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JUDICIAL TREATMENT OF RELIGIOUS-ONLY MARRIAGES UNDER ENGLISH MATRIMONIAL LAWS

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Abstract

This article examines how judges of courts in England and Wales treat religious-only marriages, particularly Islamic marriages (nikāḥ). It analyzes how judges have approached nikāḥ-based unions under the Matrimonial Causes Act 1973, distinguishing between valid, void, and non-qualifying ceremonies. Drawing on leading judicial authorities from the 1960s to 2025, I trace the transformation of judicial reasoning from questions of formality and jurisdiction to issues of human rights, equality, and non-discrimination. I argue that the insistence of judges on legal formalities has produced a dual system: one that privileges state-sanctioned forms of Anglican Christian and civil marriages while leaving other religious-only and humanist unions without legal protection. The article concludes that the challenge is not merely one of doctrinal classification but of reconciling multiple legal norms within a secular framework that aspires to equality, inclusion, and neutrality regarding religious practices.

Keywords: foreign marriages, hallmarks of marriage, human rights law, Islamic marriage (*nikāḥ*), non-marriage, non-qualifying ceremony (NQC)

INTRODUCTION*

In December 1998, Nasreen Akhter, then a trainee solicitor, married Mohammed Shabaz Khan in an Islamic marriage (*nikāḥ*) ceremony at a London restaurant. Beforehand, Mr. Khan promised that the couple would also register their marriage through a civil ceremony, but this never took place. For nearly two decades, they lived together in London and Dubai as husband and wife, raised four children, and presented themselves as a married couple. When the relationship broke down, Ms. Akhter sought financial relief under the Matrimonial Causes Act 1973, claiming that her marriage was void rather than a legal nullity. At first instance, Williams J. agreed, holding that the *nikāḥ* bore sufficient hallmarks of marriage to bring it within the statutory framework, thus entitling her to financial remedies.¹ The Court of Appeal, however, overturned that decision, introducing the category of the “non-qualifying ceremony” (NQC) to declare

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¹ *Nasreen Akhter v. Mohammed Shabaz Khan & Att’y Gen.* [2018] EWFC 54, [3] (Eng.). Most commentators welcomed Williams J.’s judgment for extending financial relief to Muslim wives following the breakdown of Islamic marriages, describing it as “monumental,” an “enormously important step forward,” a “step in the right direction,” and “instinctively just.” *See, e.g.,* Raffia Arshad, *Muslim Marriages: Financial Remedies*, 49 *FAM. L.* 517, 521 (2019); Gillian Douglas, *Marriage—Nullity: Akhter v. Khan*, 48 *FAM. L.* 1386, 1388 (2018); Amy Pratt, *Akhter v. Khan: One Small Step for Woman, One Moderate Leap for Womankind*, 27 *TUL. J. INT’L & COMP. L.* 435, 446 (2019); Claire Fenton-Glynn, *Human Rights and the Law of Nullity: Akhter v. Khan*, 48 *FAM. L.* 1265, 1268 (2018); Chris Barton & Rebecca Probert, *The Status of a Religious-Only Marriage: Valid, Void, or “Non”?* *Akhter v. Khan*, 48 *FAM. L.* 1540, 1540 (2018).

that the marriage was neither valid nor void, but a non-marriage that conferred no rights.²

This judgment is doctrinally significant, but its implications reach further. It represents a moment in which the judges redraw the boundaries of legal recognition: privileging statutory formality over purposive interpretation of remedial legislation intended to benefit weak and vulnerable parties such as wives, widows, and children. For Ms. Akhter, the outcome was exclusion from financial remedies. For the law more broadly, the NQC crystallized a shift from flexible, equity- and human rights-infused reasoning towards rigid formalism. The case exemplifies how family law can function as a site where a secular authority determines which religious practices to recognize and which to render invisible.³

In this article, I argue that the introduction of the NQC test represents a significant shift in English marriage law. First, the NQC test is a judicial innovation with no explicit statutory basis, sitting uneasily with the beneficial section 11 of the Matrimonial Causes Act 1973, which extends financial remedies even to void marriages. Second, its narrow focus on ceremony disproportionately disadvantages religious minorities, particularly Muslim women, whose Islamic marriages (*nikāh*) are socially binding but legally disregarded. Third, subsequent case law indicates that the NQC test has not displaced the hallmarks test entirely. Judges continue to apply both tests, sometimes in the same case, as positive and negative tests to determine the legal implications of marriages.

To broaden the scope of discussion, I situate the discussion on NQC within a comparative framework. Under classical Islamic law, marriage is a contract formed through consent, with formalities serving evidentiary purposes rather than constitutive ones. Modern Muslim-majority jurisdictions adopt permissive, dismissive, or accommodative models for unregistered marriages, none of which map neatly onto the NQC category. These comparisons highlight both the contingency of English law's

² Attorney General v. Akhter & Ors. [2020] EWCA Civ 122, [123] (Eng.).

³ TALAL ASAD, *Secularism, Nation-State, Religion, in FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* 181 (2003).

strict formalism and the risks of excluding religiously valid but legally unrecognized marriages.

In the literature, marriages that fail to meet statutory formalities are variously described as “unregistered” (religious, pagan, humanist), “religious-only,” “non-legally-binding,” “non-marriages,” and “non-qualifying ceremonies” (NQC).⁴ This article adopts “religious-only marriage” as the default term, unless context requires otherwise. The Law Commission defined “religious-only marriage” as: “a marriage that is recognised by a religious community or organisation but not by the state, because the wedding did not follow the legal requirements.”⁵ Following the High Court’s judgment in *R (Harrison and others) v. Secretary of State for Justice*, which held that the absence of legal recognition for humanist marriages engaged Articles 9 and 14 of the European Convention of Human Rights (ECHR), such ceremonies may be treated as analogous to religious-only marriages, in that both fall outside the framework of legally recognized marriage in England and Wales.⁶ This conceptual alignment provides a consistent analytical baseline for assessing the legal consequences of non-compliant ceremonies across religious and belief-based contexts.

The core research question is whether the NQC test provides a coherent and just framework for regulating religious-only marriages in English law. This article argues that the test undermines the protective purpose of the Matrimonial Causes Act 1973, entrenches inequality, and widens the gap between lived family relationships and legal recognition. More broadly, it asks the following: Who has the authority to define marriage—the legislature, the judiciary, or religious communities? Should the law prioritize certainty and exclusion, or protection and inclusion? And can English law reconcile statutory formality with the plural realities of contemporary family life in England and Wales?

4 REBECCA PROBERT, RAJNAARA C. AKHTAR & SHARON BLAKE, WHEN IS A WEDDING NOT A MARRIAGE? EXPLORING NON-LEGALLY BINDING CEREMONIES 10 (2022).

5 LAW COMM’N, CELEBRATING MARRIAGE: A NEW WEDDINGS LAW xii, Law Com No. 408 (2022) (UK).

6 *R. (on the application of Harrison) v. Secretary of State for Justice* [2020] EWHC 2096 (Admin), [129] (Eng.).

To answer these questions, the article proceeds in three parts. Part I traces the development of the NQC test from the perspective of Ms. Akhter, showing that until the Court of Appeal's intervention, most applications of the "non-marriage" doctrine concerned polygamous marriages. Part II analyzes the judgments of the High Court and the Court of Appeal in *Akhter*, highlighting the transformation from a contract-based, multi-factor test of the hallmarks of marriage to a status-based, single-factor NQC test. Part III reviews recent case law and demonstrates that the NQC has not completely supplanted the more flexible hallmarks test, which continues to be applied on a case-by-case basis.

JUDICIAL TREATMENT OF RELIGIOUS-ONLY MARRIAGES, 1998–2011

This section examines the case law concerning religious-only marriages during the marital relationship of Ms. Akhter and Mr. Khan. It shows that as late as 2011, English courts continued to recognize such marriages for financial relief, provided they were not polygamous, where the ceremony bore the "hallmarks of marriage" or where a presumption of marriage could be drawn from cohabitation and reputation.

Hallmarks of Marriage and Presumption of Marriage

The *nikāh* of Ms. Akhter and Mr. Khan took place at a restaurant in Southall in London in December 1998. As a trainee solicitor, Ms. Akhter appreciated the importance of civil registration under the Marriage Act 1949. Later, in his testimony, Mr. Khan claimed that his wife was "extremely religious and felt it unnecessary to register the marriage."⁷ He alleged that his wife knew that their *nikāh* ceremony was not "valid in English law" and that she "deliberately set out to deceive the court."⁸ Conversely, Ms. Akhter testified that their *nikāh* ceremony was agreed to be followed by a civil ceremony and, based on her legal

⁷ Nasreen Akhter v. Mohammed Shabaz Khan & Att'y Gen. [2018] EWFC 54, [20] (Eng.).

⁸ *Id.*

training, she informed her husband that they would be “treated as cohabitantes” under English law.⁹ She also stated that raising the issue of a civil ceremony often led to arguments.¹⁰

At the time of their marriage, judicial treatment of religious-only marriages was not settled. The leading decision was *Gereis v. Yagoub*, where a Coptic Orthodox ceremony conducted without statutory notice and by an unauthorized officiant was nevertheless treated as a void marriage.¹¹ H.H.J. Aglionby reasoned that the ceremony bore “the hallmarks of an ordinary Christian marriage” and should be recognized for the purposes of financial relief under section 23 of the Matrimonial Causes Act 1973.¹² He confined the category of “no marriage at all” to sham proceedings such as plays or plainly polygamous unions.¹³

Unlike the brief union in *Gereis v. Yagoub*, which lasted less than a year, Akhter and Khan lived together for nearly two decades. Their first child was born on September 29, 1999. Around that time, Ms. Akhter requested a civil ceremony; Mr. Khan refused, accusing her of being “materialistic.”¹⁴ Had she petitioned under the Matrimonial Causes Act 1973 in 1999, would a court have regarded the *nikāḥ* ceremony as bearing the hallmarks of an ordinary marriage? One contemporary commentary on *Gereis* suggested that an Islamic marriage ceremony could attract legal recognition if “an English court is prepared to accept that Muslim ceremony as evidence of parties effecting mutual intention to marry each other.”¹⁵ On that view, English law could treat a *nikāḥ* as a civil contract comparable to an ordinary Christian marriage: valid on proof of the ceremony and void, rather than a non-marriage, where statutory formalities or elements of formation were missing.¹⁶ That analysis starts

9 *Id.*

10 *Id.*

11 *Gereis v. Yagoub* [1997] 1 FLR 854 (Fam. Div.), 858 (Eng.).

12 *Id.*

13 *Id.* at 857. In this case, the wife had already availed a certificate of annulment of marriage from the Council of the Coptic Orthodox Church in Cairo.

14 *Akhter v. Khan* [2018] EWFC 54, [20] (Eng.).

15 W.K. Leong, *A Fresh Look at Void Marriage: Gereis v. Yagoub*, 1997 SING. J. LEGAL STUD. 580, 582 (1997).

16 To support this argument, Leong quoted S. M. CRETNEY & J. M. MASSON, PRINCIPLES OF FAMILY LAW 70 (5th ed. 1990). In the later edition REBECCA PROB-

from a contractual conception of marriage. English law, however, blends contract and status, and although recent case law has moved somewhat towards the contractual end of that spectrum,¹⁷ courts have not consistently treated contract-based, religious-only marriages of Hindus, Sikhs, Muslims, or humanists as equivalent to “ordinary Christian marriages.”

*Islamic Marriage as “Non-Marriage”
and Polygamous Marriages*

The first reported judgment addressing financial relief following a *nikāḥ* was in 2001.¹⁸ The ceremony took place in London in 1980. The husband, already married, was advised by the legal consultant of his organization that his second wife would not be entitled to a pension because their polygamous marriage was invalid in England. He was told to divorce and remarry abroad so that the English courts would recognize the union as a valid foreign marriage. He then travelled to Sharjah, divorced his second wife, and remarried her there. The couple subsequently lived together for two decades and had two children. When the relationship broke down, the wife petitioned for divorce in England and sought financial relief. The husband argued that the London ceremony created no legal rights because it was a non-existent marriage. Hughes J. held that the 1980 ceremony was neither valid nor void but that the wife could rely on the presumption of a subsequent marriage in an Islamic country to obtain relief.¹⁹

ERT, CRETNEY AND PROBERT’S FAMILY LAW 36 (7th ed. 2009), it is noted: “While it is sensible for non-compliance to be a matter of degree, it would be indefensible for a Sikh or Muslim marriage to be struck down in circumstances in which a Christian marriage would be upheld.” As discussed later, the judges did exactly that in their judgments starting from early 2000.

17 NIGEL LOWE ET AL., BROMLEY’S FAMILY LAW 11–12 (12th ed. 2021).

18 A-M v. A-M (Divorce: Jurisdiction: Validity of Marriage) [2001] 2 FLR 6 (Fam. Div.), [59] (Eng.).

19 *Id.* at [55] & [58]. This was the first judgment which applied the concept of “non-marriage” to an Islamic marriage, after it was applied in a criminal case in which the court overturned the conviction of an *imām* for performing the ceremony of “a potentially polygamous marriage” after holding that since English law did not recognize the marriage “solemnised under Islamic law,” the *imām* did not violate the law. R v. Bham (Usuf Arif) [1966] 1 Q.B. 159, 168 (Eng.).

In contrast to the marriage in the above case in *A-M v. A-M*, Ms. Akhter's marriage was monogamous. Even so, the presumption of marriage arising from continuous cohabitation and reputation may explain why she did not insist on civil registration after the birth of their second and third children. When the family moved to Dubai in 2005 and the authorities required proof of marriage, Mr. Khan produced a certificate from the *imām* (prayer leader) who had officiated in 1998. This was an opportunity for Ms. Akhter to secure recognition of her marriage in England and abroad through a civil ceremony, but Mr. Khan circumvented it by procuring a marriage certificate from the *imām*. It is reasonable to ask whether existing case law would have made her believe that her *nikāḥ* did not have any legal implications at all and constituted a "non-marriage."

The concept of non-marriage emerged in an early 2000s inheritance case. A widow, Hasmita, had participated in a polygamous ceremony at an Indian restaurant before a Brahmin priest but without complying with the Marriage Act 1949.²⁰ The court held there was "no marriage at all" and rejected her claim under the Inheritance (Provision for Family and Dependents) Act 1975. The polygamous character of the union was decisive; the court did not apply either the hallmarks test or the presumption of marriage, which it had used in a case involving a monogamous marriage ceremony conducted at a Sikh gurdwara to recognize a widow's entitlement to financial rights.²¹

Two further cases involving Islamic ceremonies also resulted in findings of non-marriage, both in polygamous contexts. In *Sharbatly v. Shagroon*, the parties married in a London hotel without attempting to comply with the 1949 Act or to supplement the Islamic ceremony with a civil one.²² They later settled in Saudi Arabia after the husband pronounced *ṭalāq* (divorce) and agreed to financial provision. A consent order in 2002 preserved the wife's ability to apply under the Matrimonial and Family Proceedings Act 1984. When she applied a decade later, the High Court granted relief, but the Court of Appeal, per

20 *Gandhi v. Patel* [2002] 1 FLR 603, 604 (Eng.).

21 *Chief Adjudication Officer v. Bath* [2000] 1 FLR 8, 10 (Eng.).

22 *Shagroon v Sharbatly* [2012] EWCA Civ 1507, [7] (Eng.).

Thorpe L.J., held that she was not entitled to orders based on the Saudi divorce because the London marriage was not recognized in English law. In a short concurring judgment, Hedley J. emphasized that each case regarding the legal recognition of marriage ceremonies “must continue to be decided on its own facts.”²³ Rather than endorsing the application of non-marriage to a Islamic marriage, the judgment in this case shows the willingness of English judges to recognize religious-only marriages in the early 2000s, a view that changed later. In *El Gamal v. Al-Maktoum*, a private *nikāh* at the husband’s London flat was proven to have occurred, but Bodey J. refused a decree of nullity and financial relief because the ceremony did not meet English formal requirements.²⁴

Taken together, *Gandhi*, *Sharbatly*, and *El Gamal* cast doubt on the status of Ms. Akhter’s religious-only ceremony under English law. A key distinction, however, is that her marriage was monogamous. In each of the other three cases, a second wife sought financial relief, and the courts treated the union as a non-marriage.²⁵

Concerns about polygamy crystallized for Ms. Akhter in 2011 when Mr. Khan said he intended to take a second wife. She grew worried about the legal status of her *nikāh*, which could not prevent a second marriage even though bigamy is a criminal offence in England. On returning from Dubai in June 2011, she again raised the need for civil registration with Mr. Khan but did not commence judicial proceedings.²⁶

The judgment in *G v. M* demonstrates that the courts could have applied the “hallmarks of marriage” test to Ms.

23 *Id.* at [40].

24 *El Gamal v Al-Maktoum* [2012] 2 FLR 387 (Eng.); see *El Gamal v Al-Maktoum* [2011] EWHC B27 (Fam), [26] (Eng.). The reported judgment in *El Gamal v Al-Maktoum* [2011] EWHC B27 (Fam) provides more details of the facts in this case, including the husband’s polygamous marriages. See para. [26] for the details of polygamous marriages of the husband.

25 Two further pre-*Akhter* authorities illustrate the courts’ approach. In *Al-Saedy v. Musawi* [2010] EWHC 3293, Bodey J. held that an Islamic ceremony conducted in London was not a “bona fide ceremony” because the husband was already married. In *Dukali v. Lamrani* (Attorney General intervening) [2012] EWHC 1748 (Fam), a monogamous ceremony at the Moroccan Consulate in London was likewise treated as a “non-marriage” under English law.

26 *Akhter v. Khan* [2018] EWFC 54, [20] (Eng.).

Akhter’s case had her dispute arisen in the early 2010s.²⁷ In that case, the High Court granted permission to present a petition for nullity where evidence indicated that both parties believed they had undergone a valid Islamic marriage recognized in English law and that the *imām* also believed he was conducting a valid Islamic marriage. Relying on this evidence, Hedley J. declined to treat the ceremony as a “non-marriage” or “non-existent marriage,” despite non-compliance with the Marriage Act 1949 and the absence of a marriage certificate.²⁸ Although *G v. M* concerned an interlocutory stage, it is significant for two reasons. First, it confirms that judges were still applying the hallmarks test as late as 2011. Second, it indicates that the three polygamy cases often cited for non-marriage, *Gandhi v. Patel*,²⁹ *Sharbatly v. Shagroon*,³⁰ and *El Gamal v. Al-Maktoum*,³¹ did not displace the hallmarks test.³²

Later events underline Ms. Akhter’s awareness of conflicting precedents. After a long career break, she qualified as a solicitor in July 2014 and began to secure financial protection for herself and her children. She drafted a will for Mr. Khan that would leave two-thirds of his estate to her and the children; he refused to sign. When he bought a house the following year and registered himself as sole owner, she again pressed for a civil ceremony, including to mitigate inheritance tax, and he rebuffed her.³³ That dispute marked the end of their relationship.³⁴

Ms. Akhter then alleged assaults and sought non-molestation orders. She applied for financial relief, including property adjustment orders, and for child arrangements and prohibited

27 *G v. M* [2011] EWHC 2651 (Fam), [8] (Eng.).

28 *Id.* at [11].

29 *Gandhi v. Patel* [2002] 1 FLR 603 (Eng.).

30 *Sharbatly v. Shagroon* [2003] EWCA Civ 156 (Eng.).

31 *El Gamal v. Al-Maktoum* [2011] EWHC 3769 (Fam) (Eng.).

32 I am grateful to Prof. Probert for drawing my attention to this point.

33 In *Re: RA (Appeal: Validity of a Marriage: Finding of Fact)* [2025] 1 FLR 301, [34], the High Court allowed the wife’s appeal in part on the basis that the district judge had failed to address a material issue of fact, whether the husband’s denial of participation in the civil marriage was a strategic attempt to defeat the wife’s claim for financial relief. As the Domestic Abuse Act 2021 includes economic abuse, such conduct may fall within its scope, offering protection to women in situations similar to *Akhter* (Domestic Abuse Act 2021, c. 17, § 1, [Eng.])

34 *Akhter v. Khan* [2018] EWFC 54, [20] (Eng.).

steps orders. Mr. Khan applied for parental responsibility and shared care. When she petitioned for divorce, he responded that they had never been legally married. She contended that their two-decade relationship should be treated as marriage by presumption and estoppel, or, in the alternative, that she was entitled to a decree of nullity based on a void marriage.³⁵

The central issue was whether the *nikāh*, followed by eighteen years of cohabitation and four children, created any rights under English law. The High Court held that Ms. Akhter was entitled to financial relief based on a “slightly more flexible interpretation of section 11 of the Matrimonial Causes Act 1973 informed by fundamental rights arguments.”³⁶ The Court of Appeal disagreed. The two judgments are examined in the next part.

JUDICIAL TREATMENT OF RELIGIOUS-ONLY MARRIAGES (2018–2020)

This part evaluates the judgments of the High Court and the Court of Appeal to show the transition from the positive “hallmarks of marriage” test to the negative “non-qualifying ceremony” (NQC) test.

Framing of Legal Issues: Legal Non-Recognition of Marriage

The framing of the issues largely determined the outcomes in the High Court and in the Court of Appeal. Williams J. framed the questions positively: whether the parties should be treated as validly married by a presumption of marriage and, if not, whether the marriage was void and susceptible to a decree of nullity.³⁷ By contrast, the Court of Appeal (Sir Terence Etherton M.R., King, and Moylan L.JJ.) framed the questions in negative terms: first, whether there are ceremonies that do not create a marriage within English law for the purposes of section 11 of

³⁵ *Id.*

³⁶ *Id.* at [96].

³⁷ *Id.* at [2].

the Matrimonial Causes Act 1973, and second, if so, whether the ceremony in this case fell within that category or was, as Williams J. held, a void marriage.³⁸

Answering the first question, the Court of Appeal held that certain ceremonies are “non-qualifying ceremonies” that create neither a valid nor a void marriage.³⁹ The parties to such ceremonies may regard themselves as married, and others may treat them as such, yet in law they remain cohabitants without any entitlement to a decree of nullity or to financial remedies.⁴⁰ A non-qualifying ceremony does not become a valid or void marriage simply because of prolonged cohabitation or the birth of children.⁴¹ It lies outside the statutory regime, which treats it as a non-marriage with no legal consequences. On the second question, the Court of Appeal held that the Islamic marriage (*nikāḥ*) at issue was a non-qualifying ceremony. A couple falls within the regulatory regime only if they undertake a ceremony that is itself within that framework.⁴²

The Court of Appeal framed the issues using the term “ceremony,” whereas Williams J. had spoken in terms of “marriage.” In its closing passage, the court stated: “We repeat that, in our view, the effect of a ceremony of marriage must be determined as at the date it was performed. To use the language of the 1949 Act, the issue of whether a marriage has been validly ‘solemnised’ depends on what has in fact *happened when it was allegedly ‘solemnised.’*”⁴³ From the Court’s perspective, this approach provided certainty and uniformity by setting a clear benchmark: legal recognition turns on the objective features of the ceremony as performed, not on the intentions of the parties or later developments. Such clarity, the judges reasoned, was essential for a consistent regulatory framework governing all marriages in England and Wales.

38 *Attorney General v. Akhter & Ors.* [2020] EWCA Civ 122, [5] (Eng).

39 *Id.* at [121].

40 *Id.*

41 *Id.* at [124].

42 *Id.* at [123].

43 *Id.* at [125] (*italics original*).

Yet the Marriage Act 1949 establishes a process rather than a single dispositive formality.⁴⁴ The Act does not prioritize any one requirement, but contemplates notice, place, officiant, and registration working together.⁴⁵ Where a couple has at least engaged with that statutory process, for example by giving notice, a subsequent non-compliant event can fall within the framework as a qualifying ceremony that is void rather than a non-marriage. In other words, treating “what happened on the day” as the only benchmark risks overlooking the Act’s process-based scheme.

The Court of Appeal accepted that the legal formalities of marriage can be described as a “process,” but it insisted that the existence of a qualifying ceremony is the determinative question for legal recognition.⁴⁶ In doing so, it rejected Williams J.’s view that the court should take “a holistic view of a process rather than a single ceremony” when deciding whether there is a marriage.⁴⁷ While marriage under the Marriage Act 1949 can be seen as a process beginning with notice and ending with registration, Williams J. proposed that the court should consider factors beyond formalities, drawing on the hallmarks analysis developed in *Gereis v. Yagoub*⁴⁸ and elaborated in *Hudson v. Leigh*.⁴⁹

The hallmarks test evaluates “questionable ceremonies” on a “case by case basis” by “taking into account various factors and features” including: (a) whether the ceremony or event set out or purported to be a lawful marriage; (b) whether it bore all or enough of the hallmarks of marriage; (c) whether the three key participants (most especially the officiating official) believed, intended, and understood the ceremony as giving rise to the status of lawful marriage; and (d) the reasonable perceptions,

44 Chris Bevan, *The Role of Intention in Non-Marriage Cases Post Hudson v. Leigh*, 25 CHILD & FAM. L. Q. 80, 93–95 (2013) (arguing that judges have preferred external aspects of marriage over its internal aspects to construct the category of “non-marriage” and proposing a hierarchical test in which formalities take precedence over the parties’ intentions).

45 Marriage Act 1949, 12, 13 & 14 Geo. 6 c. 76, §§ 26, 27, 31 & 49 (Eng.).

46 Attorney General v. Akhter & Ors. [2020] EWCA Civ 122, [126] (Eng.).

47 Akhter v. Khan [2018] EWFC 54, [94] (Eng.).

48 Gereis v. Yagoub [1997] 1 FLR 854 (Eng.).

49 Hudson v. Leigh [2009] EWHC 1306 (Fam), [2010] 1 FLR 602 (Eng.).

understandings, and beliefs of those in attendance.⁵⁰ Williams J. supplemented these factors with the Article 8 ECHR considerations and set out a flexible, process-based approach.⁵¹ He identified, in particular, whether the parties had agreed that the necessary legal formalities would be undertaken; whether the event was public, witnessed and involved promises; and whether failure to complete formalities was joint or due to one party's default. In doing so, he effectively replaced *Hudson* factor (d) with a focus on responsibility for non-compliance and sought to recognize "inchoate marriages," that is, unions that do not fully satisfy formalities but display sufficient marital characteristics to merit a legal response.

Earlier, in *MA v. JA*, Moylan J. cautioned that a purely contractual model based on consent is too wide.⁵² He proposed an approach that applies the 1949 Act consistently with Ormrod J.'s statement in *Collett v. Collett* [1968] P 482 that "the essence of marriage" is the formal exchange of voluntary consents, while also taking into account the *Hudson v. Leigh* factors.⁵³ This synthesis accommodates both the parties' substantive intent and the statute's procedural requirements.

Rationale for the NQC Test

In *AG v. Akhter*, the Court of Appeal described "certainty" as the main purpose of the marriage regulatory framework that has developed over 250 years, and adopted a purposive interpretation of the Marriage Act 1949.⁵⁴ From this perspective, the NQC test promotes certainty and predictability: by excluding ceremonies that fail to comply with any statutory formality, the court sought to avoid *ad hoc* extensions of legal recognition and to safeguard the integrity of the statutory scheme. In the judges' view, certainty was itself a form of protection, ensuring that individuals understood the consequences of marrying within or

50 *Id.* at [79].

51 *Akhter v. Khan* [2018] EWFC 54, [94] (Eng.).

52 *MA v. JA* [2012] EWHC 2219 (Fam), [96] (Eng.).

53 *Id.* at [26].

54 *Attorney General v. Akhter & Ors.* [2020] EWCA Civ 122, [10] (Eng.).

outside the legal framework and preventing the unfairness of variable or inconsistent rulings.

The certainty rationale is plausible, but it has limits. First, a purposive and mischief-based reading of the Act tends towards inclusion rather than exclusion. Sections 25 and 49, which identify void marriages, use the language “knowingly and wilfully,” introduced in 1823 to curb late challenges to marriages for technical non-compliance with the Clandestine Marriages Act 1753.⁵⁵ Courts, therefore, historically confined legal non-recognition. In *Gereis v. Yagoub*, H.H.J. Aglionby suggested that non-marriage should be limited to a marriage ceremony in a play.⁵⁶ Williams J. echoed this in *Akhter*, recommending, “the expression non-marriage should be reserved only to those situations such as acting or children playing where there has never been any intention to genuinely create a marriage.”⁵⁷ Similarly, in *AM v. AM*, Hughes J. gave the example of “a staged dramatic marriage ‘ceremony’ conducted in a play or in the course of a television soap opera” and also of “alternative marriage” rites consciously and deliberately conducted altogether outside the Marriage Acts and never intended or believed to create any recognizable marriage.⁵⁸

Second, *Akhter* concerned a petition for financial relief and engaged in a purposive reading of section 11 of the Matrimonial Causes Act 1973, which is remedial in design and extends financial relief even where a marriage is void.⁵⁹ Historically, ecclesiastical nullity left parties without remedies and rendered children illegitimate. Successive statutes addressed both problems: the Legitimacy Declaration Act 1858 allowed declarations of legitimacy and marital status, and the Family Law Act 1986 removed the power of the courts to declare “that a marriage was at its inception void”⁶⁰ with the objective “to

⁵⁵ Rebecca Probert, *Determining the Boundaries Between Valid, Void and “Non-Qualifying” Ceremonies: Past, Present and Future*, in COHABITATION AND RELIGIOUS MARRIAGE: STATUS, SIMILARITIES AND SOLUTIONS 15, 17 (Rajnaara C. Akhtar, Patrick Nash & Rebecca Probert eds., 2020).

