bidāya* is “*qiyās asḥ-Shabah*,” analogy by way of a similarity and resemblance between the original and new legal cases.

For example:

<table>
<thead>
<tr>
<th>Problematic legal issues</th>
<th>Point of resemblance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is ritual ablution (<em>wuḍū’</em>) a condition for circulating (<em>tawāf</em>) the <em>ka’ba</em> during pilgrimage (<em>ḥajj</em>)?</td>
<td>Between <em>tawāf</em> and prayer (<em>ṣalāt</em>)</td>
</tr>
<tr>
<td>Is intention (<em>niya</em>) a condition for the validity of ritual ablution?</td>
<td>Between <em>wuḍū’</em> as a ritual act and act of physical cleaning</td>
</tr>
<tr>
<td>Must one make up the prayer missed during travel?</td>
<td>Between makeup (<em>qaḍā’</em>) and fulfilling (<em>adā’</em>)</td>
</tr>
</tbody>
</table>

⁴²¹ Ibn Rushd, *Bidāya*, 1: 192-93. For other cases of disagreement incited by the conflict of premises see, e.g., Ibn Rushd, *Bidāya*, 1: 87-88 (between animals and humans), 2: 129 (between plans and animals), 3: 47, 3: 56 and 3: 69 (between marriage and sales),

– Does tayammum validate the funeral prayer?
– Between obligatory (mafrūda) and nonobligatory prayers

– What is the rule of pregnant and breastfeeding women who break the fast during Ramadan?
– Between these two and a sick person and one whose physical state cannot bear fasting

– Must one give penance for as many times as he/she breaks fast in Ramadan (due to sexual intercourse)?
– Between penance (kaffārāt) and prescribed penalties (ḥudūd).

The third main controversial area of the application of qiyās in the Bidāya is qiyās al-ʿilla, analogy by way of establishing the effective cause between the original and new legal cases. Ibn Rushd has referred to several disagreements incited by this factor, including such issues as:

**The Legal Issue**

– Can a Muslim bathe the corpse of a non-Muslim?

– Should the corpse of a Muslim who was killed by thieves or other than the polytheists be bathed?

– Is it permissible to give of the amount due in zakāt in value rather than material (ikhrāj al-qīma badal al-ʿayn)?

– For what members of the household should one pay zakāt al-fiṭr (post-Ramadan alms)?

– Can zakāt al-fiṭr be given to the poor of the people of dhimma?

– Is it permissible to observe the customs of mourning after the death of a non-Muslim woman (iḥdād)?

**The Problematic ʿIlla**

– Is bathing an act of worship (ʿibāda) or cleaning (naẓāfa)?

– Pronouncing the shahāda before death

– Is zakāt an act of worship or a right for the poor?

– Is the ʿilla guardianship (wilāya) or sponsorship (nafaqa)?

– Is the ʿilla poverty alone or poverty and being Muslim?

– Is the iḥdād and act of worship?

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423 For the above listed six cases of qiyās ash-shabah, see respectively, Ibn Rushd, Bidāya, 1:49, 15, 193-94, 257, 2: 63 and 68.
The rule of “no will for an heir” (lā waṣiyya li wārith) – Is the prohibition (manʾ) an act of worship or for preventing unfairness to the other heirs?  

\textit{Ḥadīth-Based Problematic Indicants}

A prophetic tradition (Ḥadīth) consists of two parts: the text (matn) and the chain of its transmitters (isnād). The matn is the actual speech of the prophet. It often succeeds the formula: “the Prophet said.” The isnād is the line of all authorities who transmitted that Ḥadīth. It begins with the most recent narrator (the last in the chain), and ends with the Prophet. The isnād precedes the matn and comes in various expressions, although the common expression is: “So and so said on the authority of so and so…” The Arabic equivalent of “on the authority of” is “ʿan” (lit., according to). Because of the repetition of “ʿan” in Ḥadīths, a less common name of the isnād is “al-ʿanʿana.” It is normal in Ḥadīths to read “A on the authority of B on the authority of C on the authority of D” and so on until it reaches the prophet. Based on the circumstance of the Prophet’s articulated words and their transmitters, Ḥadīth scholars have distinguished four main categories of Ḥadīths: “accurate” (ṣaḥīḥ, and the most reliable), “fair” (ḥasan, less reliable), “weak” (daʿīf, unreliable) and “objectionable” (munkar, denounced altogether).  

Ḥadīth-based disagreements in the Bidāya can be put into two groups. The first concerns the legal categorization of the Prophet’s actions, especially whether the action under focus entails obligation (farḍ) or commendation (nadīb/sunna). This was the center of dispute over several issues including lightly rubbing one’s ears with water during ḡudū’, washing a dead person in his or her clothes, the proper order of the acts of ḡudū’, and sacrificing a sheep for pilgrims and the rest of

\footnotesize{424 See, respectively, Ibn Rushd, Bidāya, 1: 240, 2: 7, 30, 41, 181, 3:142 and 4:119.}

\footnotesize{425 For a comprehensive account of the Ḥadīth tradition, see, Jonathan Brown, Ḥadīth: Muhammad’s Legacy in the Medieval and Modern World (Oxford: OneWorld, 2009); Mohammad Kamali, A Textbook of Ḥadīth Studies: Authenticity, Compilation, Classification and Criticism of Ḥadīth (Markfield: Islamic Foundation, 2005).}
Muslims. The second, and most frequently cited, is the issue of the validity of a hadith. This has caused conflict about a range of questions about wuḍūʿ (e.g., rubbing the beard with water, wiping the head multiple times, etc.), reading the Qurʾān while in a state of major impurity (janāba), having sexual intercourse with one’s wife during her menstrual cycle, standing alone in a row during communal prayer (ṣalāt al-munfarid), as well as questions such as: is the traveling person obligated to participate in the Friday prayer? Is zakāt due in honey? Does vomit (qayʾ) invalidate fast? Must a baby of a slaughtered animal also be slaughtered?

Muslim legal theorists were aware of the fact that the corpus of the prophetic tradition has been a remarkable source of conflict. What Ibn Rushd mentions in the Bidāya is no more than a fraction of the intricate implications which Ḥadīth has had on Islamic law. Ibn Taymiyya’s Raf’ al-Malām is an attempt at pinning down the complex role of Ḥadīth in jurists’ khilāf. Prior to Ibn Taymiyya, Baṭalyawsī wove a comprehensive discussion of the issue. For him, the best way to decipher the role of Ḥadīth in khilāf is through the science of Ḥadīth criticism, “‘īlal.” ‘Ilal (sg., ‘illa; lit., weakness and flaw). “‘Ilal al-Ḥadīth” is the name given to the critical study of the Ḥadīth which thrived during the third/ninth and fourth/tenth centuries. Scholars of ‘Ilal scrutinize the Ḥadīth corpus in order to discern genuine from forged reports. Several works have been written in this area, including Kitāb al-‘Ilal wa Maʾrifat ar-Rijāl by Yaḥyā b. Maʿīn (d. 233/847) and Al-‘Ilal al-Wārida fī l-Aḥādīth by Dāraquṭnī (d. 385/995).

For the centrality of

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427 Respectively, Ibid, 1: 18, 20, 55, 65, 159, 167, 2: 14-17, 54 and 205.
431 Abū Zakariyyāʾ Yaḥyā b. Maʿīn, Kitāb al-‘Ilal wa Maʾrifat ar-Rijāl, ed. Abū ʿAbd al-Hādī al-Jazāʿīrī (Beirut: Dar Ibn Ḥazm, 2004), and ʿAlī b. ʿUmar b. Ṭabāha b. Mahdī ad-Dāraquṭnī, Al-‘Ilal al-Wārida fī l-Aḥādīth an-
ʿIlal to khilāf, Baṭalyawsī structures his discussion of Ḥadīth-based causes of juristic disagreement around eight flaws (ʿilal).

The first ʿilla is the invalidity of the chain of transmission (fasād al-isnād). Baṭalyawsī warns that even if the isnād is accepted as sound and all transmitters are confirmed to be trustworthy, a hadīth might still be contested for other things.432 The invalidity of the isnād, for example, can be caused by several factors one of which is the “irsāl” — when the narrators’ sequence stops at the successors’ generation (tābiʿīn) and does not include a name from the generation of the Companions. Another is if the credibility of one or more narrators had been a subject of question, such as if they had been accused of lying, foolishness, heedlessness, or favoritism (taʿaṣṣub) toward an individual or group. On the latter issue, Baṭalyawsī refers to few hadīths which, according to him, had been fabricated by the Shīʿīs in favor and support of ʿAlī’s entitlement to succeed Muḥammad.433

The second ʿilla concerns the transmission of the meaning of a report, and not its utterance (naql al-ḥadīth ʿalā maʿnāh dūna lafẓih). Baṭalyawsī further identifies two types: reports told by the prophet in different circumstances, and reports transmitted by later narrators in their sense.434 “Naql al-Ḥadīth ʿalā maʿnāh” not only means transmitting a hadīth using wording different from the prophet’s, but also ascribing to it an entirely different sense. On the one hand, Baṭalyawsī holds that most Ḥadīth narrators paid little attention to the exact expression of the prophet. They granted themselves the liberty to transmit his intended meaning in their own words, as a result of which one finds different versions of the same hadīth.435 On the other, he draws attention to several cases of homonymy where the narrators rendered a term erroneously and distorted the entire meaning of

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432 Baṭalyawsī, Inṣāf, 158.
433 Ibid, 163-64.
434 Baṭalyawsī, Inṣāf, 165.
435 Ibid, 164.
the *ḥadīth*. One tradition, for example, reports that the prophet gave ‘Alī a type of turban called “the cloud” (*as-saḥāb*). One day, he asked his companions if they had seen ‘Alī in the cloud (“*amā raʿaytum ‘Aliyyan fī s-saḥāb*”). Reading the term “*saḥāb*” literally, a group of Shīʿīs believed that ‘Alī had in fact appeared on a cloud.436

The third *ʿilla* concerns the narrators’ lack of knowledge of inflection (*iʿrāb*). Baṭalyawsī points out that many *Ḥadīth* narrators were not versed in the Arabic language, and many could not discern a verb’s mood is subjunctive (*manṣūb*), indicative (*marfūʿ*) or jussive (*makhfūḍ*; also *majzūm*, when there is no vowel).437 He highlights the confusion about the proper vowel mark of “*yqtl*” (َتَقْتُلَ, from *qatala*, to kill) in the Prophet’s tradition: “*lā yuqtal* [non-vowelized] *qurashiyyun ṣabran baʿd al-yawm*” (no one from the Quraysh tribe shall be imprisoned for life after today). Some scholars added no vowel to the consonant “*l*” and read it as “*yuqtal*” (be imprisoned for life). Others understood the verb in its indicative mood and hence read it as “*yaqtul*” (imprison someone for life).438

The fourth *ʿilla* pertains to “*taṣḥīf*”, i.e., misspellings and misprints. This a serious problem that affected both the text and transmitters’ names in several reports. The third/tenth century was the height of scholarly interest in this area when a great deal of effort was paid to scrutinize the Ḥadīth for spelling and typographical errors. Baṭalyawsī cites *Taṣḥīf al-Ḥuffāẓ* by Dāraquṭnī which is nonextant. There are several seminal early works on this topic, such as *At-Tanbīḥ ‘alā Ḥudūth*

436 Ibid, 169.
On occasion, Ḥadīth copyists failed to decipher the right diacritical marking (tanqīṭ) in one or more words and so they marked them erroneously — for example, mistaking sittan (ستن, six) for shay’an (شيا, a thing), jarā (جرا, run) for jazā (جزا, reward) and afra‘ (افرع, hairy) for aqra‘ (اقرع, hairless). This caused several hadīths to be further copied and communicated incorrectly. For examples, a report by Yazīd b. Hārūn (d. 206/821) opens in one version with “kunnā julūsun ḥawla sarīr Muʿāwiya (we were sitting around Muʿāwiya’s bed),” and in another with “ḥawla Bishr b. Muʿāwiya.” The word sarīr [سرير] was misspelled for “Bishr b.” [بشر بن]. Another example is a report by Bukhārī that the prophet said: “dakhaltu al-janna fa-raʾaytu fīhā ḥabāʾil al-luʾluʾ (I entered paradise and saw fishing nets of pearl).” The correct word, however, is “janābidh” (جنباد, piles of pearl), not “ḥabāʾ il” (حباب). The fifth ‘illa occurs when a narrator misses to include part of a hadīth without which its meaning cannot be established. In one tradition, for example, Ibn Masʿūd was asked if anyone had witnessed the Night of the Jinn (laylat al-jinn) with the prophet, and he said: “no one has.” In another tradition, Ibn Masʿūd described certain people as “similar to the people I saw on the Jinn Night,” which confirms indirectly that he was with the prophet at the Night of the Jinn. From these two contradictory accounts, Baṭalyawsī infers that the narrator of the first report must have left out a key word, such as “ghayrī” (i.e., no one has, but me). Without it the meaning of the report was distorted.

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440 Baṭalyawsī, Inṣāf, 175.

441 The editor adds, in response to Bukhārī’s mistaken version that the same hadīth appears in ʿAlīmd b. Ḥanbal’s Musnad bearing the term “janābidh.” See, Baṭalyawsī, Inṣāf, 176 (fn. 41).

442 Baṭalyawsī, Inṣāf, 177.

443 Ibid, 178.
The sixth ‘illa is the transmission of a ḥadīth without its context of origination. Generally, a ḥadīth is often prefaced with words that sketch its background. The dismissal of this preface can cause disagreement. Such a report is: “God had created Adam in his image” (inna Allāh khalqa Ādam ‘alā ṣūratih). In its complete version, this ḥadīth is prefaced with the story that the Prophet walked by a man who was slapping his slave in the face and yelling: “Shameful is your face and the face of anyone who looks like you.” The prophet turned to his companions and said: “if any of you hits his slave, avoid the face; for God had created Adam in his image.” Not having access to the context of this report leads to attributing the possessive pronoun “his” to God, hence reading that Adam was created in God’s image. Reading the preface of this ḥadīth against other ḥadīths, the Qurʾān and Arab speech, Baṭalyawsī derives that the pronoun “his” refers to the slave (i.e., representing all humans), not God. As such, humans are created in their own image, not in God’s image. Their qualities and powers are also purely human and share nothing with the divine.

The seventh ‘illa occurs when a narrator heard part of a prophet’s statement and narrated it as if it is complete. Baṭalyawsī draws on a well-known report by Abū Hurayra that the Prophet said: “Three things cause despair [to men]: the house, the wife, and the horse.” He objected to this abridged report since it contradicts other traditions in which Muḥammad deplored pessimism (taṭayyur). Ā’isha (Muḥammad’s wife) refuted this version and confirmed that what the Prophet said is that “people prior to Islam (jāhiliyya) used to say that three things cause despair….” She clarified that Abū Hurayra might have joined the prophet’s majlis late and heard only the last part of his statement.

The eight and last ‘illa, which also may be addressed under taṣḥīf (‘illa 4), concerns the reproduction of the ḥadīths by relying on manuscripts exclusively and not meeting the authorities

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444 Ibid, 178.
445 Baṭalyawsī extends an extensive theological discussion of this Ḥadīth in the Inṣāf, 179-86.
446 Ibid, 187-78.
447 The Arabic reads: “yakūnu sh-shu’mu fi thalāth: ad-dār wa l-mar’a wa l-faras.” This Ḥadīth appears in all major collections of ḥadīth, including Bukhārī’s Ṣaḥīḥ, Muslim’s Ṣaḥīḥ and Tirmidhī’s Sunan.
in this field. This has disadvantaged many scholars and copyists in that they had no opportunity to inquire about the meanings of the hadiths and verify them for tashīf and other inaccuracies.\textsuperscript{448}

\textit{Conflict and Preponderance}

We come now to the last indicant-based group of \textit{ashbāb al-khilāf}: the conflict of two or more types of indicants which, in turn, led to the conflict of jurists’ processes of preponderance. Khilāf books often assign a chapter to this issue under the title “Conflict and Preponderance,” (\textit{at-taʿāruḍ wa t-tarjīḥ}). Ibn Rushd also identifies this \textit{Asbāb} category in the \textit{Bidāya}. In fact, half or even more of the juristic disputes he engages in the book belong to this group, which he also calls “Conflict and Preponderance,”. In a systematic way, these can be put into nearly thirty subgroups. The following is an effort at touching briefly on a selection of \textit{taʿāruḍ}-oriented disagreements. In the first column, I indicate a subtype of conflict of indicants. In the second, I list few corresponding practical cases from different sections in the book. Page numbers are cited between brackets after each example.

<table>
<thead>
<tr>
<th>Conflict/Contradiction</th>
<th>Corresponding Legal Issues</th>
</tr>
</thead>
</table>
| 1. Between the apparent sense of the Qur’ānic texts (\textit{ẓawāhir nuṣūṣ al-kitāb}) | – The ruling of truce and peace (\textit{al-muhādana wa ṣ-ṣulḥ}) with the non-believers (2: 150).  
– Eating a sea animal which was found dead (3: 17-18).  
| 2. Between traditions (\textit{āthār}) | – Using the leftover of water of an animal (\textit{āsār}). The dispute, here, is a result of three types of conflict: between the Qurʾān and \textit{qiyās}, \textit{Hadīth} and \textit{qiyās}, and traditions (1: 34-38).  
– Does touching one’s penis invalidate \textit{wuḍū’}? (1: 45-46) |

\textsuperscript{448} Baṭalyawsī, \textit{Inṣāf}, 188.
3. Between the Qurʾān and Ḥadīth (al-kitāb wa l-ḥadīth)450

- The ruling of using the skin of a dead animal (1: 86).

- Wiping/washing the feet for wuḍūʿ. The Qurʾān commands washing them, the Ḥadīth reports wiping them (1: 25).

- The exact amount of the Qurʾān to be recited during prayer (1: 134-36).

- Eating wild beasts (sībāʾ) that walk in four (3: 20).

4. Between the practice of the Companions and the explicit meaning of the Qurʾān (ʿamal aṣ-ṣaḥāba wa l-kitāb)

- Is intercourse (masīs or dukhūl) a condition for the woman’s entitlement to the dowry (3: 48-49).

5. Between the practice of the Companions and the tradition

- Praying witr after fajr (1: 212).

6. Between the apparent meanings of ḥadīths (zawāhir al-aḥādīth)

- The obligation of ritual purification after sexual intercourse (1: 53).

- The ruling of unusually prolonged menses (1: 61).


7. Between the ḥadīth and legal principles (uṣūl)

- Taṣrīya as a flaw (ʿayb) in a sale contract (3: 192).452

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449 Also, Ibn Rushd, Bidāya, 1: 25-26 and 1: 27 on the area of the feet to be wiped for wuḍūʿ and when it is permitted to do so, and 1: 42-43 for the kind or level of sleep that necessitates redoing wuḍūʿ. Conflict between āthār is the source of a very large number of disagreements.

450 Athar and ḥadīth are two different things for Ibn Rushd. As far as he uses both words, ḥadīth seems to often include a direct statement by the prophet, whereas athar does not necessarily transmit his direct words and actions.

451 Also, see, Ibn Rushd, Bidāya, 1: 30-32, for the aforementioned legal case of water mixed with a small amount of impurity, and 1: 127 on whether talking invalidate prayer.

452 “Taṣrīya” is the practice of not milking an animal for few days so that its swollen udder gives the impression that it produces large quantities of milk.
8. Between a hadīth and a legal principle

- Selling livestock for meat, (3: 156-57).

9. Between a hadīth’s positive implied meaning and negative implied meaning (faḥwā l-khiṭab vs. dalīl al-khiṭāb)

- Ta’bir an-nakhl, selling palm trees before pollinating them, which is called “ibār” (3: 205-06).

10. Between tradition and the practice of the residents of Medina

- The exact point during the day deemed forbidden for praying (1: 109-10)
- Du’ā’ at-tawajjuh: making a supplication immediately after initiating a prayer with “takbīr” (1: 131-32).
- Khiyār al-majlis: lit., option of the meeting place. It is about the right of a sale’s parties to repeal the contract as long as they did not leave the sale’s assembly. Once one or both leave the meeting place, the contract becomes binding (3: 187-88).

11. Between tradition and the presumption of continuity (istiṣḥāb)

- Hibat al-marīḍ: giving a gift during sickness (4: 112)

12. Between tradition and negative implicative speech (dalīl al-khiṭāb)

- “Tawrīth al-milal al-mukhtalifa,” the ruling of inheriting people from other religious traditions (4:137-38).

13. Between the prophet’s speech and his practice

- Takbīr (saying Allāhu akbar) in prayers (1: 129-31).
- The gesture of raising the hands for takbīr in prayer (1: 141-42).
- The exact time of performing the stoning of the devil (jamrat al-ʿaqaba) during hajj (2: 216-17).
14. Between analogies (aqyisa)

- The exact time of the day to start iʿtikāf or retreat (2: 78-79).
- The case of a deceased son who does not have a father, does his grandfather bar his brothers (yahjib al-ukhwa) in the same way the father does, i.e., so his brothers become non-rightful beneficiaries to the inheritance? (4: 131)
- Diyat al-aʿwar: the value of blood money (diyya) for a blind person’s eye (4: 190-91).

15. Between qiyās and tradition

- Massaging body parts during wuduʾ (1: 50-51).
- Drinking non-intoxicating wine (3: 26).
- Al-mufāḍala fi l-hiba: offering unequal gifts to one’s children or excluding some of them entirely (4: 112-13).

16. Between qiyās and a practice of the prophet

- The best quality of the sheep aimed for sacrifice (2: 192-93).

17. Between qiyās and a legal principle

- If sacrificing one sheep rewards all household members of its head? (2: 196-97)

18. Between public interest (maṣlaḥa) and a legal principle

- Ṭalāq al-īlāʾ: divorce after a vow of continence. Īlāʾ is when the husband swears by God to not have sexual intercourse with his wife for a limited or unlimited period of time. The question is whether this type of divorce is irrevocable (bāʾin) or revocable (rajʿī)? (3: 120)
- Mirāth al-qātil: an issue similar to the slayer rule in western common law of inheritance; i.e., the question of a person who murders someone from whom he or she is entitled to inherit (4: 144).

19. Between a transmitted expression (al-lafẓ al-manqūl) and its meaning

- Ṣalāt al-qaṣr: shortened prayer. Rationally, this is intended as a way of easing difficulty for the traveler, which is the same ground of licensing the shortening or breaking the fast during travel. On the other hand, some transmitted reports confirm
derived by way of reason \textit{(al-ma’na l-ma’qūl)} that the form and length of prayer during travel is the same as in normal circumstances (1: 175-78).

20. Between the apparent \textit{(ẓāhir)} and implied meaning \textit{(mafhūm)} – \textit{Al-ʿawd fī ẓ-ẓihār}: unsaying an injurious assimilation. Ẓihār is a statement made by the husband comparing his wife to his mother or another female in his circle of prohibited kinship \textit{(maḥārim}, e.g., mother, sister, aunt, etc.). It usually involves that the husband says to his wife: “you are forbidden for me in the way of so and so is.” Here, the wife possesses the right to refuse returning to her husband until he offers penance. If he fails, she then can ask the judge for divorce (3: 124-26).

Again, this is only to provide an overview of the complexity of conflict and preponderance \textit{(taʿāruḍ and tarjīḥ)} as a category of the \textit{Asbāb} genre. Throughout \textit{Bidāyat al-Mujtahid}, Ibn Rushd makes note of other subtypes of conflict between the legal proofs \textit{(adilla)} and discusses far more cases with respect to each. The contradiction of analogies of resemblance \textit{(shabah)} is one instance. In the next section, I survey the second generic group of the causes of \textit{khilāf}, indication-based causes. Of particular interest are four semantic forms of speech: the general/particular, homonyms, literality/non-literality, qualifiedness/unqualifiedness, and single/complex constructions both with respect to utterances and meaning. Here, too, I will draw for theoretical support on Baṭalyawṣī’s \textit{Inṣāf}.

4. Indication-Based Causes of Juristic Disagreement

\textit{Meaning Construction in Singular Vocables and Complex Expressions}

When Muslim scholars of grammar and legal theory talk about \textit{the} vocable \textit{(al-lafẓ)}, it is assumed that they intend two structures: the “\textit{mufrad}” (singular, individual vocables) and the “\textit{murakkab}” (composite, complex vocables). The process of deriving meaning directly and exclusively from the singular is called “\textit{iifrād}.” When meaning is obtained only by way of examining other parts of
the expression, it is called “tarkīb” (lit., putting together and assembling). The difference between the grammarians and legal theorists’ conception of the mufrad/murakkab may be returned to their different training. The grammarians’ definition is grounded in grammar (e.g., focus on the rule of singular, dual, and plural), for they are primarily interested in the nature and function of the vocable. The legal theorists’ definition is founded on logic, since their concern are issues of signification (dalāla) and not the vocable per se.453

Badr ad-Dīn az-Zarkashī, for example, defines the “mufrad” as a vocable which denotes a full meaning without needing to further look into one or more of its parts. The “murakkab,” on the other hand, is an expression the meaning of which can be gained only if one or more of its parts are examined.454 For example, looking at the mufrad vocable “Zayd,” we immediately understand that it is the proper noun of a person. There is no need to render “za” or “yd” separately to obtain this meaning. As for the expression “qāma Zayd,” the idea that “Zayd stood up” cannot be grasped in full unless we have access to both parts of the expression: “Zayd” and “qāma.” The same can be said about “khamsata ʿashar” (fifteen, lit., five and ten) or “ʿAbd Allāh” (lit., servant of God, as a qualification, not as a name).455

Some scholars have stretched the conception of ifrād and tarkīb beyond the scope of the logicians and grammarians. For someone like Baṭalyawsī, the mufrad can range from a singular vocable to an entire Qur’ānic verse (mufrad al-āya) or ḥadīth (mufrad al-ḥadīth).456 Like a mufrad vocable, a mufrad-Qur’ānic verse or ḥadīth is an expression the full meaning of which is obtained solely from it and without any further investigation. A murakkab-Qur’ānic verse or ḥadīth is an


455 Zarkashī, Baḥr, 3: 47.

456 Baṭalyawsī, ʾInṣāf, 115.
expression the meaning of which is derived only if one looks beyond the expression at hand. One may even draw on remote parts of the Qurʾān or Ḥadīth, since what really matters is the ability to construct the sense (bināʾ al-maʿnā) of the expression in question. One of the examples Baṭalyawsī provides in this respect is the dispute over the prohibition of alcohol. One group cites as proof of prohibition Q 56:7, “whatsoever the messenger giveth you, take it. And whatsoever he forbiddeth, abstain (from it).” Another group sought textual support in Q 5:90. A third group returned to Q 2:219 and 7:33, and established from them, by way of analogy, that all sin is forbidden, alcohol is sin, so alcohol is forbidden. Baṭalyawsī preferred the third method of inference.

Scholars who wrote about khilāf emphasize that the ifrād/tarkīb has been a major source of disagreement among the jurists. Baṭalyawsī in particular deems deep knowledge of the ways in which vocables are constructed (bināʾ al-alfāẓ) and of qiyās essential to the study of law. For him, this training enables scholars to discern Qurʾānic expressions whose meaning is self-evident and require no further clarification from those not. In an expression such as “ittaqū rabbakum” (Q 4:1) or “āminū bi-Allāhi” (Q 4:135) the intention seems simple and clear: a general call to worship God. However, the true meaning of another Qurʾānic expression such as “and Whoso desireth the harvest of the world, We give him thereof, and he hath no portion in the Hereafter” (Q 42:20) can be derived only in light of other Qurʾān and/or Ḥadīth content. At first glance, the verse seems to denote that God promises He will fulfill anyone’s wish of luxury and wealth if they so desire, but then will deprive them of true wealth in the Afterlife. For Baṭalyawsī, this cannot be true, for many people long for material wealth and care not for an Afterlife, yet continue to have an impoverished life. In his view, since the Qurʾān cannot contradict factual reality, further investigation is required. He finds the answer in another verse, namely Q 17:18, “Whoso desireth that (life) which hasteneth

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457 “Strong drink and games of chance and idols and divining arrows are only an infamy of Satan’s handiwork. Leave it aside in order that ye may succeed” (Q 5:90-1).

458 Q 2:219, “They question thee about strong drink and games of chance. Say: In both is great sin, and (some) utility for men,” and Q 7:33, “Say: My Lord forbiddeth only indecencies, such of them as are apparent and such as are within, and sin…”

away, We hasten for him therein that We will for whom We please.” Juxtaposing Q 42:20 and Q17:18, he deduces that the promise God made in Q 42:20 is conditioned by His will, “that We will for whom We please.”