⁵⁶ *Gereis v. Yagoub* [1997] 1 FLR 854, 857 (Eng.).

⁵⁷ *Akhter v. Khan* [2018] EWFC 54, [81] (Eng.).

⁵⁸ *A-M v. A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6, [55] (Eng.).

⁵⁹ *Tousi v. Gaydukova* [2024] EWCA Civ 203, [38] (Eng.).

⁶⁰ The Family Law Act 1986, § 58(5)(a). (UK).

prevent parties from avoiding the ancillary relief powers of the court which arise in nullity.”⁶¹ In this remedial context, a broad exclusionary category such as the NQC risks undermining Parliament’s protective aims.

Third, the certainty rationale may also cut the other way: upholding religious-only marriages can itself promote predictability and fairness by ensuring protection for parties and children. In extrajudicial writing before *Akhter*, Moylan L.J. (one of three judges of the Court of Appeal in *Akhter*) questioned whether the need for certainty could override the legal policy that marriages should, wherever possible, be upheld, and he warned that defining large numbers of ceremonies as having no effect risks striking the wrong balance.⁶²

Finally, the formal requirements of the 1949 Act have developed in a piecemeal fashion. As Probert notes, many current requirements have their origins in past panics, expediency, compromises, or quick fixes.⁶³ It is therefore unrealistic to ascribe a single “main purpose” to a regulatory framework that has grown inconsistently over time. In 2002, the Law Commission described the current law as “ancient and, as the result of its incremental development, complex ... inconsistent and complicated, inefficient, unfair, and needlessly restrictive.”⁶⁴ Half a century ago, on the question of what is sufficient to bring a marriage under the Act, the Law Commission’s Report stated: “Unfortunately, the Act gives little indication of what are the minimum requirements of a ‘form known to and recognised by our law ... as capable of producing ... a valid marriage.’”⁶⁵

From the case law, it is clear that judges have gradually developed the category of “non-marriage” and extended it to religious-only ceremonies. Commentators describe this as a judicial creation grounded in a narrow reading of the statutes.

61 LAW COMM’N, FAMILY LAW DECLARATIONS IN FAMILY MATTERS, Law Com No. 132, ¶ 3.18 (1984) (UK).

62 Moylan, *The Approach of English Law to the Recognition of Islamic Marriages*, 46 FAM. L. 87, 89 (2016).

63 Rebecca Probert, *Getting Married: The Origins of the Current Law and Its Problems*, 23 ECCLESIASTICAL L. J. 255, 266 (2021).

64 LAW COMM’N, *supra* note 5, at 6.

65 LAW COMM’N, FAMILY LAW REPORT ON SOLEMNISATION OF MARRIAGE IN ENGLAND AND WALES, Law Com No. 53, ¶ 120 (1973) (UK).

Valentine Le Grice QC argued that “nothing in the 1973 Act, or any other legislation, gives the court power to decide that a ceremony amounts to a non-marriage as opposed to a void marriage. Non-marriage is a judicial concept and one that has not been approved by the Supreme Court.”⁶⁶ By contrast, Rebecca Probert contended that courts are justified in declaring non-marriage where a ceremony fails to meet any of the formal requirements in the Marriage Act 1949.⁶⁷ She accepted that the category is judge-made, but reasoned that the Act supplies a framework for identifying the “minimum degree of compliance” needed for a valid or void marriage and, by inference, when a ceremony must be treated as a non-marriage. Even so, she would confine non-marriage to play-marriages and alternative rites never intended to have legal effect.⁶⁸ Similarly, in extrajudicial writing, Moylan J. accepted that non-marriage has a place but questioned whether “the net ... has been cast too widely.”⁶⁹

It may be legitimate to classify some unions, with or without ceremony, as non-marriages. Yet whether religious-only ceremonies should fall into that category is a question for Parliament, not the judiciary. The Forced Marriage (Civil Protection) Act 2007, for instance, already adopts a broad definition that encompasses both religious and civil ceremonies regardless of legal enforceability.⁷⁰ Absent a clear legislative exclusion, courts should interpret matrimonial statutes consistently with their protective and inclusive aims. That is also the thrust of Mostyn J.’s critique that non-marriage sits uneasily with section 11 of the Matrimonial Causes Act 1973 and that it has been deployed to

⁶⁶ Valentine Le Grice, *A Critique of Non-Marriage*, 43 FAM. L. 1278, 1278 (2013).

⁶⁷ Rebecca Probert, *The Evolving Concept of Non-Marriage*, 25 CHILD & FAM. L. Q. 314, 314 (2013).

⁶⁸ “Non-marriage is only appropriate where there is a play-marriage, which no one could seriously have thought to constitute a marriage.” Rebecca Probert, *When Are We Married? Void, Non-Existent and Presumed Marriages*, 22 LEGAL STUD. 398, 409 (2002).

⁶⁹ Moylan, *supra* note 62, at 88. Moylan J. was one of the three judges on the Court of Appeal in the *Akhter* case (Attorney General v. Akhter & Ors., [2020] EWCA Civ 122). Given his expertise in this area, he was most likely the author of the unanimous judgment. Notably, however, the legal position he adopted as a judge in *Akhter* differs from the views he had previously expressed in this paper.

⁷⁰ Anti-Social Behaviour, Crime and Policing Act 2014, c. 12, § 121 (UK).

deny access to financial relief that Parliament otherwise intended to be available on nullity.⁷¹

On this analysis, classifying a religious-only ceremony that bears the hallmarks of an ordinary marriage as a non-marriage or NQC does not fit the remedial purpose of the Matrimonial Causes Act 1973 and is difficult to reconcile with earlier case law that took a benevolent and case-by-case approach to protect vulnerable parties, notably wives, widows, and children.

Religion, Human Rights Law, and the NQC Test

A striking feature of the emergence of the NQC test is that the early authorities did not concern Islamic marriages. The line of cases that laid the groundwork for the modern taxonomy involved a Coptic Orthodox ceremony treated as void rather than as a non-marriage,⁷² a Sikh wedding celebrated at a London gurdwara,⁷³ a Hindu ceremony conducted in a restaurant,⁷⁴ and a Christian ceremony performed in Cape Town.⁷⁵ The first reported claim for financial relief following a religious-only Islamic marriage (*nikāḥ*) appeared only in 2001.⁷⁶ Writing shortly before this period, Pearl and Menski observed that because English law did not recognize *nikāḥ* as a marriage, Muslim women rarely approached the courts for divorce or financial relief. They noted that very few cases involving religious-only Islamic marriages reached adjudication and even fewer were reported, partly because of reluctance to bring test cases that might provide a definitive ruling.⁷⁷ This position shifted markedly in the 2010s. Between 2010 and 2020, all but one reported judgment, *Galloway v. Goldstein*,⁷⁸ applying the emerging non-marriage framework concerned religious-only Islamic marriages, and after 2020

71 *Tousi v. Gaydukova* [2023] EWHC 404 (Fam), [49] (Eng.).

72 *Gereis v. Yagoub* [1997] 1 FLR 854 (Eng.).

73 *Chief Adjudication Officer v. Bath* [2000] 1 FLR 8 (Eng.).

74 *Gandhi v. Patel* [2002] 1 FLR 603 (Eng.).

75 *Hudson v. Leigh* [2009] EWHC 1306 (Fam), [2010] 1 FLR 602 (Eng.).

76 *A-M v. A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6 (Eng.).

77 DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 166–71 (3d ed. 1998).

78 *Galloway v Goldstein* [2012] EWHC 60 (Fam) (Eng.).

almost all reported applications of the test arise in the context of Islamic marriages. This trajectory calls for explanation.

The principal explanation lies in developments within English law, particularly following the enactment of the Human Rights Act 1998, which gave effect to ECHR rights, notably Articles 8, 12 and 14, and A1P1. The incorporation of Convention rights transformed disputes about marriage formalities into rights-bearing claims concerning family life, marriage, equality, and property. The Act enabled litigants to frame religious-only ceremonies not merely as matters of legal non-compliance but as sites of potential interference with rights and interests protected under the human rights regime. As a result, questions of status that had previously remained marginal or unresolved became justiciable and increasingly contested. These rights-based developments also coincided with changes in the remedial landscape of English family law. From 2000 onwards, matrimonial finance adopted equality as its starting point, significantly increasing the practical importance of marital status.⁷⁹ Access to financial remedies became the central prize in litigation following relationship breakdown. Parties to religious-only marriages therefore had strong incentives to seek financial remedies, while respondents had corresponding incentives to invoke the developing category of non-marriage. It was within this legal environment that the NQC test assumed practical significance, with religious-only Islamic marriages becoming its most frequent testing ground.

Conflict of laws considerations play a secondary but reinforcing role. Many Islamic marriages were celebrated overseas in jurisdictions where Islamic family law governs marriage formation and requires what Hughes J. calls “comparatively slight formality” for a valid marriage.⁸⁰ Islamic law also recognizes marriage through consent, cohabitation, and reputation. These features may later conflict with the formal requirements of English law when couples relocate. However, such private international law issues only acquire significance

⁷⁹ *White v. White* [2001] 1 AC 596 (UK); *Miller v. Miller* [2006] UKHL 24; *Charman v. Charman* [2007] EWCA Civ 503 (Eng.).

⁸⁰ *A-M v. A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6, [35] (Eng.).

because English law now attaches substantial rights and remedies to the recognition of marriage, making classification disputes legally consequential.

Demographic change likewise operates in the background rather than as a primary cause. The growth of the Muslim population in England and Wales, together with its comparatively young age profile, has expanded the number of individuals likely to form relationships and eventually to experience relationship breakdown.⁸¹ This increases the pool of potential litigants but does not itself explain the doctrinal prominence of Islamic marriages in NQC jurisprudence. Rather, demographic factors amplify the effects of domestic legal developments by increasing the frequency with which English courts are required to classify religious-only marriages within a rights-based and remedial framework shaped decisively by the Human Rights Act 1998.

It is important to acknowledge a range of judicial and institutional concerns that have shaped the restrictive trajectory of non-qualifying ceremony jurisprudence. Courts have been particularly anxious about opening the floodgates to claims insufficiently anchored in statutory form, and judges have consistently resisted expanding access to financial remedies through incremental development rather than legislative design. These concerns are neither illusory nor reducible to mere exercises of judicial discretion; they reflect deeper commitments to legal certainty, institutional competence, and the integrity of the statutory framework governing marriage.

Nonetheless, these concerns are not determinative. A more inclusive approach, whether through a recalibrated

⁸¹ The Muslim population in England and Wales grew from about 1.5 million (3.0%) in 2001 to 2.7 million (4.8%) in 2011 and 3.9 million (6.5%) in 2021, making Muslims the largest religious minority. The age profile is also younger: in 2021, 84.5% of Muslims were under 50, compared with 62.0% of the population overall. Off. for Nat'l Stat., *Full story: What does the Census tell us about religion in 2011?*, (May 16, 2013), www.ons.gov.uk/ons/dcp171776_310454.pdf. Off. for Nat'l Stat., *Religion by Age and Sex, England and Wales: Census 2021*, (Jan. 30, 2023), <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/religionbyageandsexenglandandwales/census2021>. The estimated number of Muslims in England and Wales under the 1966 Census was 250,000. David Pearl, *Muslim Marriages in English Law*, 30 CAMBRIDGE L. J. 120, 143 (1972).

doctrinal test or targeted legislative intervention, is preferable for three reasons. First, it better aligns legal status with lived family reality. Second, it mitigates distributive injustice borne disproportionately by economically vulnerable partners. Third, it gives principled effect to human rights values enshrined in the ECHR without collapsing form into irrelevance or undermining the structural coherence of matrimonial laws.

JUDICIAL APPLICATION OF THE NQC TEST SINCE 2020

Since its formulation in 2020, courts have applied the NQC test in a series of reported judgments. Taken together, these decisions confirm that the NQC has not supplanted the hallmarks test; rather, the two coexist. The hallmarks test continues to identify the positive features of legally recognized marriages, valid, voidable, and void, while the NQC provides a negative standard, distinguishing void marriages from non-marriages on the basis of the ceremony.

The NQC Test and Conflict of Laws

In *Tousi v. Gaydukova*, the parties underwent a ceremony at the Iranian Embassy in Kyiv but did not register the marriage with the Ukrainian state authorities, although registration was required for validity under Ukrainian law.⁸² After moving to the United Kingdom, they acquired a joint tenancy. When the relationship ended, the wife sought a transfer of tenancy under section 53 and Schedule 7 of the Family Law Act 1996, which permits transfers to cohabitants when a relationship ends, whereas a spouse ordinarily proceeds by a nullity order. On these facts, the wife would benefit from a finding of non-marriage rather than a void marriage. Mostyn J. held that the Kyiv ceremony did not create a marriage for English law purposes. He also questioned the legitimacy of the NQC category in England and Wales, observing that while void and voidable marriages are recognized by statute, the non-marriage category sits uneasily with section

⁸² *Tousi v. Gaydukova* [2023] EWHC 404 (Fam), [5] (Eng.).

11 of the Matrimonial Causes Act 1973 because it is deployed to exclude parties from financial relief.⁸³

Mostyn J. suggested that if one party to a ceremony believed it created marital status, that belief should suffice to satisfy the definition of a void marriage under English law.⁸⁴ He described the law as “a disreputable mess” that requires substantive and procedural clarification.⁸⁵ He proposed limiting the reach of the NQC test in overseas cases so that the *lex loci celebrationis* governs not only validity but also the consequences of invalidity or irregularity.⁸⁶ On appeal, Moylan L.J. disagreed, holding that foreign law determines validity, while English law determines remedies on relationship breakdown.⁸⁷ In *Tousi*, the divergence did not affect the outcome, because Ukrainian law, since 2002, recognizes “in-fact marriage relations,” which provided the parties with financial protection comparable to English tenancy transfer provisions.⁸⁸ The position could have been different had the claim concerned financial relief under the Matrimonial Causes Act 1973.

Other judgments applying the NQC test to financial relief reveal persistent uncertainty, especially in conflict-of-laws settings where marriage is treated as a process rather than a single event. Two cases illustrate the point. In *Asaad v. Kurter*, Moylan J. held that a Syriac Orthodox ceremony that lacked prior official permission to marry a non-Syrian national could be made formally valid, because that permission could have been obtained as part of the post-ceremony registration process; on that basis, the union was treated as void rather than a non-marriage, and a decree of nullity was available.⁸⁹ In *Boughajdim v. Hayoukane*,

83 *Id.* at [36].

84 Mostyn J. proposed this solution to the problem of the legal recognition of “religious (usually Islamic) marriages,” which amount to “non-qualifying ceremonies” under the law in England and Wales but are recognized as valid by the entire Islamic world. *Tousi v. Gaydukova* [2023] EWHC 404 (Fam), [90].

85 *Id.*

86 Mostyn J. criticized the judgment in *Hudson v. Leigh* [2009] EWHC 1306 (Fam). As a lawyer, he succeeded in persuading Bodey J. that such a category existed in English law. However, as a judge he disagreed with this view. *Tousi v. Gaydukova* [2023] EWHC 404 (Fam), [78].

87 *Tousi v. Gaydukova* [2024] EWCA Civ 203, [55]–[74] (Eng.).

88 *Id.* at [39].

89 *Asaad v. Kurter* [2013] EWHC 3852 (Fam), [100] (Eng.).

MacDonald J. gave effect to Morocco's subsequent recognition and registration of the union and allowed the English divorce to proceed.⁹⁰ These cases suggest that where a foreign legal system validates marriage through later steps such as registration or court approval, English courts have accommodated that process, an approach difficult to reconcile with the NQC test's strict focus on "what happened on the day" of the ceremony as argued by the Court of Appeal in *Akhter*.

The Court of Appeal in *Akhtar v. Secretary of State for Work and Pensions* [2022] 1 WLR 421 reinforced the restrictive approach to marital status. Although Ms. Akhtar's marriage in Pakistan was valid there, it was void under English law because her husband was domiciled in England and already married. When she claimed bereavement benefits, the court held she was not a "spouse" under the relevant legislation. The judges unanimously refused to treat the marriage as valid or capable of generating financial rights, classifying it instead as an NQC. While acknowledging the harshness of this outcome, the Court stressed the need for certainty and Parliament's choice to link financial relief and social security benefits to legally recognized marriages. The Court also considered *Re McLaughlin*, where the Supreme Court found it discriminatory under Article 14 ECHR to exclude long-term cohabitants with children from Widowed Parent's Allowance (WPA).⁹¹ In *Akhtar*, this reasoning was accepted for WPA but not for the lump-sum bereavement payment, which was confined to legal spouses. This bifurcation shows how the NQC doctrine operates as a gatekeeping device: while *McLaughlin* embraced a functional approach to protect children in cohabiting families, *Akhtar* reaffirmed a formalist stance that limits broader financial rights to parties in legally recognized marriages.⁹²

The judgment in *Coventry City Council v. MK and GK and MAK* illustrates the difficulties of applying the NQC to

90 Boughajdim v. Hayoukane [2022] EWHC 2673 (Fam), [155] (Eng.).

91 *Re McLaughlin's Application for Judicial Review* (Northern Ireland) [2018] UKSC 48 (UK).

92 Kathy Griffiths, *From "Form" to Function and Back Again: A Comparative Analysis of Form-Based and Function-Based Recognition of Adult Relationships in Law at 25–28* (May 2017) (Ph.D. dissertation, Cardiff University) (on file with Cardiff University).

foreign-facing unions.⁹³ The local authority sought a Forced Marriage Protection Order after an arranged ceremony was conducted over WhatsApp between a 21-year-old man with mild learning disability and ADHD in England, and a woman in Pakistan. Morgan J. held the union to be a non-qualifying ceremony because it was invalid under the *lex loci celebrationis* (Pakistani law): expert evidence established that physical presence of the parties at the place of celebration was required, which was not satisfied on these facts.⁹⁴ She then analyzed the arrangement under English law and, instead of moving straight to the NQC test, applied the *Hudson v. Leigh* hallmarks analysis and found the ceremony deficient and incapable of creating any legal relationship.⁹⁵ Having determined invalidity, she classified the outcome as an NQC but noted uncertainty as to whether Pakistani law draws a void/non-marriage distinction; she therefore grounded her declaration in English public policy and made no financial orders under the Matrimonial Causes Act 1973.⁹⁶ The judgment confirms that courts continue to use both the hallmarks test and the NQC test, deciding “questionable ceremonies” on a case-by-case basis.

As NQC jurisprudence develops in English law, the category is likely to complicate conflict-of-laws disputes, particularly those involving marriages linked to Muslim-majority countries. Under Islamic law, a union is recognized as valid on proof of consent exchanged in the presence of witnesses. A ceremony, treated as an NQC in England and Wales, could therefore be valid under the *lex loci celebrationis* abroad. That recognition carries significant consequences for transnational families, including questions of parental responsibility, paternity and legitimacy, financial provision, gifts, wills, and succession, especially where assets in Muslim-majority states are governed by the *lex situs*. How official laws in those jurisdictions regulate such marriages is addressed in the next section.

93 *Coventry City Council v. MK* [2023] 2 FLR 1021 (Eng.).

94 *Id.* at [39].

95 *Id.* at [19].

96 *Id.* at [46].

*Legal Treatment of Religious-Only
Marriages under Muslim Family Laws*

Under classical Islamic law (*fiqh*), marriage (*nikāḥ*) is a contract (*ʿaqd*).⁹⁷ Its essence is the voluntary exchange of consent. Formalities such as witnesses, registration, and certificates serve evidentiary functions rather than constitutive ones. Failure to comply with formalities may impede enforcement, but it does not invalidate the union. Defects can be remedied by subsequent registration, judicial ratification, or presumption of marriage. This is consistent with Hughes J.'s observation that the presumption of a marriage "will more readily be applied where the marriage being presumed could have occurred with comparatively slight formality."⁹⁸ Islamic essentials are offer and acceptance in the presence of two witnesses at one sitting.

Historical practice across the Muslim world shows that marriage registration served multiple aims: deterring clandestine unions, protecting parties' rights in maintenance and inheritance, and enforcing age and polygamy restrictions.⁹⁹ English statutory history reflects comparable concerns; the drive to record and regulate marriages from Hardwicke's Act 1753 onward was likewise animated by protection and publicity.¹⁰⁰ Courts in England interpreted these formalities purposively, insisting on

97 BURHĀN AL-DĪN AL-FARGHĀNĪ AL-MARGHĪNĀNĪ, *AL-HIDĀYAH* 475–77 (Imran Ahsan Khan Nyazee trans., 2006); Kecia Ali, *Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines*, in *THE ISLAMIC MARRIAGE CONTRACT* 11, 11–45 (Asifa Quraishi & Frank E. Vogel eds., 2008). Judges in England and Wales have recognized the contractual nature of Islamic marriages and enforced them as such. In *Shahnaz v. Rizwan* [1965] 1 QB 390, the court held that a wife could sue for breach of contract if the husband refused to pay the agreed sum of dower as set out in their marriage contract. In *Uddin v. Choudhury* [2009] EWCA Civ 1205, the court held, "This was not a matter of English law. There was no ceremony which was recognized by English law, but it was a valid ceremony so far as the parties were agreed and it was valid for the purposes of giving legal effect to the agreement which had been made about gifts and dowry."

98 *A-M v. A-M* (Divorce: Jurisdiction: Validity of Marriage) [2001] 2 FLR 6, [35] (Eng.).

99 LYNN WELCHMAN, *WOMEN AND MUSLIM FAMILY LAWS IN ARAB STAES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY* 53–54 (2007).

100 REBECCA PROBERT, *MARRIAGE LAW AND PRACTICE IN THE LONG EIGHTEENTH CENTURY* 206–243 (2009); LAWRENCE STONE, *From the Marriage Act of 1753 to 1868*, in *ROAD TO DIVORCE: ENGLAND 1530–1987*, 121, at 122 (1990).

strict compliance where protective policies are engaged, for example, where required consent was absent, but applying a robust presumption of marriage where long cohabitation and reputation point to a settled union.¹⁰¹ Muslim jurists adopt analogous presumptions: prolonged cohabitation can be a ground for presumption of marriage to safeguard wives and children. The leading commentary on Muslim personal law in South Asia, *Principles of Mahomedan Law*, states, “Marriage will be presumed, in the absence of direct proof, from ... prolonged and continued cohabitation as husband and wife.”¹⁰²

The foregoing reflects the classical *fiqh* position. From the nineteenth century onward, many Muslim-majority states reformed marriage law to require registration.¹⁰³ Judges in those systems then faced challenges similar to those encountered in England when adjudicating unregistered or unofficial religious-only unions. Contemporary approaches can be grouped into three broad models: permissive, dismissive, and accommodative, each balancing legal certainty against pragmatic recognition.

Pakistan illustrates a permissive approach. The Muslim Family Laws Ordinance 1961 requires registration and prescribes penalties for non-registration, yet courts have treated registration as directory rather than constitutive, meaning that an unregistered religious-only marriage remains valid because registration is evidentiary.¹⁰⁴ The reported judgments under this model fall into two main categories: the first concerns the inheritance rights of widows whose marriages are unregistered,¹⁰⁵ and the second concerns prosecutions for extramarital sex.¹⁰⁶ In

101 Rebecca Probert, *The Judicial Interpretation of Lord Hardwicke’s Act of 1753*, 3 J. OF LEGAL HIST. 129, 134–43 (2002); *Id.*, MARRIAGE LAW AND PRACTICE IN THE LONG EIGHTEENTH CENTURY 284–85 (2009).

102 D.F. MULLA, PRINCIPLES OF MAHOMEDAN LAW 342–43 (20th ed. 2013)

103 Majid Khadduri, *Marriage in Islamic Law: The Modernist Viewpoints*, 26 AM. J. COMP. L. 213, 213–18 (1978).

104 The Muslim Family Laws Ordinance, No. 8 of 1961, § 5, PAK. CODE, Mar. 2, 1961 (Pak.).

105 In *Mirza Allah Ditta v. Amina Bibi* 2004 YLR 239 (Pak.), a widow claimed inheritance right over a property and the defendant claimed that since her marriage was unregistered, she was not entitled to inherit the property. The court rejected the defendant’s argument.

106 In *Azra Bibi v. S.H.O.*, Police Station Thingi, Dist. Vehari 2005 YLR 1859 (Pak.), the petitioner’s brother filed a criminal complaint against her with the

both types of cases, judges have recognized unregistered religious-only marriages as valid.

By contrast, Tunisia and Egypt have adopted dismissive stances at various times.¹⁰⁷ In Tunisia, unregistered customary (*urfi*) unions are unlawful and null under article 36 of the Code of Personal Status 1957.¹⁰⁸ In Egypt, Law No. 78 of 1931 restricted enforcement of unregistered marriages; later reforms in Law No. 1 of 2000 allowed judicial dissolution of such unions but continued to limit other remedies.¹⁰⁹

A third model is accommodative. Several Gulf jurisdictions allow marriage to be proven by alternative means. Qatar's Family Law 2006 provides that marriage is established by a formal contract but "may be proved by other evidence" as the judge decides.¹¹⁰ Similarly, Saudi Arabia's Personal Status Law 2022 requires registration of marriages yet permits provision of evidence to prove unregistered marriages.¹¹¹

All three models aim to balance legal certainty with flexible recognition. English courts have repeatedly asked whether Islamic law contains an analogue to "non-marriage" (NQC) under Islamic marriage law. In *Coventry City Council v. MK and GK and MAK*,¹¹² Morgan J. asked the expert witness to clarify whether Pakistani law had an equivalent of the NQC but did not receive a satisfactory answer. It is evident that both permissive and accommodative models of Muslim law are unlikely to apply

police stating that she had illicit sexual relationship with a man. She claimed that she married that man though her marriage was not registered. The court held that a simple statement of spouse is sufficient to prove the validity of a marriage.

107 Turkey also falls within this category. Unlike other Muslim majority countries, Turkey replaced Islamic family law with the Swiss Civil Code which did not recognize religious ceremonies of marriage. *Yigit v. Turkey*, App. No. 3976/05, 53 Eur. Ct. H.R. 25 (2010) (The European Court of Human Rights held that states are not obligated under the ECHR to recognize religious-only marriages or grant them legal effects because states have a margin of appreciation to require civil marriage as a condition for legal benefits.)

108 R. C. Akhtar, *Contemporary Issues in Marriage Law and Practice in Qatar*, 20 HAWWA: J. WOMEN MIDDLE EAST & ISLAMIC WORLD 124, 124–58 (2020).

109 LYNN WELCHMAN, WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY 56–57 (2007).

110 Law No. 22 of 2006 Promulgating the Family Law, art. 10 (Qatar).

111 Personal Status Law, Royal Decree No. M/73, art. 8 (Mar. 8, 2022) (Saudi Arabia).

112 *Coventry City Council v. MK* [2023] 2 FLR 1021, [36] (Eng.).

the stringent NQC test. Only the dismissive model, as adopted in Tunisia, is likely to adopt the NQC test. Under Article 36 of the Tunisian Code of Civil Status 1957, secretive customary (*urfi*) marriages are illegal, and unregistered marriages are null and void. Yet, unlike English judges who categorize religious-only marriages as “non-marriages,” Tunisian courts prosecute cohabiting couples who fail to register their unions for the offence of extramarital sex.¹¹³

A more compelling explanation for the absence of an NQC equivalent in many Muslim jurisdictions lies in the fundamentally different remedial architecture governing marital breakdown. In England and Wales, financial provision on divorce or nullity is extensive under the Matrimonial Causes Act 1973. The NQC has, in practice, operated to exclude parties to religious-only marriages from these remedies. By contrast, classical *fiqh* adopts a separate-property regime: spouses do not share assets by default; typical entitlements are limited to dower (*mahr*) and maintenance during the cooling-off or waiting period (*idda*).¹¹⁴ Only a few Muslim-majority countries, such as Malaysia, recognize the spousal right to matrimonial property under customary laws and modern legal reforms based on the contractual nature of marriage under Islamic law.¹¹⁵ Consequently, when Muslim women seek financial relief following marital breakdown in the courts of England and Wales, they do so by asking the application of English law rather than Islamic law.¹¹⁶

113 Maaïke Voorhoeve, *Law and Social Change in Tunisia: The Case of Unregistered Marriage*, 7 OXFORD J.L. & RELIGION 479, 493 (2018). See Iris Kolman, *Cohabitation and “Urfi” Marriages in Tunisia: Public Discourse and Personal Narratives*, in MUSLIM MARRIAGE AND NON-MARRIAGE: WHERE RELIGION AND POLITICS MEET INTIMATE LIFE 127 (Julie McBrien & Annelies Moors eds., 2023).

114 Rajnaara C. Akhtar & Faizal Ahmad Manjoo, *Matrimonial Property in Islamic Law*, in RESEARCH HANDBOOK ON FAMILY PROPERTY AND THE LAW 77, 78–79 (Margaret Briggs and Andy Hayward eds., 2024); M. Siraj Sait, *Our Marriage, Your Property? Renegotiating Islamic Matrimonial Property Regimes*, in CHANGING GOD’S LAW: THE DYNAMICS OF MIDDLE EASTERN FAMILY LAW 245, 245–86 (Nadjma Yassari ed., 2016).

115 In Malaysia, section 58 of the Islamic Family Law (Federal Territory) Act 1984 gives courts the power to order a division of assets between parties keeping in view their contributions towards acquiring the assets and the needs of their minor children. Islamic Family Law (Federal Territories) Act 1984 (Act 303) § 58 (Malay.).