Baṭalyawsī designates an entire chapter to theifrād/tarkīb in theInṣāf expositing most extensively on the linguistic relation of ishtirāk or homonymy (a separate section is devoted to this class of ambiguity soon). For example, on Q 93:7 ([did He not] find you wandering [dāllan] and guide (thee)?), he warns against understanding as if the prophet had lived in a state of error (dalāl) before receiving the revelation. To understand what “dāllan” means in the context of this verse, he examines its usage in other Qur’ānic verses as well as Arabs speech (i.e., exercising tarkīb by reconstructing its meaning from external sources). With respect to the Qur’ān, he refers to Q 12:3, “We narrate unto thee (Muḥammad) the best of narratives in that We have inspired in thee this Qurʾān, though aforetime thou wast of the heedless [ghāfilīn].” From this and other verses, he concludes that the attribute “dāllan” in Q 93:7 refers to a state of forgetfulness and unawareness, not erroneousness. He specifically mentions Q 20:52, “He said: The knowledge thereof is with my Lord in a Record. My Lord neither erreth nor forgetteth [lā yaḍillu wa lā yansā]” (Pickthal’s translation). From all Qurʾān renditions I consulted (Yusuf Ali, Abdul Daryabadi, Taqi Usmani, Mohsin Khan and Pickthall), the only translation with a close meaning to Baṭalyawsī’s reading of the verb dalla is Mohsin Khan’s which renders “lā yaḍillu wa lā yansā” as “neither unaware nor He forgets.” Everyone else rendered it is “err.” Another passage Baṭalyawsī mentions to proof the comparability of dalla’ and nasiya is from 2: 282, “And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses, so that if one of the two erreth (through forgetfulness) the one of them will remind.”

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460 Baṭalyawsī, Inṣāf, 113-14.
462 Note in this rendition how Pickthall adds the qualification of forgetfulness, though in between brackets, to the action of erring.
463 Pickthal’s rendition of “dāllan” as “wandering by” can be tricky, since it gives the image of someone who is moving around aimlessly. According to Baṭalyawsī, the prophet wandered in search for the truth, not aimlessly. As he puts it, the prophet was unaware of (dāllan ‘an) the truth that he was after and God guided him to it (hadā).
Another example of a homonymous expression that Baṭalyawsī reconstructs its meaning in light of the Qurʾān and Arab speech is “yuʾakhirukum ilā ajalin musammā” from Q 71:4. This phrase denotes that God promises to delay the Term (ajal) and instant of death for those who obey and serve Him. Baṭalyawsī refutes such reading on the basis that the Qurʾān confirms in other parts that when a person’s Term arrives, it cannot be delayed (e.g., Q 71:4 and Q 16:61). The true intention of “yuʾakhirukum ilā ajalin musammā” for him is that God grants people enjoyment (of wealth, health, knowledge, authority, etc.) until their Term arrives. It is common for Arabs to say “aṭāla Allāhu ʿumrak” (lit., May Allah extend your life) to wish someone to enjoy a prosperous life. They also use in various contexts the expressions “ziyāda fī l-ʿumr” (increase in life) and “nuqṣān min al-ʿumr” (decrease in life), such as when one says to another: “qassara Allāhu min ʿumrik” (May Allah shorten your life); i.e., wishing for someone a life of hardship.

Ibn Rushd makes no mention of the iifrād/tarkīb relation, perhaps because it is something that is discussed in the books of grammar, not usūl. One would assume that in light of his emphasis on concision, Ibn Rushd felt no urge to dig deep in such linguistic details. Also, since he touches on this issue in his Essentials of Grammar and passingly in his Essentials of Legal Theory (i.e., commentary on Ghazālī’s Mustaṣfā), he might have expected his readers to return to these or other works where the subject matter is addressed more appropriately. Another reason, as will be seen, is that the processes of iifrād and tarkīb come up regularly in his discussion of each relation. In

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464 Baṭalyawsī, Inṣāf, 121. 71: 3-4, “(Bidding you): Serve Allah and keep your duty unto Him and obey me [3]. That He may forgive you somewhat of your sins and respite you to an appointed term [yuʾakhirukum ilā ajalin musammā]. Lo! the term of Allah, when it cometh, cannot be delayed, if ye but knew [4]."

465 Q 71:4, “the term of Allah, when it cometh, cannot be delayed,” and Q 16:61, “and when their Term expires, they can neither put it off nor advance it one single moment.”

466 Baṭalyawsī, Inṣāf, 122. For more on the processes of iifrād and tarkīb, see Baṭalyawsī’s discussion of thirteen homonymous uses of the antonyms “ḥayāt” (life) and “mawr” (death). In light of the Qurʾān, Ḥadīth and Arab’s speech, Baṭalyawsī’s reconstructed meanings of “ḥayāt” (life) and “mawr” are: the soul inhabiting the body vs. leaving it (muqāranat an-nafs al-hayawāniyya vs. mufāraqatuhā iyyāhā); existence vs. nonexistence (wujūd vs. ʿadam); glory/might vs. lowliness/disgrace (ʿizz vs. dhull); wealth vs. poverty (ghinā vs. faqr); right guidance vs. error (hudā vs. dalāl); ignorance vs. knowledge (jahl vs. ʿilm); motion vs. stillness (haraka vs. sukūn); fertility vs. infertility (khiṣb vs. jadb); awakening state vs. sleep state (yaqaẓa vs. nawm); lighting vs. putting out fire (ishtiʿāl an-nār vs. khumūduhā); love vs. hatred (maḥabba vs. baghḍāʾ); moist vs. dryness (ruṭūba, yubs); and hope vs. fear (rajāʾ vs. khawf). Baṭalyawsī, Inṣāf, 122-41.
general, the examples of indication-based ambiguities which he brings up throughout the Bidāya are three types: ambiguities in singular vocables (mufrad), ambiguities in composite vocables and complex expressions (murakkab), and ambiguities resulting from the grammatical functions of the vocables and expressions with respect to their changing states of inflection (iʿrāb). It is in the same order that I undertake each group of ambiguities in the following pages beginning with homonymy and polysemy (ishtirāk).

**Homonymy and Polysemy**

Before exploring the jurists’ appropriation of the linguistic relation of “ishtirāk,” a word is due on its common translation as “homonymy” and occasionally “polysemy.” Simply put, neither word captures the breadth of the Arabic “ishtirāk.” Modern linguists of English describe homonyms as expressions that are phonologically and/or orthographically identical (i.e., they sound and/or look the same), but entail different meanings. Scholars often identify three main forms of homonymy. Only one of these forms also take place in Arabic: homographs. Unlike homonyms,
the semantic variants in polysemous expressions have the same origin and, hence, their derived meanings are interrelated. Homonyms have different etymological origins. Polysemous terms make different meanings of the same root —e.g., the term “book” can refer to sheets bound together, a collection of rules, a unit in a written composition, the action of reserving a hotel room, etc.\(^{469}\)

Rendering *ishtirāk* as homonymy and/or polysemy works only in part. For one reason, certain subtypes of homonymy, such as homophones (words pronounced the exact same way, but written differently), do not exist in Arabic —because of its different system of vowelization. A word in Arabic is almost always spelled the same way it is sounded. For another main reason, as will be noticed in the course of this section, the forms of ambiguities which the Arabic *ishtirāk* describes include not only singular nouns, but also particles (e.g. propositions and phrasal verbs) and more complex grammatical constructions (it could be a phrase or a full sentence). Polysemy also does not encompass the scope of *ishtirāk*, but represents one form of it only. For these outlined reasons, I maintain the original Arabic using “*ishtirāk*” in reference to the entire category of ambiguity, and “*mushtarak*” to designate the particular expression that bears the ambiguity.

Early in his introduction, Ibn Rushd introduces *ishtirāk* as the second generic category of *Asbāb* and identifies two circumstances of this ambiguity.\(^{470}\) The first are singular homonymous vocables, such as the noun “*qur*” that entails both a woman’s menstrual (*ḥayḍ*) and post-menstrual period (*tuhr*), a positive command (*amr*) that may be read in terms of obligation or commendation, or a negative command that may be interpreted in terms of prohibition (*taḥrīm*) or discouragement (*karāhiya*). The second are composite vocables, such as the expression “except those who repent” in Q 24:5 and which, in the specific context of this verse, may entail the transgressors

\(^{469}\) Also, “bank” as financial building, supply held for the future, fund in a gambling game, container for keeping money, etc.; “green” as the color, unripe, immature, inexperienced, looking pale and unhealthy, be concerned with the environment, etc. Despite the linguists’ attempts, however, sometimes its difficult tell homonyms apart from polysems. See examples in, Bussmann, *Routledge Dictionary of Language and linguistics*, 918.

\(^{470}\) Ibn Rushd, *Bidāya*, 1: 12.
(fāsiqūn) alone or the witness as well as the eyewitness (shāhid). Theorists often discuss more divisions and subdivisions of ishtirāk, as we will see with Baṭalyawsī shortly. But first, let us take a look at some of Ibn Rushd’s references to ishtirāk-based causes of juristic disagreement.

### The Mushtarak

- The particle “*ilā*” (to) and the noun “*yad*” (hand) in Q 5:6, “your hands up to the elbows,” (وأَلْقِيَتْكُمُ إِلَى الْمَرْاضِقَ).
- The particle “*bi*” in Q 5:6, “and rub your heads,” (وَأَمْسَخْوَا كَأَحْوَسَكُمْ).
- The conjunction “*wa*” (and) repeating in Q 5:6.
- The noun “*lams*” (touching) in Q 3:43, “have *touched* women,” (لَمْ تَمسُّن مَلَأَ النُّسَاءِ).
- The meaning of “*tuhr*” in Q 1:222, “And when they have *purified* themselves, then go in unto them as Allah hath enjoined

### The Problematic Legal Case

- Washing elbows in *wuḍūʿ* (1: 18).
- The particle “*ilā*” may entail “to” or “with.” The noun “*yad*” may refer to the palm only (kaff), the palm and the arm (dhirāʾ) or includes the upper arm (ʿaḍud).
- The particle “*bi*” in Q 5:6, “and rub your heads,” (I grabbed him from his shirt), but meaning part of his shirt.
- The extent of rubbing the head in *wuḍūʿ* (1: 19).
- The particle “*bi*” is sometimes a superfluous addition (zāʾida) and sometimes used to refer to partition (tabʿīḍ, part of) such as saying “*amsaktu bi-qamīṣih*” (I grabbed him from his shirt), but meaning part of his shirt.
- The order of the actions of *wuḍūʿ* (1: 23).
- The conjunction “*wa*” is used in Arab speech may entail order (tartīb) or simply a collection (jamʿ) of things without order.
- Does touching one’s wife annul *wuḍūʿ*? (1: 44).
- Sexual intercourse with a menstruating woman before she bathes (1: 64).

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471 The editor of the *Bidāya* has erroneously referred to Q 2:160, which also contains the exact same statement, but in an entirely different context. The verse which Ibn Rushd means here must be Q 24:5.
upon you,” (لا تَقْرِبْ أَنْتَيْنَ حَتَّى يِطْهَرْنَ) (بِإِنَّ أَنْتَيْنَ تَطْهِئَنَّ مِنْ حَيْثُ أَمَرَكَ اللهُ).

– The particle “min” in Q 5:6, “and rub your faces and your hands with some of it,” (فَأَطْسُخْتُمْ وَأَنْتُمْ مَنَّهُ) in Q 22:28 “and mention the name of Allah on appointed days,” (وَذِكَّرُوا نَامِمَ اللَّهِ عِنْدَ أَيَامٍ) (Muṣlim).

– The noun “ṣaʿīd” in Q 5:6 “take for yourselves clean earth,” (قَبِيمُوا صَنِيعًا طَيِّبًا) i.e., perform tayammum with clean earth.

– The noun “laghw” (oath) in Q 5:89, “Allah will not hold you accountable for that which is unintentional in your oaths, but He will take you to task for the oaths which ye swear in earnest,” (لَا يَؤْتَاهُ اللَّهُ بِلَأْتَغْوِي فِي أَيْمَانِكُمْ وَلَنْ يُؤْتَاهُ اللَّهُ بِعَفْوِ أَيْمَانِكُمْ) (Inṣāf 1: 76). The term “saʿīd” is used sometimes to refer pure soil (at-turāb al-khāliṣ) and other times to all visible parts of earth (sand, stone, etc.)

– The property of “yamīn al-laghw,” or careless oaths invoking God in any of his attributes (e.g., “By Allāh, I will do...,” without having the intention to actually fulfill the oath, such as a mother swearing to break the TV if her son turns it on).

“Laghw” in Arabic entail two types of speech: false speech (kalām bāṭil) and insincere speech (lā tanʿaqid ʿalayhi niya).

– The word “ayyām” (pl., yawm, day) in Q 22:28 “and mention the name of Allah on appointed days,” (وَذِكَّرُوا نَامِمَ اللَّهِ عِنْدَ أَيَامٍ) (Muṣlim).

– Slaughtering sheep the night before the Sacrifice Day (yawm an-nahr) on the third day of hajj (2: 200). Arabs use the word “yawm” to refer to the day and the night together, and sometimes to only the day.

One of the most rigorous legal discussions of the linguistic relation of ishtirāk has been contributed by Baṭalyawsī in the Inṣāf. Baṭalyawsī also recognizes three types of ishtirāk, but his division is different from Ibn Rushd’s. The first type, which may be equated with the English homonymy, concerns homonymous singular vocable (ishtirāk fī mawdūʿ al-lafẓa al-mufrada). The second talks about ishtirāk by virtue of singular vocables changing functions with respect to
Inflection and other grammatical relations (*ishtirāk fī aḥwālihā l-latī taʿrid lahā min iʿrāb wa ghayrih*). The third pertains to *ishtirāk* in complex constructions, where a vocable’s meaning can be obtained only if other parts, intrinsic or extrinsic to that vocable, are also examined (*ishtirāk yūjibuh tarkīb al-alfāẓ wa bināʿuh baʿdan ʿalā baʿd*).

**Homonymous singular vocables**

Homonymous singular vocables are further divided into contradictory and non-contradictory. An example of a contradictory homonym is the term “*qur*”. Originally, “*qur*” denotes a period of time (waqt). Arabs have used it to indicate both a woman’s menstrual (ḥayḍ) and inversely post-menstrual period (tuhr, lit., state of purity). The equivocalness of this term led jurists to disagree, for example, on the meaning of Q 2:228, “Women who are divorced shall wait, keeping themselves apart, three (monthly) courses [qurūʾ].” The question for jurists was: should the woman wait three menstrual or non-menstrual cycles before she can remarry? Shafiʿis, Zāhiris and Mālikis read *qur* as non-menstruation, whereas Ḥanafis interpreted as menstruation—which affected each group’s count of the legally prescribed wait period during which a widowed or divorced woman may not remarry (ʿidda). Baṭalyawsī draws on other antonymous homonyms such as the terms “*ṣarīm*” (dark night/bright day), “*naʾnaʾa*,” (the early days of Islam/the later days of Islam), and “*aʿfā*” (lengthen/shorten).

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472 See, for the full discussion of *ishtirāk*, Baṭalyawsī, Inṣāf, 35-68.

473 Ibid, 37-41.

474 See Q 68:20, “wa aṣbaḥat k-aṣ-ṣarīm,” (The [garden] became, by the morning, like a dark and desolate spot, [whose fruit had been gathered]). This rendition by Yusuf Ali is the most reflective of the ambiguity of ‘ṣarīm’. Every other consulted translated Qurʾān renders it as ‘morning’, but does not refer to the aspect of night or darkness.

475 It has been reported that the first caliph, Abū Bakr, had said: “*ṭūbā li-man māta fī n-naʾnaʾ*,” (Blessed are those who die during the age of naʾnaʾa). Because feebleness is the central meaning of naʾnaʾa, some scholars read it in this report to refer to the beginnings of Islam (i.e. Islam was weak and has not picked up strength). Others explained it as the later days of Islam (i.e., Islam was weakened by the different heretical sects and Muslim’s conflicts).

476 Reference is made to the report: “*qusṣū ash-shawārib wa aʾfū l-liḥā*,” (trim the mustache and grow/shorten the beard).
An example of different, but not contradictory homonyms is the conjunction “*aw*” (or). For example, Q 5:33, “The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed *or* [aw] crucified, *or* [aw] have their hands and feet on alternate sides cut off, *or* [aw] expelled out of the land.” Some scholars argued that “*aw*” in this verse entails preference (*takhyīr*); i.e., judges may choose any of the above convictions. Others thought it has a disjunctive function (*tafṣīl*); i.e., that judges must associate a different conviction with each category of the convicted. In other words, those who killed Muslims and seized their wealth ought to be crucified. Those who killed but did not seize Muslims’ wealth ought to be killed. Those who seized their wealth and did not kill them ought to have their hands and feet cut off, and so on.477

*Ishtirāk* by virtue of singular vocables’ changing grammatical function

Doubled verbs are particularly a controversial case in this respect. Take, for example, “*yuḍārr*” in Q 2:282, “and let no harm [*lā yuḍārra*] be done to scribe or witness.” In its non-doubled or simple form, the verb “*yuḍārr*” takes two vowelized forms “*yuḍārar*” and “*yuḍārir*.” Scholars who read it as “*yuḍārar*” conceived of the scribe and witness in this verse as accusative objects of undefined subjects, and concluded that harm is inflicted upon the scribe and witness by other agents (e.g., if they are prevented from performing their duty sincerely). Those who read “*yuḍārir*” considered the scribe and witness direct active subjects who can inflict harm upon others (e.g., if they change the dictated terms or give false testimony).478

Ishtirāk in complex expressions

Like singular mushtarak vocables, Baṭalyawsī divides composite expressions into contradictory and non-contradictory. A good example of a contradictory complex expression is “targhabūn” (v., raghiba, to desire) in Q 4:127, “and the Scripture which hath been recited unto you (giveth decree), concerning female orphans unto whom ye give not that which is ordained for them though ye desire to marry them.” “Targhabūn” is a transitive phrasal verb followed by either the proposition “fī” (“raghiba fī,” to desire) or “ʿan” (“raghiba ʿan,” to desire not). In the absence of a proposition in this Qurʾānic verse, jurists made two different readings. Those who read it as “targhabūn fī” concluded that the verse addresses men who desire to marry the orphan women, possibly for their fortune. Those who interpreted it as “targhabūn ʿan” argued that it speaks to men who desire not to marry the orphans, possibly because they are poor and/or unattractive.479 Besides phrasal verbs, indefinite pronouns also tend to be problematic. For example, the tradition, “God has created Adam in his image,” incited conflict on whether the possessive pronoun “his” refers to God or to Adam.480

Indefinite pronouns also are a source of ambiguity in composite expressions that are not contradictory. An example is the phrase, “they slew him not for certain” (mā qatalūhu yaqīnan) in Q 4:157.481 At stake, here, is the referent of the object pronoun “him” (the suffix “hu” in qatalūhu). The question is: does the expression “qatalūhu yaqīnan” refer to the killing of the Messiah or the news that he was killed. Baṭalyawsī asserts that both interpretations are possible, for it is customary in to say in Arabic: “I killed something for certain” (qataltu sh-shayʾa ʿilman), to indicate being certain about it.482 Another example is the word “ṣiyām” in Q 2:183, “Fasting [ṣiyām] is prescribed for you, just as it was prescribed for those before you.” For some scholars, “ṣiyām” refers to the obligation of fasting, whereas for others, it entails the number of the days of fasting. Baṭalyawsī

479 Baṭalyawsī, Inṣāf, 55-56.
480 Ibid, 59.
481 The full verse reads: “And because of their saying: We slew the Messiah, Jesus son of Mary, Allah's messenger - they slew him not nor crucified him, but it appeared so unto them; and lo! Those who disagree concerning it are in doubt thereof; they have no knowledge thereof save pursuit of a conjecture; they slew him not for certain” Q 4:157.
482 Baṭalyawsī, Inṣāf, 66.
confirms that such ambiguity is not unusual. One can say, for example, “aʿṭaytu Badr kamā aʿṭaytu Qamar” (I gave Badr just as I gave Qamar). This has two different but non-contradictory meanings: that Qamar was given the same thing Badr had been given (in terms of content, quantity, quality), and that Qamar was also given something just like Badr (referring to the very act of giving).  

**Literality and Non-Literality**

According to the *Encyclopedia of Arabic literature*, “ḥaqīqa” refers to the “literal or proper” usage of language. “Majāz,” on the contrary, is the “improper, idiomatic or figurative” usage of the language. Generally, this is the meaning given to haqīqa and majāz by the majority of modern scholars of Islamic law; although, one should be aware of at least two factors here. The first is the fact that majāz and ḥaqīqa are not inherently at odds as suggested by the above definition. The literal meaning of a vocable (e.g., “asad,” lion) is not necessarily the opposite of its derivative non-literal sense (e.g., brave). The second is the fact that the scope and function of the Arabic majāz, whether in law or other disciplines, are not the same as those of the English “figure of speech.” As Weiss has put it, to describe majāz as figure of speech or trope is to “stretch [it] beyond the limits of traditional usage.” In the present dissertation, the word ḥaqīqa will be used to delineate the primordial meaning ascribed to a vocable. Majāz will be used to signify a sense different from, but not necessarily in conflict with, the meaning originally ascribed to the vocable. Ḥaqīqa and majāz will be rendered as “literality” and “non-literality” respectively, though I incline for the most part to use the Arabic.

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Ibn Rushd does not extend a definition of ḥaqīqa and majāz, but mentions four types of majāz: elision (ḥadhf), addition (iḍāfa), preposing (taqdīm) and postposing (taʾkhīr), and metaphor (istiʿāra).\(^{486}\) Instances of elision seem to recur in the Bidāya more frequently than the other types. An example of a juristic disagreement caused by elision appears in the scholars’ reading of Q 4:43, “approach not prayer when ye are drunken.” Those who read it non-literally, hold that what the verse commands against approaching is not the very act of praying, but “the site” of prayer (mawḍiʿ aṣ-ṣalāt), for it is the elided part.\(^{487}\) Similarly, in “if any of you is sick or on a journey” (Q 2:184), it is presumed that a phrase such as “and broke the fast” (fa-afṭarahu) was elided.\(^{488}\) An example of istiʿāra is Muḥammad’s statement “fa man tarakahā faqad kafar” (lit., whoever abandons it is an unbeliever) against Muslims who quit praying. Some took the term “kufr” literally (i.e., a state of unbelief); others interpreted it metaphorically. According to the latter’s reading, the prophet did not want to equate Muslims who quit praying with unbelievers, but used the term “kafar” to harshly rebuke them.\(^{489}\) A rigorous systemic discussion of the role of majāz is found in Baṭalyawsī’s Inṣāf. In the same threefold division that he used to discuss the previous forms of ambiguities, he covers the category of haqīqa/majāz in terms of singular vocables, complex expressions, and by virtue of their changing grammatical functions.

**Singular majāz vocables**

Baṭalyawsī reflects especially upon the terms “mīzān” (lit., scale, balance; non-lit., justice, weight, influence), “salāsil” and “aghlāl” (lit., chains; non-lit., coercion, oppression, restriction), “qawāʿid

\(^{486}\) Ibn Rushd, Bidāya, 1: 12.

\(^{487}\) Ibid, 1: 55 and 2: 57

\(^{488}\) “(Fast) a certain number of days; and is any of you is sick or on a journey, (the same) number of other days” (Q 2:184). Ibn Rushd, Bidāya, 2: 57. See other examples of elision with respect to a range of issues of ritual worship in, Ibn Rushd, Bidāya, 1: 64, 72, 74, 78, 119, and 2: 57, and questions of oaths and vows in, 2: 170 and 174.

\(^{489}\) Ibid, 1: 64. See, for an example of preposing/postposing Ibn Rushd’s reflections on a question of tayammum, particularly in Q 5:6 “and ye find no water, then take for yourselves clean sand or earth.” Ibn Rushd, Bidāya, 1: 70.
(lit., foundations; non-lit., principles, rules), “jibāl” (lit., mountains; non-lit., stability, firmness, ascending to power).

In addition, he refers to select anthropomorphic words, such as “anzalnā” in Q 7:26, “We have sent down unto [anzalnā] you raiment to conceal your shame, and splendid vesture.” In its literal sense, “anzalnā” denotes the action of sending down. Since it is incongruous with reason to think of a divine being performing a physical action in the way of humans, however, Baṭalyawsī amends that the verb anzalnā in this verse must be interpreted in the sense of revealing (awḥaynā).

Another example is the term “nūr” in Q 24:35, “Allah is the Light [nūr] of the heavens and the earth,” which, in accordance with Arab customs of non-literal usage, it can also be read in the sense that God guides His creation and illuminates their paths.

**Majāz by virtue of the changing state of inflection**

There are several situations in which meaning can be conveyed non-literally due to inflection. For example, “fa-idhā ʿazam al-amr” (lit., when the matter has decided) in Q 47:21. According to Baṭalyawsī, an Arab takes for granted that such expression means when the matter is determined or resolved. Similarly, in Q 34:23, “makr al-layl wa n-nahār” (lit., plotting of the day and night), refers to the plotting of the people. The grammatical structure in these verses is not uncommon in Arabic, for it is possible to say “uʿṭiya thawbun Badran” (lit., a dress has been given Badr), but means that Badr has been given a dress. Arabs also say “ayyamuhu ṣiyām” (lit., his days are fasting) to indicate that someone is fasting during certain days. Similarly, they may describe the event that

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491 See Baṭalyawsī’s extensive elaboration on various ways in which the expression “nuzūl” has been appropriated in both the legal and general usage in, Baṭalyawsī, *Inṣāf*, 80-7.

492 Ibid, 87-91.

493 Ibid, 91. Q 47:21 reads: “Obedience and a civil word. Then, when the matter is determined, if they are loyal to Allah it will be well for them.” The matter to be determined or the decision to be made is going for jihād when God’s command becomes effective.
a sixty-year old man had a baby by saying: “wulida lahu sittūn āman,” which means literally: “he has given birth to a sixty-year-old.”

*Majāz in complex expressions*

Here, Baṭalyawsī reflects on ten situations where a certain word form bears a grammatical function by which it may entail a meaning other than the one originally intended. These include situations where a predicate implies command, a command implies predication, affirmation entails negation, negation entails affirmation, necessity conveys possibility or impossibility and vice versa, a word of extolment implies disparagement, disparagement implies extolment, and finally an expression of decrease that implies increase and the other way around. The following are select examples in illustration of each situation of ambiguity.

<table>
<thead>
<tr>
<th>Grammatical situations</th>
<th>Select examples relevant to Islamic law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Command (amr) taking the form of a predicate (khabar).</td>
<td>Q 2:233, “wa l-wālidāt yurḍiʿna awlādahunna ḥalwlayni kāmilayn.” This verse reads literally as if God simply informs that mothers suckle their children for two full years. But, jurists have confirmed that it actually commands mothers to suckle their children for the assigned period of time. So, it should be rendered as “the mothers shall suckle,” and not just “the mothers suckle” as in few translations.</td>
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494 Ibid, 92. Q 34:23 in full: “Those who were despised say unto those who were proud: Nay but (it was your) scheming night and day, when ye commanded us to disbelieve in Allah and set up rivals unto Him.”

495 Baṭalyawsī, *Inṣāf*, 94.
– Predicate taking the form of a command.  

Q 19:38, “asmi’ bihim wa abṣir yawma yaʾtūnanā,” which can be read literally as “see and hear them on the Day they come unto Us” —which is the meaning found in several many modern English translation of the Qurʾān. Despite that the grammatical form here is imperative (asmi’, abṣir), Baṭalyawsī believes that the verse entails an exclamatory declaration; as if God is saying: “mā asmaʿahum wa abṣarahum” (i.e., how well they hear and see!). Therefore, the verse is not commanding evil doers to hear and see, but informing of their ability to see and hear clearly when they are summoned on the Last Day.

– Affirmation (ʾījāb) expressed in the form of negation (nafy).

Baṭalyawsī reflects on cases of the negative particle “mā” (not). In the statement “mā zāla zaydun ʿāliman,” the particle “mā” does not negate Zayd’s status as scholar, but affirms it, i.e., “zayd is (still) a scholar.” To the contrary, in the phrase “mā jāʾat ar-risāla,” the particle “mā” negates the action of “jāʾa” (arrive), which means “the letter has not arrived.”

– Negation in the form of affirmation.

Q 32:13, “And if We had so willed, We could have given every soul its guidance,” and Q 10:99, “And if thy Lord willed, all who are in the earth would have believed together.” Literally, both excerpts seem to affirm the probability that: “if God had willed, He would have made all humans believers.” But in their Qurʾānic context, they are actually negating that very probability.

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496 Baṭalyawsī, Inṣāf, 97.