116 Muslim women in England and Wales approach the courts for financial relief rather than for divorce, as a court decree does not dissolve a religious marriage

It is therefore ironic that such claims are rejected against a backdrop of media portrayals framing judicial engagement with Islamic marriages as the recognition of “sharia law” in England.¹¹⁷

CONCLUSION

The litigation brought by Nasreen Akhter illustrates both the promise and the limits of English matrimonial law. After dedicating nearly two decades to her family, she secured some protective orders through the courts, but she was ultimately denied financial remedies under the Matrimonial Causes Act 1973 because her marriage was classified as a “non-qualifying ceremony.”¹¹⁸ The Court of Appeal’s introduction of the NQC test drew a sharper boundary between valid, void, and non-recognized unions, clarifying the law while also exposing its limits. The Court of Appeal’s creation of the NQC test thus left her, and many others in similar circumstances, without the

but causes the problem of “limping marriage” which is legally dissolved but religiously valid. ISLAM UDDIN, *MUSLIM WOMEN AND ISLAMIC FAMILY LAW: LIVED EXPERIENCES IN BRITAIN* 164–65 (2025).

117 The attitude of the English print media is reflected in headlines covering the High Court judgment in *Akhter*. *The Telegraph* described the decision as a “British court recognises sharia law in landmark divorce case” (Kate McCann, *British Court Recognises Sharia Law in Landmark Divorce Case*, *THE TELEGRAPH* (Aug. 1, 2018), <https://www.telegraph.co.uk/news/2018/08/01/british-court-recognises-sharia-law-landmark-divorce-case/>); while the *Daily Mail* claimed that “British court recognise sharia law for the first time” (Cheyenne Roundtree, *Landmark Ruling sees British Court Recognise Sharia Law for the First Time as Judge Rules Wife Married in Islamic Ceremony Can Make Claim on Husband’s Assets Under UK law*, *DAILY MAIL* (Aug. 2, 2018), <https://www.dailymail.co.uk/news/article-6018133/Landmark-ruling-sees-British-court-recognise-sharia-law-time.html>). In contrast, *The Guardian* framed the judgment by emphasizing its legal implications, with the headline: “English law applies to Islamic marriage, judge rules in divorce case” (Harriet Sherwood, *English Law Applies to Islamic Marriage, Judge Rules in Divorce Case*, *THE GUARDIAN* (Aug. 1, 2018), <https://www.theguardian.com/law/2018/aug/01/english-law-applies-to-islamic-marriage-judge-rules-in-divorce-case>).

118 Sociological research shows that Muslim women reaffirm their religious identity by choosing religious-only marriages while still engaging with the formal legal system to claim their secular rights. Simran Kalra, *Religious Knowledge and Legal Rights: A Study of Nikah and Secular Marriage Among South Asian Muslim Women in England*, in *RELATIONSHIP RIGHTS AND LEGAL PLURALISM: THE INADEQUACY OF MARRIAGE LAWS IN EUROPE* 157, 157–72 (Mateusz Stępień and Anna Juzaszek eds., 2025).

protections historically designed to safeguard homemakers and dependent spouses.

This article identifies three interlinked stages in the development of the NQC test. In the first stage, judges applied the doctrine of “non-marriage” primarily, though not exclusively, to polygamous religious-only marriages conducted in England and Wales, as illustrated in *Gandhi*, *Sharbatly*, and *El Gamal*.¹¹⁹ Even so, courts often extended some financial protections to wives by employing alternative mechanisms. These included the presumption of marriage, applied in both monogamous and polygamous contexts (e.g., *Bath* and *AM*); the inclusive “hallmarks of marriage” test (e.g., *Gereis* and *G*); and liberal statutory interpretation informed by ECHR principles and equity (as in *Akhter*).

The Court of Appeal’s judgment in *AG v. Akhter and Others* marked a decisive shift. The judges formulated the NQC test to distinguish between void marriages and non-marriages, thereby denying financial relief under the Matrimonial Causes Act 1973 to parties to religious-only marriages, whether monogamous or polygamous. Unlike the hallmarks test, the NQC test has a narrow scope. It was designed to exclude ceremonies that fail to comply with any statutory formality from the regulatory framework, with the specific objective of withholding remedies under the Matrimonial Causes Act 1973. Notably, the test does not identify which formalities are essential for recognition; rather, it operates as a negative device to demarcate void marriages from non-marriages, not to determine recognition of marriages themselves.

119 Polygamous marriages are not a significant portion of religious-only marriages as research conducted in 2017 showed that just over 10 per cent of 903 women interviewed in the UK were in religious-only polygamous Muslim marriages. Rajnaara C. Akhtar, “*The Truth About Muslim Marriages*”: 60% of Muslim Women Surveyed Are in Marriages Not Recognised by Law, TRUE VISION (Nov. 21, 2017), <https://www.truevisiontv.com/films/the-truth-about-muslim-marriages>; Rajnaara C. Akhtar, *Modern Traditions in Muslim Marriage Practices: Exploring English Narratives*, 7 OXFORD J.L. & RELIGION 427, 446–54 (2018). Naqvi observes that rather than engaging with the social and relational realities underpinning these unions, English law tends to categorize them as “non-existent” marriages. ZAINAB BATUL NAQVI, POLYGAMY, POLICY AND POSTCOLONIALISM IN ENGLISH MARRIAGE LAW: A CRITICAL FEMINIST ANALYSIS 46–47 (2023).

Because of its narrow scope, the NQC test has not displaced the hallmarks test. In recent judgments, judges have faced two challenges. First, they have been unable to locate an equivalent to the NQC test in foreign jurisdictions (e.g., *Tousi* and *Coventry City Council*). Second, they have found that the NQC test cannot be used to distinguish valid marriages from invalid ones (whether voidable or void) because it is a negative test concerned only with the void/non-marriage divide. As the NQC test does not specify which formalities are required for a qualifying ceremony under section 49 of the Marriage Act 1949, judges have continued to rely on the hallmarks test to identify the positive features of a marriage. Consequently, the two tests coexist and overlap.

Normatively, the NQC test raises important questions. Its uncertain statutory foundation and its restrictive application risk undermining the remedial purpose of section 11 of the Matrimonial Causes Act 1973 and disproportionately disadvantage religious minorities, particularly wives and widows.¹²⁰ In comparative perspective, English law stands apart: while Australia and many Muslim-majority jurisdictions require registration, they often provide limited recognition or evidentiary presumptions for unregistered marriages rather than excluding them altogether.¹²¹ The challenge, therefore, is one of reform.

English law requires a principled framework that balances certainty with substantive fairness. The present reliance

120 A handful of reported cases apply the non-marriage (NQC) analysis beyond matrimonial finance, notably in child abduction and widow's benefits. In *Northumberland & Durham Prop. Tr. Ltd. v. Ouaha* [2014] EWCA Civ 571 (Eng.), the Court of Appeal rejected a widow's claim to succeed to a statutory tenancy under the Rent Act 1977 on the basis that her mosque ceremony in England was a non-marriage. In *Akhtar v. Sec'y of State for Work & Pensions* [2022] 1 WLR 421 (Eng.), the Court of Appeal dismissed a widow's claim to a bereavement payment under the Social Security Contributions and Benefits Act 1992 because, at the time of celebration, the marriage was polygamous and therefore not capable of recognition for the relevant statutory purpose. The NQC also adversely affect the rights of fathers. In *A v. H* (Registrar General for England and Wales intervening) [2010] 1 FLR 1 (Eng.), the court held that the father had no rights of custody under the 1980 Hague Child Abduction Convention because his religious-only *nikāh* in England was a non-marriage.

121 Rajnaara C. Akhtar, Ghena Krayem & Anisa Buckley, *Vesting Powers in Officiants: Reforming Weddings Law in England and Wales; Lessons from Australia's Muslim Communities*, 35 *CHILD & FAM. L.Q.* 49, 50 (2023).

on the unstable and judge-made category of the “non-marriage” risks undermining both. One judicial response, as suggested in earlier judgments, would be to confine non-marriage to sham, fictitious, or purely play-acted ceremonies, where neither party intended to enter into a marriage and where the event lacked the objective characteristics of a marital union.¹²² This would preserve certainty while preventing the concept of non-marriage from being applied to relationships that in substance functioned as marriages. A more comprehensive solution lies in legislative reform of the law of weddings, as proposed by the Law Commission.¹²³ By shifting the focus away from rigid formalities tied to venue and authorized officiants and toward advance notice and registration, Parliament could clarify the legal status of religious-only ceremonies without undermining the integrity of the marriage regime. Such reform would reduce reliance on judicial categorization and provide clearer guidance to couples, religious communities, and courts. Either approach would better align marriage law with its underlying policy: to protect the vulnerable, to regulate family life consistently, and to reflect the plural social realities of contemporary England and Wales.

Returning to Ms. Akhter, she eventually qualified as a solicitor after a sixteen-year gap and secured a series of court orders against Mr. Khan concerning access to the matrimonial home, child arrangements, and parental responsibility. She ultimately settled her dispute following the High Court’s judgment. In the end, not all was lost; yet Mr. Khan retained much of the property accumulated during their relationship, while she had devoted two decades to caring for their family as a homemaker. The NQC test has undoubtedly brought greater clarity, but it also narrows the reach of legal protection at the very point where it is most needed. Rather than extending the regulatory regime to

122 *Gereis v. Yagoub* [1997] 1 FLR 854, 861 (Eng.); *A-M v. A-M* (Divorce: Jurisdiction: Validity of Marriage) [2001] 2 FLR 6, [55] (Eng.); *Akhter v. Khan* [2018] EWFC 54, [81] (Eng.).

123 Law Comm’n, *supra* note 5, at 425–49. On Oct. 2, 2025, UK’s Ministry of Justice announced that the wedding law will be reformed in accordance with the Law Commission recommendations. Ministry of Justice, *Major boost to economy through wedding law reform*, Gov.UK (Oct. 2, 2025), <https://www.gov.uk/government/news/major-boost-to-economy-through-wedding-law-reform>.

safeguard the financial rights of homemakers, the NQC test restricts those rights, leaving wider scope for religious norms to operate in the shadow of the formal legal system. This outcome reflects not judicial impartiality but the exercise of secular state authority in defining which family forms count for legal recognition.¹²⁴ As feminist and family law scholars have long observed, the law's claim to impartiality often masks its role in reproducing hierarchies and reinforcing vulnerability.¹²⁵ In the context of religious-only marriages, the NQC test exemplifies how formalist reasoning entrenches structural inequality under the guise of doctrinal clarity, legal certainty, and judicial consistency.

124 ASAD, *supra* note 3, at 181–201; SABA MAHMOOD, RELIGIOUS DIFFERENCE IN A SECULAR AGE: A MINORITY REPORT 190–95 (2015).

125 CAROL SMART, FEMINISM AND THE POWER OF LAW 20–25 (1989); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 40–47 (1990).

THE ISLAMIC DOCTRINE OF *TAKFĪR*
(EXCOMMUNICATION): TRACING ITS
HISTORICAL DEVELOPMENT IN THE
THOUGHT OF IBN ḤANBAL, IBN TAYMIYYA,
AND MUḤAMMAD IBN ‘ABD AL-WAHHĀB

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Abstract

This article traces the long-term historical development of Islamic doctrine on takfīr (excommunication, declaring a self-professed Muslim to be a disbeliever). I focus on a line of influential scholars associated with the ahl al-ḥadīth and the Ḥanbalī school—Ibn Ḥanbal (d. 241/855), Ibn Taymiyya (d. 728/1328), and Muḥammad Ibn ‘Abd al-Wahhāb (d. 1206/1792)—and examine how these scholars view takfīr in relation to three key topics: non-application of the sharī‘a, denial of Allah’s attributes (ṣifāt), and shirk (taking a being other than Allah as a god). In addition, I document the scholars’ varying approach to the “excuse for ignorance” (al-‘udhr bi’l jah) that prevents takfīr for individuals who lack knowledge of relevant Islamic teachings and examine the role of historical events and politics in shaping the development of the takfīr doctrine, with the focus of scholars’ attention shifting according to the circumstances confronting them.

Keywords: criminal law, disbelief (*shirk*), excommunication (*takfīr*), “excuse for ignorance,” *jihād*, mitigation, punishment, Salafis, *sharī‘a*

INTRODUCTION*

Takfīr is one of the most important concepts in the Islamic tradition. It means “excommunication,” or declaring a self-professed Muslim to be a *kāfir* (non-Muslim).¹ Those declared *kāfirs* are to be punished with death and fought through religious warfare (*jihād*).² The earliest Muslim sects were intensely concerned with the topic of *takfīr* and frequently excommunicated one another (e.g., the Khārijīs, Murjī’īs, Shī’īs, Mu’tazilīs).³ Around the eleventh century CE, Muslims (arguably) adopted a more restrained attitude towards *takfīr*.⁴ Nevertheless, movements that favored less restraint arose periodically.⁵

The present article examines the long-term development of *takfīr* doctrine among the *ahl al-ḥadīth*/Hanbalīs. The *ahl al-ḥadīth* emerged between the late eighth and early ninth centuries CE and were the dominant theological school in the early Sunnī sect.⁶ All early Muslim sects acknowledged the Qur’ān’s authority. They also granted some authority to *ḥadīth* reports while

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1 Given its Christian origins and connotations, the term “excommunication” is not ideal. However, it is the most suitable English translation for *takfīr*.

2 See SHERMAN JACKSON, ON THE BOUNDARIES OF THEOLOGICAL TOLERANCE IN ISLAM (2002); YOHANAN FRIEDMANN, TOLERANCE AND COERCION IN ISLAM 121–59 (2003); CAMILLA ADANG, HASSAN ANSARI & MARIBEL FIERRO (EDS.), ACCUSATIONS OF UNBELIEF IN ISLAM (2016); HUSSAM TIMANI, TAKFĪR IN ISLAMIC THOUGHT (2018).

3 See MICHAEL COOK, COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT 393–429 (2004); JEFFREY KENNEY, MUSLIM REBELS 19–54 (2006); 1–5 JOSEF VAN ESS, THEOLOGY AND SOCIETY IN THE SECOND AND THIRD CENTURIES OF THE HIJRA (2020); ADAM GAISER, SECTARIANISM IN ISLAM (2023).

4 Evidence for this will be presented below.

5 E.g., Almohads, Qadizadelis, Wahhābīs. See ADANG ET AL., *supra* note 2; TIMANI, *supra* note 2.

6 See CHRISTOPHER MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9TH–10TH CENTURIES C.E. (1997); Wesley Williams, *Aspects of the Creed of Imam Ahmad Ibn Hanbal: A Study of Anthropomorphism in Early Islamic Discourse*, 34 INT’L J. MIDDLE E. STUD. 441–63 (2002); NIMROD HURVITZ, THE FORMATION OF HANBALISM (2002); GAISER, *supra* note 3 at 147–65; AHMAD KHAN, HERESY AND THE FORMATION OF MEDIEVAL ISLAMIC ORTHODOXY (2023).

recognizing that many reports were untrustworthy or fabricated. The *ahl al-ḥadīth* differed from other sects in three basic ways. First, they granted maximal authority to *ḥadīth* reports. Second, they systematically compiled these reports in large collections (e.g., Mālik’s *Muwattaʿ*, Ibn Ḥanbal’s *Musnad*, al-Bukhārī’s *Ṣaḥīḥ*). Third, they favored a strongly literalistic approach to the interpretation of scriptural texts (*nuṣūṣ*), that is, the Qurʾān and *ḥadīth* reports. Other sects were less trusting of *ḥadīth* reports and more open to non-literal forms of scriptural interpretation. Ibn Ḥanbal (d. 241/855) was the most important authority among the *ahl al-ḥadīth*. Over the ninth and tenth centuries, the majority of the *ahl al-ḥadīth* evolved into the Ḥanbalī theological and legal school. Nevertheless, around the eleventh century, the *ahl al-ḥadīth*/Ḥanbalīs would lose their position as the dominant Sunnī theological school to the Ashʿarī and Māturīdī schools. (These two theological schools were adopted by the Shāfiʿī, Ḥanafī, and Mālikī legal schools). Three figures played a leading role in shaping *ahl al-ḥadīth*/Ḥanbalī doctrine on *takfīr*: Ibn Ḥanbal and the later Ḥanbalī scholars Ibn Taymiyya (d. 728/1328) and Muḥammad Ibn ʿAbd al-Wahhāb (d. 1206/1792).

Existing studies of *takfīr* focus heavily on individuals, sects, and movements that many Muslims and non-Muslims perceive as endorsing sweeping forms of excommunication.⁷ Nevertheless, such studies generally do not examine the long-term development of *takfīr* doctrine over time. Thus, many regard Ibn Taymiyya and Ibn ʿAbd al-Wahhāb as two of Islam’s most influential advocates for wide-ranging excommunication. Consequently, studies have given significant attention to these figures, as have the Wahhābī and Salafī movements that their ideas inspired.⁸ However, such studies do not provide a broader history of Ḥanbalī *takfīr* doctrine. The present article takes up

7 JACKSON, *supra* note 2; ADANG ET AL., *supra* note 2; TIMANI, *supra* note 2.

8 Ahmad Dallal, *The Origins and Objectives of Islamic Revivalist Thought, 1750–1850*, 113 J. AM. ORIENTAL SOC’Y 341–59 (1993); DAVID COMMS, *THE WAHHABI MISSION AND SAUDI ARABIA* (2006); Denise Aigle, *The Mongol Invasions of Bilād al-Shām by Ghāzān Khān and Ibn Taymiyyah’s Three “Anti-Mongol” Fatwas*, 11 MAMLŪK STUD. REV. 89–120 (2007); Jon Hoover, *Ibn Taymiyya between Moderation and Radicalism*, in *RECLAIMING ISLAMIC TRADITION 177–203* (Elisabeth Kendall & Ahmad Khan eds., 2016); COLE BUNZEL, *WAHHABISM* (2023); Mehdi Berriah, *Ibn Taymiyya as a Hermeneutical Paradigm: Reception and Reactivation of Medi-*

this task by addressing several interrelated topics which have not been covered in earlier research. It examines the *takfīr* doctrine of Ibn Ḥanbal and the “early” *ahl al-ḥadīth* (i.e., those who lived between the eighth and tenth centuries). It also explains how their ideas relate to the *takfīr* doctrine of Ibn Taymiyya and Ibn ‘Abd al-Wahhāb. To do this, the article examines three key topics related to *takfīr*. Though linked to one another, these topics have not been analyzed together in previous studies.

The first topic concerns non-application of the *sharī‘a* (i.e., failing to implement *sharī‘a* rulings in judgement and governance). I argue that Ibn Ḥanbal and the early *ahl al-ḥadīth* strongly opposed excommunicating governments or rebelling against them for non-application of the *sharī‘a*. They associate such behavior with heretical Khārijī beliefs. Ibn Taymiyya and Ibn ‘Abd al-Wahhāb take a more complicated stance. Although they caution against illicit rebellion, they also argue for excommunicating governments that severely fail in applying the *sharī‘a*. Moreover, Ibn Taymiyya and Ibn ‘Abd al-Wahhāb put their ideas into practice. Ibn Taymiyya excommunicated the Mongol government and mobilized a *jihād* campaign against them. Ibn ‘Abd al-Wahhāb did likewise with the Ottoman government and their allies.

The second topic concerns denial of Allah’s attributes (*ṣifāt*) (i.e., denying that scriptural descriptions of Allah are true in any literal or semi-literal sense). I argue that Ibn Ḥanbal strongly promotes excommunicating individuals for denying Allah’s attributes. On the other hand, Ibn Ḥanbal also endorses an “excuse for ignorance” (*al-‘udhr bi’l-jahl*). This means that a person can be pardoned for egregious beliefs and actions if he or she lacks knowledge of relevant Islamic teachings. An ignorant person of this type is not to be excommunicated. Like Ibn Ḥanbal, Ibn Taymiyya holds that denial of Allah’s attributes merits *takfīr*. Nevertheless, Ibn Taymiyya also tightly restrains such *takfīr* by maximally expanding the notion of an excuse for ignorance. He asserts that even highly educated religious scholars deserve to be excused. Furthermore, he holds that, in later

eval Islamic Thought in the Jihadist Discourse of Ayman al-Zawahiri, 4 *ITIHAD J. FOR ISLAMIC & ARABIC STUD.* 21 (2025); DANIEL LAV, *SALAFI POLITICAL THEOLOGY* (2025).

Islamic times, ignorance has spread so widely that entire societies deserve to be excused. While Allah's attributes are a central concern of Ibn Ḥanbal and Ibn Taymiyya, Ibn 'Abd al-Wahhāb shows little interest in this matter.

The third topic pertains to *shirk* (i.e., taking a being other than Allah as a god). I argue that Ibn Ḥanbal and the early *ahl al-ḥadīth* do not believe that there is a great risk of Muslims falling into *shirk*. They exhibit a comparatively tolerant attitude towards practices like seeking blessings from graves and relics, as well as making requests from dead persons, *jinn*, and angels. On the other hand, for Ibn Taymiyya and Ibn 'Abd al-Wahhāb, such practices raise deep concerns over *shirk*, and in many cases can justify *takfīr*. Nevertheless, Ibn Taymiyya tightly restrains *takfīr* by granting an expansive excuse for ignorance to Muslims guilty of *shirk*. By contrast, Ibn 'Abd al-Wahhāb minimizes the excuse for ignorance. Furthermore, he advocates for excommunicating those guilty of *shirk*, and for waging *jihād* campaigns against them.

Besides providing a general history of Ḥanbalī *takfīr* doctrine, the article makes three additional contributions. First, unlike previous studies, it explains the origins and development of the "excuse for ignorance" as a crucial component of *takfīr* doctrine. Second, by taking a long-term view, the article is able to explain the role of historical contingency in shaping *takfīr* doctrine. I argue that *takfīr* doctrine moved along an unpredictable trajectory and was reoriented multiple times by particular events. During the seventh and eighth centuries, Muslim thinking on *takfīr* focused on non-application of the *sharī'a* and whether this justified political rebellion. However, debates on these matters subsided as the emerging *ahl al-ḥadīth* took strong stances against Khārijism and rebellion. During the ninth century, Muslim thinking on *takfīr* came to focus on the denial of Allah's attributes. This was largely due to 'Abbāsīd state policies that sought to impose a particular Mu'tazilī understanding of Allah's attributes. Following the ninth century, Muslim societies gradually ascribed increasing power to dead prophets and saints while introducing elaborate rituals for interacting with them. By the twelfth century some Muslims

began strongly criticizing these developments as *shirk*, while reorienting *takfīr* doctrine towards a greater focus on *shirk*. Third, the article explains the role of politics in shaping *takfīr* doctrine. Existing studies recognize that particular political commitments underlie the views of Ibn Ḥanbal, Ibn Taymiyya, and Ibn ‘Abd al-Wahhāb.⁹ However, the present article goes a step further by highlighting shared features of their thinking on *takfīr*. Hence, all three figures strongly advocate loyalty to the governments under which they lived. They put forth an understanding of *takfīr* that rejects excommunicating these governments or rebelling against them. Moreover, Ibn Taymiyya and Ibn ‘Abd al-Wahhāb advocate excommunicating and fighting enemy foreign governments. While the *takfīr* doctrine of such figures cannot be reduced to politics, it is partly influenced by political loyalties.

Although texts written by Ibn Taymiyya and Ibn ‘Abd al-Wahhāb are readily available, matters are more problematic when it comes to Ibn Ḥanbal. Numerous texts and opinions are attributed to him, but such attributions are often contentious.¹⁰ In some cases, material attributed to Ibn Ḥanbal was generated (at least in part) by early Ḥanbalī scholars living within a century or two of his life. For the sake of simplicity, the present article will concentrate on early and widely accepted reports about Ibn Ḥanbal’s opinions, with the understanding that some of these opinions may in fact originate with early Ḥanbalī scholars.

I structure the article as follows. I begin by introducing classic Sunnī *takfīr* doctrine. Next, I discuss the *takfīr* doctrine of Ibn Ḥanbal and the early *ahl al-ḥadīth* with respect to non-application of *sharī‘a*, denial of Allah’s attributes, and *shirk*. I treat these topics in order of their historical emergence, which I argue must be kept in mind to understand the development of early *ahl al-ḥadīth takfīr* doctrine. In the next sections, I discuss Ibn Taymiyya’s *takfīr* doctrine with respect to denial of Allah’s

⁹ Hoover, *supra* note 8; KHAN, *supra* note 6, at 184–205; BUNZEL, *supra* note 8, at 27.

¹⁰ ABDUL HAKIM AL-MATROUDI, THE ḤANBALI SCHOOL OF LAW AND IBN TAYMIYYA 10–13 (2006);

Andrew McLaren, *Ibn Ḥanbal’s Refutation of the Jahmiyya*, 140 J. AM. ORIENTAL SOC’Y 901 (2022).

attributes, then *shirk*, and then non-application of *sharī‘a*. Here, I address non-application of *sharī‘a* last because it occupies a less important place in Ibn Taymiyya’s thought. Finally, I discuss Ibn ‘Abd al-Wahhāb’s *takfīr* doctrine with respect to *shirk* and non-application of *sharī‘a*. This reflects the fact that *shirk* dominates Ibn ‘Abd al-Wahhāb’s thought, and he does not engage with the subject of Allah’s attributes.

SECTION I: CLASSIC SUNNĪ TAKFĪR DOCTRINE

Classic Sunnī *takfīr* doctrine crystallized around the eleventh century and received its most systematic and authoritative expression in the work of the Ash‘arī theologian Abū Hāmid al-Ghazālī (d. 505/1111).¹¹ Classic doctrine is a useful point of departure in thinking about the long-term development of Sunnī thinking on *takfīr*. Although classic doctrine is complex and multifaceted, it is shaped by four key ideas. First, generally speaking, people can be excommunicated for incorrect beliefs but not incorrect actions. However, as we will see, many early Muslims, including the *ahl al-ḥadīth*, were more open to excommunicating people for incorrect actions. Second, people merit *takfīr* when they reject the teachings of Prophet Muḥammad (i.e., they disbelieve in them).¹² Third, *takfīr* should be avoided to the greatest extent possible.¹³ One oft-cited *ḥadīth* report quotes the Prophet as warning: “If a man says to his brother ‘O *kāfir*,’ then it is true of one of them.”¹⁴ To restrain *takfīr*, classic doctrine stipulates that individuals can only be excommunicated for rejecting Prophetic teachings that have been proven with certainty (such that they

11 See ABŪ HĀMID AL-GHAZĀLĪ, *FAYṢAL AL-TAFRIQA BAYNA AL-ISLĀM WA’L-ZANDAQA* (Dār al-Minhāj 2017); ABŪ HĀMID AL-GHAZĀLĪ, *AL-IQTISĀD FĪ AL-‘IṬIQĀD* 133–38 (Dār al-Kutub al-‘Ilmiyya 2004); JACKSON, *supra* note 2; Also see ADANG ET EL., *supra* note 2, at 8; TIMANI, *supra* note 2, at 75–94; FRANK GRIFFEL, *AL-GHAZĀLĪ’S PHILOSOPHICAL THEOLOGY* 111–22 (2009). Other examples of classic *takfīr* doctrine include I YAḤYĀ B. SHARAF AL-NAWAWĪ, *AL-MINHĀJ SHARḤ ṢAḤĪḤ MUSLIM B. AL-ḤAJJĀJ* 150 (Dār Ihyā’ al-Turāth al-‘Arabī 1392 AH); 9 MUWAFFAQ AL-DIN IBN QUDĀMA, *AL-MUGHNĪ* 11–13 (Maktabat al-Qāhira 1969).

12 See AL-GHAZĀLĪ, *FAYṢAL*, *supra* note 11, at 84–85.

13 *Id.* at 82.

14 8 MUḤAMMAD B. ISMĀ‘ĪL AL-BUKHĀRĪ, *ṢAḤĪḤ AL-BUKHĀRĪ* 73 (Dār al-Ta’šīl 2012).

are “necessarily known” or *ma‘lūm min al-dīn bi’l-darūra*).¹⁵ Notably, the early *ahl al-ḥadīth* do not posit any limitation of this kind, which is one reason why their *takfīr* is less restrained. The fourth key idea is the excuse for ignorance (*al-‘udhr bi’l-jahl*). The Qur’ān indicates that people are not held responsible for unintentional sins due to lack of knowledge.¹⁶ Based on this, classic doctrine asserts that a person cannot be excommunicated for rejecting one of the Prophet’s teachings out of ignorance.¹⁷ However, to better understand the four preceding ideas, some further clarifications are needed.

Classic doctrine holds that the Prophet’s teachings are proven through valid evidence (*dalīl*, pl. *dalā’il*). The three most important sources of evidence are the Qur’ānic text, Prophetic *ḥadīth* reports, and consensus opinions (*ijmā’*). The *ahl al-ḥadīth* hold a broadly similar view. In discussing evidence, classic doctrine gives significant attention to the question of how the Prophet’s teachings may be proven with certainty. Here the theory of *tawātur* is central.¹⁸ This theory originated in Greek philosophy and was then gradually adapted by Mu‘tazilī and Ash‘arī scholars.¹⁹ The theory posits that one may obtain certain (i.e., *darūrī*) knowledge about historical facts if they are corroborated by a sufficiently large number of separate contemporaneous reports. For example, we know with certainty that Napoleon invaded Egypt in 1798 because various Egyptian, French, and British officials from the time reported this fact. Similarly, a sufficiently large number of separate contemporaneous reports can prove with certainty that the Prophet made particular statements or performed particular actions.