497 Ibid, 98. This argument applies to other Qurʾānic verses such as, Q 22:13, “if We had so willed, We could have given every soul its guidance,” and Q 10:99, “if thy Lord willed, all who are in the earth would have believed.”
– A necessary action (wājib) expressed in the form of a possible action (mumkin).

– Q 5:52, “And it may happen that Allah will vouchsafe (unto thee) the victory,” and Q 17:79, “it may be that thy Lord will raise thee to a praised estate.” Read literally, the word “ʿasā” (lit., may) seems to imply possibility. However, according to Baṭalyawsī, “ʿasā” implies God’s promise of an inevitable or necessary action, i.e., granting victory and raising to a praised estate to the people in question by necessity, not possibility.498

– Impossible (mumtaniʿ) in the form of possible (mumkin).

“La-in yaqdir Allāhu ʿalayya la-yuʿadhdhibanī ʿadhāban shadīdan,” (lit., if God has power over me, he can subject me to sever punishment).499 Baṭalyawsī holds that the verbs upon him anguish in his life (the possible), He will subjugate him to severe punishment.

Another interesting suggestion which Baṭalyawsī makes in this respect is to read “yaqdir” as the transitive “yuqaddir” (lit., decree and predestine) and presume that the word “punishment” had been elided. This way, the man’s statement would sound more like: “in yuqaddir Allāh al-ʿadhāba ʿalayya la-yuʿadhdhibanī” (if God predestines punishment for me. He would punish me).

498 Baṭalyawsī, ʿInšāf, 99.

499 This is an excerpt from a tradition on a dying sinner who asked his family to cremate his corpse and disperse half of the ashes in the ocean and the other half through the land, hoping to prevent the resurrection of his body and by extension avoiding God’s punishment. It appears in many authoritative Ḥadīth books, though in slightly different versions. See the editor’s fn. 71, in Baṭalyawsī, ʿInšāf, 101.
| Extolment or praise (madḥ) in the form of disparagement (dhamm) | This is sometimes used by Arabs to avoid inflicting an addressee with the evil eye. For example, in order to praise someone’s fluency and articulateness, one may say: “la’ anahu Allāh mā afṣaḥah” (Damn him, how articulate he is). Similarly, to flatter someone for a new dress, one may say: “mā lahu maḥaqahu Allāh” (what [a beautiful dress] he has on, may God efface it).  

Q 11:87, “innaka la-ant al-ḥalīm ar-rachīd” (Lo! Thou are the mild, the guide to right behavior). The context, here, is that the people of Prophet Shu’ayb (Jethro) sarcastically inquired if his prayers command that they should abandon worshipping what their fathers had worshiped or not do what they wish with their own property. By describing his as “al-ḥalīm ar-rachīd,” they actually meant the opposite; i.e., that he is neither ḥalīm nor rashīd.

Expressing scarcity (qilla) in the form of abundance (kathra) | Sarcasm is one way of expressing this relationship, such as asking a cowardly person “kam baṭalan ghalabt (how many heroes have you defeated)” ? Or to a stingy person “kam ḍayfan nazala ‘alayk (how many guests have you hosted)” ? Another way is addressing an individual using the royal form, such as saying: “nahnu rijālun wa r-rijālu qalīl” (We are such [brave] men and [brave] men are scarce), but referring to oneself alone.

Expressing abundance (kathra) in the form of scarcity (qilla) | Occasionally, Arabs use the singular to describe a plural state such as saying: “rubba thawbin ḥasanin qad labistu” (many a beautiful fabric I have worn), or “rubba rajulin ‘ālimin qad

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500 Baṭalyawsī, Inṣāf, 104-5.

501 Baṭalyawsī, Inṣāf, p. 105.
laqaytu” (many a knowledgeable man I have met), but meaning the plural.\(^{502}\)

**Generality and Particularity**

The general/particular (‘āmm/khāṣṣ) is one of the first and most detailed linguistic relations found in books of *Uṣūl*. As early as the turn of the third/ninth century, Shāfiʿī included a rigorous account of the ‘āmm/khāṣṣ in his *Risāla*.\(^{503}\) Subsequently, the topic has been undertaken in every standard work of legal theory. Ghazālī’s comments on it in the *Mustasfā* are one of the most exhaustive and sophisticated.\(^{504}\) It will be mere redundancy to extend a lengthy overview of this topic, here, since few recent studies already have.\(^{505}\) However, one should remember one thing before we turn to Ibn Rushd’s appropriation of the ‘āmm/khāṣṣ in the *Bidāya*. At the extreme end of its usage, the ‘āmm is defined (particularly by the Ḥanbalī School)\(^{506}\) as a vocable the semantic scope of which is all-encompassing—“mā lā aʿammū minh.”\(^{507}\) This is also called “the unqualified general term” (al-ʿāmm al-muṭlaq) and includes, according to Kalwadānī, abstract expressions such as “dhālī” (essence) and “salām” (peace) and terms denoting a set of individual things of the same genus such as “mawjūd” (the existent, i.e., all existent things) and “maʿlūm” (known, i.e., all known things).

By contrast, the khāṣṣ, also at the extreme end of its usage, means a vocable the semantic scope of

\(^{502}\) Ibid, 105-7.


\(^{504}\) Ghazālī, *Mustasfā*, 3: 212-374. For an extensive list of pre-modern discussions of the categories of ʿāmm and khāṣṣ across the legal schools, see, ‘Ajm, *Mawsūʿat Muṣṭalaḥāt Uṣūl al-Fiqh*, 1: 632-45 (khāṣṣ), and 892-919 (ʿāmm).


which is all-specific —“mā lā akhaṣṣ minh.” This includes proper names, such as “Zayd” and “Mecca,” and unique technical terms, such as the names of medical surgical tools. Between these two extremes, the majority of vocables can be general and specific at the same time, based on the extent of generality or particularity of their contexts of usage. For example, the word “ḥayawān” (animal) is considered general if it designates all animate beings and particular if it entails non-human animals only. The same word is general if it is used to indicate the entire set of non-human animals, but specific if used to signify a specific type of beast.

Ibn Rushd’s conception of the linguistic relation of ‘umūm/khuṣūṣ is not much different for other scholars’, except perhaps, with respect to the way he structures its subtypes and distinguishes them from certain forms of analogical reasoning. For him, the ‘umūm/khuṣūṣ is one of the most controversial semantic features of the lawgiver’s language from which the law is obtained (i.e., the prophet’s spoken word, either through the Qur’ān or the Ḥadīth). Ibn Rushd identifies two levels of conflicts caused by the ‘āmm/khāṣṣ. The first concerns the very processes of taʿmīm/takhṣīṣ, which is further divided into three cases: a general vocable that entails generality and a particular indicating particularity, a general vocable that entails particularity, and a particular vocable that entails generality. The second pertains to the fact of confusing these three forms of the ‘āmm/khāṣṣ processes for syllogistic reasoning. The latter led Zāhirīs (who reject qiyās as a legal principle) to decline a number of arguments on account that they are qiyās based, although they are not.

Ibn Rushd confirmed that qiyās and the category of the ‘āmm/khāṣṣ can be quite confusing (valtabsān ‘alā l-Fuqahāʾ kathīran) and developed the following examples. Obtaining the ruling of slander (qadhf) from the established penalty of drinking alcohol, or of the minimum sum stolen which require cutting the hand (an-niṣāb fī l-qat’) from the minimum value of the dower (ṣadāq) is qiyās. To the contrary, applying the ruling of usury dealings (ribawiyāt) to staple (muqtāt) or foods that can be measured (makīl) or provided (maṭʿūm) is a form of a particular vocable intending a general sense. Here, the process is obtaining a particular meaning (muqtāt, makīl, maṭʿūm) from

508 Baṭalyawsī, Inṣāf, 1: 71.
a general term (*ribawiyāt*, i.e., the six main categories). The main difference between the two ways is that with *qiyās*, one investigates a shared element between two particular cases, be it the ratio or some resemblance (e.g., defamation vs. drinking alcohol). With the ‘āmm/khāṣṣ, one looks into the signification of the key vocables in the examined legal questions. Therefore, he asserts, Zāhirī scholars may object to the first approach (*qiyās*), but not to the second type. By eliminating legal conclusions reached through signification-based methods of inference (i.e., the ‘āmm/khāṣṣ in this case), one would be denying an established form of Arab speech.509

<table>
<thead>
<tr>
<th>Select legal questions</th>
<th>The corresponding ‘umūm/khuṣūṣ controversy</th>
</tr>
</thead>
<tbody>
<tr>
<td>– What vicious animals can be killed during <em>iḥrām</em>?</td>
<td>– Scholars disagreed on the kinds of vicious animals (<em>fawāsiq</em>) that is permitted to kill during the state of ritual consecration (<em>iḥrām</em>), except for five mentioned in a report by ‘Ā’isha: crow, kite, scorpion, mouse, and aggressive dogs. Problematic is “vicious animals” (<em>fawāsiq</em>): is it a general term entailing only the five species, or a particular term that includes other species? For Mālik, all predatory animals that are chased away and return can be killed. Abū Ḥanīfa restrict the killing of aggressive dogs to domesticated dogs and wolves. For Shāfiʿī, any animal that is forbidden for humans can be killed. For Ibn Ḥanbal, any animal that can bring harm to people can be killed during <em>iḥrām</em>, not just the five mentioned in the <em>Hadīth</em>.510</td>
</tr>
</tbody>
</table>

509 Ibn Rushd, *Bidāya*, 1: 11. My use of the word “inference” here and in other places bears no logical connotation. “Infer” and “inference” are sometimes used to mean the simple act of reaching a conclusion, but not by way of analogical reasoning.

What is the ruling of non-commissioned agent sale (bayʿ al-fuḍūlī)?

This is a type of sale carried by a person who is not a principle agent of the sale contract, such as a man selling his neighbor’s car without the latter’s permission. It usually takes place on the condition that the transaction between the buyer and the fuḍūlī is valid if the proprietor agrees to the sale. If he does not agree to it, the contract is annulled.

Shāfiʿīs, Ḥanbalīs and Zāhirīs reject this type of sale in cases of agreements of purchase and sale. Mālikīs allow it in both cases of agreement. Ḥanafīs allow it in sale agreements, but reject it in purchase agreements.\(^{511}\)

Are dead sea animals and dead creatures that do not have blood pure and edible?

By dead animals that have no blood (maytatu mā lā dama lah), jurists mean creatures such as locust.

Of disagreement here is the term “mayta” (carrion or dead meat) in Q 5:3, “Forbidden unto you are carrion.” Jurists agreed that this is a general expression which intends particular types of “mayta,” but disagreed on the types it encompasses.\(^{512}\)

If one had prayed at home and came to the mosque, should he/she perform that prayer again with the group?

Tradition records that the Prophet said to a man who came to the mosque in Medina, but did not pray with them: “if you came [to the mosque] pray with the people, even if you had prayed.” From this, scholars gathered that one must repeat the salāt in question, but disagreed on which of the five prescribed prayers can or cannot be repeated.


\(^{512}\) Ibid, 1: 183.
This is an interesting case that shows the way *qiyās* was used to particularize *ʿāmm* rulings.

For Shāfiʿī and Ibn Ḥanbal understood the Prophet’s words to make a general implication, they decided that all five prayers must be repeated.

For Mālik, since the fourth prayer (*maghrib*) is an odd prayer (*witr*), repeating it would make it even (with six prostrations). And this will alter its genus. From this analogy of resemblance, he argued that all prayers must be repeated except the fourth.

Abū Ḥanīfa deemed the repeated *maghrib* supererogatory (*nafl*). However, because *nafl* is not allowed after the third prayer (*ʿaṣr*), he had to exclude both the fourth and the third.

Ibn Rushd favors Abū Ḥanīfa’s analogy over Mālik’s. At the same time, he supports Shāfiʿī and Ḥanbalī’s positions that the Prophet’s expression entails generality, hence the rule should be that all prayers must be repeated.513

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Is the obligation of *ḥajj* for a woman stipulated by the presence of a *mahram* (a male from her forbidden circle of blood kinship)?

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The issue is the conflict between the Qurʾān’s obligation of *ḥajj* for anyone who has the means and capacity to make the trip and a *ḥadīth* that forbids women from traveling without a *mahram*.

Some scholars said the Qurʾān overrides the *ḥadīth* in this matter and so allowed women to travel to Mecca without the *mahram*. Others thought the *ḥadīth* particularizes the Qurʾān in this case and that the availability of a *mahram* is part of the condition of capability to perform *ḥajj* and so commanded against it.514

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– Are contractors and traders who follow the army entitled to the spoils?

– At stake, here, is Q 8:41, “And know that whatever you take as spoils of war.”

Shāfīʿī and Ibn Ḥanbal read “you” in this verse as a general term that encompasses everyone who attends a battle, even if they are not there to fight. As such, also contractors (ʿjarāʿ) and traders (tujjār) are entitled to their share of the spoils.

Mālik and Abū Ḥanīfa argue that the term “you” is specific to fighters only. Since the contractors and traders accompany the army for the purpose of trade not jihād, they are not entitled to the spoils.515

– Must the judge enforce the use of the property of an individual who refuses to lend it?

– The case in question is that of a man who wants to use the wall of his neighbor for hanging something that will profit him and will not harm the neighbor. The neighbor refuses. A similar case is of a man who does not allow his neighbor to dig a watercourse through his land, which will be profitable for both of them.

Mālik and Abū Ḥanīfa argue that a judge cannot enforce the use of someone’s property. Shāfīʿī and Ibn Ḥanbal, based on their consideration of public interest, said he must be obligated to let his neighbor use his land or wall.516

– Can a Muslim inherit a family member who renounced Islam (i.e., murtadd)?

– The prophet said: “no Muslim shall inherit an unbeliever (kāfir) and no unbeliever [shall inherit] a Muslim.”

Except for the Ḥanafīs, all other legal schools argue that this hadīth’s expression is general. Based on their analogy between kāfir and murtadd, Ḥanafīs hold that the rule is particular in this case (i.e., a Muslim can inherit a murtadd).517

515 Ibn Rushd, Bidāya, 2: 155.
517 Ibn Rushd, Bidāya, 4: 137.
Quite often, scholars admit that distinguishing between the ʿāmm and khāṣṣ can be arduous. Many of them have paid scrupulous attention to this linguistic relation and its implications on the law. However, very few strived to study systematically the vocables which seem to be a frequent subject of this type of ambiguity in the legal textual sources. Baṭalyawsī is one of few to develop a full overview of several terms which could be understood both in the general and particular sense. For example, the word “insān” (human) in Q 82:6, “O Man [insān]! What hath made thee careless concerning thy Lord,” entails all human beings. But in Q 102:2-3, “Lo! Man is in a state of loss; save those who believe and do good works,” is particularized by the conditional phrase to include only those who disbelieve and conduct ill deeds are in a state of loss.\(^{518}\)

Another word of the same family, “nās” (humans, human beings, humankind, humanity, etc.), can mean different things every time it is mentioned in the Qurʾān. Take for example Q 4:1, “O mankind! Be careful of your duty to your Lord,” and Q 5:25, “O mankind! Lo! The promise of Allah is true.” Baṭalyawsī argues that God, here, addresses all living human inhabitants of the earth. However, in Q 3:173, “Those unto whom men (an-nās) said: Lo! The people have gathered against you, therefore fear them,” the first “nās” actually refers to one man, Naʿīm b. Masʿūd.\(^{519}\) For strict legal issues, Baṭalyawsī refers to few instances of disagreement about general expressions which may or may not be particularized, such as Q 2:84, “whether ye make known what is in your minds or hide it, Allah will bring you to account for it.” One group asserted that this a particular verse that designates non-Muslims only. Another argued that it is a general verse which was later particularized by a prophetic tradition.\(^{520}\) To put it differently, up until this statement was made by the prophet, Muslims and non-Muslims were held accountable for their

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\(^{518}\) Baṭalyawsī, *Insāf*, 145

\(^{519}\) Baṭalyawsī, *Insāf*, 146. In his commentary on this Qurʾānic verse, Fakhr ad-Dīn ar-Rāzī mentions that Naʿīm b. Masʿūd was sent by Abū Sufyān b. Ḥarb (d. 30/652; leader of Quraysh tribe in Mecca and one of the fiercest opponents of Muhammad) to Medina to diffuse rumors that fighting the army of Abū Sufyān would be a suicidal mission. The motive was to spread fear among the Muslims of Medina so that they don’t join the prophet in what would later be called the Battle of Badr. Muhammad b. ‘Umar b. al-Ḥusayn Fakhr ad-Dīn ar-Rāzī (d. 606/1209), *At-Tafsīr al-Kabīr*, ed. Khalil al-Mays (Beirut: Dār al-Fikr, 1981), 9: 101-3.

\(^{520}\) “God forgave my people their evil promptings which arise within their hearts as long as they did not reveal them by action or speech.” *Ḥadīth* no. 201 in the Book of Faith of Ṣaḥīḥ Muslim, 1: 69. Baṭalyawsī, *Insāf*, 147.
bad intentions. Such reading, for Baṭalyawsī, is also supported by Q 2:84, “He will forgive whom He will and He will punish whom He will.”

As can be seen, the border line between takḥṣīṣ and abrogation is incredibly thin. A similar case of this confusion can be seen in Q 2:256, “no compulsion in religion” (lā ikrāha fī d-dīn).\textsuperscript{521} Scholars who read this as a particular expression maintained that the command of not compelling others to Islam concerns only Jews and Christians who pay jizya.\textsuperscript{522} Ibn ʿAbbās also thought this is a particularized verse, but in light of a different historical background. He noted that women in pre-Islamic Medina used to take oath that if they give birth to a boy, they will raise him Jewish. When the Jewish tribe of Banū an-Naḍīr was sentenced to be expelled from Medina, a number of Medinese Muslims came to the prophet asking what will happen to their children. According to Baṭalyawsī’s reading, Q 2:256 was revealed at the beginning as a general verse. Then, later it was abrogated (i.e., particularized) by other commands such as Q 9:73, “O Prophet! Strive against the disbelievers and the hypocrites!”

Finally, Baṭalyawsī draws attention to vocables that are general by their custom of usage, but to which the revelation ascribed a particular meaning. For example, “mutʿa” (enjoyment) has been used by Arab Bedouins to describe anything that is enjoyable (kullu shayʾin istumtiʿa bih).\textsuperscript{523} Within the context of the sharīʿa, “mutʿa” signifies two specific things. The first is zawāj al-mutʿa, a fixed-term marriage that existed prior to Islam, but was prohibited after. The second is the bride’s dower (mahr). The latter is the sense found in Q 2:236, “provide for them [mattiʿūhunna], the rich according to his means and the straitened according to his means, a fair provision,” and Q 4:24, “those of whom ye seek content (by marrying them) [istamtaʾum bihi minhunn], give unto them their portions [ujūrahunn] as a duty.”

\textsuperscript{521} In full, Q 2:256 reads: “There is no compulsion in religion. The right direction is henceforth distinct from error. And he who rejecteth false deities and believeth in Allah hath grasped a firm handhold which will never break. Allah is Hearer, Knower.”

\textsuperscript{522} Baṭalyawsī, \textit{Inṣāf}, 149.

\textsuperscript{523} Baṭalyawsī, \textit{Inṣāf}, 152.
1. The Philosophical Division of Knowledge in Ibn Rushd’s Ḍarūrī fī Ḫūṣūl al-鞬qīh

Although Ibn Rushd was in favor of keeping the spheres of philosophy and religion apart, he did, however, not hesitate to return to philosophy for approaches that he thought can help improve the study of the šarīʿa. One such approach is the philosophical division of knowledge, which he employed to classify the sciences of Fiqh and Ḫūṣūl in his early career work, the Ḍarūrī fī Ḫūṣūl al-鞬qīh. As mentioned briefly at the beginning of Chapter 3, Ghazālī talks in his Mustaṣfā about three types of knowledge: purely rational (‘aqlī maḥd, such as arithmetic and astronomy), purely traditional (naqlī maḥd, such as Ḥadīth and Qurʾān exegesis), or both rational and traditional (such as Fiqh and Ḫūṣūl). He calls the latter the “noblest of sciences (ashraf al-ʿulūm),” for it combines rational and traditional knowledge and reconciles individual opinion with the revelation.\textsuperscript{524} Ibn Rushd, however, gives a different tri-division.

The first type of knowledge for Ibn Rushd is one that is sought ultimately and solely for “the belief derived from it [and established] in the mind, such as the knowledge of the creation of the world and the discourse on the undividable part.”\textsuperscript{525} It is a form of “theoretical knowledge” — knowing for knowing — where the goal is attaining cognizance about a subject of research (as in metaphysics, pure mathematics and physics, or the parts of theology that undertake queries about

\textsuperscript{524} Ghazālī, Mustaṣfā, 1:3-4 and 12 (of Ghazālī’s text).
\textsuperscript{525} Ibn Rushd, Ḍarūrī, 34.
God’s essence, the creation of the world, the afterlife). The second type may be called “practical knowledge”—*knowing for doing*—which necessitates action (*ghāyatuhā l-ʿamal*). Ibn Rushd further divides it into universal (*kulliya*) and particular (*juzʿiya*) practical knowledge. For the universal, he gives the example of the study of the fundamentals of Islamic jurisprudence (*uṣūl*). For the particular, he refers to the study of the taxonomies (*aḥkām*) and substantive law issues—i.e., *Fiqh* as a vehicle for the categorization of human action as obligatory, prohibited, commanded, discouraged or permissible in accordance with the prescriptions of the *Sharīʿa*.

The third type, and one that concerns us here the most, is what Ibn Rushd defines as “the knowledge of the canons and circumstances which guide the mind towards that which is correct (*maʿrifat al-qawānīn wa l-aḥwāl bihā yatasaddad adh-dhihn naḥw as-ṣawāb*).” I call it “instrumental knowledge” and it represents a complex body of rules and systems intended to help scholars gain veracity and secure them against error in their pursuit of the theoretical or practical knowledge. Drawing from what it seems medical and philosophical registers, Ibn Rushd depicts the third type of knowledge as a “probe” [*ṣibār*, a surgical tool used to examine wounds] and “canon” (*qānūn*) whose relation to the mind is similar to that of the compass and ruler to the senses.

In the realm of Islamic law, it is the branch of legal theory (*Uṣūl*) that corresponds best to this type. And it is in this light that Ibn Rushd defines the *Uṣūl* science as the knowledge of the legal proofs (*dalāʾil*) with their subdivisions, the circumstances which qualify them as sound proofs, and where “analogy” may be applied to derive new laws and where not.

The original expression that I render above as “analogy” is “*an-naqla min ash-shāhid ilā l-ghāʾib*.” This is a method of reasoning which might have been coined by Muʿtazilī theologians. Within Ashʿarī circles, it was known inversely as “*radd al-ghāʾib ilā sh-shāhid*,” (lit., returning that which is absent to that which is witnessed). *Fiqh* scholars have also used this expression, although simply to entail analogy (*qiyyās*), or analogy of resemblance (*qiyyās ash-shabah*). In *Miʿyār*

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526 Ibn Rushd, *Darūrī*, 34.

527 Ibid, 35.
al-ʿIlm (the criterion of knowledge), Ghazālī equates “radd al-ghāʾ ib ilā sh-shāhid” with the sixth type of syllogism called “tamthīl” (likeness). He contends “it [qiyyās at-tamthīl] is what the jurists call qiyās and the theologians call radd al-ghāʾ ib ilā sh-shāhid.”528 He rejects totally this method of reasoning in rational matters (ʿaqliyyāt), because it produces mere opinion (ẓann) and not certainty. However, he permits it, though not without conditions, in legal matters (fiqhiyyāt).529 Ibn Rushd denied engaging radd al-ghāʾ ib ilā sh-shāhid in some areas, but accepts it in others.530

This threefold typology, as noted earlier, is both foreign to the Islamic legal tradition and different from Ghazālī’s tri-division in the Mustasfā. The distinction between belief-based and action-based knowledge, however, is not. Elaborating on the meaning of the Prophet’s report, “Q 112 equals the third of the Qurʾān,”531 Ibn ʿAbd al-Barr informed that the early legal and Ḥadīth scholars prohibited the use of dialectic and disputation (al-jadal wa l-munāẓara) in questions that concern belief, such as God’s attributes. But, they allowed it in practical matters that concerned peoples’ action (i.e., in the domain of law).532 Ibn ʿAbd al-Barr cites a report by Mālik that the people of Medina disliked dialectic and speculative theology as well as theorizing about things which can be known only by means of faith and belief (mā sabīluh al-īmān bih wa iʿtiqāduh).533 It is likely that Ibn Rushd knew about this debate among the early generation, if not directly from

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528 Ghazālī, Miʿyār, 165.
530 See, e.g., Ibn Rushd, Kashf, 130 (where he accepts the Ashʿarī argument about God’s attribute of “life”) and 109 (where he rejects their position on the creation of accidents and their inseparability from essences). In Faṣl al-Maqāl, Ibn Rushd rejects the Ashʿarīs’ argument about God’s knowledge as eternal, because they draw analogy between God’s knowledge (i.e., ghāʾib) and human knowledge (i.e., shāhid). Ibn Rushd, Faṣl al-Maqāl, 75.
531 The report reads “Qul huwa Allāhu aḥad (Say: He is Allah the One)” which is the first verse of Chapter 112, but it is used to refer to the whole chapter.
532 Ibn ʿAbd al-Barr, Istidhkār, 2:513.
533 Ibn ʿAbd al-Barr’s Istidhkār is a foundational source of Ibn Rushd’s Bidāya. As will be discussed at the beginning of Chapter 4, Ibn Rushd’s conception of the law generally and khilāf specifically seem to be largely influenced by Ibn ʿAbd al-Barr’s view in his Istidhkār.
Mālik’s *Muwatṭa’, at least from Ibn Ḥabd al-Barr’s *Istidhkār*, which, as will be shown shortly, is the most important reference of the *Bidāya*.

We know that the *Darūrī* was completed during the early phase of Ibn Rushd’s career.\(^{534}\) We also know that during this period, Ibn Rushd wrote many short commentaries and epitomes (*al-Jawāmi’ as-Ṣughrā*) on key Greek philosophical texts. It is in his philosophical works that we meet his typology of knowledge.\(^ {535}\) Although other Muslim philosophers talked about knowledge in similar ways (e.g., Ibn Sīnā, d. 427/1037),\(^ {536}\) it is Fārābī’s (d. 339/950) logical works that seem to have made the backdrop for Ibn Rushd’s account. The division of knowledge into theoretical (known and not practiced) and practical (known and practiced) resembles Fārābī’s exposition in several works, including *Iḥṣā’ al-ʿUlūm* (enumeration of the sciences), *At-Tanbīh ilā Sabīl as-Sa‘āda* (reminder of the way of happiness), *Milla* (Book of Religion), and *Ḥurūf* (Book of Letters).\(^ {537}\) In the *Tanbīh*, for example, Farābī devotes a separate discussion to this issue. In a section called “Classification of Comprehensible Things, Crafts and Subjects (*tartīb al-mudrakāt wa ṣ-ṣanāʾiʿ wa l-ʿulūm*)”, he declares that:

> Things that human beings ought to know are two types. One type ought to be known only and not practiced by humans, such as our knowledge that the world is created and God is one, and our knowledge of the principles of numerous perceptible things. Another type ought to be known and practiced, such as our knowledge that revering

\(^{534}\) Some scholars call it the “pre-554/ 1159 period.” See, e.g., Badawi, *Averoès*, 31; and Anawati, *Mu allafāt Ibn Rushd*, 75.