Classic doctrine asserts that the Qur’ānic text is proven with certainty through *tawātur*.²⁰ Put differently, there is a suf-

15 AL-GHAZĀLĪ, FAYSAL, *supra* note 11, at 84; AL-NAWAWĪ, *supra* note 11, at 150; 12 SHIHĀB AL-DĪN AL-QARĀFĪ, AL-DHAKHĪRA 28–29 (Dār al-Gharb al-Islāmī 1994).

16 *See, e.g.*, Qur’ān 2:286, 33:5.

17 AL-GHAZĀLĪ, FAYSAL, *supra* note 11, at 84; AL-NAWAWĪ, *supra* note 11, at 150; IBN QUDĀMA, *supra* note 11, at 11–13; 28 IBN TAYMIYYA, MAJMŪ‘ AL-FATĀWĀ 500–01 (Majma‘ al-Malik Fahd 2004).

18 *See generally* SUHEIL LAHER, TAWĀTUR IN ISLAMIC THOUGHT (2025).

19 LAHER, *supra* note 18, at 20–30.

20 *Id.* at 105–152, 199–200.

ficiently large number of contemporaneous reports to establish, beyond doubt, that the Prophet proclaimed a Qur'ānic text that matches the text used by later generations.

Matters are more complicated with respect to *ḥadīth* reports. Classic doctrine recognizes that many *ḥadīth* reports are untrustworthy (*da'īf*) or outright fabrications (*mawḍū'*). Moreover, even a report with a sound chain of transmitters (*ṣaḥīḥ*) cannot prove the Prophet's actions and statements with certainty. On the other hand, classic doctrine asserts that, in some cases, there exists a sufficiently large number of separate contemporaneous *ḥadīth* reports to prove things about the Prophet beyond doubt. These are known as *tawātur* reports (*al-ḥadīth al-mutawātir*). In rare instances, separate reports prove the exact wording of a statement made by the Prophet (*al-tawātur al-lafẓī*). However, far more often, these reports simply prove some more general fact about him (*al-tawātur al-ma'nawī*).²¹ For example, it is known that the Prophet taught that sinners will be punished in their graves (*'adhāb al-qabr*), and that Muslims must recite *al-Fātiḥa* in their daily prayers.²² One may doubt individual reports about the precise words or actions he used to communicate these teachings. However, the large and varied body of reports definitively establishes the basic fact that he taught these things.

Classic doctrine holds that the Prophet's teachings can only be proven with certainty through the Qur'ān, *tawātur ḥadīth* reports, and (in the view of some) consensus opinions. Consequently, a person may only be excommunicated for rejecting a Prophetic teaching established by such evidence. By contrast, teachings based on non-*tawātur ḥadīth* reports cannot justify *takfīr*.²³ Notably, although the early *ahl al-ḥadīth* are familiar with the theory of *tawātur*, it plays little role in their thinking about *takfīr*.²⁴

One important additional issue pertains to interpretation. Classic *takfīr* doctrine holds that, when interpreting scriptural texts, literal and apparent meaning (*al-ḥaqīqa*, *al-zāhir*) takes

21 *Id.* at 134,169–71.

22 *Id.* at 43–45.

23 AL-GHAZĀLI, FAYṢAL, *supra* note 11, at 84–85.

24 LAHER, *supra* note 18, at 37–45.

precedence.²⁵ Departure from such meaning (*ta'wīl*) is not necessarily unacceptable, but it requires justification. There is a special hostility towards forms of interpretation that understand scripture in ways that are highly metaphorical (*al-majāz*) or esoteric (*al-bāṭin*). Significant departures from literal and apparent meaning can justify *takfīr*, especially where they function to negate central Islamic theological beliefs and *sharī'a* rules. For instance, Muslim philosophers (*falāsifa*) and Ismā'īlī Shī'īs challenged the belief in a literal hell, the belief that Allah created matter, the obligation to pray five times daily, and the obligation to fast during *Ramaḍān*. Both groups were excommunicated despite justifying their views through metaphorical and esoteric interpretations of scripture.²⁶ We will see that classic doctrine is somewhat more tolerant of non-literal interpretation than the early *ahl al-ḥadīth*.

Finally, we come to the excuse for ignorance. According to classic doctrine, some Muslims lack knowledge of Prophetic teachings that have been proven with certainty. When these ignorant Muslims reject such teachings, they are not to be immediately excommunicated. Rather they must be provided with knowledge to remove the ignorance. Such usually involves presenting scriptural texts along with explanations of these texts. This is sometimes referred to as “establishing the proof” (*iqāmat al-ḥujja*).²⁷ After receiving knowledge, the erring Muslim no longer has an excuse. Hence, if he or she persists in rejection, then *takfīr* is necessary.²⁸

The excuse for ignorance is not granted to everyone. Hence, it is assumed that virtually all Muslims are aware of basic Islamic teachings, including many which have been established with certainty (e.g., that hell exists, that alcohol is forbidden).

25 AL-GHAZĀLĪ, FAYSAL, *supra* note 11, at 56–81, 87–88; GRIFFEL, *supra* note 11, at 111–22.

26 ABŪ ḤĀMĪD AL-GHAZĀLĪ, FADĀ'IH AL-BĀTINIYYA 46–47 (Mu'assasat Dār al-Kutub al-Thaqāfiyya 1964); *id.*, AL-MUNQIDH MIN AL-ḌALĀL 193 (Dār al-Kutub al-Ḥadītha 1979); GRIFFEL, *supra* note 11, at 111–22.

27 12 IBN TAYMIYYA, *supra* note 17, at 500–1. Also see 3 AL-JĀHĪZ, RASĀ'IL AL-JĀHĪZ 292 (Maktabat al-Khānjī 1964); 3 IBN TAYMIYYA, KITĀB JĀMI' AL-MASĀ'IL 145–46, 151 (Dār Ibn Ḥazm, 2019).

28 1 AL-NAWAWĪ, *supra* note 11, at 150; 9 IBN QUDĀMA, *supra* note 11, at 11–13.

Generally speaking, Muslims cannot claim ignorance in these matters. There are only limited exceptions. Islamic legal texts commonly mention two situations. One is the case of the new convert. The other is the person who lives in an isolated area with no access to Islamic learning.²⁹ We will see that the early *ahl al-ḥadīth* also endorse a type of excuse for ignorance—albeit one that is somewhat more vaguely defined.

SECTION II: IBN ḤANBAL AND THE EARLY *AHL AL-ḤADĪTH* ON NON-APPLICATION OF THE *SHARĪʿA*

Contrary to classic doctrine, earlier forms of Muslim thought are more open to excommunicating people for incorrect actions (as well as beliefs). Indeed, (arguably) the first theological controversy in Islam concerns whether Muslims become *kāfirs* due to incorrect actions. The controversy is tied to particular Qurʾānic verses, many of which pertain to “hypocrites” (*munāfiqūn*). In the Qurʾān, the term “hypocrite” refers to individuals who claim to be Muslims but are actually *kāfirs*. The hypocrites are associated with a faction of Muslims in Medina who politically opposed the Prophet and cultivated alliances with his non-Muslim enemies (especially the Jews of Medina).

The Qurʾān describes hypocrites as doubting or disbelieving in the Prophet but pretending otherwise.³⁰ They also lack commitment to the Islamic message at the level of personal behavior. When it comes to pious acts like prayer and charity, hypocrites avoid them, lack sincere motivation, and often only do them to impress others.³¹ Hypocrites are also described as lacking in commitment to the Islamic message at a social and political level. Hence, they mock the Islamic message and the believers.³² They avoid offering military and financial support to the Muslim community³³ and encourage others to do the same.³⁴

29 AL-GHAZĀLĪ, FAYSAL, *supra* note 11, at 84; AL-NAWAWĪ, *supra* note 11, at 150; IBN QUDĀMA, *supra* note 11, at 11–13; IBN TAYMIYYA, *supra* note 17, at 500–01

30 Qurʾān 63:1–4, 33:12.

31 Qurʾān 4:142, 9:67.

32 Qurʾān 4:140, 9:64.

33 Qurʾān 33:12–14, 63:7.

34 Qurʾān 33:12–14, 63:7.

They ally with non-Muslim enemies of the Muslims.³⁵ They are ready to rebel against the Prophet if they see this as being in their interests.³⁶ The Qur'ān also criticizes the hypocrites for refusing to submit to the legal and political judgements of the Prophet.³⁷ Moreover, Qur'ān 5:44 states: “And those who do not judge (*yahkum*) according to what Allah has revealed, then they are *kāfirs*.” Such verses appear in debates over non-application of the *sharī'a*. In classic Islamic writings, *sharī'a* refers to the full corpus of Allah's rulings (*aḥkām*) for regulating different aspects of human life, including worship, family relations, commercial transactions, criminal punishment, warfare, and the like. Social groups and states are obliged to “apply” the *sharī'a* by obeying its rulings and implementing them in governance and judgement. The preceding verses can be interpreted as suggesting that social groups and government officials who do not apply the *sharī'a* are hypocrites and/or *kāfirs*.

Significantly, existing sources indicate that the Prophet never excommunicated or fought the hypocrites. He seems to have avoided excommunicating specific individuals so long as they claimed to be Muslims.³⁸

Ultimately, the Qur'ān itself does not lay down clear principles for differentiating Muslims from *kāfirs*, or for regulating *takfīr*. Controversy about these issues broke out immediately after the Prophet's death. At this time, Abū Bakr (d. 13/634) established a caliphal government and demanded the submission of all Muslims. A number of recently converted Arab tribes refused to submit and pay *zakāt* taxes to this government. Some also pledged allegiance to new prophets who had arisen among them.³⁹ The government excommunicated the insubordinate tribes and successfully subdued them through *jihād* between 11/632 and 12/633. These events are known as “Wars of Apostasy” (*ḥurūb al-ridḍa*). Insofar as the caliphal government was understood as representing Islam, the tribes' actions might be seen as opposition to the Islamic message on

35 Qur'ān 59:11–12, 5:51–55.

36 Qur'ān 33:14, 63:8.

37 Qur'ān 4:59–61.

38 6 AL-BUKHĀRĪ, *supra* note 14, at 441–42.

39 E.g., Musaylima, Ṭulayḥa, al-Aswad al-'Ansī.

a social and political level. Moreover, according to some Sunnī scholars (including Ibn Taymiyya), tribes that merely refused to pay *zakāt* taxes thereby rejected the *sharīʿa*. Consequently, they became apostates.⁴⁰

The issue of *takfīr* for non-application of the *sharīʿa* gained even more importance with the emergence of the Khārijīs in the mid-seventh century. Khārijīs deny that mere belief suffices to make one Muslim. Actions in keeping with the *sharīʿa* are also necessary. Khārijīs excommunicated individuals who violated the *sharīʿa* by committing major sins (*kabāʿir*) such as wine drinking, fornication, and failure to apply the *sharīʿa* (i.e., failure to apply the Qurʾān and the *ḥukm Allāh*).⁴¹ Khārijīs also excommunicated governments that failed to apply the *sharīʿa* and rebelled against them with *jihād* campaigns. Based on these teachings, Khārijīs justified *takfīr* and *jihād* against the caliphs ʿUthmān b. ʿAffān (d. 35/656), ʿAlī b. Abī Ṭālib (d. 40/661), and Muʿāwiya b. Abī Sufyān (d. 60/680).

Opposing the Khārijīs, other early sects developed alternative positions on *takfīr*. The Murjiʿīs, who emerged in the late seventh century, hold that mere belief makes one Muslim. Thus, major sins (including failure to apply the *sharīʿa*) do not make one a *kāfir*.⁴² The Muʿtazilīs, who emerged in the mid-eighth century, hold that individuals who commit major sins are neither Muslims nor *kāfirs*. Rather, they have an intermediate status (*al-manzila bayna al-manzilatayn*). They are not excommunicated and killed in this life but will spend eternity in hell.⁴³

The *ahl al-ḥadīth* developed a position between that of the Khārijīs and the Murjiʿīs. Like the Khārijīs, the *ahl al-ḥadīth* hold that the criterion for being a Muslim includes both beliefs and actions.⁴⁴ Ibn Abī Yaʿlā (d. 526/1131) attributes a creed to

40 IBN TAYMIYYA, *supra* note 17, at 545.

41 KENNEY, *supra* note 3, at 46; VAN ESS, *supra* note 3, at 21–44; GAISER, *supra* note 3, at 57–85.

42 VAN ESS, *supra* note 3, at 173–262; GAISER, *supra* note 3, at 126–36.

43 Racha El Omari, *The Muʿtazilite Movement (I): The Origins of the Muʿtazila*, in THE OXFORD HANDBOOK OF ISLAMIC THEOLOGY 130–41 (Sabine Schmidtke ed., 2016); TIMANI, *supra* note 2, at 49–74; GAISER, *supra* note 3, at 140.

44 See ʿABD ALLĀH AL-ḤUMAYDĪ, UṢŪL AL-SUNNA 35–44 (Dār Ibn al-Athīr 1997); 1 ABŪ AL-QĀSIM AL-LĀLAKĀʿĪ, SHARḤ UṢŪL IʿTIQĀD AHL AL-SUNNA WAʿL-JAMĀʿA 198 (Dār Ṭayba, 2003).

Ibn Ḥanbal which reads: “Faith is speech and action (*al-īmān qawl wa-‘amal*).”⁴⁵ Because actions are essential to being Muslim, a person with bad enough actions becomes a *kāfir*. However, whereas the Khārijīs assert that any grave sin renders one a *kāfir*, the *ahl al-ḥadīth* believe that only the worst grave sins have such an effect. The *ahl al-ḥadīth* commonly put abandoning prayer into this category. Ibn Ḥanbal’s *Musnad* includes a *ḥadīth* report that quotes the Prophet, saying, “The covenant (*al-‘ahd*) between us and them is the prayer. Whoever abandons it becomes a *kāfir* (*kafara*).”⁴⁶ Abū Bakr al-Khallāl (d. 311/923) reports that Ibn Ḥanbal seems to have adopted this view.⁴⁷ Ibn Abī Ya‘lā’s creed of Ibn Ḥanbal reads: “There is no act whose abandonment is *kufīr* (unbelief) except the prayer. Whoever abandons it is a *kāfir*, and Allah has made his killing lawful.”⁴⁸ Other *ahl al-ḥadīth* scholars go somewhat further. Al-Ḥumaydī (d. 219/834) suggests that abandoning any of the five pillars (declaration of faith, prayer, fasting, *zakāt*, pilgrimage) can make one a *kāfir*.⁴⁹ Ḥarb al-Kirmānī (d. 280/893) indicates that even wine-drinking can make one a *kāfir*.⁵⁰

Significantly, the general view of later Sunnī scholars (outside the Ḥanbalī school) is that even the person who abandons prayer does not become a *kāfir*.⁵¹ This is partly because Ash‘arīs and Māturīdīs emphasize that being a Muslim is primarily, if not exclusively, a matter of belief (*taṣḍīq*) rather than action.⁵² Compared to classic *takfīr* doctrine, the early *ahl al-ḥadīth* are more open to the notion that bad actions justify *takfīr*.

Studies on early Sunnism note that some (proto-)Sunnī figures like Abū Ḥanīfa (d. 150/767) were open to rebellion against

45 I IBN ABĪ YA‘LĀ, ṬABAQĀT AL-ḤANĀBILA 243 (Maṭba‘at al-Sunna al-Muḥammadiyya 1952).

46 38 AḤMAD IBN ḤANBAL, MUSNAD AL-IMĀM AḤMAD IBN ḤANBAL 20 (Mu‘assasat al-Risāla 2001).

47 ABŪ BAKR AL-KHALLĀL, AḤKĀM AHL AL-MILAL WA’L-RIDDA MIN AL-JĀMI‘ LI-MASĀ’IL AL-IMĀM AḤMAD IBN ḤANBAL 471 (Dār al-Kutub al-‘Ilmiyya 1994).

48 IBN ABĪ YA‘LĀ, *supra* note 45, at 243.

49 AL-ḤUMAYDĪ, *supra* note 44, at 35–44.

50 ḤARB AL-KIRMĀNĪ, IJMĀ‘ AL-SALAF FĪ AL-‘IṬIQĀD KAMĀ HAKĀH AL-IMĀM ḤARB B. ISMĀ‘ĪL AL-KIRMĀNĪ 48–49 (Dār al-Imām Aḥmad 2011).

51 I ABŪ AL-WALĪD MUḤAMMAD B. AḤMAD IBN RUSHD, AL-MUQADDIMĀT AL-MUMAHHADĀT 141–44 (Dār al-Gharb al-Islāmī 1988).

52 See TIMANI, *supra* note 2, at 49–74.

evil rulers. However, over the course of the eighth and ninth centuries, Sunnī scholars became increasingly averse to rebellion, even when it was not accompanied by excommunication of rulers.⁵³ They associated rebellion with heretical Khārijī teachings.

The early *ahl al-ḥadīth* hold that Muslims have an obligation to obey the ruler. Muslims should not excommunicate him or rebel against him, even if he blatantly violates the *sharīʿa*. While absent from the Qurʾān, this idea is found in many *ḥadīth* reports. Muslim (d. 261/875) records a famous report in which the Prophet says, “There will be leaders after me who do not follow my guidance and do not adhere to my Sunna. Among them will be men with the hearts of devils in human bodies ... listen and obey the ruler, even if your back is beaten and your wealth is taken—listen and obey (*fa-smaʿ wa-aṭiʿ*).”⁵⁴ Ibn Abī Yaʿlā’s creed of Ibn Ḥanbal reads, “[We affirm] listening to and obeying the leaders and the Commander of the Believers—righteous and wicked It is not lawful for anyone among the people to kill the sultan or rebel against him ; whoever does so is an innovator upon other than the Sunna and the path.”⁵⁵ Similar ideas are echoed in the “Creed of the Two Rāzīs,” which records the ideas of major *ahl al-ḥadīth* scholars Abū Zurʿa al-Rāzī (d. 264/878) and Abū Ḥātim al-Rāzī (d. 277/890). The creed rejects Khārijī views about major sins justifying *takfīr*. Furthermore, it links this with rejection of political rebellion. The creed first states, “We do not excommunicate the people of the *qibla* on account of their sins.” Immediately thereafter, the Creed explains the need to submit to rulers and says, “We do not hold that one should rebel (*al-khurūj*) against the rulers or fight during times of turmoil. We listen to and obey whoever Allah the Mighty and Majestic has placed in authority over us.”⁵⁶

Government officials welcomed *ahl al-ḥadīth* views of this kind and permitted them to spread. By the ninth century,

53 MUHAMMAD QASIM ZAMAN, RELIGION AND POLITICS UNDER THE EARLY ʿABBĀSIDS 76–78, 97–98 (1997); KHAN, *supra* note 6, at 184–205. See also KHALED ABU EL FADEL, REBELLION AND VIOLENCE IN ISLAMIC LAW 100–233 (2001).

54 3 MUSLIM B. AL-ḤAJJĀJ, ṢAḤĪH MUSLIM 1476 (Maṭbaʿat ʿĪsā al-Bābī al-Ḥalabī wa-Shurakāʾuh 1955).

55 IBN ABĪ YAʿLĀ, *supra* note 45, at 241–46.

56 AL-LĀLAKĀʾI, *supra* note 44, at 199.

such views came to dominate Sunnī discourse and undermined the notion that non-application of *sharī‘a* could justify *takfīr* or political rebellion.

SECTION III: IBN ḤANBAL AND THE EARLY *AHL AL-ḤADĪTH* ON THE DENIAL OF ALLAH’S ATTRIBUTES

During the ninth century, Muslim thinking on *takfīr* came to focus increasingly on the issue of Allah’s *ṣifāt*. *Ṣifāt* may be translated as “attributes” or “descriptions.”

Dating back to the eighth century, some Muslims have championed a highly transcendent concept of God, partially influenced by late antique Neoplatonic philosophy. The concept posits that Allah is (something like) an invisible spirit who is radically unlike humans, lacks a material body, and is not limited to a specific spatial location. Advocates of the transcendent concept cite scriptural texts that seem to describe Allah in this way. Thus, speaking of Allah, the Qur’ān says “there is nothing like Him,”⁵⁷ and that “vision does not reach Him.”⁵⁸ The Qur’ān also says, “The East and the West belong to Allah. So, wherever you turn, there is the Face (*wajh*) of Allah.”⁵⁹ On the other hand, some scriptural texts seem to conflict with the transcendent concept. These texts suggest that there is a type of resemblance (*tashbīh*) between Allah and humans. Hence, the Qur’ān describes Allah as having “hands,”⁶⁰ a “face,”⁶¹ and a “shin.”⁶² He is also described as “speaking,”⁶³ “hearing,”⁶⁴ “loving,”⁶⁵ and being “angry.”⁶⁶ Additionally, He is described as being located in the sky and above a throne.⁶⁷

57 Qur’ān 42:11.
58 Qur’ān 6:103.
59 Qur’ān 2:115.
60 Qur’ān 38:75, 48:10.
61 Qur’ān 2:115, 55:27.
62 Qur’ān 68:42.
63 Qur’ān 4:164, 2:253.
64 Qur’ān 2:127.
65 Qur’ān 2:195, 9:7.
66 Qur’ān 1:7, 2:61.
67 Qur’ān 7:54, 10:3, 67:16-17.

Advocates of the transcendent concept include Jahm b. Ṣafwān (d. 128/746) and (more importantly) the Mu‘tazilīs.⁶⁸ Such thinkers promoted non-literal interpretations of scriptural texts that describe Allah as resembling human beings (especially those texts which suggest that Allah has a body). In their view, when scripture says Allah created things with His “hands,”⁶⁹ this is a metaphor for His power.⁷⁰ When scripture says that Allah is above a throne,⁷¹ this is a metaphor for Him ruling the universe like a king.⁷² Moreover, Allah does not literally “speak,” for “speaking” is a human action, and arguably implies that Allah has a tongue and mouth. Rather, Allah simply creates words and sounds that prophets perceive. The Qur’ān is “created” (*makhlūq*) in this manner.⁷³ The *ahl al-ḥadīth* refer to proponents of such views (e.g., Jahm, the Mu‘tazilīs) as “Jahmīs” (*al-Jahmiyya*).

The *ahl al-ḥadīth* deny that Allah genuinely resembles humans (*tashbīh*) or has a human-like material body. However, they tacitly accept some degree of resemblance between Allah and humans based on scriptural texts. Moreover, the *ahl al-ḥadīth* (including Ibn Ḥanbal) transmit and endorse many *ḥadīth* reports which go beyond the Qur’ān in suggesting that Allah has a highly human-like bodily form. The most controversial reports indicate that Allah has the form of a curly-haired youth, and that He created angels from the light of His chest.⁷⁴ (The Mu‘tazilīs consider many of these to be fabrications.) The *ahl al-ḥadīth* also adopt a literalistic approach to these scriptural texts and insist on

68 See 3 VAN ESS, *supra* note 3, at 138–46; GAISER, *supra* note 3, at 138–46; David Bennett, *The Mu‘tazilite Movement (II): The Early Phase*, in THE OXFORD HANDBOOK OF ISLAMIC THEOLOGY 142–58 (Sabine Schmidtke ed., 2016); Jon Hoover, *God Spatially Above and Spatially Extended: The Rationality of Ibn Taymiyya’s Refutation of Fakhr al-Dīn al-Rāzī’s Ash’arī Incorporalism*, 69 ARABICA 626, 627–31 (2022).

69 Qur’ān 36:71, 38:75.

70 Binyamin Abrahamov, *The “Bi-lā Kayfa” Doctrine and Its Foundations in Islamic Theology*, 42 ARABICA 365 (1995).

71 Qur’ān 7:54, 10:3.

72 ABRAHAMOV, *supra* note 70, at 365; Hoover, *supra* note 68, at 631.

73 See VAN ESS, *supra* note 3, at 305–8, 443–51; FARID SULEIMAN, *IBN TAYMIYYA AND THE ATTRIBUTES OF GOD* 294–95 (2024).

74 See LIVNAT HOLTZMAN, *ANTHROPOMORPHISM IN ISLAM* 152–53, 201–2, 246 (2018).

avoiding non-literal interpretation. Their ideal (i.e., *bi-lā kayf*) is simply affirming the truth of texts, without speculating further on their exact meaning (e.g., it is necessary to affirm a text which states Allah has a hand, without asking about the exact nature of this hand).⁷⁵ Ibn Abī Ya‘lā’s creed of Ibn Ḥanbal reads: “One does not say: ‘Why?’ or ‘How?’ [in interpreting scriptural texts]—rather, it is affirmation and belief in them [which is necessary]. Whoever does not know the interpretation of the *ḥadīth* report and his intellect (*‘aql*) does not reach it ... his duty is to believe in it and submit to it (*al-taslīm lahu*).”⁷⁶

The early *ahl al-ḥadīth* consider many Jahmī views to be deviant (*bid‘a*). However, in most cases, they do not believe that such views justify *takfīr*. Nevertheless, there are two major exceptions, which concern Allah’s attributes of “speech” (*kalām*) and “aboveness” (*‘uluww*, *fawqiyya*). According to the *ahl al-ḥadīth*, the Qur’ān clearly affirms that Allah literally speaks and that this speech is not merely created. The Qur’ān also clearly affirms that Allah is spatially located in an upwards direction, above other things like the earth and the throne. This is His “aboveness.” Denying either of these two things justifies *takfīr*. Hence Jahmīs are *kāfīrs*.

Notably, classic *takfīr* doctrine is more tolerant of interpretive differences in these matters. Thus, Ash‘arīs and Māturīdīs affirm that Allah speaks. However, like Mu‘tazilīs, they deny His aboveness using non-literal interpretation. The Ash‘arī Abū Ḥāmid al-Ghazālī (d. 505/1111) permits limited non-literal interpretation of this type. For him, it does not justify *takfīr*.⁷⁷

Between 218/833 and 237/852, the ‘Abbāsīd caliphical government instituted policies known as the *Miḥna* (trial/ordeal). These policies sought to impose the Mu‘tazilī view that Allah does not literally speak and that the Qur’ān is created. The government tested religious scholars about their beliefs and punished those who rejected the Mu‘tazilī view with beatings, loss of official positions, and death threats. The *Miḥna* deeply impacted *ahl al-ḥadīth* theology.

75 Abrahamov, *supra* note 70, at 365–79; HOLTZMAN, *supra* note 74, at 185–266.

76 IBN ABĪ YA‘LĀ, *supra* note 45, at 241–46.

77 AL-GHAZĀLĪ, FAYSAL, *supra* note 11, at 56–81.

Mu‘tazilī ideas on *takfīr* guided the *Miḥna*. Mu‘tazilīs asserted that *ahl al-ḥadīth* views on Allah’s speech were contrary to the Qur’ān. On these grounds, some Mu‘tazilīs favored excommunicating and killing the *ahl al-ḥadīth*.⁷⁸ However, Mu‘tazilīs endorsed a type of excuse for ignorance. They held that offenders should only be excommunicated after having their errors explained to them.⁷⁹ Partly for this reason, the *Miḥna* only resulted in perhaps two deaths.⁸⁰

Ibn Ḥanbal led *ahl al-ḥadīth* opposition to the *Miḥna* and was initially arrested and tortured. But a new caliph (al-Mutawakkil) ended the *Miḥna* and took a favorable stance towards Ibn Ḥanbal. This facilitated the eventual acceptance of his views as Sunnī orthodoxy. Ibn Ḥanbal made heavy use of *takfīr* to counter Jahmīs. Ibn Ḥanbal’s son ‘Abd Allāh (d. 290/903) quotes him as saying, “Whoever claims that anything from Allah, the Almighty and Majestic, is created—whether His knowledge or His speech—is a heretical *kāfir* (*zindīq kāfir*). Such a person should not be prayed over [in funeral prayer], nor should prayers be performed behind him. His wealth should be treated as the wealth of an apostate [i.e., it should be taken by the state treasury].”⁸¹ According to some reports, Ibn Ḥanbal not only mandated *takfīr* of Jahmīs but declared that “whoever does not excommunicate [Jahmīs] becomes a *kāfir* [himself].”⁸²

Although Ibn Ḥanbal asserts that Jahmīs in general should be excommunicated, he avoided excommunicating the caliph and other government officials who embraced Jahmī beliefs.⁸³ Reports indicate two reasons for this. First, the *ahl al-ḥadīth* endorsed an excuse for ignorance.⁸⁴ Al-Bukhārī (d. 256/870) approvingly quotes Ibn Ḥanbal as saying, “Anyone who does not know that Allah with His speech is not created—must be taught,

78 AL-JĀHIZ, *supra* note 27, at 292, 294; IBN ABĪ YA‘LĀ, *supra* note 45, at 81; IBN TAYMIYYA, *supra* note 17, at 507.

79 AL-JĀHIZ, *supra* note 27, at 292.

80 I.e., Aḥmad b. Naṣr and Muḥammad b. Nuḥ.

81 I ‘ABD ALLĀH B. AḤMAD IBN ḤANBAL, AL-SUNNA 164 (Dār Ibn al-Qayyim 1986).

82 IBN ABĪ YA‘LĀ, *supra* note 45, at 342.

83 See I ABŪ BAKR AL-KHALLĀL, AL-SUNNA 131 (Dār ar-Rāyah 1989); 23 IBN TAYMIYYA, *supra* note 17, at 349.

84 AL-LĀLAKĀ‘I, *supra* note 46, at 200.

and his ignorance returned to the Book and the Sunna [i.e., the person should be taught scripture]. If, after the truth is made clear to him, he still refuses, then he is one who resists stubbornly (*mu'ānid*). Allah Most High says, 'Allah would not lead a people astray after He has guided them until He makes clear to them what they should avoid' [Qur'ān 9:115]."⁸⁵ Similar ideas appear in the Creed of the Two Razīs.⁸⁶ A second possible reason why Ibn Ḥanbal did not excommunicate the caliph was his opposition to the Khārijī practice of excommunicating rulers (for behavior contrary to the *sharī'a*) and then revolting against them.