\(^{535}\) Generally, this approach is attributed to the peripatetic tradition and can be traced back to Aristotle. See, e.g., the beginning of his Book V of the *Nicomachean Ethics* and Books II and VI of the *Metaphysics*. For the evolution of the concepts of “scientific” and “practical knowledge” in the Greek philosophical tradition, see Richard Parry, “*Episteme* and *Techne*,” *The Stanford Encyclopedia of Philosophy* (2014), ed. Edward Zalta, 1-18. Accessed online on November 5, 2015 at: http://plato.stanford.edu/entries/episteme-techne/


the parents is good, betrayal is evil and justice is beautiful, or the knowledge of the physician that restores good health.\textsuperscript{538}

Here, Farābī divides knowledge into two categories (ṣinfān): knowledge sought for the sole goal of learning about a subject, not for inciting an action, and knowledge sought for both knowing and acting. For the first, he gives the examples of the knowledge of the creation of the world—this is the same example Ibn Rushd provides in the \textit{Darūrī}, and almost word for word—and the knowledge of the principles of perceptible things; i.e., things that we learn about through our intellect, not our senses (i.e., \textit{mudrakāt}, as opposed to the \textit{maḥsūsāt}). On the second, he refers to medicine as a practical discipline where the goal is curing the ill. Then, he mentions moral and political knowledge whereby a scholar not only learns about, for example, the golden rule, but ought to act in accordance with it. In \textit{Kitāb al-Milla}, Farābī draws a comparison between falsafa and \textit{sharīʿa} and upholds that both constitute a theoretical and a practical part. He identifies the theoretical as that which can be known, but not practiced and the practical as that which can be practiced (in other places, he says “must” be practiced) if known.\textsuperscript{539} Despite Farābī’s influence, Ibn Rushd differs from him in at least two ways. On the one hand, he applies this approach to law directly and in more detail. On the other hand, he holds \textit{Uṣūl} as an instrumental knowledge necessary for the study and practice of \textit{Fiqh}. Farābī never mentioned \textit{Uṣūl}, although, he made a quick note of the rank of jurisprudence and jurists in the \textit{Book of Letters}, and jurisprudence and theology (\textit{kalām}) in the \textit{Enumeration of the Sciences}.\textsuperscript{540}

I should, at the end, reemphasize that although Ibn Rushd was impressed by and engaged certain philosophical discussions to inform his study of the law, he was cautiously attentive not to mix the philosophical and legal ways of reasoning. Also, Ibn Rushd wrote in full agreement with his intellectual convictions and ambitions, notwithstanding a precarious age of rivaling powers that left many esteemed scholars to their own. Ibn Rushd’s intellectual contribution was largely an

\textsuperscript{538} Fārābī, \textit{Tanbīh}, 220.

\textsuperscript{539} Fārābī, \textit{Milla}, 46-7.

\textsuperscript{540} Fārābī, \textit{Hurūf}, 132-33; and \textit{Iḥṣāʾ}, 85-92.
independent effort, and it is unlikely that he partook in Almohad’s political agenda as claimed by some scholars. Ibn Rushd remained true to himself and his readers and articulated his views in the manner he saw fit for each type of his different audiences. He was convinced that falsafa and Sharīʿa share in the same goal of equipping society members with the virtues necessary for gaining “happiness” in this life and after. He neither disguised his “true” views of God and the afterlife (like other Muslim philosophers, he took issue with personal immortality or bodily resurrection), nor did he embrace a double truth. Unlike other Muslim philosophers, such as Ibn Ṭufayl (d. 581/1185) in his philosophical tale Ḥayy Ibn Yaqẓān (Living Son of the Awakened), he believed strongly that the philosopher’s natural place is within society, not without it. For him, the philosopher, like the prophet, bears full responsibility towards his people even if they react unfavorably towards him and his teachings—which was the dominant attitude during his time. Ibn Rushd was not only aware and confirmed the prevalence of such increasing sentiment of animosity toward philosophy and the philosophers during his age. He endured it firsthand during his miḥna (see Chapter 2).

2. Vestige of Reform

Ibn Rushd was aware of the political, moral and scientific decline of his own society. Exploring his intellectual labour with this assumption in mind, one begins to notice a pattern that invites to think that he had attempted some kind of “intellectual reform.” Not that he had a preset agenda, but, from the various signs that will be examined, it becomes clear that Ibn Rushd took pains at

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542 The double truth theory considers revealed law and philosophy separate sources of knowledge which arrive at conflicting truths, with respect to key questions about, e.g., the nature of God, existence after death. The theory of the unity of truth suggests that the truth conveyed by the revelation and examined by philosophy in regard such matters is one, despite that each of them communicates it in different ways. It is now largely agreed that Ibn Rushd advanced a theory of the unity of truth. I return to this question soon.

mending specific intellectual and educational areas. Two areas, in particular, are of interest for us in the following pages, one is didactical, the other pedagogical. At the didactical level, Ibn Rushd strived to instruct about the mutual goal of falsafa and sharī‘a. The question of the relationship between the two is addressed in Faṣl al-Maqāl, Tahāfut at-Tahāfut, the Kashf ‘an Manāhij al-Adilla, as well as his commentaries on Plato’s Republic and Aristotle’s Nicomachean Ethics. By attempting to settle this dispute and granting the philosophers the legal permission to explore questions at the heart of Islamic belief, Ibn Rushd sought to found a “scientific” way of engaging such matters; a way grounded in the demonstrative method. Unlike any of his predecessors, Ibn Rushd’s intervention on this issue was made in his capacity as jurist, not philosopher.

Much of the terminology used in Faṣl, for example, belongs to the register of law. In fact, the entire treatise serves as an extensive fatwā on the ruling (ḥukm) of the study and practice of falsafa and logic: “is it permitted, prohibited or prescribed, either by way of commendation or obligation (mubāḥ bish-shar‘, am maḥzūr, am ma‘mūr bih, immā ‘alā jiḥat an-nadhb wa immā ‘alā jiḥat al-wujūb)?”544 At the end of his legal assessment, Ibn Rushd concludes that exercising philosophy and logic (and theoretical speculation generally) is an obligation (wājib) that expert scholars must fulfill on behalf of the rest of the community. Generally, what distinguishes Ibn Rushd’s discussion of the relationship between the the sharia and falsafa and his defense of the latter is that, unlike any of his predecessors, Ibn Rushd was the only one who practiced law, and so sought to defend philosophy not with philosophy, but with the sharī‘a.

Not only Ibn Rushd strived to change the negative image of philosophy in the collective memory of Muslims, public and scholars alike, but also sought to correct key Islamic doctrinal views that, in his view, had been distorted by the theologians. His Tahāfut and Faṣl constitute an assertive response to the way philosophy had been vilified by Muslim theologians, particularly

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544 Ibn Rushd, Faṣl, 22.
The Kashf critiques their reading of fundamental issues of Islamic belief with respect to God’s essence and attributes, the creation of the world, prophecy, and miracles. The falsafa-sharīʿa relationship and the criticism of kalām occupied a central position in Ibn Rushd’s work. However, they are not of priority in this chapter. I touch Incidentally on parts of this discussion, but I will not delve deeply into the theological and metaphysical challenges it presents. My goal is to address some of the ways in which Ibn Rushd conceived of and wrote about revealed law as a domain of theory and practice in both his legal and political writings.

At the pedagogical level of Ibn Rushd’s “intellectual reform,” we notice his deep concern with the complexity of the methods of learning broadly and in law specifically. Ibn Rushd was aware of the fact that the ways of knowledge acquisition had become an impediment to students’ learning and might have thought of this problem in the same way he envisioned the evolution and ramification of scriptural hermeneutics (taʾwīl). Basically, that the latter had developed from a simple, accessible source of knowledge to one that is arduous, confusing and, in some contexts, a threat to the very integrity of the Qurʾān’s teachings on belief (ʿaqīda). To illustrate the perils of allegorical interpretation as practiced by many scholars during his time, Ibn Rushd strikes an interesting simile in the Kashf which goes as follow.

Initially, there was a skillful physician who created a drug to preserve the health of his people. The master compound drug (ad-dawāʾ al-murakkab al-aʿẓam) worked fine for the majority, until a man tried it and it did not work for him. However, this was not because of the drug, but due to a condition the man had (li-radāʾat mizājin kāna bih lā yaʿriḍ illā lil-aqall min an-nās). The man reinterpreted the master formula and declared that people had been using the wrong drug. He altered ingredients of the compound, added new ones and presented it as the true drug intended by the master physician (aṭ-ṭabīb al-awwal). However, the “improved” drug only spoiled the humors of many (fasadat bih amzijat kathīr min an-nās). Later physicians (Ibn Rushd

545 Ghazālī’s attack on philosophy in Tahāfut al-Falāsifā has been widely studied. Ghazālī, The Incoherence of the Philosophers (Tahāfut al-Falāsifā), trans. Michael Marmura (Provo, Utah: Brigham Young University Press, 2000).
stops at the fourth generation) noticed the side effects of this drug. Each one of them offered a different interpretation of the formula and sought to fix the drug by changing and adding new ingredients. Every time they did, new types of illnesses appeared. The more the drug formula was modified, the sicker people became, to the extent that the intended benefit of the master drug was entirely lost.  

The master physician (at-ṭabīb al-awwal) is the prophet and lawgiver. The master drug (ad-dawāʾ al-awwal) is the sharīʿa as a revealed law prescribed in the Qurʾān and expanded in the Prophet’s Sunna. This revealed law was at the beginning an accessible source of knowledge and suited most people. Over time, and as it was reinterpreted by different groups, its intended benefit became less and less apparent. Each group provided a different interpretation and claimed it is the one designated by the lawgiver, “until the law was torn up into shreds and strayed away from its original place, (hattā tamazzaq ash-sharʿ kullu mumazzaq wa baʿada ʿan mawḍiʿ ih al-awwal).”

Ibn Rushd does not explain here how the sharīʿa’s was torn up. However, we know from his other works that he is critical of fusing the legal study with supererogatory topics on Islamic belief and other theoretical subjects which, in his view, serve no benefit but burden the students. As seen in Chapter 1, Ibn Khaldūn confirmed that one of the reasons why scholars confined to the madhhhab after the establishment of the schools was the complexity and ramification of the legal discipline.

By Ibn Rushd’s time, dialectic was a form of the legal discourse. Supererogatory topics on Islamic belief and other theoretical subjects (e.g., linguistics) were standard chapters in law books. More jurists concentrated on substantive law (fiurūʿ), whereas only a few could understand its meta-rules and principles, and the legal schools’ theories were imbued with infinite authority at the expense of responding to practical demands. This made the legal study an arduous exercise. Ibn Rushd was aware of the complexity of learning and density of the legal discipline by his age,

546 Ibn Rushd, Kashf, 149-50.

547 Ibid, 150.
and he intervened at, at least, three levels: maintaining focus and concision in writing, prioritizing comprehension over memorization, and connecting the furūʿ with their respective uṣūl.

**Concision and Economy in Writing**

By emphasizing succinctness, Ibn Rushd seems to aspire to found a tradition of legal writing (and writing broadly) that prioritizes quality and accessibility. Often in his preambles, Ibn Rushd reveals his intent to avoid superfluous details. His Tahāfut, kashf and Faṣl, for example, open with a brief statement on his plan and do not extend lengthy prefatory accounts of certain topics as we see in several books of the same period. The phrase he often uses to convey his aim is: “wa nataḥarrā fī dhālik awjaz al-qawl” or “bi-awjaz mā yumkinunā fī dhālik” (we address this issue in the most succinct way).548 Concision is a strategy that Ibn Rushd pursues in most of his works, voluminous and summative, and across the disciplines to which he has contributed, including philosophy, law, medicine, grammar, and others. For example, in the introduction to his middle commentary on Plato’s Republic, Ibn Rushd states, after defining his purpose, “we shall be strict in speaking succinctly of this.”549 Concision, as will be illustrated, is a custom which Ibn Rushd established for himself as a writer broadly.

One way in which Ibn Rushd exerts succinctness in writings is by being highly selective of the subjects he covers and discussions he comments on. Both his Bidāya and Ḍarūrī disclose a deliberate intention to leave out theological issues and introductions to logic and select topics in Arabic linguistics that many authors of Uṣūl would include. For example, Juwaynī, in his Burhān fī Uṣūl al-Fiqh, includes an extended critique of the Muʿtazilī notions of good and evil and devotes

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548 He used the first phrase in the Ḍarūrī and the second in the Bidāya. See, respectively, Ibn Rushd, Ḍarūrī fī Uṣūl al-Fiqh, 34; and Bidāya, 1: 9.

In his commentary on the latter, Ibn Rushd dismissed Ghazālī’s introduction to logic openly and gave this explanation:

Prior to that, Abū Ḥāmid presented an introduction to logic, claiming that it had led him to it [the fact] that the theologians looked into certain logical matters in this craft [i.e., legal theory], such as their investigation of the definition of knowledge (ḥadd al-ʿilm) and so on. As for us, let us discuss each subject in its [appropriate] place, for one who seeks to learn more than one thing at the same time ends up learning [comprehensively] none."

With this assertion, Ibn Rushd conveys few important points. Firstly, he remarks that the subject matter of logic (i.e., philosophical logic) is not essential to the study of legal theory, and so must be dropped from its curriculum. Secondly, he advises his readers who may be interested in logic to consult the books of logic. Ibn Rushd urges concentrating on one subject at a time and taking it from its proper sources, so one can obtain a deep knowledge of it. Concealed in this assertion, however, is Ibn Rushd’s effort to separate the study of the shari’a from philosophy at the level of their methods of instruction; a strategy that he advances in more detail in Faṣl al-Maqāl.

Another example is Ibn Rushd’s deliberate neglect of passages of Plato’s discourse in the Republic that he considers “dialectical.” He explained in the preamble of his commentary on this work that his focus is directed at Plato’s “scientific” and “demonstrative” passages only. In the Bidāya, Ibn Rushd makes his goal reflecting on the issues that function as legal principles and form which new rulings may be inferred (masā’il al-aḥkām), and not substantive law (furūʿ). In other words, he is not interested in questions that lead to defining micro rights and duties, but those that grant the rules by which those micro individual rights and duties are ascertained. Also in the Bidāya, Ibn Rushd announces that he has limited himself to examining legal issues already

551 Ibn Rushd, Ḍarūrī, 37-38.
552 Ibn Rushd, Averroes on Plato’s Republic, 4.
553 This is reasserted in many places in the book. Ibn Rushd, Bidāya, 1: 95, 200, 3: 118, 147, 160, 167, 210, 218.
addressed by the law (mantūq bihā), not those about which it remained silent (maskūt ʿanhā). It is for this reason that he ignored hypothetical and unrealistic questions, even if they had been commonly addressed by legal authorities. As seen in Chapter 3, Ibn Rushd renounces the jurists’ discourse on the question of the entitlement of clientage (walāʾ) if the manumitter is Christian (i.e., a Christian manumitting his slave), and called it one of the hypothetical questions that no longer exist, (hādhih al-masāʾil hiya kulluhā mafrūda fī l-qawl lā taqaʿ baʿd), for slavery was no longer part of the Christian and Jewish traditions by his age.554 Another example is his refutation of the jurists’ discussion of men’s breast milk. Using his medical knowledge, Ibn Rushd holds that men’s breasts do not produce the same composition of milk as women. He clarifies that the term “milk” used in such rare cases to describe the substance that comes out of a man’s breasts only by way of homonymy, not because it is actual “milk.” On another occasion on this topic, he refuses to give his view on the question of a baby who suckles his dead mother. This question, he asserts, “almost never occurred, and exists only in [hypothetical] talk, (yakād an takūn masʾala ghayr wāqiʿa, fa-lā yakūn lahā wujūd illā fī l-qawl).”555

Prioritizing Comprehension over Memorization as a Method of Learning

The centrality of rote learning (ḥifẓ) in Muslims’ systems of education is well known. Emphasis on memorization may have roots in Arabs’ oral culture and the important place poetry played in their life before Islam. The importance of memorization has grown with the Islamic civilization and, ostensibly, has never left Muslim education.556 People with prodigious retentive minds are glorified in biographical books to the extent that an exceptional memory seems a standard quality

554 Ibid, 4: 147.
555 Ibid, 1: 129
that every illustrious Muslim figure shares, from poets to Ḥadīth narrators and from tribe leaders to kings. Individuals with this cognitive trait are called “the memorizers” (al-ḥuffāz) and often described as oceans (muhīṭāt) and receptacles (awʿiya) of knowledge. Their death is considered a loss of the knowledge they had carried. The Abbasid Caliph, Hārūn ar-Rashīd (d. 809/1138), is reported to have said after the famous Ḥanafī jurist, Muḥammad b. al-Ḥasan ash-Shaybānī and the grammarian Abu al-Hasan al-Kisāʾī died in 189/805: “the legal and language sciences are now buried in Rayy (dufina l-fiqh wa l-ʿArabiyya fī r-Rayy).”

The ʿHanbalī scholar, Ibn al-Jawzī (d. 597/1201), wrote Al-Ḥathth ʿalā Ḥifẓ al-ʿIlm, (The Imperative of Memorizing Knowledge) with the sole goal of inciting students and drawing their attention to the significance of hifẓ. The first chapter of this treatise talks about the role of hifẓ, the second describes the physical and mental qualities of the memorizer, the third lists medicinal nutriments that help memorizing, the fourth on the ways of retaining memorized information, the fifth on the points of time most suitable for memorizing, and the sixth on the proper order of the subjects of rote learning. The seventh and last chapter, which constitutes more than half of the book, is an alphabetized list of leading memorizers of the religious sciences, especially in Ḥadīth and Fiqh. What prompted Ibn al-Jawzī to write this treatise, as he pronounces in the preamble, is students’ laziness and inability to retain what they learn. He presents his book as an endeavor to inspire hard work and discourage indolence (muḥarriḍan lahum ʿalā l-ijtihād wa muʾkhilan ʿalā l-kasal).

557 Ibn Khallikān, Wafayāt, 3: 296. Makdisi has attributed the action of burial to the Caliph erroneously, hence, read it as, “I buried jurisprudence and the Arabic language arts in Rayy” —reading “dafantu” instead of “dufinat.” Makdisi, Colleges, 99. See also his brief account of memorization as a way of learning in Islam in, Makdisi, Colleges, 99-103.


559 Ibn al-Jawzī, Ḥathth ʿalā Ḥifẓ al-ʿIlm, 32.
Read through today’s eyes, many parts of Ibn al-Jawzī’s book may sound strikingly odd. The second chapter, for example, lists signs of cognitive incompetence—which are, in his view, also signs of physical imperfection—that impede mastering memorization. Some of these would include a flat and small head; fat stomach, forehead and nose; short neck; black pupils and short fingers.\(^{560}\) In the third chapter, he describes the inability to retain knowledge as a brain disease (\textit{min amrād ad-dimāgh}), and claims that it is often the result of a corrupt cold and humid temperament (\textit{mizāj}), which results from excessive consumption of onion, meat and fruits.\(^{561}\) Ibn al-Jawzī refers to select traditions that had advised of particular foods and actions believed to help strengthening memory. He quotes ‘Alī b. Abī Ṭālib (d. 40/661) and ‘Abd Allāh Ibn ʿAbbās’ (d. 68/687) advice to eat honey, raisins, pomegranates and frankincense (\textit{al-lubbān}; olibanum, aromatic gum resin obtained from Arabian and East African trees). He also cites Ibn ʿAbbās saying that shaving one’s nape or the back side of the neck (\textit{qafā}) increases the ability to master memorization. Finally, he provides “recipes” for memorization, one of which asks for mixing frankincense and white pepper with bread dough, baking it and eating it alone for forty days.\(^{562}\)

By Ibn Rushd’s time, memorization was not only an established means for learning. It was almost an end in itself, for a good jurist was identified by the number of legal questions he cites from memory. Ibn Rushd exhibited deep concern with this approach in the \textit{Bidāya} and warned against its serious implications for the future of the legal study. He reasserted his position that what makes a scholar “knowledgeable of” \textit{fiqh}, and hence worthy of the title \textit{Faqīh}, is the ability to exercise \textit{ijtihād}, not the number of legal questions he memorizes even if it is the highest number any human being can learn. He described those who think otherwise as someone who thought that the “real” shoe tradesman (\textit{khaffāf}) is one who owns the largest collection of shoes. One day,

\(^{560}\) Ibn al-Jawzī, \textit{Ḥathth ʿalā Ḥifẓ al-ʿIlm}, 35.

\(^{561}\) Ibid, 39.

\(^{562}\) Ibid, 40-41.
however, he adds, a customer with different sized feet visits this person and cannot find for his right fit. Then, by necessity, the customer returns to the person who makes shoes.\footnote{Ibn Rushd, \textit{Bidāya}, 3: 210-11.}

In other words, the “real” \textit{khaffāf} is not one who owns a huge collection of shoes, but one who can make them. The Arabic term “\textit{khaffāf}” refers broadly to someone who owns a shoes shop. It is possible, but not necessary, that this person also makes shoes. What Ibn Rushd means by \textit{khaffāf} is not “shoemaker,” someone who makes or repairs shoes, unless it is understood as someone who also sells shoes. The Arabic equivalent of shoemaker is \textit{sakkāf} and \textit{iskāf}. In general, the difference between \textit{khaffāf} and \textit{kassāf} is marginal and contextual. What matters the most, here, is that for Ibn Rushd, the real \textit{khaffāf} is not someone who only sells shoes, even if this person owns a massive collection of them. Rather, it is someone who also makes shoes. In other words, the “true” \textit{khaffāf} is by necessity a \textit{kassāf}, but not necessarily the other way around. This is not to say that Ibn Rushd disvalues or refutes the pedagogical role of rote learning.\footnote{His discussion of the faculty of memory appears esp., in his commentaries on Aristotle’s \textit{Parva Naturalia} and De \textit{Anima}. Averroes, \textit{Epitome of Parva Naturalia}. Trans. Harry Blumberg. Cambridge: Mediaeval Academy of America, 1961; and \textit{Long Commentary on the De anima of Aristotle}. Trans. Richard Taylor. New Haven: Yale University Press, 2009. See an excellent essay on this subject by Deborah Black, “Memory, Individuals, and the Past in Averroes’ Psychology,” \textit{Medieval Philosophy and Theology}, 5-2 (1996): 161-187.} Of primary interest for him is the skill to supply rulings for new legal situations that have not been addressed in the \textit{sharī’a}. And he believed that only \textit{ijtihād} can bring this goal from potentiality to actuality. By stressing the exhaustibility of legal theory in the \textit{Bidāya} and \textit{Ḍarūrī}, Ibn Rushd seems to have foreseen the dangers of reducing the legal practice to a set of memorizable theories and cases. It is for this reason that he took pains at presenting \textit{Uṣūl} as “instrumental” knowledge. By subverting the view that memorization is an effective method of learning and giving primacy to comprehension, Ibn Rushd resisted a formalistic approach (the question of legal formalism vs. legal functionalism is discussed in the third section of Chapter 3).

Ibn Rushd’s appraisal of comprehension can also be seen in the central role he ascribed to “critical investigation” (\textit{an-nāẓar as-ṣinā‘ī}) and in the extent to which he has strived to apply it in
his legal writings. Chapters 2 and 3 discuss aspects of Ibn Rushd’s interest in critical investigation in the Ḍarūrī and Bidāya. In the latter work, Ibn Rushd states on several occasions that his goal is to examine the legal questions in a “critical and systematic” manner (ṣināʾiyyan wa jāriyan ‘alā niẓām), and describes critical investigation as “a genre of instruction” (nawʿ min at-taʿlīm); i.e., a reader-centered activity of instruction, and not merely an author-based mode of composition.565

**Connecting the Furūʿ with their Respective Uṣūl**

By the expression “connecting furūʿ with uṣūl,” I do not mean that the two genres were treated in isolation from one another by Ibn Rushd’s fellow jurists. This is impossible for an effective discussion of the legal principles requires quoting practical cases. I also do not mean that the legal praxis during Ibn Rushd’s age was dominated by taqlīd —keeping in mind the complexity of the latter as concept and institution. One cannot be entirely oblivious to the character of change which has accompanied Islamic law at every stage of its development. Wael Hallaq’s work on this subject has concentrated on this element of change for about two decades, and has convincingly established that the gate of ijtihād was never utterly shut.566 At the same time, however, one cannot deny the fact that dogmatic adherence to the madhhab, or “at-taʿaṣṣub al-madhhabi” as Ibn Khaldūn calls it,567 reached its peak during this age. The heavy focus on furūʿ and decreasing interest in legal theory, the reduction of Uṣūl to a set of memorizable rules, and the anarchic

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567 Ibn Khaldūn’s history of Islamic law and khilāf and his views of taqlīd are discussed in Chapter 1.
levying of charges of unbelief (куфр) in all directions are some of the many faces of a widespread movement of intellectual intolerance at the heart of which taqlīd thrived.568

Several accomplished legal scholars before and after Ibn Rushd noticed that the study of ʿUṣūl was in no better shape than its counterpart, the study of furūʿ (i.e., Fiqh). They, too, pointed out and critiqued how various theological and logical topics became requisite for the study of ʿUṣūl. Ghazālī gave us a vivid image of this situation in his preface to the Mustafa. For him, since ʿUṣūl entailed knowledge of the proofs of legal taxonomies (maʿrifat adillat al-ḥākīm), scholars dug deep in the definitions of knowledge (maʿrifa and ʿilm), proofs (adilla) and rulings (ahkām) from various disciplines. Driven by their pursuit of kalām, one group imbued their study of ʿUṣūl with several techniques of dialectical theology. And scholars trained in the language sciences integrated in their legal books parts of the theoretical discussions found in books of linguistics and grammar. Jurists, because of their interest in substantive law, merged in the study of ʿUṣūl a vast number of applied cases —Ghazālī referred specifically to the Ḥanafī scholar, Abū Zayd ad-Dabbūsī (d. 430/1039).569 He considered these cases “excess” and of little value for the study of ʿUṣūl. However, while declaring that ʿUṣūl scholars “went too far” mixing legal theory with other sciences (isrāfuhum fī hādhā al-khālt), he did not avoid this practice in his own works. In the Mustasfā, for example, he admitted that he cannot part with this custom (lā narā an nukhāli hādhā), and suggested to be brief instead.570 So, he designates separate sections to logic and the definition of knowledge —both of which Ibn Rushd disregards in his commentary on this book.

568 It may strike the reader of classical Muslim intellectual history the extent to which the mutual accusations of heresy and unbelief between the traditionalists and rationalists resemble the charges certain contemporary groups level against others (Salafis vs. Sufis, Sunnis vs. Shiʿis, and preachers with mediocre training in the religious sciences vs. almost anyone who does not share their doctrine and way of life). Ghazālī wrote a book specifically about the limits of the charge of heresy in Islam called Fayṣal at-Tafriqa fīmā bayn al-Islām wa z-Zandaqa (The Decisive Measure of Discerning Islam from Heresy). A good translation of this book is appended in Sherman Jackson, On the Boundaries of Theological Tolerance in Islam: Abū Ḥāmid al-Ghazālī’s Fayṣal al-Tafriqa bayn al-Islam wa al-zandaqa (Oxford: Oxford University Press, 2002). The early Ghazālī, however, engaged in various polemical attacks esp., on the Shiʿīs (e.g., Faḍāʾiḥ al-Bāṭiniyya) and philosophers (e.g., The Incoherence of the Philosophers).

569 Ghazālī, Mustasfā, 1: 26-28.

570 Ghazālī, Mustasfā, 1: 28-29.
In a later work entitled *Mazāliq al-Uṣūliyyīn (The Pitfalls of the Legal Theorists)*, Ṣanʿānī (d. 1182/1768) provides a detailed critique of the *Uṣūl* discipline. He disproves particularly of the introduction of logic into *Uṣūl* and the import of complex theoretical topics. He refers to the theological concept of “internal speech” (*kalām nafsī*) and the philosophical notions of “assent” (*taṣdīq*) and “conception” (*taṣawwur*), and, echoing Ibn Rushd’s concern in the *Bidāya*, objects to analyses that fail to establish a connection between the rulings and their indicants (*adilla*). The *Bidāya* is primarily a book of *ijtihād* or, to be precise, a book of inter-doctrinal *ijtihād* which cuts across different Schools’ theories and which does not make Mālikī hermeneutics its center of attention. It is an attempt at fulfilling what Ibn Rushd, as a young scholar, conceived of as the most efficient and useful (*al-anfa‘*) method of obtaining new laws from established ones. For this reason, Ibn Rushd emphasises specifically the role of the textual proof as a decisive criterion for establishing preponderance, regardless of the *madhhab’s* theory. He holds an injunction legally binding only if it is sustained by solid proof from the Qurʾān, Sunna and/or *ijmā‘* —he does not consider *qiyyās* and other ways of legal reasoning, such as *istiḥsān* and *maṣlaḥa*, authoritative sources of legal knowledge.

Basically, the idea of connecting *furū‘* with *uṣūl* entails Ibn Rushd’s attempt at reinstating the indispensability of *Uṣūl* and *Fiqh*. His endeavor can be seen, for example, in including a brief introduction to legal theory in the *Bidāya*, which is unusual in books of *Fiqh* and *khilāf*. It is also evident in the way he repeatedly points out the authorities’ inconsistent views, the inconsistency which he considers the main source of jurists’ dispute both within and across the *madhhabs*. For Ibn Rushd, what jurists need so they can discern and demystify their eponyms’ discrepant legal conclusions, and which he strives to found in the *Bidāya*, is a sound system and canon (*qānūn*), not memorizing skills.