Multiple reports indicate that, during the *Miḥna*, *ahl al-ḥadīth* religious scholars approached Ibn Ḥanbal. They wished to rebel against the caliph, but Ibn Ḥanbal forcefully rejected this idea, insisting that it conflicted with *ḥadīth* reports requiring obedience.⁸⁷ Al-Khallāl records how the jurists of Baghdad came to Ibn Ḥanbal and complained about the caliph promoting belief in the Qur'ān's createdness. The report continues: "[The jurists said:] We do not approve of his [i.e., the caliph's] leadership nor his authority.' So Abū 'Abd Allāh [Ibn Ḥanbal] debated with them for a while and said: 'You must reject what is in your hearts. Do not remove yourselves from obedience, do not break the unity of the Muslims, do not shed your own blood or the blood of the Muslims with you This [rebellion] is contrary to the reports (*al-āthār*) [from the Prophet and *salaf*] that command us to be patient [and not rebel].'"⁸⁸ Al-Khallāl records a report where Ibn Ḥanbal asserts that he believes in praying behind the (Jahmī) caliphs, considers their leadership valid, and rejects rebelling against them.⁸⁹ That being said, al-Khallāl also records a report which indicates that Ibn Ḥanbal excommunicated the (Jahmī) caliph al-Ma'mūn after his death in 281/833, while passing by his grave in Ṭarsūs.⁹⁰

85 MUHAMMAD B. ISMĀ'ĪL AL-BUKHĀRĪ, *KHALQ AF'ĀL AL-'IBĀD* 62 (Dār al-Ma'ārif al-Sa'ūdiyya n.d.). See also 'ABD ALLĀH B. AḤMAD IBN ḤANBAL, *supra* note 81, at 164.

86 AL-LĀLAKĀ'Ī, *supra* note 44, at 200.

87 AL-KHALLĀL, *supra* note 83, at 131–33.

88 *Id.* at 133.

89 *Id.* at 131.

90 *Id.* at 95.

SECTION IV: IBN ḤANBAL AND THE EARLY
 AHL AL-ḤADĪTH ON SHIRK

The Qur’ān refers to people “taking” (*ittakhadha*) particular beings as “gods” (*āliha*).⁹¹ *Tawḥīd* means taking Allah alone as a god. Meanwhile, *shirk* means taking beings other than Allah as gods. Such gods are treated as partners (*shurakā’*) beside Allah.⁹²

Premodern Muslim discourse on *shirk* is shaped by a number of key ideas. One key idea is that *shirk* involves believing that beings other than Allah have great power, including the power to create, to control the universe, and to benefit or harm humans.⁹³ Another key idea is that *shirk* involves worshipping beings other than Allah. The Qur’ān presents worship (*ibāda*) as having two major components. The first consists in making requests (*du‘ā’*).⁹⁴ Gods are asked to provide benefits (e.g., wealth, children) or eliminate harms (e.g., sickness). The second component consists in striving to please the god, for this makes it more likely that he or she will grant requests. The underlying assumption here is that gods are pleased when people perform acts of submission (*islām*) and/or reverence (*ta‘zīm*) which affirm the god’s much greater power and status. The Qur’ān mentions many distinctive submissive/reverential acts used by Arabs at the Prophet’s time. These include chanting praise for gods (*taṣbīḥ*, *ḥamd*),⁹⁵ visiting their shrines or idols (*ḥajj*), circumambulating these shrines and idols (*tawāf*),⁹⁶ prostrating before them,⁹⁷ and slaughtering animals (*naḥr*) in their gods’ honor.⁹⁸

One who commits *shirk* is known as a *mushrik*. *Shirk* is most closely associated with the pre-Islamic Arabs who were

91 Qur’ān 5:115, 19:81, 25:3.

92 Qur’ān 6:22, 10:28.

93 Qur’ān 10:3, 22:11, 25:3, 32:5.

94 Qur’ān 10:106, 46:5, 35:13–14, 7:194. See also IBN TAYMIYYA, *supra* note 17, at 10–11.

95 Qur’ān 17:44, 87:1.

96 Qur’ān 2:125.

97 Qur’ān 22:18, 27:24–25.

98 Qur’ān 22:36–37, 108:2; 4 AL-BUKHĀRĪ, *supra* note 14, at 175; 5 *Id.*, *supra* note 14, at 431; 8 AL-NAWAWĪ, *supra* note 11, at 90; 13 *Id.*, *supra* note 11, at 141.

the primary audience of the Prophet's message.⁹⁹ These Arab *mushriks* believed in Allah as well as a host of lesser gods that were represented as idols (e.g., al-Lāt, al-‘Uzzā, Manāt, Hubal).¹⁰⁰ Arab *mushriks* believed that all of these gods had the power to harm and benefit.¹⁰¹ They worshipped these gods by making requests and performing the distinctive submissive/reverential acts mentioned above. Preaching against this *shirk*, the Prophet condemned believing in gods besides Allah, making requests of them, and performing submissive/reverential acts for them.

Muslims turned away from pre-Islamic gods like al-Lāt and al-‘Uzzā. Nevertheless, with time, Muslims gradually developed an increasingly elaborate set of beliefs concerning prophets (*anbiyā’*) and pious non-prophets or “saints” (*awliyā’*). In the eyes of critics like Ibn Taymiyya, these beliefs tacitly elevated such figures to the status of gods.

The early *ahl al-ḥadīth* hold that Allah has empowered both prophets and saints to perform miraculous supernatural acts (*mu‘jizāt, karāmāt*) (e.g., curing illness, resurrecting the dead). Many *ḥadīth* reports endorse these ideas. Ibn Ḥanbal transmits a report which asserts that Syria is home to forty men known as the *abdāl*. Allah uses them to bring rain and achieve military victories.¹⁰² Ibn Ḥanbal believes in the *abdāl*, and suggests that certain people are from among them.¹⁰³ Al-Bukhārī transmits a famous *ḥadīth* report, wherein Allah states that He will grant sufficiently pious persons whatever they request.¹⁰⁴ With these ideas in mind, many scholars came to believe that prophets and saints can exercise some control over the universe (*taṣarruf*). They can do this by using their God-given powers to perform miracles (e.g., causing rainfall) or by making requests to Allah, which He will likely grant (e.g., they can request that Allah causes rainfall).¹⁰⁵ Many scholars also came to believe that prophets

99 See Qur’ān 2:221, 9:5.

100 Qur’ān 53:19-120; 4 AL-BUKHĀRĪ, *supra* note 14, at 175.

101 See Qur’ān 19:81, 21:43, 36:74.

102 2 IBN ḤANBAL, *supra* note 46, at 231.

103 4 *id.* at 441; 1 IBN ABĪ YA‘LĀ, *supra* note 46, at 263.

104 8 AL-BUKHĀRĪ, *supra* note 14, at 294.

105 See TAQĪ AL-DĪN AL-SUBKĪ, SHIFĀ’ AL-SIQĀM FĪ ZIYĀRAT KHAYR AL-ANĀM 357–58, 372–85 (Dār al-Kutub al-‘Ilmiyya 2008).

and saints retain their powers even after death. They also encouraged Muslims to make requests of the dead.

Scholars who attribute great power to prophets and saints deny that this means taking them as gods. These scholars argue that Allah is the only real power in the universe and hence the only god. Prophets and saints are not gods because they lack independent power. They can only use power that Allah has given them or make requests of Allah. Such a perspective is famously articulated by figures like Taqī al-Dīn al-Subkī (d. 756/1355) and Ibn Ḥajar al-Haytamī (d. 974/1566).¹⁰⁶

When Muslim scholars discuss the relationship between *shirk* and worship, they give special attention to submissive/reverential acts. Scholars hold that such acts are worship in some contexts but not others. For instance, prostration and animal slaughter are worship when done for idols. However, the Qurʾān speaks of Prophet Yūsuf’s family prostrating before him¹⁰⁷ and Prophet Ibrāhīm slaughtering animals to honor guests.¹⁰⁸ In these contexts, prostration and slaughtering are not understood to be worship.¹⁰⁹

At the same time, scriptural texts condemn many types of submissive/reverential acts when they are directed towards beings other than Allah, especially the dead. Ibn Ḥanbal transmits a *ḥadīth* report where the Prophet says, “O Allah, do not turn my grave into an idol (*wathan*). Allah has cursed people who take the graves of their prophets as places of worship (*masājid*).”¹¹⁰ Thus, the report cautions against worshipping near the graves of prophets, as it can lead to *shirk*. There are also *ḥadīth* reports which forbid making images,¹¹¹ placing lamps on graves,¹¹² constructing places of worship upon graves,¹¹³ prostrating to beings

¹⁰⁶ AL-SUBKĪ, *supra* note 105, at 378–79, 382–83; IBN ḤAJAR AL-HAYTAMĪ, AL-JAWHAR AL-MUNAZZAM FĪ ZIYĀRAT AL-QABR AL-MUKARRAM 111 (Maktabat Madbūlī 2000).

¹⁰⁷ Qurʾān 12:4, 99–100. *See also* 4 IBN TAYMIYYA, *supra* note 17, at 358, 360.

¹⁰⁸ Qurʾān 51:24–26.

¹⁰⁹ 4 IBN TAYMIYYA, *supra* note 17, at 358, 360.

¹¹⁰ 12 IBN ḤANBAL, *supra* note 46, at 314.

¹¹¹ 14 *id.*, *supra* note 46, at 152.

¹¹² 2 IBN QUDĀMA, *supra* note 11, at 378–79.

¹¹³ *Id.*

other than Allah,¹¹⁴ and slaughtering animals for beings other than Allah.¹¹⁵ Notably, however, these *hadīth* reports do not refer to such acts as *shirk*. They also do not state that such acts cause one to become a *kāfir*. Muslim scholars typically condemn the same acts condemned in scripture, arguing that they resemble *shirk* and encourage it.¹¹⁶ However, scholars typically do not call the acts *shirk* or excommunicate the doer of the acts.

Certain submissive/reverential acts were prohibited by virtually all scholars when done for beings other than Allah. These include prostration (e.g., before living *shaykhs*)¹¹⁷ and circumambulation (e.g., of graves).¹¹⁸ Scholars also commonly banned many forms of animal slaughter (e.g., for *jinn*)¹¹⁹ and vowing (e.g., “O dead saint, I vow to donate to your shrine if my daughter is healed”).¹²⁰ However, many scholars permitted other types of reverential acts when used to *honor* (not worship) prophets and saints (e.g., reciting praise poetry for them, annually celebrating their births, kissing and touching their relics, building monumental structures over their graves).

Ibn Ḥanbal accepted some kinds of reverential acts, especially when directed towards the Prophet. Thus, he permitted reverently touching and kissing material objects (i.e., relics) associated with the Prophet, like his pulpit and grave.¹²¹ It is reported that Ibn Ḥanbal himself used to seek blessings by kissing a hair from the Prophet, placing it on his eyes, dipping it in water, and then drinking the water.¹²²

114 3 ABŪ DĀWŪD SULAYMĀN AL-SUJISTĀNĪ, *SUNAN ABĪ DĀWŪD* 475 (Dār al-Risāla al-‘Ālamiyya 2009).

115 13 AL-NAWAWĪ, *supra* note 11, at 141.

116 *See also* 10 ABŪ ‘ABD ALLĀH AL-QURTUBĪ, AL-JĀMĪ‘ LI-AḤKĀM AL-QUR’ĀN 380 (Dār al-Kutub al-Miṣriyya 1964); 2 IBN QUDĀMA, *supra* note 11, at 378–79.

117 AL-HAYTAMĪ, *supra* note 106, at 117.

118 *Id.* at 113.

119 13 AL-NAWAWĪ, *supra* note 11, at 141; 1 IBN ḤAJAR AL-HAYTAMĪ, AL-ZAWĀJIR ‘AN IQTIRĀF AL-KABĀ’IR 351 (1987).

120 2 IBN ‘ĀBIDĪN, ḤĀSHIYAT RADD AL-MUḤTĀR ‘ALĀ AL-DURR AL-MUKHTĀR 439 (Maktabat wa-Maṭba‘at al-Muṣṭafā al-Bābī al-Ḥalabī wa-Awlādih 1966).

121 2 IBN ḤANBAL, AL-‘ĪLAL WA-MĀ‘RIFAT AL-RIJĀL 492 (Dār al-Khānī 2001).

122 ABŪ AL-FARAJ IBN AL-JAWZĪ, MANĀQIB AL-IMĀM AḤMAD 255 (Dār Hajr 1409 AH).

As indicated above, worship also involves making requests. However, just as submissive/reverential acts can be worship, but are not necessarily worship, the same is true of making requests.¹²³ For instance, Muslim scholars agree that when a living person requests something from a living person, this is not worship or *shirk* (e.g., “O brother bring me medicine”). Moreover, some scriptural texts suggest that certain limited requests may be made of *jinn* and angels. Thus, the Qur’ān speaks approvingly of Prophet Sulaymān making requests from *jinn*.¹²⁴ There is also a *ḥadīth* report where the Prophet encourages people who are lost to call out and request help from angels.¹²⁵ Based on such texts, Ibn Ḥanbal endorses calling out to angels when lost.¹²⁶ He dislikes making requests from *jinn*, but does not prohibit it.¹²⁷

Requests from the dead fall into two basic categories. The first is known as *tawassul* (intercession), which involves requesting that dead persons ask Allah for assistance on one’s behalf (e.g., “O Prophet, ask Allah to heal me”). The second is known as *istighātha*. It involves directly requesting assistance from dead persons (e.g., “O Prophet, heal me”).

Some reports indicate that, as early as the caliphate of ‘Umar b. al-Khaṭṭāb (d. 23/644), Muslims would go to the Prophet’s grave and request that he petition Allah on their behalf for benefits like rain.¹²⁸ *Tawassul* was an established practice by the time of Ibn Ḥanbal, and he endorsed it.¹²⁹ Eventually, *tawassul* won the approval of almost all Muslim scholars. Many scholars likewise came to endorse *istighātha* and often did not clearly differentiate it from *tawassul*.¹³⁰

123 See Qur’ān 24:63.

124 Qur’ān 27:38–40, 34:12–14.

125 11 ABŪ BAKR AL-BAZZĀR, *MUSNAD AL-BAZZĀR* 181 (Maktabat ‘Ulūm wa-Ḥikam 1988–2009).

126 IBN ḤANBAL, *MASĀ’IL AHMAD IBN ḤANBAL RIWĀYAT IBNIHI ‘ABD ALLĀH* 245 (al-Maktab al-Islāmī 1981).

127 1 IBN MUFLIḤ, *AL-ĀDĀB AL-SHAR‘IYYA WA’L-MINAH AL-MAR‘IYYA* 198 (‘Ālam al-Kutub 2009).

128 AL-SUBKĪ, *supra* note 105, at 381–82; AL-HAYTAMĪ, *supra* note 106, at 112.

129 3 IBN MUFLIḤ, *AL-FURŪ‘ WA-TAṢḤĪḤ AL-FURŪ‘* 229 (Mu’assasat al-Risāla 2004).

130 See AL-SUBKĪ, *supra* note 105, at 383. See also *id.* at 357–58, 372–85; AL-HAYTAMĪ, *supra* note 106, at 109–12.

**SECTION V: IBN TAYMIYYA ON THE
DENIAL OF ALLAH'S ATTRIBUTES**

Ibn Taymiyya was a highly respected but controversial scholar in Mamluk Syria.¹³¹ He wrote on a myriad of topics but gave special attention to Allah's attributes and *shirk*. The concept of the *salaf* is central to Ibn Taymiyya's thought. The term *salaf* refers to the earliest Muslim generations. It includes the Prophet's Companions as well as Muslims who lived during the first two centuries or so after his death (approximately mid-seventh to mid-ninth centuries CE). The last members of the *salaf* include the founders of the four legal schools and the earliest *ahl al-ḥadīth*. Generally speaking, Sunnīs believe that because the *salaf* learned from the Prophet and were closest to him in time, they had the best understanding of his message. Consequently, Sunnīs in later eras claim that their views are based on those of the *salaf*. However, Ibn Taymiyya routinely argues that later scholars (including later Ḥanbalīs) actually hold views that conflict with the views of the *salaf* and hence should be regarded as heretical "innovations" (*bida'*).

For Ibn Taymiyya, promoting the views of the *salaf* usually meant promoting the views of the early *ahl al-ḥadīth*. Like the early *ahl al-ḥadīth*, Ibn Taymiyya is highly critical of non-literal interpretation, especially as it relates to Allah's attributes. He goes so far as to deny that the Qur'ān contains metaphors that could justify non-literal interpretation.¹³² He also attacks contemporary Ash'arīs, Māturīdīs, and Ḥanbalīs for their openness to non-literal interpretation. Like the early *ahl al-ḥadīth*, Ibn Taymiyya insists on excommunicating those who deny Allah's aboveness via non-literal interpretation.¹³³ He rejects tolerance

131 For works on Ibn Taymiyya's ideas see AL-MATROUDI, *supra* note 10; JOHN HOOVER, *IBN TAYMIYYA'S THEODICY OF PERPETUAL OPTIMISM* (2007); YOSSEF RAPOPORT & SHAHAB AHMED EDS., *IBN TAYMIYYA AND HIS TIMES* (2010); CARL EL-TOBGUI, *IBN TAYMIYYA ON REASON AND REVELATION* (2019); SULEIMAN, *supra* note 75.

132 7 IBN TAYMIYYA, *supra* note 17, at 113. *See also* SULEIMAN, *supra* note 73, at 141–72.

133 7 IBN TAYMIYYA, *DAR' TA'ĀRUḌ AL-'AQL WA'L-NAQL* 26–29 (Jāmi'at al-Imām Muḥammad b. Sa'ūd 1991); *Id.*, *KITĀB AL-ISTIGHĀTHA FĪ AL-RADD 'ALĀ AL-BAKRĪ* 253 (Maktabat Dār al-Minhāj 1426 AH).

for different opinions in this matter—thereby repudiating the position of al-Ghazālī and classic *takfīr* doctrine.

However, Ibn Taymiyya also diverges from the early *ahl al-ḥadīth* in significant respects. He insists much more strongly on restraining *takfīr*. For instance, Ibn Taymiyya assumes that *takfīr* requires rejecting Prophetic teachings known with certainty through *tawātur*.¹³⁴ This reflects classic doctrine rather than the views of the early *ahl al-ḥadīth*. Expanding on a point made by al-Ghazālī,¹³⁵ Ibn Taymiyya adds that in order to excommunicate a person, the person must deny a teaching they know with certainty comes from the Prophet. And this requires that the person knows that the teaching is transmitted via *tawātur*. A person may not be excommunicated simply because they deny a teaching that other scholars know with certainty comes from the Prophet, because the scholars know it is transmitted via *tawātur*. For example, *ḥadīth* experts know that the Prophet will be given the right to intercede for his followers on the Day of Judgement. They know that Muslims will see Allah in the afterlife and that Companions like Abū Bakr were of righteous character. All of this is found in *tawātur ḥadīth* reports.¹³⁶ *Tawātur* reports also remove any ambiguity found in the Qur’ānic text about Allah’s aboveness, and whether He is literally located in an upwards direction. Nevertheless, certain individuals may falsely believe that the views of *ḥadīth* experts are not based on *tawātur ḥadīth* reports and hence doubt them. Such individuals cannot be excommunicated. Ibn Taymiyya holds that, as a result, Mu’tazilīs and Ash’arites generally cannot be excommunicated for denying Allah’s aboveness. Ibn Taymiyya writes:

The assertion that Allah, Most High, is above the universe is known with certainty (*ma’lūm bi’l-iqṭirār*) from the Book, the Sunna, and the consensus of the *salaf* of the *umma*—after an individual reflects on the matter In fact, it might be said that there are hundreds of places in scriptural texts concerning aboveness (*‘uluww*). *Tawātur*

134 See 7 *id.* at 26–29; 2 *id.*, BAYĀN TALBĪS AL-JAHMIYYA 73–74 (Majma’ al-Malik Fahd li-Ṭibā’at al-Muṣḥaf al-Sharīf 1426 AH).

135 AL-GHAZĀLĪ, FAYṢAL, *supra* note 11, at 84.

136 18 IBN TAYMIYYA, *supra* note 17, at 69–70.

reports from the Prophet—peace be upon him—his Companions, and the Successors agree on this [i.e., affirming literal aboveness]. So, there is no need for us to deny this based on the wording of a specific text, which could be said to be open to non-literal interpretation (*yaḥtamil al-taʿwīl*) For this reason, the *salaf* unanimously agreed on excommunicating anyone who denied this, because in their view it was among the religious matters [i.e., teachings] which are known with certainty. But the matters known with certainty to the *salaf*, the *imāms*, and the scholars of religion may not be known to some people—either because they turn away from listening to what has been transmitted on the matter [or because they refuse to reflect on what has been transmitted].¹³⁷

Ibn Taymiyya continues on to note that deviant groups like the Muʿtazilīs often lack the type of transmitted religious knowledge possessed by the *ahl al-ḥadīth*. Consequently, such deviants are ignorant on matters like Allah’s aboveness.¹³⁸

Ibn Taymiyya also restricts *takfīr* by reworking the excuse for ignorance. He selects out the most forgiving views in the Islamic tradition and synthesizes them together. He thereby produces a distinctive notion of excuse, which ranks among the most expansive found in premodern Islam.

Some earlier scholars assert that people should not be excommunicated until their various false arguments have been explicitly countered with evidence. Although al-Ghazālī does not affirm this relatively forgiving view, it seems to be endorsed by the eminent Syrian Ḥanbalī Ibn Qudāma (d. 620/1223).¹³⁹ Ibn Taymiyya goes beyond Ibn Qudāma’s position to argue that it is not sufficient to produce a general refutation of a deviant group. Every individual from the group must have his or her arguments carefully addressed with evidence. Ibn Taymiyya says: “No one should excommunicate any Muslim, even if he or she errs and goes astray, until the evidence is established for him or her and

137 7 *id.*, DAR’ TA’ĀRUD, *supra* note 133, at 26–29.

138 *Id.*

139 9 IBN QUDĀMA, *supra* note 11, at 12.

the right path is made clear to him or her ... [his or her status as a Muslim] can only be negated after establishing the evidence and eliminating specious arguments (*al-shubha*) [that he or she has for his or her mistaken view].”¹⁴⁰

Ibn Taymiyya also goes beyond Ibn Qudāma by clarifying that even deviant religious scholars, like learned Jahmīs, cannot be excommunicated until their arguments have been countered. Such scholars necessarily have some significant amount of religious knowledge—including knowledge of opposing positions. Hence it is not obvious that they are “ignorant” such that they deserve to be excused. But Ibn Taymiyya nevertheless holds they are entitled to an excuse: “I used to say to the Jahmīs from among ... those who denied that Allah, Exalted is He, is above the Throne ...: ‘Had I agreed with you, I would have been a *kāfir*; because I know that your statement is *kufir*. But you, in my view, are not *kāfirs* because you are ignorant.’ And this was addressed to their scholars, judges, elders, and leaders.”¹⁴¹

In fact, Ibn Taymiyya likely believed that deviant religious scholars might still be entitled to the excuse for ignorance even after their opponents had argued with them for many years and presented them with extensive evidence. After all, he spent his own life arguing with highly educated scholars of this type. Moreover, his writings indicate that he refrained from excommunicating them, despite the fact that their views merited *takfir*—were it not for the excuse (e.g., Ash‘arīs who denied Allah’s aboveness, Sufis who endorsed *istighātha*).

Ibn Taymiyya’s position can be contrasted with the early *ahl al-ḥadīth*, as well as classic *takfir* doctrine. The early *ahl al-ḥadīth* do not state that before excommunicating any deviant individual, it is necessary to carefully counter all his or her arguments with evidence. The early *ahl al-ḥadīth* also do not state that deviant scholars are entitled to the excuse for ignorance. Indeed, many of their statements seem to imply that such scholars (e.g., Jahmīs) can be excommunicated with few limits.¹⁴² Moreover, as noted earlier, classic doctrine holds that the excuse for

140 12 IBN TAYMIYYA, *supra* note 17, at 500–1.

141 IBN TAYMIYYA, *AL-ISTIGHĀTHA*, *supra* note 133, at 253.

142 See e.g., 1 ‘ABD ALLĀH B. AḤMAD IBN ḤANBAL, *supra* note 81, at 164; *AL-LĀLAKĀ’I*, *supra* note 44, at 200.

ignorance is generally only allowed in limited circumstances. Where basic Islamic teachings are concerned, the excuse is typically reserved for people of little knowledge (e.g., recent converts, those who live in isolated areas).

Ibn Taymiyya's analysis raises a particular difficulty. He claims to be following the *salaf* and the early *ahl al-ḥadīth*. However, he seems to favor more restraint in *takfīr* than they do. How can this be justified? Here Ibn Taymiyya has a number of arguments. One is that there must be more restraint in later times (like his era) than earlier times (like the *salaf*'s era). This is because in later times ignorance is more widespread, such that more deserve to be excused.

For example, Ibn Taymiyya explains that the *salaf* excommunicated the Jahmīs with few restraints because, at that time, the general body of Muslims possessed a very high level of knowledge. He says:

The *salaf* and the *imāms* were unanimous in excommunicating the Jahmīs when their opposition to the Messenger appeared. It was famous and known with certainty to the general body of Muslims, even before [succeeding generations] acquired [detailed] knowledge of faith later on. [Then, when knowledge declined,] some of that became unclear to many who were not outright heretics.¹⁴³

Elsewhere Ibn Taymiyya remarks:

When time grew long, what had been apparent to them [i.e., the earliest Muslims] became hidden to many people.... Yet even so, they [i.e., scholars from later generations] were *mujtahids* who were excused (*mujtahidīna ma'dhūrīn*). Allah forgives their errors and rewards them for their *ijtihād*. And it may be that, in terms of good deeds, a doer among them has the reward of fifty men who performed it in that [earlier] time; for they [i.e., the early Muslims] used to find those who would

143 2 IBN TAYMIYYA, *supra* note 134, at 73–74.

help them, whereas these later ones have not found anyone to help them.¹⁴⁴

More generally, Ibn Taymiyya argues that access to knowledge is “a relative matter” (*amr idāfi*) and depends heavily on circumstances. In some circumstances, individuals lack even the most basic types of Islamic knowledge (e.g., those living in isolated desert areas). Hence, they are not aware of religious obligations concerning prayer, *zakāt*, and *hajj*.¹⁴⁵ Elsewhere, Ibn Taymiyya asserts that religious knowledge often dies away. He states that “many people may be raised in times and places in which much of the knowledge of the prophets becomes effaced.”¹⁴⁶ Where ignorance prevails, many may be excused. Indeed, as we will see, Ibn Taymiyya seems to hold that, in later times, entire societies may be excused.¹⁴⁷

Thus, Ibn Taymiyya can grant that the *salaf* engaged in relatively unrestrained *takfīr*, while holding that later generations need more restraint. However, he also puts forth a second key idea. According to Ibn Taymiyya, truly unrestrained *takfīr* is a heretical innovation (*bid‘a*) associated with groups like the Khārijīs, Shī‘īs, and Mu‘tazilīs.¹⁴⁸ For Ibn Taymiyya, the *takfīr* practiced by the early *ahl al-ḥadīth* is actually more restrained than it appears. This is because the *ahl al-ḥadīth* tacitly endorse an expansive excuse for ignorance. So, when the *ahl al-ḥadīth* say things like “Jahmīs are *kāfīr*,” they really mean that Jahmīs are *kāfīr*s unless they have an excuse for ignorance.¹⁴⁹ Ibn Taymiyya cites Ibn Ḥanbal’s behavior as evidence for this view and notes that Ibn Ḥanbal prayed behind ‘Abbāsīd caliphs, refused to publicly excommunicate them, and refused to rebel against them. For Ibn Taymiyya, all of this implies that Ibn Ḥanbal considered them Muslims and excused them for their Jahmī views.¹⁵⁰ Ibn

144 13 *id.*, *supra* note 17, at 65.

145 *Id.* at 118.

146 11 *id.*, *supra* note 17, at 407.

147 3 *id.*, *supra* note 27, at 145–46, 151.

148 5 *id.*, MĪNHĀJ AL-SUNNA AL-NABAWIYYA FĪ NAQD KALĀM AL-SHĪ‘A AL-QADĪRIYYA 239–40 (Jāmi‘at al-Imām Muḥammad b. Sa‘ūd al-Islāmiyya 1986).

149 5 *id.*, *supra* note 148, at 239–40.

150 23 *id.*, *supra* note 17, at 349.

Taymiyya is correct that Ibn Ḥanbal likely granted the caliphs an excuse for ignorance. Nevertheless, it should be reiterated that Ibn Taymiyya's concept of the excuse is much broader than that of Ibn Ḥanbal and the early *ahl al-ḥadīth*.

SECTION VI: IBN TAYMIYYA ON *SHIRK*

Recall that, over time, Muslim scholars gradually ascribed increasing power to the dead while encouraging people to make requests of them. By the twelfth century, a minority of scholars (particularly within the Ḥanbalī school) had begun to criticize these developments as *shirk*.¹⁵¹ This trend reached its apex with Ibn Taymiyya.