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572 Respectively, Ṣanʿānī, *Mazāliq*, 63-68 (logic), 74-78 (theology), 89 (philosophy), and 62 (methodology).


khilāf ought to determine the authorities’ meta-principles of legal analysis to be able to make sense of their conflicting views.\footnote{Ibn Rushd, \textit{Darūrī}, 37.}

The \textit{Bidāya}, for many eminent legal scholars, is not an ordinary work of \textit{Fiqh} and \textit{Khilāf}. It is a systematic book of rules intended to codify and, therefore, enhance the \textit{ijtihād} experience. It may be for this reason that Qarāfī called it by mistake the \textit{Book of Rules} (\textit{Kitāb al-Qawā‘id}).\footnote{Qarāfī, \textit{Furūq}, 3: 419-22.} More importantly, Ibn Juzayy’s (d. 741/1340) \textit{Al-Qawānīn al-Fiqhiyya} seems like an attempt at actualizing a project that Ibn Rushd promised to carry out after finishing the \textit{Bidāya}, but he never did. This project, had it been fulfilled, is a comprehensive, systematic study of the fundamentals of Mālikī hermeneutics. Towards the end of the Manumission chapter, Ibn Rushd reconfirmed the \textit{Bidāya}’s focus on issues that act as principles from which new laws can be derived, and revealed his hope to produce a study of legal theory in conformity with Mālikī law.\footnote{Ibn Rushd, \textit{Bidāya}, 4: 169. His full expression is: “\textit{wa naḥnu narūmu, in shā’ a Allāh, ba’da farāghīnā min hādhā l-kitāb an naḍa’ fi madhhabī Mālik kitābān jāmi’ an li-uṣūlī madhhabīhi wa masā’ ilīhi al-mashhūra allaith tajrī fi madhhabīh majrā l-uṣūl lit-taftrī ‘alayhā.”} Though unrealized, this shows that Ibn Rushd had a commitment to systematize the \textit{madhhab}’s legal tradition to help future scholars engage Mālikī substantive law more effectively.

Although Ibn Juzayy does not mention the \textit{Bidāya} by name, he cites both Ibn Rushd and his grandfather. It seems that he draws on the latter for issues concerning Mālikī \textit{furū‘} and on the former for inter-doctrinal disputes. For example, he returns to the grandfather for a question on which mosque has the highest “spiritual” value, for theoretical details about intention (\textit{niya}), and for the exact time of the Night of Decree (\textit{laylat al-qadr}).\footnote{Ibn Juzayy, \textit{Qawānīn}, 129, 141 and 236, respectively. None of these three issues is mentioned in Ibn Rushd’s \textit{Bidāya}, and that is because they belong to the \textit{furū‘} category.} He refers to the grandson for legal principles in regard certain subjects, such as “\textit{ḥinth}” (breaking oath). Their respective discussions of \textit{ḥinth} is a good example to show concretely the ways in which Ibn Rushd’s inter-doctrinal \textit{uṣūl} approach in the \textit{Bidāya} differs from Ibn Juzayy’s \textit{madhhab}-focused \textit{Qawānīn} which relies on
Mālikī furūʿ. The following pages provide a parallel outline of Ibn Rushd and Ibn Juzayy’s accounts of the issue of hinth and seeks to show the key distinctions between an usūl-based and a furūʿ-based approach.579

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**Ibn Rushd on Oath**

Chapter 1: Types of Oaths and their Rulings

Ibn Rushd identifies permissible, discouraged and proscribed oaths, based on the name sworn on (to swear on the name Allāh is permissible, on his attributes is permissible by some and discouraged by others, but on the names of other Gods is forbidden by some and said it leads to disbelief by others).

Then, he mentions ineffectual oaths (aymān laghwiyya, from the adjective “lāghiya,” invalid and negligible) and effective oaths (munʿaqida, binding).

Finally, he further divides effective oaths into those that may be waived through expiation, and those that may not.

Chapter 2: Remitting Binding Oaths

It focuses on two main topics: (1) conditions of exemptions (istithnāʾ) and (2) ways of expiation (kaffārāt).

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**Ibn Juzayy on Oath**

Chapter 1: Types of Oaths

Ibn Juzayy organizes his discussion in this chapter around seven legal issues. Many of the things he touches on here are included under different rubrics in the Bidāya.

Issue 1: the legal categorizations of oaths (he refers to the three types Ibn Rushd mentions and identifies their established rulings).

Issue 2: on binding oaths, and includes three subtopics: (1) Oaths that can be revoked by exemption or expiation, (2) those which can not be revoked by exemption or expiation, and (3) those which are not binding and so do not need exemption or expiation.

Issue 3: the linguistic formulae of oaths

Issue 4: on the subjects/objects of oath (al-mahlūf ʿalayh).

Issue 5: types of oaths that require expiation and those that do not.

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579 Respectively, Ibn Rushd, Bidāya, 2: 170-183, and Ibn Juzayy, Qawānīn, 277-290. Ibn Juzayy cites Ibn Rushd on p. 283. However, a large part of his discussion on oath repeats things mentioned in the Bidāya.
The discourse on *kaffārāt* is further divided into three sections: (1) the conditions of violating oaths and their rulings, (2) forms of expiation, and (3) the times of granting expiation and its proper measures and amounts.

Ibn Rushd highlights three main issues that are the subject of the jurists’ disagreement.

**Issue 1:** the case of the forgetful or coerced person; i.e., one who forgets to keep an oath or is coerced into breaking.

**Issue 2:** the case of fulfilling only part of the thing sworn; e.g., swearing to eat “bread” and eating only half of a loaf, or swearing not to eat it and eating a small piece of it.

**Issue 3:** the case of an oath statement which means different things for different people; i.e., should an oath be read in light of the meaning intended by the person who swears it, or by its apparent meaning? The problem of customary implication (*dalāla ʿurfiyya*) is addressed under this question.

**Issue 4:** Should oath be read in accordance with the intention of the person who swears it or the person at whom it was directed?

Ibn Rushd, as it is his custom in this book, expands on each point and question about oath across the schools. He first refers to the textual

**Issue 6:** taking an oath to forbid something lawful (food, drinks, clothes, etc.).

**Issue 7:** violating an oath that one takes upon himself or herself

Chapter 2: Binding (and unbinding) Oaths

It looks into various situations where one is forced to break an oath.

Ibn Juzayy highlights four principles in light of which an oath ought to be considered: (1) intention of both the articulator of oath and the person addressed by the oath, (2) when the condition of intention cannot be verified, (3) the customary usage of language, (4) the meaning of an oath statement in accordance with the Arabic language and the law.

Then, he lists 20 legal issues derived from these principles, including the case of a person who: (1) takes an oath not to enter a house and gets in through the roof; (2) not to sell/buy something, not to divorce, not to sell a slave, and hires someone to do it; (3) not to enter a house which later becomes his or her property; (4) not to eat bread, but eats cake and other foods made with flour; (5) not to talk to someone, but writes to him/her or sends a messenger instead.
The third chapter addresses various issues about exemption and expiation, but what is in the first two is enough for the purpose of the explanation below.

Though there seems to be a slight difference between the way Ibn Juzayy and Ibn Rushd structure their discourse of oath, the core of their discussions is more or less the same. Ibn Rushd put forward two chapters: one on the types of oath and their rulings, the other on remitting oaths by way of exemption or expiation. Ibn Juzayy advanced three chapters. The first about the types of oath, the second about binding (and non-binding) oaths, the third about the various conditions of exemption and ways of expiation when violating an oath. However, it is at the end of their second chapters that we see a striking difference. Concluding his discussion of istithnāʾ and kaffārāt in this chapter, Ibn Rushd remarked that jurists have disagreed on many issues, most of which can be grouped with the four he outlined, for these serve as principles (uṣūl) from which rulings about other derivative questions can be inferred. Ibn Rushd, and this where he differs sharply from Ibn Juzayy, showed no interest in these derivative questions. On the current topic of ḥinth, he only passingly referred to a dispute on the rule of someone who takes an oath to not eat heads and eats fish heads, and another on a person who takes oath to not eat meat and eats fat. Generally, Ibn Rushd’s reference to furūʿ cases throughout the Bidāya seems, for the most part, incidental to his explanation of the process of deriving new laws effectively from the four primary issues of oath. Ibn Juzayy, on the other hand, focuses on Uṣūl with respect to Mālikī law, which maybe the main reason that he had to delve into furūʿ questions. Whereas Ibn Rushd refers in passing to two furūʿ issues of oath only, Ibn Juzayy mentions and elaborates on twenty Mālikī furūʿ cases.

580 At stake in the first question is the customary usage of the expression “heads” (ruʾūṣ, pl., of raʾs) in the Arabic language. An oath statement such as, “by God, I will never eat heads,” entails in Arab speech the heads of animal only, not fish heads. For Ibn Rushd, the bulk of jurists’ disputes on many secondary questions of oath, including this one, is the result of their different interpretations of the semantic value of the oath’s utterance; i.e., is it general or particular, apparent or customary, etc.?
Ibn Rushd’s focus on *uṣūl* and inclination to simplify the learning method through urging concision in writing are not specific to his legal work. In the closing statement of the *Kulliyāt fī ṭ-Ṭibb* (*Generalities in Medicine*), for example, Ibn Rushd exhibited concern with similar issues that have been discussed above as part of his intellectual reform endeavor. Namely, he asserts that he developed his account of the treatment of the different kinds of illness in the most succinct way. Also, he maintains that he deliberately avoided including a discussion of the cures of the symptoms of illnesses case by case (i.e., the particularities of medicine) —like Ibn Rushd promised in the *Bidāya* to designate a separate book to Mālikī law, he promised in the *Kulliyāt* to write on the particularities of medicine, a promise that also was never fulfilled.

Finally, I should reemphasize that *Bidāyat al-Mujtahid* has almost nothing to do with the analytic methods of philosophy. It is a work written in compliance with established ways of legal synthesis. Throughout the *Bidāya*, Ibn Rushd wears the garb of a skillful jurist and legal scholar who lends no signs that he is at the same time a philosopher —which may be the reason why some scholars doubted his authorship of it. Whatever considered “rationalistic” about the *Bidāya* simply means a way of legal reasoning that admits analogy, *istiḥsān* and *istiṣlāḥ* methods. Yet, at the same time, this does not mean that the *Bidāya*, or, for this matter, Ibn Rushd’s legal thinking, is entirely detached from philosophy and its arguments. As I hope to establish in the next section, despite that the *Bidāya*’s method appears to be “philosophy-free,” the book nonetheless contains philosophical views that Ibn Rushd believed to be a common ground for both *falsafa* and *sharīʿa*.

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3. Morality at the Intersection of the *Sharīʿa* and *Falsafa*

The Moral Foundations of the *Sharīʿa*

A brief intervention is due first on the meaning of the word “*sharīʿa,*” which Ibn Rushd uses in juxtaposition with philosophy (*falsafa*). *Sharīʿa* has been translated as “divine law,” “revealed law,” “Islamic law,” or simply “the Law,” definite and capitalized. Quite often, and for obvious reasons, the term “*sharīʿa*” gets confused with “*fiqh,*” which is also rendered as “Islamic law.” The two, however, are not the same. Without delving into any lexical and etymological detail, “*sharīʿa*” (and “*shar*”) simply means “the way.” This way is the way of life and code of conduct prescribed through the Qur’ān and elaborated in the Prophet’s Sunna. This code binds all Muslims across time and space. Binding by this code, according to the Islamic doctrine, promises its adherents deliverance after death.

*Fiqh,* on the other hand, is the jurisprudence developed to assist Muslims to perform the *Sharīʿa,* preferably but not necessarily, to the highest measures of perfection. It is the instrument by which the divine code of conduct, the *sharīʿa,* is recognized and its details are expanded. Unlike the *sharīʿa,* and this is a crucial point, *Fiqh* is considered a pure human product —though remarkably founded on the *Sharīʿa* and functions within its perimeters. *Fiqh,* for better or worse, is one way the interconnectedness of the legal and moral in Islam has been self-maintained and regenerated. Therefore, when Ibn Rushd uses “*sharīʿa*,” what he intends is more than just a legal system. What he has in mind is a comprehensive way of life founded on a revelation-based code of conduct. *Fiqh,* the law, is its main vehicle and sustainer.

Law and morality in Islam are intriguingly intertwined through the *Fiqh* process. Their reciprocal relation is attested in the complex nature and structure of the division of the legal rulings (*aḥkām*) into judicial, positional and moral. The last type is of particular importance to the current

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discussion.\textsuperscript{584} Moral-based rulings (\textit{ahlām taklīfīyya}) are determined through a fivefold judicial scale. The function of this scale is, at the same time, categorizing peoples’ actions and assessing their moral conduct. Understood as such, any legal obligation is also a moral obligation —since abiding by a divine command is doing that which is right/good, and avoiding that which wrong/evil. The five categorizations of legal/moral action include: the obligatory, prohibited, commended, discouraged, and permitted.

The obligatory (\textit{wājib}/\textit{farḍ}) refers to irremissible actions that are required of all Muslims, regardless of the degree to which they might consider themselves pious or committed to the Islamic ethical project (e.g., the five daily prayers, Ramadan fasting, giving \textit{zakāt}, etc.). The fulfillment of obligatory actions brings reward and their deliberate denial may impose punishment.

The prohibited (\textit{mahzūr}/\textit{ḥarām}) refer to reprehensible actions which must be avoided by Muslims (e.g., stealing, killing, adultery, etc.). Committing a prohibited action brings punishment, whereas refraining from it brings reward in this life and the next. Obligatory and prohibited actions have been described sometimes as “identity markers.” Subscription to the obligatory and denial of the prohibited mark the individual’s belonging to the Muslim community, because such actions can bring the individual closer from the rest or set him/her apart from them. The issue of apostasy (\textit{zandaqa}) is discussed at this stage.

The commended (\textit{mandūb}, \textit{mustaḥabb}, or \textit{sunan}) are actions that are conformable with the overall ethical spirit of the \textit{shari'ā}. Although Muslims are urged to perform commendable actions, they are not obliged to do so. Fulfilling a commended action brings reward, but leaving it inflicts no penalty. For example, the documentation of transactions and loans —despite the expression of Q 2:282, “O you who believe! When you contract a debt for a fixed term, record it in writing”— is understood as a commendation, not obligation.

\textsuperscript{584} I specifically mean the three principal types of legal injunctions or rulings: judicial (\textit{ḥukm al-qādī}), positional or situational (\textit{ḥukm waḍʿī}), and moral-based rulings (\textit{ḥukm taklīfī}). \textit{Ḥukm waḍʿī} and \textit{taklīfī} as sometimes called “determination of validity” and “determination of moral status,” respectively (e.g., Reinhart).
The discouraged (makrūh) are abominable actions that may be inevitable to commit, but preferred to be avoided. Performing an abominable action brings no punishment. Denying it brings rewards. A well-known example is the tradition, “the most abominable of permissible things for God is divorce” (inna abghaḍa l-ḥalāl ‘ind Allāh at-ṭalāq). Although this ḥadīth is classified weak (daʿīf) ―lower in rank than sound (ṣaḥīḥ) and good (ḥasan), and higher than forged (mawḍūʿ)― there is consensus among the jurists that divorce is, in fact, a morally discouraged action.

Finally, the permitted (mubāḥ) refers to action allowed by means of their essence; however, the law has remained indifferent towards them. In other words, a permitted action in as much as it is permitted in and of itself brings neither reward nor punishment. However, a permitted action in certain circumstances may be prohibited or required. For example, eating is intrinsically permitted. But, when one’s life depends on it, it becomes obligatory (this is why certain ascetic practices of fasting are prohibited in Islam). By the same token, eating desert is permitted, but if it will lead to missing the Friday prayer in the mosque, it becomes prohibited.

Ideally, every action a Muslim individual performs ought to conform with the dictates of the divine norms. Abiding by the sharīʿa simply means to lead a pious, virtuous life in God’s way. This way is the way to deliverance in the afterlife. Now, the question is: how and to what extent humans qua humans are obliged to respond to this moral knowledge in accordance with the Islamic tradition? In other words, what is the structure and scope of the force of obligation by and through which a Muslim is compelled to respond to God’s moral command? Two approaches, at least, have been developed in reaction to this question. The first emphasizes the element of “mental capacity” (ahliyya) as an external key criterion with the acquisition of which individuals become compelled to pursue a moral life in agreement with the sharīʿa. The standard theological argument is that God distinguished humans from all other animals by empowering them with reason (ʿaql). Therefore, each sane person who attains the age of puberty is compelled by the law and, hence, becomes fully responsible for his or her actions. The faculty of reason, sane and running one, is a principal factor in determining whether one is obliged to respond to God’s moral knowledge or not. Those who
acquire it are obliged. Those who do not, including the insane and non-human animals, are not. To be a rational being is, by necessity, to be a moral being.

The second approach focuses on injunction (taklīf; obligation and charge) as an internal measure which makes all Muslims bound by God’s moral knowledge. Unlike the first approach, it is not the power of “reason” that confines individuals to embrace moral law. It is the “will” of the Lawgiver’s (shārī’). To put it differently, just by being God’s creation and because He had willed so, Muslims ought to submit to His moral knowledge as communicated in the Qurʾān and elaborated in the Prophet’s Sunna. However, as Reinhart has rightly observed, although both approaches (ahliyya and taklīf) emerged separately, there is a general understanding today that what compels individuals’ obligation towards revealed law is both mental capacity and God’s injunction.585

Moral Excellence as the Highest Objective of the Sharīʿa and Falsafa

Like his predecessors, Kindī, Farābī and Ibn Sīnā, Ibn Rushd, too, embraces the view that falsafa and sharīʿa (broadly and not exclusively Islamic sharīʿa) share in the same goal: to help humans gain moral excellence and, hence, happiness after death. Ibn Rushd, as far it appears in several of his works, was not concerned about entertaining the idea that the Qurʾān is God’s revelation and the practice of philosophy is commanded by God. The challenge for him was finding a way to reconcile the conveyed truths and seeming conflicts between falsafa and sharīʿa. Establishing harmony between the two sources of knowledge was his goal in Tahāfiṭ, Faṣl and Kashf. Even the Bidāya echoes aspects of this attempt as will be seen shortly.

Of crucial significance for Ibn Rushd is that the truth expressed by falsafa and sharīʿa is one intrinsically. Simply put, philosophy investigates key questions about the nature of God, the fate of the body and soul after death, the nature of the afterlife, as well as other topics that have

585 Reinhart, “Islamic Law as Islamic Ethics,” 189.
been a site of contention between the philosophers and theologians (as defenders of religion). Ibn Rushd holds in *Faṣl* and elsewhere that the conclusions Muslim peripatetic philosophers reached with respect to these matters are not different from the teachings of revealed law. Despite that *falsafa* and *sharīʿa* communicate these truths differently, it is the same truth at the end. What is especially at stake, and this is key to Ibn Rushd’s thesis, is that *falsafa*’s demonstrative method of instruction should not be conflated with the poetical, rhetorical and dialectical ways used in the revelation. Each method must be employed to address an appropriate audience. Any effort to combine *falsafa* and *sharīʿa*’s ways —Ibn Rushd critiqued openly Ghazālī for having done so in *Tahāfut*— will have serious implications on people’s reception of both sources of knowledge.

Ibn Rushd’s concluding remarks in *Faṣl al-Maqāl* captures well this notion of the unity of the truth communicated by *falsafa* and *sharīʿa* and gives a good idea of his conception of the relation of *falsafa* and *sharīʿa*. He states:

> Philosophy is the companion and milk-sister of revealed law (*ṣāḥibat ash-sharīʿa wa l-ukht ar-raḍīʿa*). The harm caused to it from those affiliated with it is more intense. [However,] despite the enmity, animosity and conflict created between them, they are associates by nature and companions by disposition. It [*sharīʿa*] has also been harmed by several of its reckless friends who associate themselves with it. These are the schisms within it. May God, with His grace and mercy, help and guide them all to His love, unite their hearts around his devoutness, and free them from hatred.

What Ibn Rushd wants his readers to understand by the end of his exposition of the relation of *falsafa* and *sharīʿa* in *Faṣl al-Maqāl* is that the two are in essence not different from one another. The *sharīʿa* instructs about the truth, and philosophy searches for the same truth. At the end, the truth attained through demonstrative philosophy does not contradict the revelation’s truth, since “truth does not contradict truth, but agrees with it and attests to it (*al-ḥaqq lā yuḍadd al-ḥaqq, bal yuwāfiquh wa yashhadu lah*).

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of knowledge and, as he also describes them, “sciences of truth” (ʿulūm al-haqq). And the conflict between them is primarily the result of a lack of understanding the nature of falsafa on the part of the theologians and jurists, whom Ibn Rushd holds culpable for turning the public against falsafa and its adherents.

Ibn Rushd showed close interest in justifying philosophy to his coreligionists and explain its role and usefulness. In addition to works where he covers this issue directly, esp., Faṣl, Kashf and Tahāfut, this issue seems to have haunted him in other writings. In his conclusion to one of his last works, the commentary on Galen’s Book of Temperaments, Ibn Rushd argues that falsafa is a requisite for acquiring medicine. He quotes Galen’s statement that “the virtuous physician is necessarily a philosopher” (at-ṭabīb al-fāḍil huwa faylasūf ḍarūratan). Ibn Rushd stresses especially the meaning of faylasūf as devotee of the sciences of truth (muḥibb fī ʿulūm al-haqq). Then, he appealed to future physicians and philosophers to communicate this particular meaning, (the philosopher as devotee of truth) to unbiased (munṣif) listeners, and hoped this would change the hideous reputation of falsafa ascribed to it by people affiliated with the religious sciences (qawm intasabū ilā ʿilm ash-sharʿ; i.e., jurists and theologians). Ibn Rushd did not hesitate to use harsh language to blame them for misinforming the public about the nature of falsafa, and so his final word were: “shame on them for what the public has learned.”

Modern scholars sometimes define the theory of the unity of truth as an advanced logical method by which Muslim philosophers strived to assert the continuity of exercising philosophy. George Hourani, for example, embraced this view in his translation of Faṣl and other articles. For Majid Fakhry, Ibn Rushd, as a “good Muslim,” showed full adherence to the doctrine of the


589 Ibn Rushd, Talkḥiṣāt Ibn Rushd li-Jālīnūs, 94. The original expression reads “w a hum maʿarrūn mimmā taʾrifuh al-ʿāmma.” The word “maʿarra” entails shame and disgrace.

infallibility of the Qur’an, and, as a “good philosopher,” was equally devoted to the ideal of the
unity of truth. To harmonize falsafa and sharī’ā, Fakhry adds, Ibn Rushd returned to allegorical
interpretation (ta’wil) and stressed the parity of philosophy and scripture in regard their means of
instruction.\(^{591}\) Richard Taylor rightly returned the theory of the unity of truth to Aristotle’s Prior
Analytics, and pointed out that Ibn Rushd used it not only to legitimize and allow philosophy a
niche among the dominant Islamic sciences, but also to show the importance of Aristotle’s
demonstrative method in grasping the reality of God, his creation and his revealed law.\(^{592}\)

More interestingly, however, the theory of the unity of truth (called sometimes “wahdat al-
haqq” by Arab scholars) was invoked not only by philosophers to reconcile falsafa with the
sharī’ā. It also was appealed to by non-philosophers within broader contexts to justify the
phenomenon of diversity and pluralism. For example, Baṭalyawsī says in the Inṣāf that “peoples’
difference about truth does not necessitate that the truth in itself is different (ikhtilāf an-nās fī l-
haqq lā yūjib ikhtilāf al-ḥaqq fī nafsih).”\(^{593}\) The “truth” which Baṭalyawsī intends, here, is the truth
of the afterlife with particular reference to Q 16:27-28, “And they swear by Allah their most
binding oaths that Allah will not raise up those who die. Nay, but it is a promise (binding) upon
Him in truth: but most of mankind know not (38). [They must be raised up] that He may explain
for them the Truth of that wherein they differ, and that those who disbelieve know that they were
liars (39).” The key expression in this verse is “that He may explain for them the Truth of that
wherein they differ.” For Baṭalyawsī, this is a clear acknowledgment from God that people will
differ about the same truth of resurrection and the afterlife; yet, this truth is one in and of itself and
free from contradiction. The truth is one, although there are different ways of describing it.

Like falsafa, the sharī’ā is a system comprised of practical and theoretical knowledge. Its
utmost purpose, both at its theoretical or practical levels, is to help people attain happiness in this


\(^{593}\) Baṭalyawsī, Inṣāf, 27.
life and the next. Happiness is gained through acquiring the moral qualities of virtue and piety that can be derived from divine moral knowledge. On this issue, Ibn Rushd reasserts:

The purpose of the *sharīʿa* is to instruct about true knowledge and true practice. True knowledge is knowing God (may He be blessed and exalted) and all existents in and of themselves, particularly the noble ones, and knowing about happiness and misery in the afterlife. True practice is abiding by actions which bring happiness and avoiding actions which bring misery. The knowledge of these actions is called practical science, and it comprises two divisions. The first is outward physical actions. The knowledge of these is called jurisprudence. The second division is psychological actions, such as gratitude, patience and other morals which the law enjoined or forbade. Their knowledge is called asceticism and knowledge of the afterlife. This is what Abū Ḥāmid leaned toward in his book [i.e., *Iḥyāʾ*]. Since people neglected this genre [i.e., knowledge of the afterlife] and concentrated on the other [i.e., *fiqh*], and since it is this genre that earns happiness, he called his book: *Iḥyāʾ ʿUlūm ad-Dīn* (*Revival of the Religion Sciences)*.594

Here, Ibn Rushd reminds us that the goal of the *sharīʿa* (*maqṣūd ash-sharʿ*) is to teach about true knowledge (*al-ʿilm al-haqq*) and true practice (*al-ʿamal al-haqq*). True knowledge is to learn with certainty about God and all existents *qua* existents (*maʿrifat Allāh wa sāʾir al-mawjūdāt ʿalā māhiya ʿalayh*), and about misery and happiness in the afterlife (*as-saʿāda l-ukhrawiyya wa sh-shaqāʾ al-ukhrawiyya*). True practice is to pursue actions that bring happiness and avoid those that bring misery. The word which Ibn Rushd uses is “*imtithāl*”; i.e., to act in accordance with the *sharīʿa*’s prescriptions, either by fulfilling or avoiding certain actions. Jurisprudence operates at the level of practical science (i.e., *ʿilm ʿamalī*), for its main concern is people’s actions. Ibn Rushd further divides human beings’ actions into physical (*badaniyya*) and psychological (*nafsāniyya*). Whereas the physical actions are apparent (*afʿāl ẓāhira*) and involve bodies, psychological actions are inner and involve the soul. Later, he adds that in order to accomplish its goal of instructing about true knowledge and practice, the *sharīʿa* lends itself in a way that “incorporates all different

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ways of bringing about assent (taṣdīq) and conception (taṣawwur). With this epistemological approach, Ibn Rushd does not only accentuate the harmony of sharīʿa and falsafā, but also explains and justifies why scriptural interpretation (taʾwīl) must be a field of demonstrative philosophy.

Generally, three expressions in the above quotation require attention: happiness (saʿāda), knowledge about God (maʿrifat Allāh) and the high objective of revealed law (maqṣūd ash-sharʿ). Happiness and misery (shaqāʾ) are key philosophical terms in Ibn Rushd’s discussion of the relation of sharīʿa and falsafā. It is tempting to suggest that he uses them as equivalent to salvation (najāt/ʿitq) and punishment (ʿiqāb/ʿadhāb) commonly cited in theology. Even in a strict legal text such as the Bidāya, Ibn Rushd uses the term “saʿāda.” Perhaps, the reason behind his word choice is the fact that theology-oriented concepts are entangled in the Qurʾānic descriptions of hellfire and paradise, which, as far as the Muslim philosophical argument goes, are imageries communicated to persuade the multitude who lack the capacity to comprehend the true nature of these elements. Also, since Ibn Rushd and most peripatetic philosophers took issue with the idea of bodily resurrection, he seems to find refuge in the terms of “happiness” and “misery” which reflect a state of the soul, not the body.

The true meaning of the expression “maʿrifat Allāh” is encrypted in Ibn Rushd’s passing reference to Ghazālī’s Iḥyāʾ at the end of the passage quoted above. Why Ghazālī and why the Iḥyāʾ? A quick answer is that Ghazālī’s work was by that time widely circulated and influential and simply could not be overlooked. The measured answer can be derived from a fatwa issued

595 Ibid, 55. “Conception” or “concept formation” entails a cognitive action by which complex concepts are formed and apprehended wholly, either as the thing itself or its likeness. Assent is a cognitive act by which the formed concepts are assessed for truthfulness or falsity, and it is obtained differently by different people based on their natures. For the use of taṣdīq and taṣawwur in Islamic philosophy, see, esp., Deborah Black, “Certitude, Justification, and the Principles of Knowledge in Avicenna’s Epistemology,” Interpreting Avicenna: Critical Essays, ed. Peter Adamson (Cambridge: Cambridge University Press, 2013), 20-142; and “Knowledge (ʿilm) and Certitude (yaqīn) in al-Fārābī’s Epistemology,” Arabic Sciences and Philosophy, 16-1 (2006): 11–46.

596 Ghazālī’s influence on Islamic Iberia and the Maghrib has been the subject of investigation over the past few years. His philosophical theology (imbued with mystical teachings) was received with great skepticism (and animosity in many instances) by Mālikī scholars to the extent that many of his books, including the Iḥyāʾ, were ordered to be burned in public. See, for more on this event, Urvoy, Pensers d’al-Andalus, esp., 167-71. Also, see Griffel’s study of two influential students of Ghazālī, Abū Bakr Ibn a-ʿArabī (d. 543/1148) and Ibn Tūmart, the spiritual founder
by Ibn Rushd’s grandfather several decades before the composition of the Bidāya.\footnote{Fatwā no. 642 in, Muḥammad Ibn Rushd (d. 520/1126), Fatāwā Ibn Rushd, 3: 1624-29.} The fatwa is a response to a query about Ghazālī’s view in the Iḥyā’ that those who “know about” God (al-ʿārifīn bi-Allāh) rank higher than those who “know God’s laws” (al-ʿārifīn bi-aḥkām Allāh), i.e., jurists and legal scholars. The phrase “maʿrifat Allāh,” in the context of Muḥammad Ibn Rushd, seems to bear a sense of gnosis. It is not clear if he upholds the mystics’ concept of maʿrifā and ʿirfān. However, he strongly defends Ghazālī’s view that “knowledge about” God has more value than Furū’ and Uṣūl. Also, the expressions “ʿārifīn bi-Allāh” and “awliyāʾ Allah” (close associates God) which he uses are Şūfī terms. Abū l-Walīd Ibn Rushd agrees with his grandfather that knowing about God is more valuable than Fiqh and Uṣūl. However, he disagrees with him in that he describes this type of knowledge (maʿrifat Allāh) as a rational exercise, makes it attainable by the philosophers only, and refutes the view that Şūfis can possess intuitive knowledge of spiritual truths.\footnote{For the resistance of Sūfism in Andalus, see, e.g., Maribel Fierro, “Opposition to Sufism in Al-Andalus,” Islamic Mysticism Contested: Thirteen Centuries of Controversies and Polemics, eds. Frederick de Jong and Bernd Radtke (Leiden: Brill, 1999), 174-206. For a history of the concept of “knowledge” in Islamic intellectual history, see, Franz Rosenthal, Knowledge Triumphant: The Concept of Knowledge in Medieval Islam. (Leiden and Boston: Brill, 2007), esp., 129-42 about humans’ knowledge of God (maʿrifat Allāh).}

In this fatwā, the petitioner inquires particularly if this division is rightful, since it has also been confirmed in a tradition that what raises peoples’ rank over others’ in God’s “eye” is their actions (i.e., not knowledge). At stake, here, is a longstanding debate about which kind of knowledge is of higher value and status: theoretical or practical —seeing the former as resulting in no practice, whereas the latter is necessarily. Muḥammad Ibn Rushd defends Ghazālī’s position and hold categorically that those with inner knowledge of God and His attributes possess a higher status than the jurists and legal scholars (ahl al-furū’ wa l-uṣūl). This is for two main reasons. First, because the subject matter of the former type of knowledge is the noblest of all things; that is God. Second, the knowledge about God perfects its bearer’s morality. As Muḥammad Ibn Rushd puts
it, “its fruits are the best fruits” (thimarahu afḍal ath-thimār); the actions that result from this type of knowledge are the best actions.\textsuperscript{599} He adds that knowing the attributes of God, by necessity, endows the ‘ārifīn and awliyā’ (God’s close associates) with the best of virtue and purifies their souls from evil. Every time they possess true knowledge about a God’s attribute, they perfect a corresponding human quality or group of qualities. For example, being cognizant of the scope of God’s mercy and the severity of his punishment results in sincere devoutness and piety and makes of one a better person. Unlike the knowledge of the ‘ārifīn bi-Allāh, the knowledge of Fiqh and Uṣūl does not necessarily bring about virtue. The proof is, in the same manner Ibn Rushd the grandson also reiterated in some of his works, several jurists and legal scholars had engaged in sinful practices far from the prescribed way of the sharī’a.

Now, we come to third key expression in the excerpt quoted above, “maqṣūd ash-shar’.” By presenting Ghazālī’s Iḥyāʾ as a work of ethics, Ibn Rushd stresses his conviction that the scope of the sharī’a goes beyond its function as a judicial system. The true goal of the sharī’a is moral primarily; that is to teach the virtues necessary for attaining happiness in the afterlife. The law is there to help people obtain this end, and it is not an end in itself. It is important to understand, here, that what Ibn Rushd means by “maqṣūd ash-shar”’ is not “maqāṣid ash-sharī’a” —the model of practical legal reasoning established by Shāṭibī (d. 790/1388) and regained popularity among Muslim modern legal reformists.\textsuperscript{600} It is indisputable that Ibn Rushd has made an effort to ground the legal injunctions in their practical purpose. We have seen how a key feature of his method of legal construction is his endeavor to give a rational explanation (taʿlīl) for established rulings, even those previously deemed “inexplicable” ritual-based rulings (aḥkām taʿabudiyya, as different from

\textsuperscript{599} Muhammad Ibn Rushd, Fatāwā, 3: 1625.

ahkām taʿlīliyya). At the same time, however, Ibn Rushd is neither the first to have done so, nor did he lay the foundation of the theory of Maqāṣid as some scholars have argued.  

Although the concept of maqṣūd ash-sharʿ takes up a large space in Faṣl and Kashf, it is in the Bidāya, particularly the concluding two paragraphs, that it gains an interesting place. In this conclusion, Ibn Rushd affirms that there are two categories of injunctions. The first addresses issues adjudicated by judges—the bulk of issues undertaken in the Bidāya belongs to this category. The second covers rules not adjudicated by judges, such as returning a greeting, blessing a person who sneezed, and other commended (mandūb) rules of conduct—these rules are often talked about as ādāb. By commenting on the unadjudicated type of rules, Ibn Rushd did not invent a new discussion. It is customary in the Mālikī tradition that books of substantive law close with a chapter called “al-Jāmiʾ,” where the author covers briefly and broadly other topics assumed to be relevant to the law. Two primary observations can be made in this regard. The first is that the Jāmiʾ genre may be distinctive of Mālikī furūʿ—at least, insofar as it is a standard chapter in books of Mālikī furūʿ. The second is that in a Jāmiʾ chapter, the author often goes beyond unadjudicated rules to discuss a range of other topics. For example, one third of the Jāmiʾ chapter in Ibn Juzayy’s the Qawānīn is a biographical account of the Prophet and his family, and a survey of Muslim caliphs from the Ummayads to the Almohads. The rest covers rules of conduct with respect to different situations, such as greeting, yawning, eating and drinking. The Bayān of Muḥammad Ibn Rushd includes one of the most comprehensive Jāmiʾ chapters (two volumes). It touches on a range of

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602 Certainly, Ibn Rushd’s discussion of the purpose of revealed law takes up a small space at the end of the Bidāya. Nevertheless, one must not forget that the latter is a practical legal work, not a book of legal theory where it is more appropriate to see such issues discussed in length—in the manner, e.g., Shāṭibī does in the Muwāfaqāt.
603 Ibn Rushd calls these rules “sunan karāmiyya,” i.e., established rules of practices rooted in moral excellence and the best of good conduct (I understand “karāmiyya” in the context of “makārim al-akhlaq”). Ibn Rushd, Bidāya, 2: 258. I will be translating the term “sunan” (in its current moral and ethical context) as rules and practices.
604 E.g., Ibn Juzayy, Qawānīn, 600-64, and Muḥammad Ibn Rushd, Bayān, vols. 17 and 18. We find this type of chapters also in the books of non-Andalusian Mālikī jurists, such as the Tafrīʾ by Ibn al-Jallāb of Basra (d. 378/988). Abū l-Qāsim ʿUbayd Allāh b. al-Ḥasan Ibn al-Jallāb, At-Tafrīʾ fi Fiqh al-Imām Mālik Ibn Anas, ed. Kasrawī Ḥasan (Beirut: Dār al-Kutub al-ʿIlmiyya, 2007), 2: 408-420.
non-ethical (e.g., history, language, Qurʾān exegesis, etc.) and ethical issues, including interesting cases such as trading in the Bible and Torah by Muslims, and the burning of “controversial” books.

By closing the *Bidāya* with a statement on the moral foundation of the *sharīʿa*, Ibn Rushd presents Islamic law in its full circle. After beginning with a brief discussion of legal theoretical issues relevant to his methodology of legal pluralism, the *Bidāya* ends with what several jurists by his age had ignored. It is the fact that the law is a mere vehicle for the accomplishment of a higher end: grounding moral excellence. Ibn Rushd strives to remind of and perhaps shifts attention from ḥukm to ḥikma, from being totally preoccupied with God’s law to the wisdom behind its design and dictation. With this conclusion, he takes pains at exhibiting the dependency of Fiqh on Uṣūl; yet, even more importantly, of the value of reading the *sharīʿa* in the light of its ethical goals. With this conclusion, Ibn Rushd seeks to reequip the legal practice with the pragmatic fluidity it had lost after the fixation of the schools’ legal hermeneutics and restore the original purpose of the *sharīʿa*.

Unlike his predecessors, and perhaps in his spirit of intellectual reform, Ibn Rushd saw that what is most appropriate and worthy of coverage under the *Jāmiʿ* chapter are rules of good conduct only —since moral excellence is the highest purpose of the *sharīʿa*. For this reason, the *Bidāya*’s conclusion makes no mention of the prophet’s battles and miracles or any non-ethical topics which Mālikī scholars had been including in their books of Furūʿ. The *Bidāya*’s conclusion functions as a moral measure for substantive law; a scale through which the divisions of Furūʿ are classified by way of their ascription to specific generic virtues. Since for Ibn Rushd, the goal of all established rules is psychological virtues (faḍāʾil nafsāniyya) —acquired by and impressed in the soul— he determines four main types of virtues: abstinence, justice, generosity and courage.\footnote{\textit{Ibn Rushd, Bidāya,} 2: 258.}

Abstinence (ʿiffa) basically refers to the rules of refraining from indulging an appetite. Ibn Rushd further divides the domain of the virtue of ʿiffa into rules of eating and drinking, and rules of marital affairs. Justice (ʿadl) entails the reciprocal processes of ensuring justice and preventing injustice in regard people’s wealth and bodies. Islamic retaliation laws, corporal penalties and war
laws, for example, are considered by Ibn Rushd a means for the attainment and sustenance of ʿadl. Generosity (ṣakhāʾ) refers to rules that instill the habits of generousness and deters covetousness (bukhl). The laws of alms giving (zakāt) and charity (ṣadaqāt) concern this virtue. Ibn Rushd does not elaborate on the virtue of courage (shajāʾa) in the Bidāya. To these four, he adds another virtue, governance (riyāsa). The latter is refined through rules of sociability and inhabiting the city (sunan al-ijtimāʿ).

Ibn Rushd holds that such rules are essential for preserving one’s practical and theoretical virtues. He insists that it is for this reason that the Imams and those in charge of the domain of religious affairs must acquire them. In what seems an indirect reference to jurists’ disagreements and the theologians’ attacks on the philosophers, Ibn Rushd considers part of the most important practices of ijtimaʿ actions of love (maḥabba) in regard religious matters, and that the ill-natured believer who lacks this virtue is more susceptible to raise hate (baghdā) in such matters. With this conclusion to the Bidāya, Ibn Rushd seems to stress the connection between Islamic law and its moral foundation and that, after all, ethics rank higher than jurisprudence and ritual worship since, in his view, the latter two ought to be seen as means aimed to help people cultivate virtue, not ends in themselves.

4. Revealed Law, Ethics and Politics in Ibn Rushd’s Political Writings

The root of Ibn Rushd’s views of the moral foundation and function of the sharīʿa at the end of the Bidāya, insofar its language reveals, is Greek political philosophy. His discussion of the role of virtue in social life is developed particularly in his commentaries on Plato’s Republic and on Aristotle’s Nicomachean Ethics. It is tempting, nonetheless, to think that falsafa was not his only

606 Ibn Rushd, Bidāya, 2: 258. In fact, this last remark rings the bill about Ibn Rushd’s invocation at the end of Faṣl al-Maqāl: “May God with His grace and mercy help and guide them all [philosophers, theologians and jurists] to His love, unite their hearts around his devoutness, and free them from hatred.” See, Ibn Rushd, Faṣl, 67.

607 See Appendix Four for a translation of Ibn Rushd’s conclusion to the Bidāya.
source of knowledge about such matters. Not only the Qurʾān talks extensively on happiness and misery and insists on developing virtues of justice, generosity, chastity and courage, but also, many of these virtues were key in Arabs’ life before Islam and were at the centre of attention in their poetry and the literature to develop around it later.\(^\text{608}\) Given his upbringing and early training in the literary and religious sciences, Ibn Rushd most likely was aware of the importance of these virtues in other disciplines —in *kalām* and in the Ṣūfī tradition since, as seen earlier, he refers to Ghazālī’s *Iḥyāʾ*’s emphasis on virtue.

What Ibn Rushd might have found more appealing about falsafa’s ethical discourse is its universality and ability to examine humans through a panoptic lens that is more embracing than *Fiqh* and *Uṣūl*. *Falsafa* helped Ibn Rushd situate humans within the large picture and equipped him with the tools he needed to explore their purpose of existence, both teleologically and cosmologically. Like other theologians and philosophers before him, Ibn Rushd believed that humans are part of a bigger design that encompasses physical and non-physical worlds. He also believed that the highest end of human beings is gaining what revelation calls salvation (*najāt* and *ʿitq*) and he calls “eternal happiness” (*saʿāda ukhrawiyya*).\(^\text{609}\) The role of falsafa and sharīʿa, for him, lies primarily in helping people achieve this goal.

The most important source of Ibn Rushd’s views of the political role of the sharīʿa is his commentary on Plato’s *Republic*.\(^\text{610}\) By examining this work, it will be observed that Ibn Rushd had hope for Plato’s virtuous city. He believed that such city can be realized through a political

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\(^\text{609}\) I use the expression “eternal happiness” (happiness after death) on few occasions in this chapter; however, I do not hold that Ibn Rushd believed in personal immortality. Ibn Rushd uses the expressions “*saʿāda ukhrawiyya*” and its antonym “*shaqāʾ ukhrawī*” (eternal misery) at the end of *Faṣl* within the context of his discussion of true knowledge being the knowledge about God, existing things as they are in themselves, and eternal happiness and eternal misery. See Ibn Rushd, *Faṣl*, 54. I elaborate on this passage bellow.

\(^\text{610}\) Anawati and Badawi argue that Ibn Rushd completed his commentary on Plato’s *Republic* (called *Jawāmiʿ Siyāsat Aflāṭūn* by Badawi, and *Talkhīṣ Jumhūriyyat Aflāṭūn* by Anawati) in 590/1194.
reform which focuses on individuals’ virtues. He also believed that the *sharīʿa*, more than *falsafa* or any other source of knowledge, is capable of getting better results in this respect—because it can address all kinds of people despite their natures and rational capacities. In this work, as in other commentaries, Ibn Rushd is not a passive commentator on Greek political thought. As will be shown, he is deeply immersed in the concerns of his own time and place. In fact, and this is what makes this commentary important for the present chapter, a substantial part of it is an effort to reread the *sharīʿa*’s place within the Islamic system of governance. Ibn Rushd does not hesitate to voice his opinion or reflect on current practices of polity through the lens of Plato’s *Republic*. He reached out to Muslim history to illustrate Plato’s theory of political change and the degradation of regimes—i.e., Aristocracy, Timocracy, Oligarchy, Democracy, and Tyranny.

Plato distinguishes two main kinds of regimes and cities: the virtuous (i.e., Aristocracy) and the non-virtuous or imperfect. He further divides the latter type into four types: Timocracy, Oligarchy, Democracy and Tyranny. The political features of each regime are indicative of the psychological traits of their respective rulers. Societies fall into each type of regime successively as the virtues of their rules and citizens decline. Aristocracy (the virtuous city) is a just society ruled by the wisdom-loving ruler (i.e., the philosopher-king). Timocracy is dominated by a class of warriors who seek honor (ʿiffa, since it is the term Ibn Rushd uses in the *Bidāya* and the word used in the Arabic translation of Plato’s *Republic*). As this class grows desire for wealth, the regime transfers into Oligarchy, and rule becomes in the hand of the rich and few. The gap between the rich and poor widens leading to rebellion and the founding of a Democracy. In a Democracy, people enjoy maximum freedom and partake in government, which leads to the rise of mob rule. Fearing for losing their freedoms and returning to the rule of the few (i.e., Oligarchy), dwellers of a Democratic city confer a demagogue with all their trust to protect their rights. This political leader exploits their trust and establishes a Tyrannical regime. Now, the rule is in the hands of one
person who will do “anything” to keep people under his control. Tyranny is the most unjust type of rule.\textsuperscript{611}

Ibn Rushd applies Plato’s discussion of the transformation of the virtuous city into Timocracy, and by extension, the virtuous individual into a timocrat, to what he identifies as “the governance of the Arabs during the early times.”\textsuperscript{612} “The early times,” as Lerner has rightly argued, refers to the age of the four Caliphs who succeeded the prophet (Caliphal Age or Great Age).\textsuperscript{613} Two things are especially worth noting about Ibn Rushd’s understanding of the way transformation from one type of regime to another took place in this Islamic context. The first is that the virtuous city did exist among the Arabs, and that was during the age of the prophet. The second is that the next phase, the Great Age, was not an abrupt passage into Timocracy, but a transitional stage where Arab rulers imitated the virtuous city. It was after the Great Age and with the beginning of the rule of Muʿāwiya —founder of the Umayyad dynasty, Muʿāwiya b. Abī Sufyān (d. 78/680)— that the ruling class transformed into Timocrats (class of warriors seeking honor primarily).\textsuperscript{614}

Ibn Rushd is able to draw on another and even more current example in illustration of the transformation of political regimes. He explains:

An example in this time is the kingdom of people known as the Almoravids. At first, they imitated the governance based on the nomos; this was under the first one of them. Then they changed under his son into the timocratic, though there also was mixed in him the love of wealth. Then it changed under his grandson into the hedonistic with all the kinds of things of the hedonists; and it perished in his days. This was because the


\textsuperscript{612} Ibn Rushd, \textit{Plato’s Republic}, 121.

\textsuperscript{613} See, fn. 89.28-31 in, Ibn Rushd, \textit{Plato’s Republic}, 121. In the absence of the original text, it is possible that the Arabic expression is “aṣ-ṣadr al-aʿẓam” (the Great Age), which Ibn Rushd uses in other works, including \textit{Faṣl} and \textit{Bidāya}.

\textsuperscript{614} Ibn Rushd, \textit{Plato’s Republic}, 121.
governance that opposed it at that time resembled the governance based on the nomos.\footnote{Ibn Rushd, \textit{Plato's Republic}, 124.}

Putting this quote into historical perspective, particularly with respect to Ibn Rushd’s mention of the change of governance from the father to his son and then to his grandson, it seems that he refers to Yūsuf Ibn Tāshfīn (reigned 453/1061–1106/500), his son ʿAlī Ibn Yūsuf (500/1106–537/1143) and his grandson, Tāshfīn Ibn ʿAlī, (537/1143–539/1145).\footnote{Almoravid dynasty (\textit{Murābiṭīn}) preceded Almohad’s (\textit{Muwaḥḥidīn}), under which Ibn Rushd had worked as judge and enjoyed, for most of his life, the privilege of studying philosophy and other sciences of the ancients. Almoravid dynasty came to its end with the fall of Marrakech in 641/1147 to Almohads and the assassination of Ibrāhīm Ibn Tashfīn and his uncle and short-lived successor, Isḥāq Ibn ʿAlī.} However, reading the history of Almoravids during the rule of these kings shows that Plato’s theory does not quite apply, at least not in a rigid manner. Presumably, one can argue that the first three types of governance (quasi-virtuous, timocratic and oligarchic) all existed under Yūsuf Ibn Tāshfīn. Ibn Rushd is aware of this. On one occasion, he asserts that the dominant type of rule during the reign of ʿAlī Ibn Yūsuf was both timocratical and oligarchical. On another, he avers that a ruler can develop two or more virtues at the same time; such is the case of ʿAlī Ibn Yūsuf who possessed the desire for honor and for wealth.\footnote{Ibn Rushd, \textit{Plato's Republic}, 124.}

Ibn Rushd has no doubt that Cordoba, his home city, went through the process of political degeneration described by Plato. Even though he does not give extensive details, what he says is strong proof that he was troubled by current events and deeply concerned about the future.\footnote{Concluding his commentary on Plato’s \textit{Republic}, Ibn Rushd gives reason why he made it short, and one of these reasons is political instability. He says, “We have explained them [i.e., Plato’s political arguments] as briefly as we possibly could on account of the troubles of the time.” Ibn Rushd, \textit{Plato's Republic}, 148.} Commenting on Plato’s account of the emergence of the tyrannical regime from the democratic, Ibn Rushd explains that a tyrant ruler acts in the most heinous way to subdue his people to his will and desires. He tortures and kills to expose his opponents and destroys them. He continues to act in this way to keep the inhabitants of that city under his control, until he becomes their first enemy.

\begin{footnotesize}
\footnote{Almoravid dynasty (\textit{Murābiṭīn}) preceded Almohad’s (\textit{Muwaḥḥidīn}), under which Ibn Rushd had worked as judge and enjoyed, for most of his life, the privilege of studying philosophy and other sciences of the ancients. Almoravid dynasty came to its end with the fall of Marrakech in 641/1147 to Almohads and the assassination of Ibrāhīm Ibn Tashfīn and his uncle and short-lived successor, Isḥāq Ibn ʿAlī.}{Ibn Rushd, \textit{Plato’s Republic}, 124.}
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\end{footnotesize}
Then, Ibn Rushd says the following: “an example of this is the lordship existing in this land of ours. It was almost completely democratic; then the situation turned after 540 into a tyranny.”

The city Ibn Rushd talks about is Cordoba, and the tyrant is Yaḥyā Ibn Ghāniya (d. 543/1148), the last Almoravid governor in Andalus who ruled Cordoba with an iron fist. To put his illustration in dates, one may suggest that from 500/1106 to 540/1145, Cordovans enjoyed a democratic regime. Then, under Ibn Ghāniya —precisely from 540/1145 until 542/1147 when he was overthrown by Almohads— Cordovans were governed in tyranny. And since the fate of all material things is decay, so it is for regimes and dynasties. Later in the book, Ibn Rushd confirms that in forty years, the habits and natures of Almohad rulers transformed to the extent that the law was entirely corrupted, marking the end of a rule that began as quasi-virtuous, then changed into timocratic and into democratic. Ibn Rushd does not clearly say if the type of governance during his day is tyrannical. However, given his gratitude to his patron at the end of the book, he seems to hold that after Almohad’s intervention, democracy was restored in Cordoba.

The question, now, is: is political transformation a matter of choice? In other words, can human beings prevent the debasement of governance, or are they destined to the above described cyclicity of regimes? Ibn Rushd reads his current political circumstance that there is a chance that Cordoba’s actual democratic regime changes into tyranny. At the same time, however, he holds that not only maintaining democratic rule is possible, but also restoring an “imitation” of virtuous governance. In what it seems a tacit advice to his patron, Ibn Rushd posits: “only he among them

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621 Ibn Rushd’s words, according to Lerner’s translation of the Hebrew translation, are: “You can make this clear from what —after forty years— has come about among us in the habits and states of those possessing lordship and status.” Ibn Rushd, Plato’s Republic, 144-45.

622 Ibn Rushd does not name his addressee, although, it has been argued that it might be Abū Yūsuf Ya’qūb, known better as Ya’qūb al-Manṣūr (d. 595/1199), Almohad’s third ruler who was known for his admiration and favorable judgement of philosophy. It is well known that Ya’qūb al-Manṣūr appointed Ibn Rushd to explain the work of Aristotle and made him his personal physician. So, it is very likely that Ibn Rushd’s addressee is Ya’qūb al-Manṣūr.
who is virtuous according to Legal prescriptions remains in an excellent state.”

This observation shows something crucial about Ibn Rushd’s appropriation of Plato’s theory; namely, his conviction that the way to maintaining virtue and not falling into base governance is tenable through observing the *sharīʿa*. His focus on the *sharīʿa* as a significant player in the preservation of people’s virtues has led Lerner to argue that “perhaps the greatest use he [i.e., Ibn Rushd] makes of the Republic is to understand better the *sharīʿa* itself.”

In his reading of the Republic and the political role of the *sharīʿa*, Ibn Rushd establishes a strong connection between the ethical and the political. Like Plato, he attributes the decline of regimes to the decline in the virtues of city dwellers and rulers. In this way, the perfect start of a society means very little, for despite the first rulers’ enthusiasm for virtue, the subsequent rulers’ longing for riches, pleasure and authority would soon cause the degradation of that society’s rule from Timocracy (ruled by the desire for honor and glory through war), to Oligarchy (desire for wealth), to Democracy (desire for freedom), and to Tyranny (desire for absolute authority). After all, however, Ibn Rushd seems to have had hope that it is possible to guard Muslim society from falling into inferior political states if people abide by revealed law.

The importance of revealed law for a “healthy” social order has been emphasized by many Muslim philosophers prior to Ibn Rushd. “Book 10” in Ibn Sīnā’s *Metaphysics of the Healing* covers various aspects of the political and ethical role of the *sharīʿa*. Some of its topics include the benefit of acts of worship in this world and the next, the criteria for establishing a city (i.e., regime), universal laws regarding select aspects of social life (e.g., household, marriage), and the urgency of a sound moral life. Fārābī’s work on political philosophy remains the most elaborate among the classical Muslim philosophers. Farābī conceives of ethical matters as the primary domain of

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624 The word Lerner translates as “Law” must be the Arabic “*sharīʿa*;” since often when Ibn Rushd talks about the law in Plato’s historical context, he uses “*nāmūs*” (nomos).


political teaching and of virtue as the field of the lawgiver. In other words, it is the responsibility of the lawgiver to cultivate morals in citizens, for this helps them and him to achieve ultimate perfection, hence happiness.627

Ibn Rushd’s reflections on the sharīʿa as an instrument for political reform are different from his predecessors’ in several ways. For one reason, he was a legal theoretician and practicing judge, whereas none of the other philosophers practiced law, including Kindī, Farābī, Ibn Sīnā, Rāzī, or even Ghazālī. This allowed him to provide practical insight into the debate of the value of revealed law for social order. For another, he was writing at a time of increasing turmoil, which, in a sense, makes his comments at the same time a historical testimony to the political and moral decay of his society. The Caliphate of Cordoba crumbled into the kingdoms of Ṭawāʾif as early as 421/1030. The rest of its Islamic history was political instability that ended in the fall of the last Muslim Andalusian citadel, Granada, in 897/1492, followed by largescale forced conversion into Christianity in 907/1502, and a royal decree of final expulsion in 1017/1609.628 Within the context of his reading of Plato’s Republic and given the important place of the sharīʿa in political reform, Ibn Rushd criticized the jurists specifically for their moral dissolution and how they became a tool for social control in the hands of unjust rulers. His attack on jurists is conceivable once we learn that he held the political and moral to be securely interlaced, and that he believed that society can thrive politically and acquire the best regime if its rulers and members at large perfect their virtues. The jurist, being representatives and communicators of the sharīʿa, has absolutely no excuse but abiding perfectly by this code and providing a role model for all the people.


628 For the conflict between Christians and Muslims in Iberia during this period, see, e.g., Angus MacKay, Spain in the Middle Ages: From Frontier to Empire – 1000-1500 (London: Macmillan, 1977).
It is this Andalusian context and the focus on the *sharīʿa* that gives Ibn Rushd’s reading of the *Republic* special importance. His argument on the degeneration of “Islamic governance” from virtuous during the early days to timocratic, oligarchical, and democratic must not be read as a mourning for the loss of “Islamic authority.” As Leaman has justifiably argued, when Ibn Rushd talks about the degeneration of a regime, “the decline is very much one from a law-abiding citizenry to a more amorphous and independent group of social agents.”

When Ibn Rushd gives as example the decline of the early Islamic regime or the democratic regime in Cordoba, what he means is the decline of law as a social control mechanism so essential for organizing society and preparing individuals for their supreme goal: eternal happiness. This may explain his description of ritual worship at the end of the *Bidāya* as a necessary exercise for preserving virtue, as well as his accusation of some jurists of moral dissipation.