Recall that many scholars came to emphasize that Allah is the only real power in the universe, and hence the only real god. Such scholars assert that Muslims do not commit *shirk* so long as they believe Allah is the only real power.¹⁵² As highlighted in previous studies, Ibn Taymiyya's single most important idea is that Muslims can commit *shirk* even if they believe Allah is the only real power.¹⁵³ To advance his argument, Ibn Taymiyya puts forth a novel claim. He argues that the ancient Arab *mushriks* believed that Allah was the only real power in the universe (i.e., they affirmed *tawḥīd al-rubūbiyya*).¹⁵⁴ Given this belief, the *mushriks* actually conceptualized their “gods” as similar to dead persons, *jinn*, and angels. Such beings have apparent power, but not real independent power. They can only do what Allah allows them to do. Ibn Taymiyya argues that when the Qur'ān condemns *shirk*, it is actually referring to those who worship beings like dead persons, *jinn*, and angels. It is possible to worship such beings, and commit *shirk*, even if one believes that they lack real independent power. For Ibn Taymiyya, this type of *shirk* characterizes both the ancient Arabs as well as many Muslims in his

151 See ONDŘEJ BERÁNEK & PAVEL TUPEK, THE TEMPTATION OF GRAVES IN SALAFI ISLAM 28–29, 42 (2018); BUNZEL, *supra* note 8, at 106–07.

152 AL-SUBKI, *supra* note 105, at 357–58, 372–85; AL-HAYTAMI, *supra* note 106, at 109–12.

153 BUNZEL, *supra* note 8, at 128–45; LAV, *supra* note 8, at 38–94.

154 1 IBN TAYMIYYA, *supra* note 17, at 22–23; 14 *id.* at 12–14; Hoover, *supra* note 131, at 26–39; BUNZEL, *supra* note 8, at 128–45; LAV, *supra* note 8, at 38–94.

era, who worship prophets and saints. Ibn Taymiyya notes that such *shirk* is a grave sin, and that the Prophet fought *jihād* wars against the ancient Arabs to eliminate it.¹⁵⁵ Ibn Taymiyya refers to worshipping Allah alone as *tawḥīd al-ulūhiyya*. For him, what distinguishes true Muslims from *mushriks* is *tawḥīd al-ulūhiyya* (rather than *tawḥīd al-rubūbiyya*).¹⁵⁶

Compared to other scholars, Ibn Taymiyya takes stricter positions on matters of *shirk*. For example, Muslim scholars commonly hold that actions like prostration, slaughtering, and vowing can be *shirk*. But this requires that the doer intends to worship a being other than Allah and considers it a god (e.g., a dead person, a *jinn*).¹⁵⁷ Meanwhile, Ibn Taymiyya downplays the importance of intentions. He suggests that slaughtering,¹⁵⁸ vowing,¹⁵⁹ and (maybe) prostration are *shirk* regardless of the doer's intentions.¹⁶⁰

Ibn Taymiyya forbids travelling to graves with the aim of acquiring benefits for oneself from Allah or from the dead. For him, such pilgrimages encourage *shirk*, even if they are not necessarily *shirk* themselves.¹⁶¹ At Ibn Taymiyya's time, pilgrimage to the Prophet's tomb was a major, widely accepted religious rite. Ibn Taymiyya's opinion prohibiting it was one of his most controversial and resulted in his incarceration.¹⁶²

Ibn Taymiyya takes a harsher stance on touching structures and relics than other scholars like Ibn Ḥanbal. Ibn Taymiyya does not believe that kissing (*taqbīl*) and rubbing (*tamassuḥ*) inanimate objects (*jamādāt*) is *shirk*.¹⁶³ However, in his view, it can encourage *shirk*—especially when graves are involved. He

155 1 IBN TAYMIYYA, *supra* note 17, at 154–55.

156 *Id.* at 22–24; BUNZEL, *supra* note 8, at 128–45; LAV, *supra* note 8, at 38–94.

157 See, 8 AL-NAWAWĪ, AL-MAJMU' SHARḤ AL-MUHADHDHAB 409 (Maṭba'at al-Taḍāmun al-Ukhawī 1344–47 AH); 4 IBN ḤAJAR AL-HAYTAMĪ, AL-FATĀWĀ AL-KUBRĀ AL-FIQHIYYA 284–87 (Al-Maktaba al-Islamiyya, 1357 AH).

158 2 IBN TAYMIYYA, IQTIDĀ' AL-ŠIRĀT AL-MUSTAQĪM LI-MUKHĀLAFAT AŠḤĀB AL-JAḤĪM 65 (Dār 'Ālam al-Kutub 1999).

159 1 *id.*, *supra* note 17, at 81; 11 *id.* at 504.

160 27 *id.* 91–95; 4 *id.* at 360.

161 See 4 *id.* at 520; 24 *id.* at 343; 27 *id.* at 188; 2 *id.*, *supra* note 158, at 157–58.

162 AL-MATROUDI, *supra* note 10, at 18–20.

163 Or at least not *shirk akbar*.

thus generally forbids such behavior, with some limited exceptions (e.g., kissing the black stone in the Ka‘ba, because this was done by the Prophet).¹⁶⁴

For Ibn Taymiyya, mere requests often raise concerns over *shirk*, even when they are not accompanied by submissive/reverential acts. Whereas Ibn Ḥanbal permits certain requests from angels, Ibn Taymiyya strongly suggests that such behavior is *shirk*.¹⁶⁵ However, somewhat surprisingly, Ibn Taymiyya permits requests from *jinn*.¹⁶⁶ This more tolerant position is close to that of Ibn Ḥanbal.

Ibn Taymiyya strongly condemns requests from the dead. Breaking with Ibn Ḥanbal, he prohibits the widely accepted practice of *tawassul*. This is another of his most controversial opinions. According to Ibn Taymiyya, *tawassul* is not *shirk*, but it encourages *shirk*.¹⁶⁷ Furthermore, he prohibits *istighātha* as blatant *shirk*.¹⁶⁸

Ibn Taymiyya’s views on *shirk* must be situated in relationship to his expansive excuse for ignorance. According to him, ignorance about *shirk* had become so widespread in his era that people typically deserved the excuse for ignorance. Speaking of the person who engages in *istighātha*, Ibn Taymiyya says:

[It is] obligatory to kill him like other similar *mushriks* [who are fought in war].... But if he was ignorant, knowledge did not reach him, and he was not aware of the true nature of the *shirk* for which the Prophet fought the *mushriks*, then [in that case] it is not ruled that he is a *kāfir*, especially since this *shirk* has proliferated amongst those who profess Islam.¹⁶⁹

164 27 IBN TAYMIYYA, *supra* note 17, at 79–80, 107–08; *id.*, AL-RADD ‘ALĀ AL-IKHNĀ’Ī 126 (Dār al-Kharrāz 2000); *id.*, MANĀSIK AL-ḤAJJ 71–72 (Dār Rakā’iz li-l-Nashr wa-l-Tawzī’ 2018).

165 1 *id.*, *supra* note 17, at 124.

166 1 *id.* at 307–8; 13 *id.* at 87.

167 1 *id.* at 330; *id.*, MUKHTAṢAR AL-FATĀWĀ AL-MIṢRIYYA 192–93 (Dār al-Kutub al-‘Ilmiyya 1985).

168 3 *id.*, *supra* note 27, at 145–46, 151.

169 *Id.*

SECTION VII: IBN TAYMIYYA ON NON-APPLICATION OF THE *SHARĪʿA*

Ibn Taymiyya’s views on *takfīr* for non-application of the *sharīʿa* are complex. He states with approval that, as a general matter, the “doctrine of the *ahl al-ḥadīth* is to refrain from armed rebellion against tyrannical rulers and to be patient with their injustice.”¹⁷⁰ Nevertheless, Ibn Taymiyya also indicates that, in some cases, governments and groups can be excommunicated for not applying the *sharīʿa*. He expresses these views in a series of *fatwās* (legal responsa) against the Mongol government.¹⁷¹ During the late thirteenth century, the Ilkhanate Mongols launched a series of military campaigns to conquer Mamluk-ruled Syria. In 1295, the Mongol leader Ghāzān Khān (d. 703/1304) converted to Sunnī Islam and demanded that all fellow Muslims submit to him. Most of his soldiers were also Muslims. Nevertheless, compared to the Mamluks, the Mongols were more relaxed in their adherence to the *sharīʿa*. Many did not undertake practices like prayer and *zakāt*. They also followed a Mongol legal code laid down by Genghis Khan known as the *yāsā*,¹⁷² which they often prioritized over the *sharīʿa*. This produced a confusing situation for the Muslims of Mamluk Syria, who did not know whether to treat the Mongols as fellow Muslims or as invading *kāfīrs* to be fought. Ibn Taymiyya addressed this situation by publicly excommunicating the Mongols for not applying the *sharīʿa*. He also played a major role in organizing a successful *jihād* campaign against them.

Explicating his views, Ibn Taymiyya draws attention to the Wars of Apostasy. He states:

The Companions and the *imāms* after them unanimously agreed on fighting those who withheld the *zakāt*, even if they performed the five daily prayers and fasted the month of Ramaḍān. These people did not have any false

¹⁷⁰ 4 *id.*, *supra* note 17, at 444.

¹⁷¹ 28 *id.* at 501–53; AIGLE, *supra* note 8; Hoover, *supra* note 8; Berriah, *supra* note 8.

¹⁷² 28 IBN TAYMIYYA, *supra* note 17, at 521–22, 530–31.

argument that would justify [excusing them], and thus they were apostates (*murtaddīn*). They were fought for withholding it [i.e., the *zakāt*]—even if they acknowledged that it was obligatory.¹⁷³

Ibn Taymiyya claims that the Mongols, as a group, are guilty of many offenses: they do not practice or implement a wide range of *sharīʿa* rules beyond *zakāt*; they consider Genghis Khan to be a son of God and a messenger of Allah; they regard his *yāsā* as a sacred law and favor it over the *sharīʿa*; and they commit acts of open blasphemy like fornicating in mosques or simply destroying them.¹⁷⁴ Ibn Taymiyya states:

We personally witnessed the army of these people and saw that the majority of them did not pray. We did not see in their camp a single *muʿadhdhin* (person who performs the call to prayer) or *imām* (prayer leader) ... even with their power, they did not perform *hajj* to the Ancient House. And even if some of them prayed and fasted, the majority did not establish prayer or give *zakāt*....They did not fight for Islam, nor did they impose *jizya* (poll tax) [on *kāfīrs*] and subjugate them.¹⁷⁵

Ibn Taymiyya also states that if the Mongols were to win, it “would lead to the disappearance of the religion of Islam and the effacement of its laws (*durūs sharāʿi ih*).”¹⁷⁶ Ibn Taymiyya holds that the Mongols are worse than the tribes excommunicated by Abū Bakr. Hence, he excommunicates them *en masse* and repeatedly refers to them as apostates (*murtaddīn*).¹⁷⁷

Like the Khārijīs, Ibn Taymiyya is willing to excommunicate governments. However, he also differs from Khārijīs in several notable ways. Khārijīs hold that it is legitimate to excommunicate and wage *jihād* against any government—whether foreign or one’s own. Meanwhile, the *ahl al-ḥadīth* reject

173 *Id.* at 519.

174 *Id.* at 519–22.

175 *Id.*

176 *Id.* at 530–31.

177 *Id.* at 519, 530–31, 534–35.

excommunicating and rebelling against one's own government. However, they do not address the case of foreign governments. Ibn Taymiyya excommunicates a foreign government (i.e., the Mongols), but not his own. This goes beyond the *ahl al-ḥadīth* position but does not necessarily conflict with it.

Such is not the only difference between Ibn Taymiyya and the Khārijīs. Khārijīs hold that governments and groups can become *kāfirs* by ignoring a single *sharī'a* rule. Ibn Taymiyya holds that this is technically possible in specific circumstances (e.g., the tribes who refused to pay *zakāt* to Abū Bakr).¹⁷⁸ Nevertheless, Ibn Taymiyya does not promote excommunicating governments that ignore a single rule. (This would lead to excommunicating all extant governments, including the Mamluks.) Rather, he promotes excommunicating governments that abandon a wide range of basic *sharī'a* rules and replace the *sharī'a* with an alternative law code. This position is a novel one. It is less permissive of excommunicating governments than the Khārijī view yet more permissive than the *ahl al-ḥadīth* view.

Ibn Taymiyya's student Ibn Kathīr (d. 774/1373) echoed his ideas. Citing Qur'ān 4:65 and 5:50 as evidence, Ibn Kathīr states, "Whoever abandons the definitive, revealed law sent down to Muḥammad b. 'Abd Allāh, the Seal of the Prophets, and seeks judgment (*taḥākama*) by another abrogated law, has committed disbelief (*kafara*). So, what then of one who seeks judgment by the *yāsā* and gives it precedence over [the *sharī'a*]? Whoever does so has become a *kāfir* by the consensus of the Muslims."¹⁷⁹

Notably, in countering the Mongols, Ibn Taymiyya invokes another *takfīr* principle, which is tied to particular Qur'ānic verses (e.g., 3:28, 5:51). Thus, Qur'ān 5:51 reads, "You who believe, do not take the Jews and Christians as allies (*awliyā'*); They are allies only to each other. Whoever takes them as allies becomes one of them." Muslim scholars have long interpreted such verses as prohibiting Muslims from forming alliances with *kāfirs* against other Muslims. Those who do this are declared

178 *Id.* at 518–19, 530–31.

179 15 ABŪ AL-FIDĀ' IBN KATHĪR, AL-BIDĀYA WA'L-NIHĀYA 161 (Dār Ibn Kathīr 2013); see also Berriah, *supra* note 7.

kāfirs themselves.¹⁸⁰ Although Ibn Ḥanbal has little to say about this principle, matters are different for Ibn Taymiyya. Ibn Taymiyya suggests that this principle applies to the (*kāfir*) Mongols. Consequently, whoever allies with them against the Mamluks becomes a *kāfir*.¹⁸¹

SECTION VIII: IBN ʿABD AL-WAHHĀB ON *SHIRK*

Unlike Ibn Ḥanbal and Ibn Taymiyya, Ibn ʿAbd al-Wahhāb had little interest in Allah’s attributes (*ṣifāt*). Rather his central concern was *shirk*. Prior to Ibn ʿAbd al-Wahhāb’s time, Ibn Taymiyya’s influence on mainstream Sunnism was limited due to his controversial opinions.¹⁸² However, Ibn ʿAbd al-Wahhāb enthusiastically embraced Ibn Taymiyya’s uniquely strict views on *shirk*. Breaking with earlier scholars, he held that Ibn Taymiyya should be treated as the foremost authority on Islamic doctrine.

In the mid-eighteenth century, Ibn ʿAbd al-Wahhāb initiated an enduring partnership between his growing Wahhābī movement and the Saud dynasty (*Āl Suʿūd*), which ruled the town of Dirʿiyya. Together they established a larger Saudi state in the central Arabian region of Najd. The expanding Saudi state soon entered a long-term conflict with the Ottoman empire (698–1341/1299–1922). The Ottomans and their allies exercised varying degrees of authority over southeastern Europe and the Arab world, including the sacred Ḥijāz region. At the time, most of the world’s Muslims equated the Ottomans’ version of Islam with Sunnī orthodoxy. However, Ibn ʿAbd al-Wahhāb condemned Ottoman Islam as *shirk*, and rebuked the Ottomans for not applying the *sharīʿa*. Based on this, Saudi Wahhābī authorities excommunicated the Ottomans and launched *jihād* campaigns against them.¹⁸³ The Saudi-Ottoman conflict continued until the Ottoman empire collapsed following its defeat in World War I. The 1920s witnessed several key developments.

180 On Qurʾān 3:28, see 6 ABŪ JAʿFAR AL-ṬABARĪ, JĀMĪʿ AL-BAYĀN ʿAN TAʿWĪL ĀY AL-QURʾĀN 313 (Dar al-Tarbiya waʿl-Turāth 2010).

181 28 IBN TAYMIYYA, *supra* note 17, at 530–31.

182 RAPOPORT & AHMED, *supra* note 131, at 6–7, 16, 269–70.

183 10 ʿABD AL-RAHMĀN IBN QĀSIM ED., AL-DURAR AL-SANIYYA FĪ AL-AJWI-BĀ AL-NAJDIYYA 7–8 (Maṭbaʿat Umm al-Qurā 1996); BUNZEL, *supra* note 8.

The Saudis annexed the Ḥijāz and established the modern state of Saudi Arabia. However, in the Ḥijāz and elsewhere, many Muslims opposed strict Wahhābī doctrines on *shirk* and *takfīr*. To allay these concerns, the Saudi government began forcibly reforming the Wahhābī religious establishment, demanding that it gradually tone down and qualify its *takfīr* doctrine.¹⁸⁴ In this way, Wahhābism evolved into the influential global movement known as Salafism.

As recognized in previous studies, Ibn ‘Abd al-Wahhāb embraces most of Ibn Taymiyya’s ideas on *shirk*.¹⁸⁵ Thus, he accepts Ibn Taymiyya’s central claim that Muslims can commit *shirk* even if they believe that Allah is the only real power in the universe. He likewise accepts Ibn Taymiyya’s claim that the ancient Arab *mushriks* conceptualized their “gods” as similar to dead persons, *jinn*, and angels.¹⁸⁶

Like Ibn Taymiyya, Ibn ‘Abd al-Wahhāb holds that slaughtering¹⁸⁷ and vowing are *shirk* when directed towards beings other than Allah,¹⁸⁸ and that little if any consideration needs to be given to the doer’s intentions. Like Ibn Taymiyya, Ibn ‘Abd al-Wahhāb forbids pilgrimage to graves¹⁸⁹ and holds that requests from angels are *shirk*.¹⁹⁰ However, whereas Ibn Taymiyya permits requests from *jinn*, Ibn ‘Abd al-Wahhāb considers this *shirk*.¹⁹¹ Following Ibn Taymiyya, Ibn ‘Abd al-Wahhāb considers *istighātha* to be *shirk*.¹⁹² Like Ibn Taymiyya, Ibn ‘Abd al-Wahhāb opposes *tawassul* without considering it outright *shirk*.¹⁹³ How-

184 See STEPHANE LACROIX, AWAKENING ISLAM 12–14 (2011); HENRI LAUZIERE, THE MAKING OF SALAFISM 60–94 (2016).

185 1 IBN QĀSIM, *supra* note 183, at 137–38; 2 *id.* at 125; BUNZEL, *supra* note 8, at 128–38; LAV, *supra* note 8, at 95–125.

186 See MUḤAMMAD IBN ‘ABD AL-WAHHĀB, KASHF AL-SHUBUHĀT 33–35 (Wizārat al-Shu‘ūn al-Islāmiyya wa’l-Awqāf wa’l-Da‘wā wa’l-Irshād 1418 H).

187 IBN ‘ABD AL-WAHHĀB, *supra* note 187, at 40; 10 IBN QĀSIM, *supra* note 183, at 14.

188 IBN ‘ABD AL-WAHHĀB, *supra* note 187, at 40; 10 IBN QĀSIM, *supra* note 185, at 14.

189 IBN ‘ABD AL-WAHHĀB, ĀDĀB AL-MASHĪ ILĀ AL-ṢALĀH 40 (Jāmi‘at al-Imām Muḥammad b. Sa‘ūd n.d.).

190 *Id.*, *supra* note 186, at 6–8.

191 *Id.* at 6–8.

192 *Id.*, *supra* note 187, at 42–44.

193 1 IBN QĀSIM, *supra* note 183, at 33–34.

ever, whereas Ibn Taymiyya firmly prohibits *tawassul*, Ibn ‘Abd al-Wahhāb indicates that it is merely disliked (*makrūh*).¹⁹⁴

As recognized in earlier scholarship, the primary difference between Ibn Taymiyya and Ibn ‘Abd al-Wahhāb concerns the excuse for ignorance.¹⁹⁵ Ibn ‘Abd al-Wahhāb adopts Ibn Taymiyya’s strict opinions on *shirk* while rejecting his exceptionally expansive excuse for ignorance. Ibn ‘Abd al-Wahhāb judges that the general population of self-professed Muslims in his era has fallen into *shirk*. However, rather than pardoning them (like Ibn Taymiyya), he declares *jihād* against them. In some places, Ibn ‘Abd al-Wahhāb suggests that there is no excuse for ignorance.¹⁹⁶ More often, he admits that there is an excuse for ignorance but holds that it should be tightly restricted.¹⁹⁷ He argues that a person can no longer be considered ignorant once he or she has simply heard the Qur’ān. Addressing this matter, he says: “As for the fundamentals of the religion (*uṣūl al-dīn*), which Allah has clarified and made firm in His Book, Allah’s proof is the Qur’ān. Whoever the Qur’ān reaches, the proof has reached him (*balagathu al-hujja*).”¹⁹⁸

Ibn ‘Abd al-Wahhāb’s sons (who became the highest Wahhābī religious authorities after his death) argue that anyone who has heard about their father’s general message possesses enough evidence. Such a person cannot claim the excuse for ignorance. They write, “[A]s for those who have received our call to *tawhīd* and the application of Allah’s [*sharī’a*] obligations (*al-‘amal bi-farā’id Allāh*) but refuse to accept it, persist in *shirk*, and neglect the [*sharī’a*] obligations of Islam, we excommunicate them, fight them, and launch raids against them.”¹⁹⁹

Admittedly, there is a famous letter where Ibn ‘Abd al-Wahhāb asserts that he does not automatically declare those worship at graves to be disbelievers (e.g., for acts like *istighātha*).

194 IBN ‘ABD AL-WAHHĀB, *FATĀWĀ WA-MASĀ’IL* 68 (Jāmi‘at al-Imām Muḥammad b. Sa‘ūd al-Islāmiyya n.d.).

195 BUNZEL, *supra* note 8, at 127–190.

196 IBN ‘ABD AL-WAHHĀB, *supra* note 186, at 11; *see also id.*, *supra* note 187, at 28.

197 *Id.*, *AL-RASĀ’IL AL-SHAKHSIYYA* 60 (Jāmi‘at al-Imām Muḥammad b. Sa‘ūd 1206 AH).

198 10 IBN QĀSIM, *supra* note 183, at 93.

199 9 *id.* at 252–53.

He asserts that his critics have slandered him by falsely claiming that he does not grant an excuse for ignorance.²⁰⁰ Nevertheless, this letter conflicts with what Ibn ‘Abd al-Wahhāb says in many other places. As such, it either represents a contradiction in his thinking or an attempt to conceal his actual views.²⁰¹

SECTION IX: IBN ‘ABD AL-WAHHĀB ON NON-APPLICATION OF THE *SHARĪ‘A*

Ibn ‘Abd al-Wahhāb holds that, as a general principle, Muslims must submit to governments and not rebel against them, even when they fall short in applying *sharī‘a*. In one text, Ibn ‘Abd al-Wahhāb explains that the ancient Arabs had many erroneous views that Islam came to correct. These include seeing disobedience to rulers as a good thing. Ibn ‘Abd al-Wahhāb comments:

[For the ancient Arabs,] opposing the ruler and refusing to submit to him is seen as a virtue. Obeying and listening to him is regarded as humiliation and disgrace. But the Messenger of Allah opposed them, and commanded patience with unjust rulers. He commanded obedience [to rulers] and giving them [beneficial] advice. He emphasized that with severity, repeating it often.²⁰²

However, like Ibn Taymiyya, Ibn ‘Abd al-Wahhāb believes that some circumstances justify excommunicating governments and groups for not applying the *sharī‘a*. Ibn ‘Abd al-Wahhāb expresses his views in a short influential text titled *Nawāqid al-Islām (Nullifiers of Islam)*, which lists ten offenses that make one a *kāfir*.²⁰³ The first two offenses concern *shirk*. The fourth offense is not applying the *sharī‘a*. In describing this fourth offense, Ibn ‘Abd al-Wahhāb uses the distinctive term *ṭāghūt*. In

200 1 *id.* at 104.

201 BUNZEL, *supra* note 8, at 158–62.

202 IBN ‘ABD AL-WAHHĀB, *MASĀ’IL AL-JĀHILIYYA* 7 (al-Maṭba‘a al-Salafiyya 1347 AH).

203 10 IBN QĀSIM, *supra* note 183, at 90–93.

Ibn Taymiyya’s writings, a *tāghūt* is an illegitimate authority who demands obedience to his or her commands and laws over those of Allah.²⁰⁴ Ibn ‘Abd al-Wahhāb states, “Fourth [nullifier]: Whoever believes that the guidance of someone other than the Prophet is more complete than his guidance, or that the judgment of another is better than his judgment—such as those who prefer the rule of *tāghūt* over his rule—then he is a *kāfir*.”²⁰⁵ He also suggests that simply supporting the rule of a *tāghūt* verbally makes one a *kāfir*, such that the one who “praises the *tāghūts* or argues on their behalf ... exits Islam even if he fasts and stands in prayer.”²⁰⁶

As mentioned above, Ibn ‘Abd al-Wahhāb’s sons argued that *takfīr* is justified for both *shirk* and non-application of the *sharī‘a*.²⁰⁷ Significantly, the prominent early Wahhābī scholar Ḥusayn Ibn Ghannām (d. 1225/1810) cites Ibn Taymiyya’s *fatwās* against the Mongols to legitimate *takfīr* and *jihād* against the Ottomans and their allies. Like Ibn Taymiyya, Ibn Ghannām emphasizes that Abū Bakr was correct to excommunicate tribes who simply did not pay *zakāt*. This justifies excommunicating groups who do not adhere to *sharī‘a*.²⁰⁸ For Ibn Ghannām, the most serious offence of the Ottomans and their allies is failure to implement *sharī‘a* rules banning *shirk*.

To build support against his enemies, Ibn ‘Abd al-Wahhāb invokes two further *takfīr* principles. In *Nawāqid*, he identifies allying with *kāfirs* against Muslims as the eighth offense that makes one a *kāfir*.²⁰⁹ For Ibn ‘Abd al-Wahhāb, Muslims who have allied with the Ottomans against the Saudi state have become *kāfirs*. A second important *takfīr* principle concerns what we might call “chain *takfīr*.” Recall that according to classic *takfīr* doctrine, denying a Prophetic teaching that is known with certainty makes one a *kāfir*. Chain *takfīr* is a specific application of this principle. Thus, it is definitively known that

204 28 IBN TAYMIYYA, *supra* note 17, at 201.

205 10 IBN QĀSIM, *supra* note 183, at 91.

206 *Id.* at 55.

207 9 *id.* at 252–53.

208 1 ḤUSAYN IBN GHANNĀM, TĀRIKH NAJD 31 (Muṣṭafā al-Bābī al-Ḥalabī 1949).

209 10 IBN QĀSIM, *supra* note 183, at 90–93.

the Prophet taught that particular groups are *kāfirs*. Examples are Christians and worshippers of al-Lāt.²¹⁰ A person who denies that such groups are *kāfirs* becomes a *kāfir* himself and merits *takfīr*. This is chain *takfīr*. Many Muslim scholars accept some form of the chain *takfīr* principle, such as Ibn Ḥanbal. He holds that the Prophet taught that Allah literally speaks, and that whoever denies Prophetic teachings is a *kāfir*. On these grounds, Ibn Ḥanbal excommunicates Jahmīs. He further excommunicates whoever denies that Jahmīs are *kāfirs* and refuses to excommunicate them.²¹¹

Although Ibn Taymiyya presumably accepts the chain *takfīr* principle, it does not play a significant role in his thought. By contrast, Ibn ‘Abd al-Wahhāb emphasizes the importance of chain *takfīr*. In *Nawāqid*, the third offense that makes one a *kāfir* is not excommunicating those who are *kāfirs*. The text states: “Whoever does not excommunicate the *mushriks*, doubts that they are *kāfirs*, or considers their doctrine sound, has become a *kāfir* by consensus.”²¹² For Ibn ‘Abd al-Wahhāb, this means that whoever does not excommunicate the Ottomans and their allies becomes a *kāfir*.

Although Ibn ‘Abd al-Wahhāb is critical of surrounding societies for not applying the *sharī‘a*, his primary justification for excommunicating them is *shirk*. Thus, people in these societies partake in or tolerate making requests from dead persons and angels, slaughtering for *jinn*, and so on. Indeed, Ibn ‘Abd al-Wahhāb goes so far as to assert that “the *shirk* of the ancients [i.e., pre-Islamic Arabs] is less severe (*akhaff*) than the *shirk* of people in our time.”²¹³ In other words, given their extreme *shirk*, the Ottomans are lower in status, and further from Islam, than the ancient Arabs. The implied message is that since the Prophet fought the ancient Arabs for their *shirk*, the Ottomans are even more deserving of being fought.

To sum up, Ibn ‘Abd al-Wahhāb excommunicates the Ottomans, their allies, and whoever does not excommunicate them. He also accuses these groups of *shirk* and refers to them

210 Qur’ān 98:1, 6.

211 1 IBN ABĪ YA‘LĀ, *supra* note 45, at 342.

212 10 IBN QĀSIM, *supra* note 183, at 91.