Ibn Rushd’s interest in the political role of the law appears also in his commentary on Aristotle’s *Nicomachean Ethics*. One thing that sets this work apart from his commentary on Plato’s *Republic* is the lack of practical examples, despite several instances where resemblance could be drawn out between Aristotle’s views and Ibn Rushd’s current events. One reason, as Leaman remarked, may be that Ibn Rushd read the *Republic* (i.e., the parts he commented on) as a practical account of polity, whereas he conceived of the *Nicomachean Ethics* as its theoretical discussion. What brings the two works together, however, is their emphasis on the political role of the *sharīʿa* and virtue for both the individual and society. Leaman has remarked that in the *Nicomachean Ethics*, Ibn Rushd used the notion of the *sharīʿa* to connect the beginning of Aristotle’s discussion, where he associates the study of virtue with politics, with its end where he

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631 See Leaman’s remark on Ibn Rushd’s reading of the *Nicomachean Ethics* as a political text and how this changed certain aspects of it. Leaman, *Averroes and his Philosophy*, 134-35.
argues that the law is necessary for attaining a better life.\textsuperscript{632} It is evident that for Ibn Rushd, the \emph{sharīʿa}, as a comprehensive legal and moral code —the \emph{nomos} in Plato’s virtuous city— is the only thing that can secure political stability and bring prosperity in this world and the next. As such, it should be the center of attention for every serious ruler.

Finally, Ibn Rushd’s identification of Islamic governance with Plato’s theory of political change, leads to raising important questions that, however, are beyond the scope of this chapter. For example, what function does prophecy, and by extension the revelation, play in Ibn Rushd’s model of polity? Ibn Rushd did not write a separate treatise about prophecy like Ibn Sīnā did.\textsuperscript{633} However, he touched on the subject in some of his commentaries, such as the \textit{Epitome of Parva Naturalia} (\textit{Talkhīṣ al-Hiss wa l-Maḥṣūs}).\textsuperscript{634} A close study of Ibn Rushd’s natural explanation of dreams and divination (\textit{ruʾyā}) in this work may help elucidating the ways in which he thinks of prophecy and revelation as “natural” phenomena, hence allowing a better look into his reading of the political role of the prophet.\textsuperscript{635} In his commentary on the \textit{Republic}, Ibn Rushd promises that he will return to the topic of prophecy.\textsuperscript{636} He eventually does, but he only briefly refers to the role of the prophet as lawgiver and king of the virtuous city.

\textsuperscript{632} Ibid, 134.


\textsuperscript{634} Ibn Rushd, \textit{Talkhīṣ Kitāb al-Hiss wa l-Maḥṣūs} (\textit{Epitome of Parva naturalia}), ed. Hary Blumberg (Cambridge: The Mediaeval Academy of America, 1972); \textit{Epitome of Parva Naturalia}, trans. Harry Blumberg (Cambridge: Mediaeval Academy of America, 1961). See, esp., his discussion of “true divination” (\textit{ar-ruʾyā ṣ-sādiqa}) in, \textit{Talkhīṣ Kitāb al-Hiss wa l-Maḥṣūs}, 66-91. Ibn Rushd points out that revelation may occur during a state similar to fainting or losing consciousness (\textit{ighmāʾ}), since for the soul to receive a divination, the external senses must be disactivated (83).

\textsuperscript{635} Ibn Rushd confirms passingly in \textit{Tahāfut} the relationship between prophecy and divination. See, Ibn Rushd, \textit{The Incoherence of the Incoherence}, 1:316.

\textsuperscript{636} Ibn Rushd, \textit{Plato’s Republic}, 72. Neither Lerner nor Rosenthal comment on this passage (Rosenthal’s trans., p. 177).
Another question that derives from the previous one is: how does Plato’s *nomos* differ from Ibn Rushd’s *sharīʿa*, and to what extent this variance may complicate the way their political role is understood and approached? Rosenthal argued that despite that the *nomos* and *sharīʿa* are grounded in law, the *sharīʿa*, as a revealed prophetic code, is superior to the *nomos* in the same way the *nomos* is superior to myth. The superiority of the *sharīʿa* must be understood within the context of the prophet’s and lawgiver’s ability to explain the truth in ways accessible to the multitude. As Leaman concluded, “we cannot derive from his [Ibn Rushd] political writings the thesis that religion is inferior to philosophy, nor the reverse, except in a practical sense.”

_Practical sense_ refers to the premise that what qualifies a prophet over others is not his theoretical knowledge of God, the angels, the afterlife, etc. Rather, it is his practical knowledge and unique skill to put that abstract knowledge as a law (*sharʿ*) and communicate it to a wider audience.

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638 In addition to his unique capacity of founding comprehensive laws (*sharāʾiʿ*) that help people perfect virtue, Ibn Rushd adds to the qualities of a prophet his ability to perform miracles, receive a revelation, and be cognizant of the nature and attributes of God, as well as life after death. See, Ibn Rushd, *Kashf*, 173- 98 (an extension, from a theological perspective, on sending prophets and miracles).

639 Leaman, *Averroes and his Philosophy*, 130.
It is now largely agreed that the study of philosophy in the Muslim West came to a halt after Ibn Rushd’s death at the end of the sixth/twelfth century. The question why Ibn Rushd’s philosophy had insignificant influence in his own world, vis-à-vis its lasting impact on Jewish and Christian scholasticism, remains a site of dissension. According to Henry Corbin, the reason is uprooting Islamic philosophy from its prophetic habitat. Ibn Rushd’s philosophy, whether he wanted or not, led to the separation of metaphysics and theology which laid the foundation of a “secularized metaphysics” (which disunites knowledge and belief) that flourished later in the West. In the East, however, his philosophy “was merely a dead end, an episode ignored by the thinkers of Eastern Islam.” To put Corbin’s assumption differently, Muslims rejected Ibn Rushd’s philosophy as a punishment for his failure to appreciate and contribute to Islamic prophetic philosophy. For it is the latter that secured the continuity of the thought of other prominent scholars, such as Ibn Sīnā, Shahāb ad-Dīn as-Suhrawardī (d. 586/1191), and Muḥyi ad-Dīn Ibn ʿArabī (d. 638/1240).

Corbin may be right about Ibn Rushd’s lack of attention to prophetic philosophy —which he groups with mysticism— for Ibn Rushd was a vocal critic of Sufism, or rather a certain aspect of it. But to hold this as the main reason why his philosophy was not engaged by his successors is far from being true. For if it was, one may ask: why, then, was Ghazālī received with vehement enmity by several Andalusian scholars in spite of developing a sophisticated prophetic philosophy

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641 Ibn Rushd is critical especially of the Şūfīs’ claim that the way to derive knowledge about God and the existents is through a Şūfī master who, after enduring devotion and ascetic practices, receives this knowledge directly from God. However, he adheres to their call for cleansing the self from desire and considers it a condition for a healthy process of knowledge acquisition. We have already seen in Chapter 5 his reference to Ghazālī’s *Iḥyāʾ* and his emphasis on cultivating virtue. See, Ibn Rushd, *Kashf*, 117.
grounded in Islamic theology. \(^{642}\) Many of Ghazālī’s works were refuted and condemned in public, at times by his closest students from the Muslim West. One such student is Abū Bakr Ibn al-ʻArabī (d. 543/1148) who was reported to have said: “our Master Abū Ḥāmid swallowed the philosophers and wanted to vomit them up, but he could not.” \(^{643}\) Current studies of the refutation of Ghazālī by Muslim Andalusian scholars show that Ghazālī was condemned particularly for his philosophical mysticism, but generally for incorporating elements of falsafa in his writings. \(^{644}\)

In this light, the practical problem is not that Ibn Rushd turned his back to Islamic prophetic philosophy, but that he engaged falsafa in the first place. As seen in Ibn al-Khaṭīb’s letter of admonition to his sons (Chapter Two), the “ancient sciences” (al-ʼulūm al-qadīma) had become by Ibn Rushd’s age an eminent evil about which scholars were constantly warned. This negative attitude may be considered part of the larger lack of interest in speculation (naẓar) among Western Mālikīs, which Ibn Khaldūn has associated with the event that most of them originated from the Maghreb and were for the most part Bedouins who cared little for the crafts — unlike their Eastern Ḥanafī and Shāfiʿī counterparts (Chapter One). \(^{645}\) In addition, Corbin and those who adhere to his assumption ignore two other significant details. The first is the fact that what Corbin identifies as the “Islamic West” simply ceased to exist after Ibn Rushd. The second is that what interested Ibn Rushd in prophecy, unlike his predecessors, is the practical function of the prophet as a lawgiver (ṣāḥib ash-sharīʿa).


\(^{643}\) “shaykhunā Abū Ḥāmid bala’ al-falāsifa wa arād an yataqayya’ahum famā istaṭā‘.” See, Dhahabī, Siyar, 19: 327. Dhahabī includes a lengthy discussion of the reception of Ghazālī in Muslim Iberia. Among the Western Muslim scholars who issued fatwās against Ghazālī or condemned his work only part, he mentions Māzarī of Sicilia, Ṭurtūshī of Tortosa, Ibn Hamdīn of Cordova (d. 508/1114), Ibn al-Ibīrī of Granada (d. 537/1142), and others


By Ibn Rushd’s time, Muslim Iberia had already gone through many troubling phases that brought its division into small kingdoms and municipalities (ṭawā’if). Five years before Ibn Rushd was born, in 514/1121, a massive rebellion erupted in his own city, Cordoba, against the Almoravid governor. When the Almohads entered Andalusia around 539/1145, a second wave of ṭawā’if was underway and the Christian kings intensified their attacks on the Muslims’ territories, which made any plans to reunify Andalusia impossible. Cities and towns which were under the control of Muslims fell in speed to the Christian armies. In about fifty years after the death of Ibn Rushd, namely between 613/1217 and 649/1252, Fernando III subdued Cordoba, Murcia and Sevilla, among other cities. In between and until the fall of the last Islamic kingdom in Iberia, Granada, in 896/1491, the region experienced unprecedented turmoil. As seen in Chapter Five, Ibn Rushd was seriously concerned about political insecurity during his time and held it, on few occasions, to be the main reason why he only briefly wrote about certain subjects and ignored others. Therefore, to talk about the influence of Ibn Rushd in an “Islamic West,” one should not forget that after his death, this “West” was no longer the same.

Moreover, that Ibn Rushd did not designate a special treatise or book to prophecy does not necessarily entail that it occupied a marginal place in his thought. On the contrary, prophecy and the revelation were central to his political philosophy and, of course, they made the foundation of his jurisprudence and methodology of legal pluralism. Unlike Ibn Sīnā, Suhrawardī or any of the other figures named by Corbin, Ibn Rushd was not interested in the psychological, epistemological or mystical aspects of prophecy. Given his legal training and office, Ibn Rushd was interested first and foremost in the political role of prophecy and in the ways in which the sharīʿa as a revealed law can be used to improve society. And it is at this practical level that he endeavored to harmonize falsafa and sharīʿa’s intentions with respect to their mutual ethical goals (Chapter Five). Ibn Rushd was interested in the human side of the sharīʿa, i.e., Fiqh, and this drove him to dedicate years of his life to writing the Bidāya which, by the testimonials of many legal authorities, is a masterpiece of Islamic law. It is this legal aspect of Ibn Rushd’s work and thought that the present dissertation strived to explore.
Through a systematic and topical approach, I have examined the legal sides of Ibn Rushd’s life, writings and influence. In the course of my study, I have paid close attention to three of Ibn Rushd’s books: his commentary on Plato’s *Republic*, his *Ḍarūrī fī Uṣūl al-Fiqh*, but especially, his *Bidāyat al-Mujtahid*. From these three, I strived to reconstruct the general structure of Ibn Rushd’s jurisprudence and his view of the role of the *sharīʿa* as an instrument for moral and political reform. My account of the *Bidāya* was intended as a survey and introduction to the book and the genre of *khilāf*. I emphasized that the *Bidāya*’s intellectual merit lies not only in its critical quality, but also, and especially, in the fact that it represents and carries out what Ibn Rushd considered the most complete way of engaging with Islamic law; a way of reconciling different Islamic legal schools and doctrines, hence creating legal unity within legal diversity.

This dissertation began with an overview of the development of *khilāf* (being the genre of *Bidāyat al-Mujtahid*) up to the sixth/twelfth century, in an effort to show how Muslims’ disputes in legal matters evolved into an advanced branch of knowledge. After situating the *Bidāya* in its large historical and disciplinary context of *khilāf*, I provided a preliminary discussion of the book focusing in particular on the history of its study in the West, its extant manuscripts, title, purpose, and its methodological introduction. Then, I developed a thorough textual study of Ibn Rushd’s method of legal analysis and synthesis in the *Bidāya*. I identified his approach to legal theory (*uṣūl*) as “functional” and extended a discussion of various aspects of its functionalism. Moving deeper into the intricacies of the *Bidāya*, I investigated the relation of revealed law and language with respect to Ibn Rushd’s approach to the causes of juristic disputes (*asbāb al-khilāf*). Finally, to place Ibn Rushd’s view of revealed law within the totality of his intellectual labor, I looked into the intersection of the *sharīʿa* and *falsafa* in his writings and made special reference to his ethical conclusion of the *Bidāya* and commentary on Plato’s *Republic*. I elaborated in particular on his classification of the sciences of *Fiqh* and *Uṣūl*, select aspects of his tendency to reforming the methods of learning generally and the legal study specifically, and the *sharīʿa* and *falsafa*’s emphasis on moral excellence.
Despite my effort to engage Ibn Rushd the jurist and his legal writings comprehensively, I am, however, aware that my study cannot comprehend everything in this respect. My intention, has been to provide a preliminary, detailed introduction to Ibn Rushd’s legal thought with special focus on his Bidāyat al-Mujtahid as a work of juristic disagreement (khilāf). I hope my account of the Bidāya incites future critical studies of Ibn Rushd’s method and theory of legal pluralism, perhaps by scholars with formal legal training since the study of the book has been for the most part the domain of non-lawyers. I also hope my work will be found useful for conducting deeper investigation that would clear other areas of Ibn Rushd’s legal thought. A much-needed study is a historical reading that contextualizes the events Ibn Rushd only briefly cites in his commentary on Plato’s Republic. This should give us a concrete idea of how he envisioned the development of Muslim political regimes and the degeneration of the role of the sharīʿa in his society and age. There is also much to excavate with respect to where Ibn Rushd stands from Ghazālī (besides Griffel’s work, no one has taken up this task), especially that Ibn Rushd’s Ḍarūrī is more of a critical reflection on the Mustasfā than a standard summative commentary. A critical edition and translation of the Ḍarūrī is yes to be carried out. The study of Ibn Rushd’s legal thought is largely a fresh domain. I hope this dissertation maps the beginning of the road for further research in this direction.
Appendix One

The Lexical Usage of “Khilāf” and “Ikhtilāf”

The terms “khilāf” and “ikhtilāf” stem from the root “khlf” and entail disagreement, dispute, difference and divergence of opinion. Within the context of legal theory, the question of whether the two represent different legal categories —i.e. one is permitted and the other is not— has not yet been settled. Scholars’ positions on this issue, particularly in modern Arabic studies of khilāf, maybe limited to three groups. The first identifies “ikhtilāf” with tolerable disagreements. The second claims that it is “khilāf,” not “ikhtilāf,” that stands for permissible disputes. The third considers both the same; a juristic disagreement that can be valid under certain circumstances and invalid under others. Before delving into the technical usage of both terms in each camp, it is important to explore their linguistic origin. In the following pages, I examine first the root “khlf” in seven authoritative lexicographical dictionaries including, Kitāb al-ʿAyn by Farāhīdī (d. 173/789), Tahdhib al-Lugha by Azharī (d. 370/980), Tāj al-Lugha by Jawharī (d. 393/1002), Muʿjam Maqāyīs al-Lugha by Ibn Fāris (d. 395/1005), Lisān al-ʿArab by Ibn Manẓūr (d. 711/1311), Tāj al-ʿArūs by Zubīdī (d. 1205/1790), and finally, Al-Mufradāt fī Gharīb al-Qurʾān by ʿIṣfahānī (d. 502/1108).

ʿIṣfahānī’s work is not a comprehensive dictionary in the tradition sense of the word “dictionary,” but a lexicographical elaboration on select Qurʾānic terms. His entry on “khlf” is an

excellent source for the Qur’ānic background of the discussion of the juristic im/permissibility of disagreement as well as the connection between the linguistic and the Qur’ānic usage of the terms “khilāf” and “ikhtilāf.” The present discussion, however, aims at offering neither an etymology of both terms nor an exhaustive examination of the root “khlf.” My primary focus is the derived word forms that entail a sense of dispute, disagreement and difference, as the primary semantic contexts within which “khilāf” and “ikhtilāf” have been perceived by classical Muslim legal scholars.

The Pre-Modern Lexical Background of “Khilāf” and “Ikhtilāf”

There are over fifteen meanings associated with different derived word forms of the root khlf. However, only three are of relevance to our survey: “khilf,” “khalf” and “khalaf.” All seven consulted lexicographers mention these three noun forms, though some more inclusively than others, and make extensive use of the Qur’ān as a principal source of linguistic knowledge in addition to the vast reservoir of Arabic poetry.

The First Noun Form: “Khilf”

“Khilf” is a masculine noun (feminine, khilfa) which describes two entities that possess different but not necessarily contradictory qualities. Azharī notes that early Arabs used the word “khilfān” to describe two brothers with opposite features, such as if one is tall and the other short or if one is light skinned and the other dark skinned.647 Farāhīdī (also Jawharī and Zabīdī) holds khilāf and mukhālafa to be synonymous in that they mean “in disagreement with.” He reflects upon Q 9:81, “Those who were left behind rejoiced at sitting still behind the messenger of Allah [fariḥa l-mukhallaфаn bi-maq’adīhim khilāfa rasūl Allah].” and reads “khilāfa rasūli Allah” in the sense of disagreeing with him (mukhalaфаtuhу). Several contemporary English renditions of the Qur’ān—including Pickthall, Yusuf Ali, Abdul Daryabadi, Taqi Usmani and Mohsin—all read the term “khilāfa” as “behind.” Farāhīdī interestingly interpreted it as “mukhalaфа” (disagreement).

647 Azharī, Tahdhīb, 7: 397. Azharī’s example was later repeated in Ibn Manẓūr, Lisān, 9: 91.
such, Q 9:81 would read: “those who were left behind rejoiced at sitting (behind), in disagreement with the messenger of Allah” —not stayed behind him.

Ibn Fāris also identifies the word “khilāf” as difference and dissimilarity. He points out that saying “ikhtalaf an-nās” and “an-nās khilfā” means the people are different (mukhtalifūn). Ibn Manẓūr further extends upon this particular idea and highlights the verb forms “khālafa,” “takhālafa” and “ikhtalafa.” He provides examples from poetry and colloquial usage where “khīf” and “khilfa” are used in reference of difference, dissimilarity, variation, diversity, multiplicity and disagreement. He gives the example of Q 6:141, “and the date-palm and crops of divers flavor.” He draws a firm link between the adjective mukhtalif and the noun khilfa and reconfirmed what Azharī had said earlier about the word “khilfān.” He lists other examples from Arab speech, such as the expression “dalwāya khilfān” (my two [well] buckets are different) which is used to capture the image of an ascending full bucket versus a descending empty one, or if one is new and the other is old. Like Ibn Manẓūr, Zabīdī also explains the phrase “ikhtalafa l-amrān” as “lam yattafiqā;” i.e., two things that did not agree. But unlike him, he emphasizes contradiction (muḍādda) as an extension of mukhalafa; i.e., two entities that are different are also in contradiction with one another.

Iṣfahānī’s entry of the root “khlf” is by far among the most comprehensive. Iṣfahānī mentions the noun form “ikhtilāf” (v. ikhtalafa) and associates it with disagreement and difference. While he considers ikhtilāf and mukhālafa synonymous, he, unlike Zabīdī for instance, holds the term khilāf (difference) to be inclusive of the sense of opposition and contradiction (taḍādd), not equivalent to it. To put it differently, whereas two opposites (addād) are inherently different, two different things are not essentially opposites. He further observed that in the Qurʾān, the word “ikhtilāf” and its related forms are used for the most part to indicate quarrel and dispute (munāzaʿa’a and mujādala). He mentions about ten Qurʾānic verses that present “ikhtilāf” in this sense,

648 Ibn Fāris, Mu’jam, 2: 213.
including Q 2:213,^{650} 1:105^{651} and 2:176, “Lo! those who find (a cause of) disagreement in the
Scripture are in open schism.” Yusuf Ali has understood this verse to mean “those who seek causes
of dispute in the Book are in a schism far (from the purpose).” Iṣfahānī makes a particular comment
on this verse explaining the phrase “Ikhtalafū fī l-kitāb” as drawing out an interpretation from the
Qurʾān that is different from what God has intended,” (ataw fīhi bi-shayʾin khilāfa mā anzal
Allāh).^{652}

The Second Noun Form: “Khalaf”

The second word form of the root “khlf” is the noun “khalaf” (v. khalafa) which is understood
broadly as a succeeding generation or posterity. Ibn Fāris explains the act khalafa in terms of “a
thing coming after another and standing in its place,” (an yajīʾa shayʾun baʿda shayʾin yaqūmu
maqāmahū).^{653} This would include meanings of succession, substitution, replacement, following
up, growing back (as in plants and animal parts) and staying or sitting behind. He gives the
examples of Q 7:169 (also 19:59), “a generation [khalf] hath succeeded them;” and Q 9:87 (also
9:93), “they are content to be with those who remain behind [khawālif].” On the latter verse, the
noun “khawālif” (those who remain behind) has been used to describe particularly women (also
old and sick men) who did not accompany Prophet Muḥammad in his wars and trade journeys.
Staying behind, in this context, is derived from the image of succeeding the men at home.

^{650}“Mankind were one community, and Allah sent (unto them) prophets as bearers of good tidings and as warnings,
and revealed therewith the Scripture with the truth that it might judge between mankind concerning that wherein
they differed. And only those unto whom (the Scripture) was given differed concerning it, after clear proofs had
come unto them, through hatred one of another. And Allah by His Will guided those who believe unto the truth of
that concerning which they differed.”

^{651}“And be ye not as those who separated and disputed after the clear proofs had come unto them;”

^{652}The full list of the Qurʾānic verses Iṣfahānī mentions under the rubric of mukhālafa includes: 3:55 (similar meaning
(repeated in 43:65), 22:60, 51:8, 78:3, 10:93 (similar meaning appears also in 45:17). See Iṣfahānī, Mufradāt, 155-
57.

^{653}Ibn Fāris, Muˈjam, 2: 213.
On the context of Q 7:169 (or 19:59), Iṣfahānī interestingly notes that the Qurʾān draws a sharp distinction between “khalf” and “khalaf,” both of which share the verb “khalafa” and entail a succeeding generation. He asserts that the Qurʾān uses the word khalaf to indicate a positive description of posterity (khalaf ūṣālih), whereas it uses half to represent a corrupt posterity (khalf fāsid). For illustration, he lists Q 7:169, “And a generation hath succeeded them who inherited the scriptures. They grasp the goods of this low life (as the price of evil-doing) and say: It will be forgiven us;” and Q 19:59, “Now there hath succeeded them a later generation whom have ruined worship and have followed lust.”

Of the many verses that address succession in the Qurʾān, Q 25:62 has generated primary interest: “And He it is Who hath appointed night and day in succession.” The general meaning, here, is that the day and night succeed or inherit one another in an endless cycle. Farāhīdī understands “ikhilfa” (feminine of khilf) as a form of ikhtilāf, since the day and night succeed one another also because they are inherently different from one another. To get a clear sense of the suggested connection between khilfa and ikhtilāf, it is helpful to remember that the origin of the word khilf according to all lexicographical texts is “istisqāʾ” (drawing water from a water source). Ibn Manẓūr, for instance, informs that Arabs used to say “min ayna khilfatukum?” or “min ayna tastaqūn?” (from where do you draw water?). The communal source where people draw water is also called “ikhilfa” because the action of istisqāʾ takes place by turn, whether for the purpose of watering one’s cattle or getting water for home. As such, khilf and khalaf come from the ideas of coming after or in place of (i.e., succeeding) something or someone.

The Third Noun Form: “Khalf”

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654 Of the five consulted English renditions of the Qurʾān, only Yusuf Ali prefaces the word posterity in the first verse (but not in the second) with the adjective ‘evil’. However, based on Iṣfahānī’s reading of khalaf as khalf fāsid, a more precise term would be ‘corrupt’ instead of ‘evil’.

655 In this context, Iṣfahānī mentions, in addition to Q 25:62, Q 6:165, 7:69, 10:73, 11:57, 38:26, and 53:39.


The third word form of the root “khlf” is “khalf” (back and behind as opposite to front and ahead). On this particular meaning of ‘khalf’ (back and behind), Iṣfahānī refers to Q 2:255 (also Q 20:110, 21:28, 22:76, and in a closer version Q 36:45), “He knoweth that which is in front of them [His creatures] and that which is behind them.” Q 9:87, “They are content that they should be with those who remain behind,” is another favorite example engaged by most lexicographers. Azhařī elaborated on the word khawālif (singular feminine “khalfāʾ,” singular masculine “khalf”) in this verse drawing particular attention to its derogatory extension. He said that early Arabs used “khalf” and “khalfāʾ” to identify an individual who is mentally unstable. Like the word “behind” in the English language, the Arabic “khalf” is also used to describe the developmentally challenged.

To sum up, the qualities of difference, disagreement and conflict of opinion inherent in the terms khilāf and ikhtilāf have origin in at least three derived word forms of the root “khlf”: “khalf,” “khalaf” and “khilf.” In the first usage, a disagreement takes the meaning of an opinion that stands behind an already established one. In the second, a disagreement refers to an opinion intended to succeed the established one. In the third, a disagreement takes an image of something not the same, something different, but not necessarily contrary —since the verb “khālafa” (opposite of wāfaqa, agree and conform) means to disagree and act in nonconformity. In addition, it is clear that none of our lexicographers consider ikhtilāf and khilāf antithetical. To the contrary, they conceived of them as equal and uses them interchangeably.

A quick look at classical books of law proves that early jurists cared less, if at all, about the lexical dissimilarities between ikhtilāf and khilāf. For example, Shāfiʿī uses both terms in alternate ways in several of his treatises. Ikhtilāf and khilāf, for him, entail a different and opposing opinion irrespective of the legal validity or invalidity of the formulated disagreement.658 In other words, what counts is the status of the juristic disagreement; if it is permissible or not. Accordingly, disputes on issues already covered in the Qurʿān and/or Sunna are prohibited. But, those that

658 Shāfiʿī designated several entries to Legal Disagreement in Ar-Risāla. Cf., Shāfiʿī, Umm, 1: 259-70. Shāfiʿī’s use of khilāf and ikhtilāf can also be seen in other texts, such as Kitāb Ikhtilāf Mālik wa sh-Shāfiʿī, being vol. 8 of the Umm.
address matters for which there was no precedence, and for which a solution may be obtained by way of taʾwīl and qiyās, are permissible. A list of scholars who conceive of khilāf and ikhtilāf in equal ways may include, but is not limited to, Marwazī in Ikhtilāf al-ʿUlamāʾ; Ṭabarī in Ikhtilāf al-Fuqahāʾ; Ṭahāwī in Ikhtilāf al-Fuqahāʾ; Qāḍī ʿAbd al-Wahhāb in Al-Ishrāf ala Nukat Masāʾ il al-Khilāf; Ibn ʿAbd al-Barr in Al-Inṣāf fī mā bayna ʿUlamāʾ al-Muslimīn min al-Ikhtilāf; Baṭalyawsī in Al-Inṣāf fī t-Tanbīh ‘alā l-Maʿānī wa l-Asbāb allatī Awjabat al-Ikhtilāf; Asmandī in Ṭarīqat al-Khilāf fī l-Fiqh bayn al-Aʿimma l-Aslāf; to only name a few texts where the words khilāf and ikhtilāf appear in the title.

The Contemporary Debate of Khilāf/Ikhtilāf

The First Argument: Ikhtilāf, NOT Khilāf

ʿAbd al-Karīm Zaydān claims that Shāṭibī (d. 790/1388) considered the terms ikhtilāf and khilāf different and that he permitted the former and forbade the latter.659 Hence, for Zaydān, khilāf is a divergent opinion based on misleading whim rather than on the lawgiver’s objective,660 and ikhtilāf is a sustained opposing opinion contributed by an independent legal scholar on matters for which no indicants from the Qurʾān and Sunna are found. In the same spirit, Tāha Jābir al-ʿAlwānī spoke of ikhtilāf as “an aspect of rational speculation and ijtihād,”661 and set two conditions for a juristic dispute to be accepted. First, it must be grounded in valid legal evidence. Second, it must provide only possible and realistic rulings. Any dispute that does not meet these two requirements

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659 Abd al-Karīm Zaydān, Al-Wajīz fī Uṣūl al-Fiqh (Cairo: Muʿassat Qurṭuba, 1976), 327-46. See Zaydān’s khilāf/ikhtilāf discussion in Section 3 of Chapter 4, “al-khilāf fī sh-Sharīʿa l-Islāmiyya,” though it is not part of the edition I have used. It is accessible online at: http://majles.alukah.net/t91068/. Zaydān refers to Shāṭibī’s Muwāfaqāt ʿa fī. Shāṭibī does not devote an independent entry to khilāf in this work, but talks about it elaborately in “Kitāb al-Ijtihād,” 4:89-243.


661 ʿAlwānī, Adab al-Ikhtilāf fī l-Islām, 104.
cannot be accepted, and hence are called *khilāf*. ʿAlwānī’s position has been embraced to the letter by Kamali who decried *khilāf* for constituting “unrealistic disagreement.”

Muḥammad ʿAwwāma returns to Kafawī’s (d. 1094/1683) dictionary, *Al-Kulliyāt*, to make the same distinction between *khilāf* and *ikhtilāf*. Kafawī’s definition may be summarized as follows. *khilāf* refers to a dispute over both the method and objective of the law (*maqṣūd ash-sharʿ*); it is not based on legal evidence; it is a sign of schism; and hence it is an invalid type of *ijtihād*. *Ikhtilāf*, on the other hand, is a different opinion which looks into the law’s method only; it is supported by legal proof; it is a sign of mercy; and hence it is a valid type of *ijtihād*. Simply put, *khilāf* is a disagreement that is made in a legal area that requires no further digging and negates the Qur’ān, Sunna and *ijmāʿ*. 

The Second Argument: Khilāf, NOT Ikhtilāf

Few scholars have argued for the positive implication and, hence, legal admissibility of *khilāf*. One such position is held by Muḥammad Marʿashlī in a work entitled *Al-Khilāf Yamnaʿ al-Ikhtilāf*. As his title hints, “*khilāf* prevents *ikhtilāf*,” Marʿashlī acknowledges *khilāf* as a type of diversity and plurality of opinion that brings unity and prevents dissension among scholars. Drawing on Iṣfahānī and others, he assigns three attributes to *khilāf*: it is an opinion founded on valid legal evidence; it is an inevitable reaction of people’s inherently diverse dispositions; and, as a result, it does not lead to schism, but to mutual understanding. *Ikhtilāf*, on the contrary, means for him a divide of opinion that threatens the integrity of Islamic law and the unity of the Muslim community at large.

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Marʿashlī’s reflection is confusing and at odds with several of the very claims it accentuates. For example, while endorsing Qannūjī’s equalization of the methods of *khilāf* and *jadal*, he also emphasizes that *khilāf* is not an action of quarrel and contention (*munāza‘a wa mushāqqa*) —two qualities essential to the practice of *jadal*. Also, while maintaining that several scholars have warned against the practice of *ikhtilāf*, he provides as textual proof Ibn Masʿūd’s maxim: “*al-khilāf sharr*” which shows ironically the word *khilāf* not *ikhtilāf*. Finally, it is not clear how and why Marʿashlī draws upon Kafawī especially since the latter, as mentioned above, tolerates *ikhtilāf* not *khilāf*.

*The Third Argument: Ikhtilāf IS Khilāf*

A third group of scholars consider *khilāf* and *ikhtilāf* similar or with minor differences, of little import to the integrity of the meaning of juristic disagreement. Muḥammad Rūgī renders *ikhtilāf* and *khilāf* as the opposite of *wifāq* (unity, conformity, harmony, agreement, etc.). He reads both are semantically the same and take place when two or more jurists disagree on a legal issue (e.g., one permits a certain action and the other prohibits it). As such, Rūgī rebuts Zaydān’s argument that Shāṭibī distinguishes between *khilāf* and *ikhtilāf*. For Rūgī, Shāṭibī has used both interchangeably to indicate a form of *ijtihād* that can be grounded in valid legal proof, hence accepted, or in mere capricious opinion, hence rejected.

In a more recent work, Nawwār ben Shallī also considers *ikhtilāf* and *khilāf* similar and refers to the discipline as, ‘*ilm al-khilāf*, ‘*ilm al-ikhtilāf* and *al-khilāfiyyāt*. Shallī also equates the

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666 Marʿashlī, 16. Also, the author’s two paragraphs that introduce Ḥasan al-Qannūjī and Kafawī (14) are almost word for word and may have been copied from ‘Awwām (reviewed above).


668 For Rūgī’s critique of Zaydān’s reading of Shāṭibī, see esp., Rūgī, *Nazarīyyat at-Taqʿ ʿid*, 181-2.
science of khilāf with modern comparative Islamic law that he defines as: “the comparison of [lit. balancing of] practical legal injunctions for [the purpose of] deciphering the most preponderant among them.” He clarifies that the word “muwāzana” (balancing) is the closest the true goal of contemporary comparative Islamic law. Here, what is intended is not a mere collation of legal rulings for the sake of raising their points of conflict (muqābala). Rather, it is to compare them in a balanced way to identify which outweighs, hence which is more appropriate to admit. In addition, Shallī calls attention to the difference between doctrinal and superior juristic disagreements (khilāf madhhabī vs. al-khilāf al-ʿālī). He clarifies that in the first, jurists confine themselves to opposed legal opinions within their respective legal schools (I call intra-doctrinal). In the second type, jurists compare juristic disagreements across all doctrines (I call inter-doctrinal). It is within the latter category that Ibn Rushd’s *Bidāyat al-Mujtahid* has been perceived in this study.

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Appendix Two

Ibn Rushd’s Preamble to *Bidāyat al-Mujtahid*

Translation of the introduction of the *Bidāya*. Ibn Rushd, *Bidāya*, 1: 9-12

In the name of God, the Merciful, the Compassionate

“For whomsoever God wills good, He gives the understanding of the religion”

In the name of God, the Merciful, the Compassionate.
Praise be to God in every way that He may be praised, and blessing and peace be upon His Messenger Muḥammad, his family and his Companions.

My intention in this book is to establish for myself, by way of reminder, the undisputed and disputed questions of legal rulings along with their indicants, and call attention to the intricacies of juristic disagreement which constitute the foundations and general principles [of Fiqh] so that the adept jurist is prepared for [answering] cases presented to him and about which the law is silent. These questions [of legal rulings] are for the most part issues already addressed by the law, or very closely related to them. They are issues which are either agreed upon or widely disputed by the Muslim jurists, from the time of the Companions, may God be pleased with them, until the widespread of School adherence.
The ways through which the legal rulings were received from the Prophet, [God's] peace and blessing be upon him, are three categories: a verbal expression, an implicative action, or a tacit approval. For the rulings about which the lawgiver was silent, the majority [of jurists] said that the way to attain their knowledge is through [juridical] analogy (qiyās). The Zāhirīs, [to the contrary], maintained that analogy in legal matters is invalid, and whatever the lawgiver was silent about has no ruling. [Nevertheless,] reason bears witness to its validity since occurrences among human beings are infinite, whereas the [prophet’s] texts, actions and tacit approvals are finite. And it is impossible for that which is infinite in number to be equal with that which is finite.

The categories of verbal expressions from which the rulings are derived by way of revealed knowledge are four. Three are agreed upon and the fourth is disputed. The three agreed upon are: [1] a general expression intended in its general sense, or a specific expression intended in its specific sense, [2] a general expression entailing a specific sense, and [3] a specific expression

وَأَلْفَاظُ الْأُفُوْضُ الَّتِيْ تَتَلَقَّىُ مِنْهَا الْحُكُمَانَ مِنَ السِّمْعِ أَرْبَعَةُ: ثُلَاثَةُ مَتَّىٰ عَلَيْهَا، وَرَابِعٌ مَخْتَلِفْتِ فِيهِ. أَمَّا الثُّلَاثَةُ المَتَّىٰ عَلَيْهَا: فَلِفَطُ عَلَى، أوْ عَمَّامْ يُحَمِّلُ عَلَى غَفُورِهِ، أوْ خَاصّ يُحَمِّلُ عَلَى خَصَصِّي، أوْ لُفْطُ عَمِّمْ يُزَادُ بِهِ غَفُورًا، أوْ لُفْطُ عَمِّمْ يُزَادُ بِهِ خَصِّي، وَوَهَٰذِهُ يُنْكَلَّ النِّبِيّةُ بِالْعَلِيمِ عَلَى الأَنْثَىٰ،
entailing a general sense. It goes under the latter inference from higher to lower, from lower to higher, and from equal to equal. An example of the first category is God’s word: “Forbidden unto you (for food) are carrion and blood and swine flesh” [5:3]. Muslims have agreed that the term “swine” represents all types of swine unless it is called “swine” by way of homonymy, such as “water-swine.”

An example of a general expression understood in a specific sense is God’s word: “Take alms of their wealth to purify them and make them thrive” [9:103]. Muslims have agreed that the zakāt is not obligatory on all types of wealth.

An example of a specific expression which entails a general sense is God’s word: “say not ‘Fie’ unto them [one’s parents]” [17:23]. This is a way of inference from the lesser to the greater. From it, it is understood the prohibition of cursing, beating and whatever is greater [than saying “Fie”].

When these [verbal expressions] are used to require the addressee to act, they come either in a command form, or in a predication form [but] intended as a command. When they are used to require the addressee to refrain, they come either in the form of prescription, or in the form of a predicate intended as a prescription. When these expressions come in these forms, and from what will be said about the definition of the obligatory and commended, should the invited...
action be considered an obligation or commendation? Or, should one hold an agnostic position until there is proof that indicates one or the other? Disagreement among the scholars about this [question] has been recorded in the books of legal theory. The same is [to be said] about the forms of proscription. Do they entail disapproval, forbiddance, or neither? There is also recorded dispute on this [point].

The things (a’yān) to which a legal ruling pertains are indicated by an expression which bears either one single meaning or more than one meaning. [The first] is known in the discipline of legal theory as the [univocal] Text (an-naṣṣ), and there is no disagreement about the requisite of acting in conformity with it. [The second] is of two types. [One] implies [every one of its possible] meanings equally. It is known in legal theory as “the ambiguous” (al-mujmal), and there is no disagreement that it does not compel a ruling. [The other] implies some of its [probable] meanings more likely than others. It is called “manifest” (zāhir) with respect to the meanings it entails more likely and “probable” (muḥtamal) with respect to the meanings it entails less likely. When it [expression] is used in an unqualified way, it is considered bearing on its most manifest meanings until there is evidence that it implies the probable meaning. This caused the jurists to disagree on the lawgiver’s words, particularly with respect to three [areas of] meaning: homonymy (iṣṭirāḵ) of the [key] expression in which the ruling was grounded, homonymy of the definite article [i.e., al] which...
corresponds to the genus of the object [of ruling] (does it intend universality of particularity?), and homonymous expressions of command and prohibition.

The fourth way [i.e., type of verbal expressions from which the rulings are derived] is to understand from the obligation of a ruling on something its negation of all other things, and from the negation of a ruling on something its obligation of all other things. This is known as implicative speech (dalīl al-khiṭāb), and it is a disputed principle. An example is [the prophet’s] saying, blessing and peace be upon him: “alms are due in free-range sheep,” and from which some people understood that no alms are due on sheep that are not free-range.

Juridical analogy is the association of an obligatory ruling for a legal matter with another matter about which the law is silent, because the two matters resemble each other or share the [same] effective cause. For this reason, juridical analogy is two types: analogy of resemblance and analogy of the effective cause.

The difference between juridical analogy and a particular expression entailing a general sense is that analogy is applied to a particular [expression] intended as particular, and so it gets associated with other things. I mean that an unstated [issue in the law] is associated with that which is stated by way of their resemblance, not by way of the expression’s implicative function —because the association of the
unstated with the stated by way of an expression’s indication is not analogy, but part of the expression’s implication. These two techniques are quite similar, for they deal with establishing an unstated [ruling] based on a stated one, and they cause the jurists great bewilderment.

An example of analogy is the association of the drinker of wine with the slanderer in terms of punishment, the [value of] the dower with the [minimum] amount due in the [punishment of] cutting [the hand]. As for the association of usury dealings with edibles or foods that can be measured or provided, this goes under the category of the particular [expression] that entails a general sense. So, ponder over this for it is obscure.

It is the first type [i.e., analogy of resemblance] that the Zāhirīs should dispute. But, they should not dispute the second [i.e., qiyās ‘illa] because it is part of the revealed knowledge. One who rejects it, rejects an [essential] form of Arab speech.

As for the [prophet’s] implicative action, the majority has agreed that it is one of the ways from which legal rulings are obtained. [However,] one group argued that actions do not imply a ruling since they lack linguistic forms. Those who said the rulings may be obtained from them [i.e., the actions] differed on the type of implied ruling. Some said they indicate obligation, others said they indicate commendation. The [view] preferred by the experts is that if actions come to elucidate an ambiguous expression of an
Obligatory (act), they indicate obligation. If they come to elucidate an ambiguous expression of a commended [act], they indicate commendation. If they do not come to elucidate an ambiguous expression and belong to [acts of] devotion, they indicate commendation, [whereas,] if they belong to permissible acts, they indicate permissibility.

Tacit approval indicates permissibility. These are the categories of the ways from which legal rulings are received or deduced.

Consensus (ijmā‘) finds support in any of these four ways. Except that when it takes place with respect to one of them and it is not conclusive, the injunction is considered conclusive based on the prevailing opinion. Consensus is not an independent principle [of the law] which can do without one of these ways. Had it been so, it would require proving a [new] law added after the prophet, God’s blessing and peace be upon him—since it does not draw on any of the legal sources.

In general, the common intentions derived from these verbal ways of the legally competent either: command an act, prohibit it, or allow a choice in it. If the command is conceived of as decisive and invokes punishment if not fulfilled, it is called obligatory. If it is conceived of as bringing reward if fulfilled but no punishment if left undone, it is called commended. Also, if a prohibition of an act is conceived of as decisive and invokes punishment if fulfilled, it is
called prohibited and forbidden. If it is conceived of as better if left undone but brings no punishment if done, it is called discouraged. And so, the categories of juridical rulings obtained through these ways are five: obligatory, commanded, prohibited, discouraged, and optional which means permitted.

The causes of juristic disagreement are six categories. First: the changing [linguistic nature] of expressions in these four ways. I mean that an expression may be general entailing a specific [sense], specific entailing the general, general entailing the general or specific entailing the specific, or may or may not inform of implicative speech.

Second: homonymous [singular and complex] expressions. [An example of] a singular homonymous expression is the term “qur” which denotes the periods between menses and the menstrual period. [Another is] an expression of command that may to refer to either obligation or commendation, and an expression of negation that may refers to either prohibition or discouragement.

[An example of] a complex homonymous expression is God’s word: “Except those who repent” [2:160]. It is possible that this [expression] refers to the transgressor only, or to the transgressor and the witness, in which case repentance annuls the [sin of] transgression and permits the slanderer’s testimony.
Third: difference in [the grammatical functions of an expression with respect to] inflection.

Fourth: the changing [semantic nature] of an expression from literal to metaphorical and from literal to a non-literal form, including elision, addition, preposing and postposing.

Fifth: the use of an expression unqualifiedly at times and qualifiedly at other times. For example, the term “slave” is used in [the context of] manumission unqualifiedly sometimes [i.e., all slaves], and other times it is restricted by belief [i.e., believing slaves only].

Sixth: the contradiction of two things within any of the categories of expressions from which legal rulings are obtained; as well as the contradiction in [the prophet’s reported] acts or tacit approvals; the contradiction of analogies; or the contradiction that arises from these three categories. I mean the contradiction between a verbal expression and the action, or tacit approval, or analogy, the contradiction between the action and the tacit approval or analogy; and the contradiction between the tacit approval and analogy.

The Judge [Ibn Rushd], may God be pleased with him, said: now that we have mentioned these things broadly, let us begin, seeking help from God, what we
have intended. Following their [i.e., the jurists] custom, let us begin with the Book of Purification.
Appendix Three

Does Little Impurity Soil a Small Amount of Water?

From Section 3 of Kitāb al-Wudūʿ (Book of Ritual Ablution), being part of Kitāb aṭ-Ṭahāra min al-Ḥadath (Book of Ritual Purification). Ibn Rushd, Bidāya, 1: 29-33.

The origin of the obligation of using water for purification is the Sublime’s word: “and sent down water from the sky upon you, that thereby He might purify you,” and “if you find not water, perform dry ablution with clean soil.”

Scholars decided unanimously that all kinds of water are in themselves pure and [capable of] purifying other things, except for “sea water” about which there was a peculiar dispute among the first generation.

Their objection [to sea water] is rebutted on the ground that the unqualified noun “water” encompasses it [i.e., sea water], and because of the tradition established by Mālik; that he, prayer and peace be upon him, said: “Its water is pure, and its carrion is permissible.” Even though the authenticity of this Ḥadīth is a matter of dispute, the manifest intention of the law sustains it.
They also agreed that everything that alters water and cannot be separated from it often does not undermine its attribute of purity and purifying capability, save for a peculiar disagreement on stagnant water reported by Ibn Sīrīn. This disagreement, too, is rebutted on the ground that the unqualified noun “water” encompasses it in its scope.

They agreed that the water which taste, color, odor, or more than one of these attributes are altered by an impurity cannot be used for ablution or purification.

And they agreed that water of great quantity and depth remains pure and not affected by the impurity that does not alter one of its qualities. These are the things upon which they have reached consensus in regard this topic.

[On the other hand,] they disagreed on six issues which run as principles and meta rules within this area.

The First Issue: They disagreed about water mixed with an impurity that does not alter any of its attributes. One group claimed that it remains pure, whether it is a large or small amount. Such position is reported on Mālik and upheld by the Zāhirīs. Another group distinguished between large and small amounts [of water]. They argued that if it is a

وذلك أجمعوا على أن كلما يغيّر الماء ممّا لا ينقف عليه غالباً أنه لا يسلّمه صفة الطهارة والتطهير إلا خلافاً شاذًا رويا في الماء الأجن عن ابن سيرين، وهو أيضًا مخجل بتجاوز اسم الماء المطلق له.

وافقوا على أن الماء الذي غيّرته النجاسة إنما غيّر الطهارة أو لنونة أو ريبة أو أكثر منها واحدة من هذه الأوصاف أنه لا يجوز به الوضوء ولا الطهور.

وافقوا على أن الماء الكثير المستنبجر لا تضره النجاسة التي لم تغيّر أحد أوصافه وأنه طاهر، فهذا ما أجمعوا عليه من هذا الباب.

واختُلِفوا من ذلك في ست مسائل تجري مخزى الفوائد والأصول لهذا الباب.

المسألة الأولى اختُلِفوا في الماء إذا خالطته نجاسة ولم تغيّر أحد أوصافه، فقال قوم: هو طاهر سواءً أكان كثيرًا أو قليلًا، وهي إحدى الروايات عن مالك، وله بالله أهل الطاهر، وقال قوم بالفرق بين القليل والأكبر، فقالوا: إن كان قليلًا كان نجساً وإن كان كثيرًا لم يكن نجساً.
small amount [of water], it becomes impure. If it is large, it does not.

They [further] disagreed on the borderline between large and small amounts. Abū Ḥanīfa suggested that the water should be of a great deal that if a person stirs one of its ends, the ripple does not reach its other end.

Shāfi‘ī suggested that the dividing line is the fill of two jars of the jars made in Hājr—which is about five hundred rotls.

Others did not require a limit, but stated that impurity spoils a small amount of water even if one of its attributes did not change. This view is also reported on Mālik. It was also reported [on him] that [the use of] this kind of water is discouraged.

So, three [different] views are ascribed to Mālik with respect to the permissibility of a small-amount of water that is mixed with insignificant impurity: that impurity spoils it, that it does not spoil it unless it alters one of its attributes, and that it is discouraged.

The cause of their dispute is the conflict between the manifest expressions of the Ḥadīths on this topic. [For example,] from the plain text of the previously mentioned Ḥadīth of Abū Hurayra—that the Prophet (prayers and peace be upon him) said: “when one of you wakes up”—it is understood that little impurity does soil a small amount of water. Similarly, the manifest text of
Abū Hurayra’s report that he (prayers and peace be upon him) said: “None of you urinates in still water, then bathes in it” also makes one believe that little impurity soils a small amount of water. The same is for [the traditions] prohibiting a person in a state of major ritual impurity from bathing in still water.

[Contrarily,] Anas ath-Thābit reported that “a Bedouin went up to a side of the mosque and urinated. The people yelled at him, but God’s messenger asked to leave him alone. After he had done, God’s messenger ordered to pour a pitcher of water on the urine.” The manifest expression [of this tradition] denotes that little impurity does not soil a small amount of water, for it is clear that that spot had been purified from sin.

[There is] also Sa’īd al-Khudari’s report (also established by Abū Dawūd): “I heard that the messenger of God (prayers and blessings be upon him) was told that the water he was provided is from the well of Budā’a, which is a well in which dog flesh, menstrual cloths and people’s dirt are cast. The prophet (prayers and blessings be upon him) replied: ‘Nothing soils water.’”

Scholars strived to harmonize these traditions, but disagreed on the way to do it, and so developed different methods.

Those who rendered the Bedouin’s tradition and the report by Abī Sa’īd by way of their manifest text
contended that the Abū Hurayra’s two reports have no rational intention and so the observance of their content is [mere] ritual—not because that water can become impure. The Zāhirīs went too far in this regard and suggested that [even] if a person pours urine from a bowl in that water, it would not be discouraged to wash with it and use it for ablution. It is in this manner that the adherents of this position harmonized these traditions.

As for those who discouraged the use of a small amount of water mixed with little impurity understood Abū Hurayra’s reports to entail discouragement and rendered the Bedouin’s tradition and Abū Saʿīd’s to large amounts.

Shāfiʿī and Abū Ḥanīfa reconciled Abū Hurayra’s reports and that of Abū Saʿīd al-Khudarī in that they applied Abū Hurayra’s to small amounts of water and Abū Saʿīd’s to large amounts.

According to Shāfiʿī, what solves the harmony of these traditions is the content of ‘ʿAbd Allāh b. ‘Umar’s report on the authority of his father (established by Abū Dawūd and at-Tirmidhī and authenticated by Muḥammad b. Ḥazm) who said: “the messenger of God (prayers and peace be upon him) was asked about the predators’ and riding animals’ leftover of water and the like. He
answered that if the [amount of] water is equal to two jars, it contains no impurity.”

Abū Ḥanīfa sought a solution by resorting to analogy. He held that the impurity affects the entire water if it has circulated through all of it. If it is believed that the impurity cannot spread through all of it, the water is [considered] pure.

However, the well-known Bedouin’s tradition negates by necessity these two opinions. For this reason, the Shāfī’is sought to distinguish [two situations]: when water is poured over impurity, and when impurity is cast in water. They argued that if water is poured over impurity, as in the Bedouin’s tradition, it does not become impure. But, if impurity is cast in water, as in Abū Hurayra’s report, it becomes impure. The majority of jurists called this an arbitrary view.

[Nonetheless,] if thought over carefully, it makes a valid point. [The issue is] that they have unanimously agreed that little impurity does not contaminate a large amount of water if the water is so abundant that it can be guessed that the impurity cannot circulate through all of its parts and that its material substance disintegrates within it.

[Even] if this is the case, it is not implausible that a certain amount of impurity disintegrates in a certain amount of water, yet it circulates through it and makes it impure. [But,] if that water is poured bit by
bit over the impurity, it is certain that the core
substance of the impurity would vanish before the
water is over. As such, the last bit of water to be
poured [over the impurity] purifies the [soiled] spot
—for the quantitative relation of the impurity and
the water poured over it is that of a large amount of
water and a little impurity.

Therefore, certain knowledge in this matter hinges
on the disappearance of the substance of impurity
—i.e. in that the last part of clean water is poured
over the last part of the substance of impurity. It is
for this [reason] that they have unanimously agreed
that what purifies a drop of urine on clothes of body
is purified by the amount used for ritual ablation.
And they disagreed on if the drop of urine fell in
that [same] amount of water.

In my view, the most suitable opinion and best
method for harmonizing [the traditions] is to
constre Abū Hurayra’s report (as well as others
with the same intention) in the sense of
discouragement, and Abū Sa’īd’s and Anas’ reports
in the sense of permissibility. For such
interpretation preserves the manifest implication of
the traditions —i.e. that the purpose of Abū
Hurayra’s reports is [to instruct about] the
impurity’s effect on water.

Discouragement in my view is [applied to] that
from which the soul refrains in disgust and
considers filthy. So, that which people forbear
drinking must not be used in rituals devoted to God the Sublime, and it must be refrained from consuming it or applying it to the external body.

Some [legal scholars] have argued that if little impurity were to soil a small amount of water, water would never purify anything —and, by extension, the object external to the water and sought to be purified will be impure forever. This is a flimsy argument, [however,] for we have shown that the relation of the last bit of water poured over the last part of the impurity is [the same as] the relation of a large amount of water to little impurity.

Even though it appeals to several modern scholars, we know for certain that little impurity does not pollute a large amount of water. So, if the person washing continues pouring water over the impure spot or body part, the water, by its abundance, removes necessarily the substance of the impurity. And there is no difference between a large amount of water that is poured over the impurity all at once or in stages.

What these [scholars] actually did, without awareness though, is presenting an argument on which there is consensus to address a controversial issue. The two, however, are immensely distinct.

This is what we sought to cover on this issue, with respect to people’s dispute about it the preponderance of their arguments. We wish we...
could apply this method [of analysis] on every issue, but that would require much more time and death may hinder its completion. It is cautious, then, to stick to the goal we have outlined at the beginning. If God the Sublime would make it possible and we have an extended life, we will accomplish this goal.
Appendix Four

Ibn Rushd’s Conclusion to Bidāyat al-Mujtahid

Translation of the conclusion of Bidāyat al-Mujtahid wa Kifāyat al-Muqtaṣid, 4: 257-58.

The Judge, may God be pleased with him, said: You should know that the legal rulings are divided into two [main] parts. One part is adjudicated by the judges. Most of what we have mentioned in this book belong to this part. Another part is not adjudicated by the judges. Most of these [rules] belong to the commended [category].

This genus of rulings is like returning a greeting, blessing [someone] who sneezes, and similar things of what the legal scholars mention in their last books [or chapters] which they entitle called the “Jawāmi‘.” We, too, decided to mention the best known [of issues] in this genre, God the Exalted willing.

Prior to this, however, you should know that the purpose of the established practical rules is psychological virtues.

Some of them [i.e., established practical rules] concern giving praise to whom requires praise and thanks to whom requires gratitude. Under this category goes ritual
Some concern the virtue called abstinence. And this is of two kinds: rules with respect to eating and drinking, and with respect to marital affairs.

Some concern demanding justice and ending injustice. These are the rules [of conduct] that require justice in [matters involving] money and bodies, under which goes [the laws of] retaliation, wars and penalties —since the goal of these [laws] is the attainment of justice. Also part of this [category] are rules of honor.

Some concern rules of collecting and managing money, which are intended to gain the virtue called generosity and avoid the vice called covetousness. Alms giving belongs to this category with one respect, and to wealth sharing with another. The same applies to charity.

Some concern rules of sociability, which is condition for the life of humans and for preserving their practical and theoretical virtues. These are called governance. For this reason, imams and people in charge of religious affairs ought to abide by these rules.
One of the important rules of sociability are rules of love and hate, and cooperating to maintain them. This is called the prohibition of vice and the command of virtue. It is the love and hate — i.e., in religion [matters] — that results either from evading these rules [of conduct] or from the wrong belief in the sharī’a.

Most of what the jurists mention in the Jawāmi’ chapters of their books is derivative of the four generic categories, which are the virtue of abstinence, the virtue of justice, the virtue of courage, and the virtue of generosity. [All kinds of] ritual worship act as conditions for sustaining these virtues.

The Book of Judgement is [now] complete. With its completion, the entire manuscript is completed. Much praise be to God for this, He is the all deserving.
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Ibn Ḥusayn, Muḥammad ʿAlī. Tahdhīb al-Furūq wa l-Qawāʿid as-Sunniyya fī l-Asrār al-Fiqhiyya (a parallel commentary in Qarāfī’s Furūq, see Qarāfī).


**Lexicographies and Encyclopedias**