213 IBN ‘ABD AL-WAHHĀB, *supra* note 186, at 33.

as *mushriks*. This functions to justify *jihād* campaigns against all the putative “Muslim” lands surrounding the Saudi state. Expressing his views, Ibn ‘Abd al-Wahhāb says:

You have also heard the [Ottoman] *mushriks* say: “*Shirk* is the worship of idols but not that of the pious [dead].” ... Allah has blessed you with the acknowledgment of the *mushriks*’ scholars regarding all of this. You have heard their admission that the practices taking place in the Two Holy Sanctuaries [Mecca and Madina], Basra, Iraq, and Yemen are acts of *shirk* [i.e., associating] with Allah. They have admitted to you that the religion whose people they support—and who they claim are the great majority—they have admitted to you that their religion [i.e., that of the Ottomans] is [in fact] *shirk*.²¹⁴

Commenting on the need for *jihād* against such *mushriks*, Ibn ‘Abd al-Wahhāb says, “May Allah have mercy on the one who reflects for himself and contemplates what Muḥammad brought from Allah of enmity toward *mushriks*, whether near or far, excommunicating them, and fighting them until religion is entirely for Allah.”²¹⁵

Contemporary Ottoman figures often accused Ibn ‘Abd al-Wahhāb and his followers of being “Khārijīs.” Eminent Ottoman religious scholars with this view include the Mālikī jurist Aḥmad al-Sāwī (d. 1241/1825)²¹⁶ and the Ḥanafī jurist Ibn ‘Ābidīn (d. 1252/1836).²¹⁷ For Ottomans, Wahhābīs resembled Khārijīs because they promoted illegitimate mass *takfīr* and political rebellion. Notably, many jurists regard Khārijīs as *kāfirs*. Hence, labeling Wahhābīs as “Khārijīs” can be interpreted as implicitly excommunicating them. Ottoman scholars’ loyalty to their government naturally shaped their intensely negative judgements of Wahhābism.

214 10 IBN QĀSIM, *supra* note 183, at 7–8.

215 1 IBN ‘ABD AL-WAHHĀB, MUFĪD AL-MUSTAFAĪD FĪ KUFR TĀRIK AL-TAWHĪD 298 (Jāmi‘at al-Imām Muḥammad b. Sa‘ūd 1206 AH).

216 3 AḤMAD AL-SĀWĪ, ḤĀSHIYAT AL-SĀWĪ ‘ALĀ TAFSĪR AL-JALĀLAYN 255 (Muṣṭafā al-Bābī al-Ḥalabī 1926).

217 4 IBN ‘ĀBIDĪN, *supra* note 120, at 262.

CONCLUSION

In the present article, I have sought to make four contributions to scholarship on *takfīr*. First, I have traced the long-term development of *takfīr* doctrine among the *ahl al-ḥadīth*/Ḥanbalīs, while explicating the views of Ibn Ḥanbal, Ibn Taymiyya, and Ibn ‘Abd al-Wahhāb. The article has highlighted key differences between these figures. Thus, the early *ahl al-ḥadīth* (including Ibn Ḥanbal) promote *takfīr* for denying Allah’s attributes but not for *shirk* or non-application of the *sharī‘a*. Significantly, the *ahl al-ḥadīth* excuse many persons guilty of denying Allah’s attributes, and do not call for *jihād* against them. Meanwhile, Ibn Taymiyya promotes *takfīr* for denying Allah’s attributes, for *shirk*, and for non-application of the *sharī‘a*. However, Ibn Taymiyya typically excuses offenders, and does not call for *jihād* against them (with the Mongols being a limited exception). Ibn ‘Abd al-Wahhāb promotes *takfīr* for *shirk* and for non-application of the *sharī‘a*. He limits excuses and calls for *jihād* against offenders.

Second, I explain the origins and development of the “excuse for ignorance” as a crucial component of *takfīr* doctrine. The excuse plays a fundamental role in determining how *takfīr* doctrine is applied. Scholars who minimize the excuse’s scope (e.g., Ibn ‘Abd al-Wahhāb), thereby encourage *takfīr* and conflict between Muslim groups. Scholars who maximize the excuse’s scope (e.g., Ibn Taymiyya), foster more tolerance for Muslim groups with divergent theological views. Nevertheless, since Ibn Ḥanbal’s time, the notion of excuse has been somewhat vague, leading to major disagreements about how it is to be understood. For example, who counts as “ignorant” and deserving of the excuse? Is the class of ignorant people limited to new converts and the like? Or does it include ordinary laypersons and even deviant religious scholars? Moreover, how much evidence does a person need before he or she is no longer considered ignorant? Is it enough to simply read the Qur’ān or hear about Ibn ‘Abd al-Wahhāb’s teachings? Or is it necessary for someone to counter all of a deviant’s misleading arguments with evidence? Is there a time limit for this educational process, or can it continue indefinitely?

Third, by taking a long-term view, I have explained the role of historical contingency in shaping *takfīr* doctrine, showing that *takfīr* doctrine moved along an unpredictable trajectory and was reoriented multiple times by particular events. Thus, Muslim thinking on *takfīr* first moved from a focus on non-application of *sharī'a* to a focus on denying Allah's attributes, then to a focus on *shirk*.

Fourth, I have highlighted the role of politics in shaping *takfīr* doctrine. Among other things, I demonstrated how Ibn Ḥanbal, Ibn Taymiyya, and Ibn 'Abd al-Wahhāb advocate loyalty to their governments and reject excommunicating them or rebelling against them. Moreover, Ibn Taymiyya worked to protect his Mamluk government by excommunicating an invading Mongol force. Ibn 'Abd al-Wahhāb excommunicated all governments and societies surrounding the Saudi state in Najd, legitimating Saudi expansion against the rival Ottomans and their allies. The Ottomans responded by implicitly excommunicating Wahhābīs as Khārijīs. Although *takfīr* doctrine cannot be reduced to politics, political loyalties affect how this doctrine is understood and applied.

RECALIBRATING *TAKĀFUL*'S COMPASS TO MĀLIKĪ SOURCES: REVISITING CLASSICAL PROOFS FOR MODERN CLAIMS

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Abstract

This article revisits the tabarru' (donative) versus mu'āwāḍa (onerous/reciprocal exchange) distinction in the Mālikī school—a widely invoked justificatory frame for takāful (Islamic insurance)—and examines how far that distinction transposes to takāful's constitutive contract. It traces the reception history and excavates its classical origins, bringing to light three overlooked insights: al-Qarāfi's three-feature gharar (uncertainty) test for exchange contracts, Mālik's tripartite taxonomy of legal dispositions, and his rationale for tolerating gharar in gratuitous contracts. The argument starts with an orientation that surfaces the paradigm-level assumptions and disciplinary priorities often latent in takāful's doctrinal-technical debates and clarifies the article's scope and methodological limits. It then proceeds to a logical deconstruction of the received dichotomy, then to a reconstruction of its reception pathway, and finally to a close reading of its classical Mālikī sources. Engaging al-Qarāfi's Distinction 24 (the standard reference point for the issue) together with the canonical Mālikī text al-Mudawwana, the article proposes a constructive recalibration: shifting discourse away from a rigid, label-driven tabarru'–mu'āwāḍa binary toward Mālik's tripartite scheme, guided by al-Qarāfi's three features and more faithful to the Islamic moral-juristic economy.

Keywords: consideration/exchange (*mu'āwāḍa*), gratuitous exchange (*tabarru'*), Islamic finance, Islamic insurance (*takāful*), Mālikī law, objectives of Islamic law (*maqāṣid*), uncertainty (*gharar*)

INTRODUCTION

Islamic insurance (*takāful*) is said to be valid notwithstanding the uncertainty (*gharar*) in indemnity because the parties' core undertaking is gratuitous (*tabarru'*), and the prohibition of *gharar* attaches to onerous exchange (*mu'āwada*), not to donation. Contemporary standard-setting instruments such as the Accounting and Auditing Organization for Islamic Financial Institutions' (AAOIFI) "Shari'ah Standards"¹ and state-endorsed resolutions,² and juristic treatments³ frequently present this special tolerance for *gharar* in gratuitous dispositions as a *Mālikī* doctrine that other schools (*madhāhib*, sg. *madhhab*) have adopted by necessity, thereby supplying a principal basis for *takāful*'s legitimacy.

This article tests the received claim by recovering its classical *Mālikī* foundations and mapping those foundations onto contemporary *takāful*. It proceeds in three stages: Section 1 zooms out to locate the article's narrow doctrinal entry point within the wider anthropological aims and stakes that animate the inquiry in order to render the ensuing constraint a deliberate methodological choice rather than an omission. Section 2 starts the inquiry by tracing a plausible reception pathway by which Shihāb al-Dīn al-Qarāfī's (d. 684/1285) nuanced juristic formulation became an oversimplified industry axiom. Section 3 zooms in on the principal *Mālikī* point of reference—al-Qarāfī's Distinction 24—as the classical anchor for the *tabarru'*–*mu'āwada* framing. The section analyzes this doctrinal

1 ACCOUNTING & AUDITING ORG. FOR ISLAMIC FIN. INSTS, SHARI'AH STANDARD NO. 26: ISLAMIC INSURANCE APP. B: THE SHARI'AH BASIS FOR THE STANDARD (Eng. ed) 690–91, <https://aaoifi.com/ss-26-islamic-insurance/?lang=en> (last visited Oct. 13, 2025) ("Permissibility of cooperative/mutual/social insurance stems from the fact that it is based on cooperation and donation, rather than on *mu'āwada* (exchange contract). It is well known among the *fuqahā'* (*Mālikī* school) that *gharar* has no impact on donation contracts.")

2 SHARIAH ADVISORY COUNCIL OF BANK NEGARA MALAY., SHARIAH RESOLUTIONS IN ISLAMIC FINANCE, 65 (2d ed. 2010), https://www.bnm.gov.my/documents/20124/9198675/shariah_resolutions_2nd_edition_EN.pdf.

3 Ḥamad Ḥammād 'Abd al-'Azīz al-Ḥammād, 'Uqūd al-ta'mīn ḥaqīqatuhā wa-ḥukmuhā, 65–66 MAJALLAT AL-JĀMI'Ā AL-ISLĀMIYYA BI'L-MADĪNA AL-MUNAWWARA 76 (1985); ALY KHORSHID, ISLAMIC INSURANCE 61 (1st ed. 2004).

architecture and applies its functional markers to contemporary *takāful* in a narrowly doctrinal sense of transposability.

SECTION 1: AIMS, SCOPE, AND CONTEXT OF INQUIRY

This section maps the interlocking registers in which debates about insurance—and by extension *takāful*—take place in order to clarify the anthropological stakes, doctrinal entry point, and methodological limits of my argument from the outset.

First is the moral register, in which the animating concern is compliance with religious values, and doctrinal reasoning functions as an instrument for achieving it. Proponents frame *takāful* as a constrained pursuit of *sharīʿa* compliance under non-ideal conditions⁴—sometimes via “lesser harm” reasoning⁵—whereas critics treat it as an illicit compromise with Islamic jurisprudence.⁶ Some argue that, far from the proclaimed spirit of cooperation, certain *takāful* implementations can be more disadvantageous to participants than conventional insurance.⁷

4 In early deliberations of the Islamic *Fiqh* Academy of the Organization of the Islamic Conference (OIC)—published in its *Majallat majmaʿ al-fiqh al-Islāmī* (1986)—scholars treated Islamic insurance as a constrained, pragmatic, and temporary accommodation, to be augmented and revised. 2 MAJMAʿ AL-FIQH AL-ISLĀMĪ, MAJALLAT MAJMAʿ AL-FIQH AL-ISLĀMĪ 606–07 (1986) (“We live in a situation where Islam is completely absent from the Arab nation as a whole—save for what remains of the shadows of creed and worship. As for Islamic Jurisprudence (*fiqh*), it has no presence in society, neither among individuals nor the collective, except in very rare instances . . . We must temporarily establish a practical insurance system that current states and governments allow to function . . . Indeed, we are now facing a temporary Islamic insurance, so let us wait.”)

5 See, e.g., *Ruling on Cooperative Insurance*, DĀʿIRAT AL-IFTĀʿ AL-ʿĀMM (May 10, 2024), <https://www.aliftaa.jo/en-fatwas/696/Ruling-on-Cooperative-Insurance> (demonstrating that Jordan’s Dār al-Iftāʿ endorses cooperative insurance as the “lesser of two evils” relative to commercial insurance; it does not spell out the cooperative model’s contractual mechanics, but it expressly anchors the permissibility in the OIC International Islamic *Fiqh* Academy’s *fatwā*).

6 For a critique of *takāful* in general and its *waqf*-based model in particular, see MUḤAMMAD RĀSHID DASKAWĪ, MURAWWAJA TAKĀFUL KA-FIQHĪ JĀʿIZA (2013).

7 Al-Sāʿātī, for example, argues that “Islamic insurance companies bear lower risks and achieve greater gains,” since deficits are covered via a recoverable loan to the policyholders’ account, and *muḍāraba* lets the operator share in gains (*al-ghunm*) but not losses (*al-ghurm*). ʿAbd al-Rahīm ʿAbd al-Ḥamīd al-Sāʿātī, *Idārat al-gharar fī al-taʾmīn al-taʾwunī*, 23 J. KING ABDULAZIZ UNIV. ISLAM. ECON. 85, 109 (2010).

Second is the doctrinal register, which asks whether *takāful*, as a purportedly Islamic contract form, satisfies the criteria of Islamic jurisprudence. For pragmatic reasons, this article foregrounds that register, while nevertheless considering it as analytically incomplete in isolation.

Third is the economic register, which evaluates *takāful* in terms of, *inter alia*, efficiency and risk-sharing performance, welfare and distributional incidence, and incentive and information effects, often articulated through policy idioms oriented around *maqāṣid* (objectives of Islamic law) rather than fine-grained doctrinal analysis.⁸

Fourth is the political-economic register. Here insurance functions as a development infrastructure, shaping which projects become financeable and on what terms, and where surpluses settle. Because modern insurance can generate outward premium/reserve flows and place large-risk coverage decisions—often mediated through reinsurance—outside the domestic economy, it can operate as a developmental chokepoint. Timur Kuran's account of the Ottoman Empire illustrates this dynamic, linking the insurance sector to foreign consortia control of large infrastructure, exclusionary distributional effects marginalizing local majority Muslims, and outward wealth transfer via foreign-headquartered insurers.⁹ A later illustration is Saudi Arabia's post-oil devel-

8 Economic-register debates on *takāful* are not uniformly approving. El-Gamal, for example, criticizes contemporary *takāful* as part of a broader pattern of “rent-seeking” *sharī'a* arbitrage with attendant transaction costs and efficiency costs, calling for restructuring around substantive mutuality and agency. He frequently frames his critique in *maqāṣid al-sharī'a* terms. While he does discuss the juristic logic of *gharar*, his engagement with classical *fiqh* literature is comparatively thin. For example, he cites Bank Al-Jazira's “pure agent” (*wakīl*) model as the “most widely accepted” way of neutralizing *gharar*—via mutuality rather than commutative exchange, without elaborating on and tracing the claim's jurisprudential pedigree in that discussion. See MAHMOUD A. EL-GAMAL, *ISLAMIC FINANCE: LAW, ECONOMICS AND PRACTICE* 170 (2006). By contrast, Ahmad & Hasan offer a more approving, *maqāṣid*-inflected economic account of *takāful*, presenting regression evidence from Malaysia that *takāful* industry growth supports economic development. Abu Umar Faruq Ahmad & Rashedul Hasan, *A Critical Review of Takaful Companies' Contributions to Economic Developments in Fulfilment of Maqasid al-Sharī'ah: Evidence from Malaysia*, in 1 *ENHANCING FINANCIAL INCLUSION THROUGH ISLAMIC FINANCE* 91 (Abdelrahman Elzahi Saaid Ali, Khalifa Mohamed Ali & Muhammad Khaleequzzaman eds., 2020).

9 TIMUR KURAN, *THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST* 30, 194–99 (2010).

opment, where dependence on foreign insurers raised concerns about sustained capital flight and helped motivate domestication efforts, including the institutionalization of *takāful*.¹⁰

An associated fifth register is the institutional-ecosystem register in which proponents defend *takāful* as more than as a risk-management contract framed primarily in terms of individual and commercial necessity. Rather, it is a risk-management infrastructure for Islamic finance itself, with individual and corporate participation serving as a conduit for institutional viability and scale and regulatory legibility.¹¹ Since the contemporary liberal-capitalist order is organized around continuous, investment-driven expansion rather than slow, organic continuity, it multiplies exposure and makes insurance a constitutive feature of market coordination. Islamic finance, operating as it does within this global order, typically either relies structurally on conventional insurance and reinsurance or develops an internal analogue. Proponents defend *takāful*, and especially re-*takāful*, as that analogue: a condition of scalability, supervisability, and institutional coherence rather than merely a retail option.¹²

10 Ammar Al-Jaser, *Is Islamic Insurance Ready to Take the Lead? A Case Study of Saudi Arabian Insurance* 41 (2014) (S.J.D. dissertation, Georgetown University Law Center).

11 The Islamic Financial Services Board (IFSB)—an international standard setter for Islamic finance—frames *takāful* as “critical to the development of the ecosystem required for the overall development of the industry” and notes that a World Bank–IMF Joint Note “called for integration of Islamic finance with the global financial system.” It further adds that applying IFSB *takāful* standards, can provide the “harmonised regulatory framework ... needed for the future growth of the *takāful* sector, particularly for organisations ... engaged in cross-border business.” ISLAMIC FIN. SERVICES BOARD & WORLD BANK, *REALISING THE VALUE PROPOSITION OF THE TAKĀFUL INDUSTRY FOR A STABLE AND INCLUSIVE FINANCIAL SYSTEM*, at ix–x, 160 (2017), https://www.ifsb.org/wp-content/uploads/2023/10/IFSB-World-Bank-Joint-Publication-on-Realising-The-Value-Proposition-of-the-Tak257ful-Industry-for-a-Stable-and-Inclusive-Financial-System_En-1.pdf. Gönülal’s World Bank-published book likewise notes that *takāful* was conceived “out of the need for Islamic banks” to obtain *sharī‘a*-consistent coverage, underscoring its institutional (not merely retail) function. TAKĀFUL AND MUTUAL INSURANCE: ALTERNATIVE APPROACHES TO MANAGING RISKS 71 (Serap O. Gönülal ed., 2013).

12 IFSB frames re-*takāful* as a scalability and system-coherence constraint, noting that conventional cession is often defended via *ḍarūra* (necessity) because without it, *takāful* and re-*takāful* undertakings would be “unable to maintain or to expand the level of their business,” citing “a lack of capacity of appropriate quality in the *Retakāful* sector.” ISLAMIC FIN. SERV. BD., *GUIDING PRINCIPLES FOR RETAKĀFUL*

Sixth is the register of power and governmentality. From a Foucauldian perspective,¹³ insurance functions as a technology of governance by conditioning access to central domains of private, social, and economic life, including mobility, housing, employment, trade, and industrial production. Individuals and firms may formally own cars, homes, or enterprises, yet remain unable to operate them without insurance authorization. This is the liberal paradox: insurance governs by conditioning access even as it liberates us from liability. Historically, this governing role has extended beyond market coordination into the exercise of state power in both war and peace,¹⁴ and it takes renewed salience in contemporary data-intensive, platform-mediated political economies, sometimes described as a technofeudal order.¹⁵

(ISLAMIC REINSURANCE) 34 (2016), [https://ceif.iba.edu.pk/pdf/IFSB-GuidingPrinciplesforRetak%C4%81ful\(IslamicReinsurance\)2016.pdf](https://ceif.iba.edu.pk/pdf/IFSB-GuidingPrinciplesforRetak%C4%81ful(IslamicReinsurance)2016.pdf).

13 See Francois Ewald, *Insurance and Risk*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 200 (Graham Burchell, Colin Gordon & Peter Miller eds., 1991). Ewald, though more analytical than critical, calls insurance a “technology of risk” and a rationality “capable of transforming the life of individuals and that of a population.” More critical governmentality-oriented sociology treats insurance as a modality of governance beyond the state that structures institutions and everyday conduct. See, e.g., RICHARD V. ERICSON, AARON DOYLE & DEAN BARRY, *INSURANCE AS GOVERNANCE* (2003).

14 Luis Lobo-Guerrero, inspired by Foucault, primarily focuses on the British “Commercial Kingdom” as his central case study for “insurantal sovereignty,” yet he also reaches beyond Britain to discuss other western governments and supranational security actors—e.g., EU anti-piracy operations and Lloyd’s cooperation with NATO—to show how insurance quietly shapes security environments in both peace and war. In peacetime, he argues, the “most prominent” manifestation of this “insurantal sovereignty” lay in neutralizing class struggle among “populations experiencing dramatic economic and social change as a result of industrialising processes.” Through accident and social insurance as “bourgeois solutions to proletarian problems,” governments sustained “social and political peace in an age of revolution.” During war time, insurance helped the British government endure and sustain conflict: in World War I it established a War Risks Insurance Scheme to “ensure security of food supply in time of war”; because private insurers would have laid up ships under prohibitive rates, the state acted as reinsurer of last resort to “keep the merchant fleet sailing under the threat of enemy action.” LUIS LOBO-GUERRERO, *INSURING WAR: SOVEREIGNTY, SECURITY AND RISK*, at xvi, 1, 4, 57 (2012).

15 “Technofeudal” is used here as a heuristic descriptor, associated especially with Yanis Varoufakis, for platform-mediated forms of economic coordination and dependence; the essay does not rely on the term’s broader historical or normative claims. See YANIS VAROUFAKIS, *TECHNOFEUDALISM: WHAT KILLED CAPITALISM* (2023).

The same actuarial-informational infrastructures that make persons and assets insurable, such as granular data on sites, inventories, productive capacity, and exposure, have at times been repurposed to render industrial capacity and human life legible and targetable.¹⁶ In this register, insurance governs less through overt coercion than through the technical organization of access, visibility, and vulnerability.

Each of these registers captures something real. Yet taken in isolation, they frame *takāful* respectively as a problem of *sharīʿa* compliance, functional efficiency, developmental necessity, institutional self-preservation, or governmental power—partial descriptions of a deeper dynamic. *Takāful* does not merely distribute risk; it reconfigures how human beings encounter consequence, obligation, and contingency in ordinary life, a transformation that standard moral-philosophical framings often register only incompletely because this transformation is mediated through institutions, techniques, and habituated practices rather than discrete individual choices. That is why I treat the question as irreducibly anthropological. The core concern of the broader research program—of which this article forms one part—is that *takāful* can (de)form moral agency itself, with effects that cut across the other registers and recast the very dynamics they seek to explain. Because this approach does not just address risk-management but also illuminates how risk may be created through incentive distortions such as moral hazard and then amplified through positive feedback loops. Ulrich Beck

16 Drawing on Feldman and Fritz, Lobo-Guerrero cites multiple wartime examples of insurance operating as an intelligence tool. In the Nazi period, the Third Reich used Allianz's life-insurance/actuarial records to locate and expropriate the assets of "the enemies of the people and the State," including Jews and communists. On the Allied side, the American Office of Strategic Services (OSS) (X-2) created an Insurance Intelligence Section (1943) that acquired blueprints of strategic industrial facilities by tracking facilities for which reinsurance was being sought in the market. Declassified OSS material also recounts that a British insurer's San Francisco office resold Panama Canal coverage to two Japanese firms (1941), and that, in connection with this insurance, detailed descriptions of the canal's locks and machinery—critical U.S. infrastructure—were transmitted to Tokyo. He treats these episodes as instances of an "intimate relationship" between statehood and actuarial resources, and situates them within his larger thesis of "insurantal sovereignty." LOBO-GUERRERO, *supra* note 14, at 2–3.

makes a closely related point: modern society generates the risks it later seeks to contain and insure against.¹⁷

In Islamic legal-theoretical terms (*uṣūl al-fiqh*), insurance risks reshaping *fiqh*'s construction of the morally accountable agent (*mukallaḥ*) whose juridical liability capacity (*dhimma*) is the locus of obligation, liability, and discharge. By permitting the insured to externalize risk, insurance can reconfigure the very texture of *taklīf* by altering the conditions under which the *mukallaḥ*'s *dhimma* is borne, shared, or effectively transferred. In classical juristic grammar, liability or *dhimma* is not treated as a detachable commodity.¹⁸ Thus *kafāla* (suretyship) is permissible on a gratuitous basis precisely because it is not a sale of *dhimma*: the guarantor's *dhimma* is joined to that of the principal (*ḍamm al-dhimma ilā al-dhimma*), so the creditor may claim from either.

17 ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* 12 (reprt. ed. 2009) ("The argument is that, while in classical industrial society the 'logic' of wealth production dominates the 'logic' of risk production, in the risk society this relationship is reversed.")

18 Across classical discussions of transactions, jurists repeatedly treat *dhimma* (financial liability) as a relational obligation, not a detachable, fungible commodity. One illustrative locus is their prohibition of *qisma* (partition) of jointly owned debt claims (*dayn*) owed by multiple debtors: the creditors generally cannot simply agree, "You take Zayd's debt and I take 'Amr's," as though each claim were an equivalent unit. They observe that liabilities do not equate nor balance (*lā tatakāfa' wa-lā tata'adal*) because obligors differ in solvency and creditworthiness. Partition in unequal components is only completed by *ta'dīl* (equalization): one side must be compensated so the shares match. Once compensation becomes necessary, the operation is no longer mere partition; it functions as an exchange in substance, and in the debt setting that exchange readily takes the form of debt-for-debt (*bay' al-dayn bi'l-dayn*) or liability-for-liability (*dhimma bi-dhimma*), which is prohibited. Relatedly, jurists define true partition as *ifrāz* (severance/demarcation) that presupposes *tamyīz* (individuation), and they deny that such severance is even conceptually realizable within a single debtor's liability prior to collection. Thus, if one debtor owes a joint debt to two creditors, neither creditor can stipulate that "the first half collected will be mine and the remainder yours," because no prior "severance" inside the *dhimma* is imaginable and the claim is therefore not yet allocatable; only once collection occurs does a possessed sum exist that is then allocatable. In other words, doctrine resists *dhimma*-based allocation-by-severance that operationally mimics trading claims, while conceding *dhimma*-mediated discharge-by-clearing of *ḥawāla*, as a settlement device. See, e.g., 20 SHAMS AL-DĪN AL-SARAKHSĪ, *AL-MABSŪṬ* 131 (Maḥba'at al-Sa'āda, Cairo, n.d.); 21 *id.* at 39; 25 *id.* at 170; 4 MĀLIK B. ANAS, *AL-MUDAWWANĀ AL-KUBRĀ* 277 (Dār al-Kutub al-'Ilmiyya 1994); 7 MUḤAMMAD 'ULAYSH, *MANḤ AL-JALĪL SHARḤ MUKHTAṢAR KHALĪL* 266 (Dār al-Fikr 1984); 16 ABŪ AL-ḤASAN 'ALĪ AL-MĀWARDĪ, *AL-ḤĀWĪ AL-KABĪR* 1269 (Dār al-Kutub al-'Ilmiyya 1999); 6 *id.* at 484; 5 ABŪ MUḤAMMAD 'ABD ALLĀH IBN QUDĀMA, *AL-MUGHNĪ* 60 (Maktabat al-Qāhira 1969).

For this reason, the jurists of the four Sunnī schools generally treated *kafāla* as *tabarruʿ* and did not allow guarantors to charge a fee for the mere assumption or co-joining of *dhimma*.¹⁹ Similarly, *hawāla* (transfer of debt) too was construed as a voluntary relocation of obligation rather than a commutative exchange of liability; hence compensation for the transfer as such was not approved within the classical framework.²⁰

By effectively rendering *dhimma* a commodifiable object, this reconfiguration of *taklīf* distorts moral agency and, in turn, threatens the very goods that *maqāṣid* reasoning seeks to safeguard, namely, religion, life, intellect, lineage, and wealth. Accordingly, narrower doctrinal questions—such as how to characterize insurance (*takyīf*) and thus trigger or tolerate *gharar*; whether risk alone can constitute a valid object of contract (*maḥall al-ʿaqd*) and thus be commodifiable; and whether the rationale behind the prohibition of wager-like instruments, such as unjust appropriation of others’ wealth, applies to *takāful*—are best read not as isolated compliance checkpoints but as local

19 Jurists from across the four Sunnī schools generally treat unbundled guarantee—i.e., *kafāla* issued on its own and not tied to a larger exchange or wrongful act—as a gratuitous *ʿaqd tabarruʿ*. Even when some analyses shift rubrics across stages—e.g., *tabarruʿ* at initiation but exchange-like at discharge for doctrinal coherence—the prevailing characterization remains gratuity or benevolent accommodation (*irfāq*), not a commodified liability instrument. This holds across jurisdictions and terminologies (e.g., *kafāla/ḍamān/hamāla/zaʿāma* etc). See, e.g., 19 AL-SARAKHṢĪ, *supra* note 18, at 170; 30 *id.* at 148; 3 MĀLIK, *supra* note 18, at 77–78; 1 ISMĀʿĪL B. YAḤYĀ AL-MUZANĪ, AL-MUKHTAṢAR MIN ʿILM AL-SHĀFIʿĪ WA-MIN MAʿNĀ QAWLIH 564 (Dār Madārij lil-Nashr 2019); 14 IBN QUDĀMA, *supra* note 18, at 567.

20 The four schools of Islamic jurisprudence concur that a valid *hawāla* (debt transfer) fundamentally requires absolute parity (*tasāwī*) between the debt transferred and the debt owed. This equality must encompass quantity (*qadr*), quality (*ṣifa*), and genus (*jins*). Because *hawāla* is legally categorized as a contract of concession or charitable assistance (*irfāq/maʿrūf*) rather than a commercial exchange, any discrepancy in value—such as swapping low-quality coins (*nabahrāja*) for high-quality ones (*jiyād*)—invalidates the contract. Jurists warn that such imbalances transform the arrangement into either *ribā* (usury) or an impermissible sale of debt for debt (*bayʿ al-dayn biʿl-dayn*). While fees for distinct administrative services, such as agency or transport, may be permissible, they cannot function as a profit on the transfer itself. See, e.g., MUḤAMMAD B. AL-ḤASAN AL-SHAYBĀNĪ, AL-JĀMIʿ AL-KABĪR 329 (Dār al-Maʿārif 1981); 3 ABŪ BAKR AL-JASSĀS, SHARḤ MUKHTAṢAR AL-ṬAḤĀWĪ 221 (Dār al-Bashāʿir al-Islāmiyya wa-Dār al-Sirāj 2010); 9 SHIHĀB AL-DĪN AL-QARĀFĪ, AL-DHAKHĪRA 244 (Dār al-Gharb al-Islāmī 1994); 7 MUḤAMMAD B. YŪSUF AL-MAWWĀQ, AL-TĀJ WAʿL-IKLĪL LI-MUKHTAṢAR KHALĪL 26 (Dār al-Kutub al-ʿIlmiyya 1994); 7 IBN QUDĀMA, *supra* note 18, at 59.

doctrinal sites where the *taklīf-dhimma* architecture, understood to extend beyond individual burden bearing to charitable mutual support, is practically specified, tested, and contested.

This broader, *taklīf*-inflected anthropological stake also means that the object of analysis is not insurance in isolation, but rather consequence-displacing mechanisms more generally. Insurance primarily offers economic consequence shielding; juridical artifacts such as legal personhood and limited liability can furnish legal consequence shielding; and certain responsibility-attenuating doctrines, especially expansive appeals to necessity (*ḍarūra*), can provide conscience shielding by softening self-implication and guilt. The common thread is the weakening of the feedback between agency, consequence, and moral self-attribution that ordinarily produces prudence and restraint. Thus, just as the multiple registers elaborated above clarify that doctrine alone cannot explain the problem of insurance, anthropological stakes clarify that insurance alone is not the sole site of the problem.

While such a scope may appear expansive, the relevant threads connect naturally within the classical *fiqh* tradition. In that tradition, *sharī'a* compliance is not a procedural test satisfied in the letter through loophole engineering, but a substantive safeguard that must be preserved in spirit, thus forming moral agency and social order, and thereby enabling the community to negotiate the terms of political-economic engagement rather than simply to absorb them. For Muslims, it can also function as a decisive point of practical reference amid what Alasdair MacIntyre described as the “interminable disagreement” characteristic of liberal discursive orders.²¹ This article therefore adopts a doctrinal entry point, not because the problem is reducible to doctrine, but because doctrinal fidelity preserves *sharī'a*'s normative integrity, and thereby helps secure the conditions under which ethical agency can be formed and sustained across the other registers the debate invokes.

Yet doctrinal fidelity requires distinguishing between pressures that legitimately inform juristic reasoning and those that impermissibly deform it. Epistemic considerations internal

21 WAEL HALLAQ, *RESTATING ORIENTALISM: A CRITIQUE OF MODERN KNOWLEDGE* 191 (2018).

to *fiqh* grammar—such as assessing the degree of necessity (*ḍarūra*) and authorizing calibrated dispensations (*rukḥṣa*)—are legitimate modes of reasoning recognized by the tradition itself. By contrast, pressures that pre-commit juristic reasoning to extrinsic ends are external distortions that strip *fiqh* of normative independence and degrade it into justificatory compliance. In many Islamic finance products, including *takāful*, juristic reasoning is better understood as institutionally conditioned rather than methodologically neutral: standard-setting committees often deliberate with a target functionality already in view and then pursue retrospective evidentiary search and justificatory rationalization, rather than a *de novo* assessment of the problem across the registers mapped above. These epistemic pressures operate within a broader political-moral economy of Islamic finance, in which products emerge under regionally variable demands for legitimacy and are further conditioned by state interests and global capital structures. The controversy around AAOIFI’s draft “Standard 62” on *ṣukūk* (Islamic financial certificates) makes this dynamic visible: a reform, framed as closer adherence to risk-sharing, prompted warnings that it could “add complexity and raise costs” and might “put off investors,” while senior market voices suggested it “may never come into force,” emphasizing that “hurting issuance wasn’t their intention.”²²

Under such political-economic pressures, political actors often epistemically construct rather than ontologically identify concepts such as “need,” “progress,” and “development.” Governments do not simply discover necessity as an organic social demand; they actively manufacture and cultivate it through law, regulation, and infrastructural design.²³ Pakistan’s relatively

22 Jennifer Hughes & Ian Smith, *Contentious Sukuk Rule May Never Come into Force, Says IsDB Chair*, FIN. TIMES, Oct. 23, 2025, <https://www.ft.com/content/8978d2b7-1a87-47bd-b2a7-e0834d086efe>.

23 Pakistan’s recent trajectory further illustrates this top-down push: constitutional signaling toward the elimination of *ribā*, a widening regulatory embrace of *takāful* by the SECP (including re-*takāful* capacity, centralized data platforms, and a phased transition strategy), and provincial rollout of state-funded life *takāful*. See: PAK. CONST. art. 38, cl. f; *SECP Facilitates Signing of Agreement Between Insurance/Takaful Companies and CDC to Join Centralized Information Sharing Solution for Health Insurance*, SEC. & EXCH. COMM’N OF PAK. (n.d.), <https://www.secp.gov.pk/media-center/press-releases/secp-facilitates-signing-of-agreement-between-in->

late formal entry into *takāful* (often dated to its 2005 *Takāful* Rules), in comparison to Malaysia's earlier statutory adoption (notably, its 1984 *Takāful* Act), can be read as suggestive of differing state-jurist configurations. In more state-coordinated settings, uptake and standardization can proceed faster, whereas in more contestatory scholarly ecologies, doctrinal disputes may remain open longer and slow consolidation. This is not a definite claim, but a plausible explanation of how *takāful*'s development is shaped not only by juristic arguments but also by the political and institutional conditions that determine which juristic arguments are foregrounded and which are not.

This article foregrounds what has been backgrounded in global *takāful* debates. It thus pursues three parallel aims. Normatively, it seeks to realign contemporary *takāful* discourse with its purported Islamic economics roots, emphasizing substance over labels. As a disciplinary stewardship project, it recovers nuances embedded in the classical *tabarru'–mu'āwada* discussions that recent treatments often flatten. Doctrinally, it assesses how far that distinction can be legitimately invoked and mapped onto contemporary Islamic insurance.

Having clarified the article's aims and scope, I now specify its limits. Despite its broader concern, the present analysis is confined to one micro-level evidentiary strand within contemporary *takāful* justification: the *tabarru'–mu'āwada* dichotomy as attributed to al-Qarāfī, which I find insufficiently probative. Other Mālikī and non-Mālikī approaches to justify *takāful* in general, or particular forms of it—whether as a comprehensive permissibility claim across contexts or as a concessionary, transitional accommodation varying by time and place—implicate different jurisprudential mechanics, warrant independent treatment, and may yield different conclusions.

Finally, my argument acknowledges that *sharī'a* rulings presuppose and operate within a sustaining social-moral ecology. The four canonical schools' shared stance on keeping *kafāla* strictly gratuitous,²⁴ a stance that effectively bars the commodi-

surancetakaful-companies-and-cdc-to-join-centralized-information-sharing-solution-for-health-insurance/ (last visited Aug. 19, 2025).

²⁴ See *supra* note 19.

fication of standalone risk, made practical and normative sense in the premodern social order. In this context, a fabric of tight-knit kinship, communal obligation, and trade-based associative forms—guild-like pacts and mutual undertakings—and institutions such as the *‘āqila* framed loss-sharing as a form of socially obligated assistance rather than a priced, premium-for-indemnity exchange.²⁵ Juristic error therefore arises both from transplanting premodern risk rulings into today’s ruptured social-moral-political fabric without reckoning with that missing ecology, and from accepting the rupture as fixed and refashioning *sharī‘a* to conform to it. This dilemma exceeds both approaches and marks a fertile research agenda not merely on managing risk but on recovering the moral rationalities, social forms, and institutional and developmental capacities that once rendered recourse to artificial risk-transfer institutions unnecessary or illegitimate in the first place.

Having situated the problem and its broader horizon at an anthropological level, I now deliberately narrow my inquiry to one doctrinal locus, tracing the career of al-Qarāfi’s *tabarru‘-mu‘āwada* dichotomy as a justificatory device in contemporary Islamic insurance.

SECTION 2: DECONSTRUCTING THE ARGUMENT, MAPPING ITS RECEPTION

The toleration of *gharar* in gratuitous contracts is not a uniquely Mālikī position, though it has become closely associated with the school, arguably due to al-Qarāfi’s influential framing. More accurately, the juristic schools span a range of views regarding the effect of *gharar*, and neat boundaries are difficult to draw: some schools tolerate it in certain gratuitous dispositions but not others. Broadly, the seventh/thirteenth-century Ḥanbalī jurist Ibn Taymiyya (d. 728/1328) reflects a comparatively more lenient line, often converging with Mālikī thought, whereas Shāfi‘ī doctrine tends to be more restrictive, with Ḥanafī closer

²⁵ *‘Āqila* refers to the offender’s agnatic kin-group collectively liable for paying blood money (*diyya*), especially in cases of accidental homicide.

to the middle.²⁶ Accordingly, when Ḥanbalī-oriented bodies like the Council of Senior Ulema of Saudi Arabia articulate such tolerance without reference to Mālikī school,²⁷ the omission can be consistent with their internal doctrinal framework. By contrast, when Shāfi'ī-oriented treatments reach a similar position, explicit attribution and a method-consistent rationale for the departure help to preserve doctrinal coherence within the Shāfi'ī framework. For example, Bank Negara Malaysia, which operates in a Shāfi'ī-default jurisdiction that allows cross-school borrowing for the purposes of public interest,²⁸ presents *tabarru'* as “the pillar in *takāful* system [sic] that makes the *Gharar* (uncertainty) element allowable,” with no reference to the underlying juristic transplantation,²⁹ although its “Shariah Resolutions” do make that attribution.³⁰ This intra-corpus variance likely reflects considerations of genre and condensation, but it can mislead by implying that the tolerance is axiomatic.

Logically deconstructed, the Mālikī *tabarru'–mu'āwāḍa* distinction and the associated tolerance of *gharar* in *tabarru'* is built on three premises: within the Mālikī tradition, (i) contracts divide cleanly into *mu'āwāḍa* or *tabarru'*; (ii) *gharar* does not vitiate *tabarru'*; and (iii) *takāful* is (contemporarily) classified as

26 Taqī al-Dīn Aḥmad Ibn Taymiyya treats *ribā* and *gharar* as twin sources of contractual corruption and argues that the harm of *gharar* is lighter than that of *ribā*. He compares the juristic schools' treatment of *gharar*, censures jurists who conflate the two harms, and commends the Mālikī school for its relative balance. For his analysis of *gharar*, see AḤMAD B. 'ABD AL-ḤALĪM IBN TAYMIYYA, *AL-QAWĀ'ID AL-NŪRĀNIYYA AL-FIQHIYYA* 168–256 (Aḥmad b. Muḥammad al-Khalīl ed., Dār Ibn al-Jawzī 2001).

27 Qarār Raqm 51 wa-Tārīkh 4/4/1397 bi-sha'n al-Ta'mīn al-Ta'āwunī [Res. no. 51 of Mar. 25, 1977 on Cooperative Insurance], in QARĀRĀT HAY'AT KIBĀR AL-'ULAMĀ' 119 (Council of Senior Scholars n.d.) (Saudi Arabia).

28 Al-Hafiz b. Ishak, *IRSYAD USUL FIQH SIRI KE-77: Bilakah Keadaan Yang Dibenarkan Untuk Mengambil Pandangan Mazhab Lain?* [When Is It Permitted to Adopt the View of Another Madhhab?], FEDERAL TERRITORIES MUFTI OFFICE (May 2, 2025) (Malay.), <https://www.muftiwp.gov.my/ms/artikel/irsyad-usul-fiqh/6227-irsyad-usul-fiqh-siri-ke-77-bilakah-keadaan-yang-dibenarkan-untuk-mengambil-pandangan-mazhab-lain> (explaining that per the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), §§ 34, 38, the default is the Shāfi'ī “*qaul mukta-mad*,” with qualified recourse to Ḥanafī, Mālikī, or Ḥanbalī views as needed).

29 *General Takaful*, BANK NEGARA MALAYSIA 2, <https://www.bnm.gov.my/documents/20124/792374/booklet.en.pdf> (last visited Mar. 1, 2026)

30 SHARIAH ADVISORY COUNCIL OF BANK NEGARA MALAY., *supra* note 2.

a *tabarru'* contract. From these, the conclusion follows: *takāful* is valid despite *gharar*. Premises (i) and (ii) rest on a meta-assumption of taxonomic lineage and authenticity: Foundational Mālikī authorities articulated the *tabarru'–mu'āwada* dichotomy and jurists have, since then, treated it as an authoritative, mutually exclusive, and functionally exhaustive scheme for allocating *gharar* rules. Premise (iii) rests on a meta-assumption of contemporary transposability in which this classical divide can be carried over, unmodified, to Islamic insurance or *takāful*, with no hybrid genus or intervening doctrine limiting its use. These meta-assumptions become evident when scholars and *sharī'a* standards routinely classify conventional insurance as *mu'āwada* (thus prohibiting it) and *takāful* as *tabarru'* (thus permitting it).

Having uncovered these underlying assumptions, I now turn to testing them. The central question is twofold: what classical Mālikī criteria distinguish *tabarru'* from *mu'āwada* and thus activate or relax *gharar* rules? And to what extent do those criteria map onto the reciprocal (premium-for-indemnity) structure of contemporary *takāful*? To answer this, I first trace the reception pathway of the claim and then analyze the origin.

A plausible reception pathway runs through the Sudanese Mālikī jurist al-Şiddīq Muḥammad al-Amīn al-Ḍarīr (d. 2015), whose doctoral dissertation “*Gharar and Its Effects on Contracts in Islamic Law*” (*al-Gharar wa-atharuhū fī al-'uqūd fī al-fiqh al-Islāmī*) was approved in 1967.³¹ Circulating in Sudanese legal-academic circles in the late 1960s and 1970s, it furnished an early doctrinal template directly germane to the contemporary problem of insurance and its inherent *gharar*. When Sudan launched the Islamic Insurance Company in 1979—the first *takāful* operator worldwide—policy and industry discussions drew on this analysis already in circulation.³² The work

31 AL-ŞIDDĪQ AL-AMĪN AL-ḌARĪR, *AL-GHARAR WA-ATHARUH FĪ AL-'UQŪD FĪ AL-FIQH AL-ISLĀMĪ* 14 (Dār al-Sūdāniyya lil-Kutub 1995).

32 While Ḍarīr's influence on the first Islamic insurance company is often acknowledged by academics, perhaps the cleanest evidence we have is that an Islamic insurance company in Sudan itself hosts and cites Ḍarīr in a company publication on its website: al-Şiddīq al-Amīn al-Ḍarīr, *al-I'tibārāt al-shar'iyya li-mumārasat al-ta'mīn* (Islamic Ins. Co. Ltd. n.d.). https://www.islamicinsur.com/insurance_form/

filled a considerable gap by systematizing the *gharar* corpus and linking it to modern financial transactions. His contribution was later recognized with the King Faisal International Prize in Islamic Studies (1990)³³ for work on financial transactions. The subsequent book publication (1995) further consolidated and disseminated the framework.

In his dissertation, Ḍarīr's contribution was evident—among other respects—in three areas: (a) formulating “*gharar* theory” as a four-point test for when *gharar* becomes legally operative in contracts, which he explicitly presents as an inferential synthesis (*istintāj*) from juristic views without binding himself to any single school;³⁴ (b) highlighting the Mālikī *tabarru'–mu'āwada* distinction;³⁵ and (c) cataloging a nine-item typology identifying where *gharar* may attach across the counter-values of a sale contract.³⁶ These framework-setting contributions are reflected in the *al-Mawsū'a al-fiqhiyya al-Kuwaytiyya*—a flagship, state-sponsored reference compiled under Kuwait's Ministry of *Awqāf* and Islamic Affairs. The encyclopedia is a forty-five-volume project; the volume containing the *gharar* entry appeared in 1994. As a government-organized collective enterprise, entries cite classical sources rather than naming individual contributors; thus, it states the *tabarru'–mu'āwada* dichotomy and cites al-Qarāfī, not Ḍarīr.³⁷ Yet the *gharar* entry's close alignment with Ḍarīr's (arguably novel) contribution makes it plausible that the compilers drew substantially on his work.

dareer.pdf (last visited Mar. 1, 2026). And while a website alone does not prove corporate identity, the Federation of Afro-Asian Insurers & Reinsurers (FAIR)'s member directory entry for “Islamic Insurance Company Ltd.” (Sudan) lists that same domain as the firm's official website and classifies its business as “Takaful,” making it very likely that this is the Sudan-based pioneer being referenced in the historical claim. FED. OF AFRO-ASIAN INSURERS & REINSURERS, ISLAMIC INSURANCE COMPANY LTD., <https://fair1964.org/company-details/islamic-insurance-company-ltd> (last visited Mar. 1, 2026).

33 KING FAISAL PRIZE, KING FAISAL PRIZE, ISLAMIC STUDIES (1990): AL-ŞIDDĪQ MUḤAMMAD AL-AMĪN AL-ḌARĪR, <https://kingfaisalprize.org/ar/professor-al-siddiq-m-al-darir/> (last visited Oct. 14, 2025).

34 ḌARĪR, *supra* note 31, at 583–84.

35 *Id.* at 525.

36 *Id.* at 175.

37 MINISTRY OF AWQĀF & ISLAMIC AFFAIRS (KUWAIT), AL-MAWSŪ'A AL-FIQHIYYA AL-KUWAYTIYYA 154 (Dār al-Safwa Press 1994).

The encyclopedia may have functioned as a high-visibility amplifier of his framework within Arabic reference culture. Through Mahmoud A. El-Gamal's *Islamic Finance: Law, Economics, and Practice* (2006), that framework entered Anglophone discourse. El-Gamal engages Ḍarīr's *gharar* theory and develops further analysis on that foundation.³⁸ El-Gamal's book is commonly assigned on Islamic finance course syllabi and is heavily cited in the research literature.³⁹ Pending fuller bibliographic verification, this pattern supports a cautious hypothesis that Ḍarīr's framework—amplified by the encyclopedia and transmitted via scholars like El-Gamal—has served as a principal conduit for the now-familiar *tabarru'–mu'āwada* dichotomy underpinning much *takāful* discourse.

The point is not to claim that Ḍarīr was the first modern figure to surface the Mālikī *tabarru'–mu'āwada* dichotomy; he attributes it to the seventh/thirteenth century al-Qarāfi,⁴⁰ and many jurists would likely have drawn on it over the centuries, since the basic contrast is intelligible and broadly consistent with juristic thought. Rather, the point is that contemporary use of the *tabarru'–mu'āwada* dichotomy would benefit from the nuances of its classical origins, including those embedded in al-Qarāfi's formulation, so that contemporary discourse is better aligned with the Islamic moral-juristic economy. To recover those often-neglected nuances, it is useful first to observe how Ḍarīr introduces the dichotomy and then how al-Qarāfi himself explains it.

Ḍarīr's distillation of this dichotomy from al-Qarāfi, in his seminal study of *gharar*, is concise enough to cite verbatim. He opens a chapter titled "The Effect of *Gharar* in Gratuitous Contracts," and, under the subheading "The Mālikī School," writes: "The Mālikī school is distinguished from the other schools by adopting a general rule concerning *gharar* in gratuitous contracts, namely: all gratuitous contracts are unaffected

38 EL-GAMAL, *supra* note 8, at 58.

39 E.g., *Cambridge Muslim College BA (Hons) in Islamic Studies: Module Specifications Year 2*, at 26 (Key reading list) https://www.cambridgemuslimcollege.ac.uk/wp-content/uploads/2021/06/Modules-Specifications-Year-2_Last-version.pdf (last visited Feb. 27, 2026).

40 ḌARIR, *supra* note 31, at 525–26.

by *gharar* in their validity. Al-Qarāfī articulated this rule explicitly, stating [...].” Ḍarīr then reproduces al-Qarāfī in a shortened, slightly adjusted excerpt. Immediately thereafter, without further analysis, he adds a subheading—“Ibn Taymiyya agrees with the Mālikīs”—and closes with a brief restatement of the *tabarru‘-mu‘āwada* framing.⁴¹ The brevity suggests that Ḍarīr regarded al-Qarāfī’s formulation as sufficiently self-explanatory. It is therefore appropriate to turn to al-Qarāfī’s text itself.

SECTION 3: AL-QARĀFĪ’S DISTINCTION: THE CLASSICAL ANCHOR OF A MODERN DICHOTOMY

The Mālikī jurist al-Qarāfī sets out 274 legal distinctions in his celebrated work *al-Furūq*. He treats *tabarru‘-mu‘āwada* under Distinction 24 in a passage of about 377 words. The analysis is neither cursory nor exhaustive, a mid-range treatment that nonetheless frames later debate. It is worth citing the pertinent portions in his own terms. He writes:

The twenty-fourth distinction between (i) the rule for dispositions where unknowns (*jahālāt*) and excessive uncertainty (*gharar*) are operative, and (ii) the rule for those where they are not. Sound *ḥadīths* report the Prophet’s prohibition of the sale of *gharar* (*bay‘ al-gharar*) and of the unknown (*bay‘ al-majhūl*). Scholars then differed: some generalized [the ban] across all dispositions, such as Shāfi‘ī [...] while others—namely Mālik—drew a distinction between:

(a) the rule concerning what *gharar* and *jahāla* must be avoided in, namely:

1. dispositions involving bargaining (*bāb al-mumākāsāt*);
2. dispositions designed to grow wealth (*al-taṣarrufāt al-mūjiba li-tanmiyat al-amwāl*); and
3. those intended for wealth acquisition (*mā yuqṣad bihī taḥṣīluhā*); and

41 ḌARĪR, *supra* note 31, at 525–26.

(b) the rule concerning what *gharar* and *jahāla* need not be avoided in—namely what is not intended for that purpose.

Mālik divides dispositions into three classes: two polars and a middle.

Class 1—pure exchange (*mu'āwada širfa*), so that [*gharar* and *jahāla* are] avoided here, except what customary necessity tolerates. [...]

Class 2—pure gratuity (*ihsān širf*): [dispositions] not intended to grow wealth, such as almsgiving (*ṣadaqa*), gift (*hiba*), and release/waiver (*ibrā'*). These dispositions do not aim at wealth-growth; if they fail to reach the beneficiary, the benefactor suffers no loss, *because he paid nothing* [emphasis added] (*fa-'in-nahu lam yabdhul shay'an*)—unlike Class 1, where, if it fails through *gharar* and unknowns (*bi'l-gharar wa'l-jahālāt*) (i.e., where if the exchange fails to yield the object of exchange—because the object is indeterminate, unavailable, or cannot be delivered as contemplated), the money paid as its counter-value is lost (*dā'a al-māl al-mabdhūl fi muqābalatihi*); hence the *sharī'a* barred unknowns there. Pure *ihsān* entails no such loss; therefore, legal wisdom and the law's encouragement of *ihsān* broaden it, permitting both known and unknown Thus, if one donates a runaway slave, it is valid: he may be found and yield benefit; if not found, *the donor loses nothing, having paid nothing* [emphasis added].

Class 3—marriage (*nikāh*) as the middle: In one respect, money is not the objective in [the marriage contract]; its aims are affection, harmony, and repose, which suggests allowing *gharar* and *jahāla* [in *mahr*—obligatory marital dower payment]. In another respect, the Lawgiver conditioned it on wealth, [quoting the Qur'ānic verse] “that you seek [marriage] with your wealth,” which suggests barring *gharar* and *jahāla*. Balancing these, Mālik allows slight *gharar* but not major: e.g., an unspecified

slave (*‘abd min ghayr ta’yīn*) or a standard room of a house (*shūrat bayt*) are allowed by reference to customary median standards; but not a runaway slave (*‘abd ābiq*) or a stray camel (*ba’īr shārid*), which lack a governable standard⁴²

My analysis of the foregoing excerpt from al-Qarāfī invites a reconsideration of the two meta-assumptions identified earlier in this section, (1) the taxonomic lineage and authenticity of the *tabarru’-mu’āwada* dichotomy and (2) its transposability to *takāful*, by bringing to light three clarifying nuances, in order: first, al-Qarāfī privileges functional three-point criteria over nomenclature, and those criteria are amply substantiated by the canonical Mālikī source *al-Mudawwana*; second, while al-Qarāfī’s own framing is dichotomous, he attributes to Mālik a more nuanced tripartite scheme; third, the tolerance of *gharar* in pure gratuitous contracts rests on no-paid-value at risk, unlike premium-based *takāful*.

*Features, Not Labels: al-Qarāfī’s
Three Tabarru’ Disqualifiers*

By privileging functional criteria over nomenclature, al-Qarāfī mitigates terminological slippage. Although his formulation comes close to the familiar binary of *mu’āwada* and *tabarru’*, his operative rule is feature based: three diagnostic markers—bargaining, wealth-growth, and wealth acquisition—delineate the divide. Accordingly, he treats a disposition exhibiting any of these exchange-characteristics as onerous, whether labelled *tabarru’* or *mu’āwada*.

Al-Qarāfī did not introduce this triad *ex nihilo*; instead, he synthesized it from established Mālikī sources. While al-Qarāfī did not supply citations, reflecting the scholarly practice of his time, a careful reading of his juristic extrapolation permits a plausible reconstruction of its sources and logic. As to the first criterion—*mumākasāt* (dispositions involving bargaining)—a

42 1 SHIHĀB AL-DĪN AL-QARĀFĪ, *AL-FURŪQ: ANWĀR AL-BURŪQ FĪ ANWĀ’ AL-FURŪQ* 276–77 (1st ed. Dār al-Kutub al-‘Ilmiyya 1418/1998).

portion of its doctrinal footing may obtain from the following passage of *al-Mudawwana*: “It has reached me that the Messenger of Allah (ﷺ) prohibited all forms of selling the unseen (*bayʿ al-ghayb*) in all that people trade among themselves (*yudīruh al-nās baynahum*).”⁴³ The verb in the report is *adāra* (to circulate, manage, turn), which the Qurʾān uses in a commercial setting: *illā an takūna tijāratan ḥāḍiratan tudīrūnahā baynakum*.⁴⁴ While the word does not, by itself, denote bargaining, its usage signals reciprocal circulation of value, i.e., a commutative exchange.

The second criterion—wealth-generation or profit-seeking—appears inferable from the following excerpt in which Mālik prohibits contributing unrefined gold or silver as capital in a partnership. He requires capital to consist of standardized minted dinars or dirhams, as unstandardized raw metal introduces *gharar* and invites valuation disputes.

I [i.e., Saḥnūn, transmitter of the *al-Mudawwana*] said: What is your view regarding uncoined silver and gold (*naqr*)—is *qirāḍ* [investment partnership] valid with them [as capital contribution of a partner]? He [ʿAbd al-Raḥmān b. al-Qāsim, a student of Mālik] said: I asked Mālik about this, because some of our companions had informed us that Mālik had shown leniency in the matter. Al-Layth [b. Saʿd], however, used to say: *qirāḍ* with them is not permissible. He would strongly disapprove of it and say: *qirāḍ* is valid only with minted dinars and dirhams. So, I asked Mālik about it, and Mālik said to me: *qirāḍ* is not valid with raw gold and silver.⁴⁵

The above passage is worth citing verbatim because it records a contemporaneous perception—prevalent then, as now—of Mālik’s relative leniency regarding *gharar*. Yet the exchange also evidences the balance of his position: despite that reputation, he did not permit *gharar* in dispositions meant for wealth-generation such as investments, where knowing the precise amount

43 3 MĀLIK, *supra* note 18, at 254.

44 Qurʾān 2:282.

45 3 MĀLIK, *supra* note 18, at 630.

of a partner's capital contribution is imperative for investment contract validity.

The third criterion, wealth acquisition, is likewise supported by the following passage, which invalidates employment with outcome-contingent wages on account of *gharar*. Employment checks this third feature because it is neither trade nor wealth-growth but acquisition of wealth through labor.

I said: What if I rent a mount from a man on the condition that he deliver me to such-and-such a place by such-and-such a day; otherwise, he gets no wage? He said: Mālik judged this invalid, because it stipulates a condition under which one does not know what wage will be due; this is *gharar*—one does not know whether the wage will be taken in full or vanish entirely, so he may end up with nothing.⁴⁶

Another contract that exhibits wealth acquisition is the “compensatory gift” (*hibat al-thawāb*), which, though free of trade, bargaining, and money-growth, still yields wealth acquisition and therefore triggers *gharar*.

I inquired: May a runaway slave be sold by his owner while still in a state of flight? He responded: Mālik ruled that such a sale is impermissible. I further inquired: If a person gifts a runaway slave, is the gift legally valid? He responded: If the gift is not in exchange for consideration, then it is valid according to Mālik. However, if it is given with the expectation of reciprocal compensation, then it is invalid according to Mālik, on the basis that a compensatory gift [*hiba li-thawāb*] constitutes a form of sale (*bayʿ*), and the sale of a runaway slave is invalid, so is the compensatory gift.⁴⁷

The preceding passage is instructive: it contrasts a true gift with a compensatory gift and shows that *gharar* operates in the latter

46 3 *id.* at 481.

47 4 *id.* at 462.

but not the former, because the compensatory gift entails wealth acquisition, the third feature in al-Qarāfi's three-feature test. A parallel comparison, consistent with the same framework, appears below where Mālik allows and even binds lot-drawing in *qisma* (apportionment) but prohibits it in sale. The rationale is that *qisma* merely allocates pre-owned undivided shares among partners, whereas sale initiates ownership for a non-partner. Put differently, *qisma* lacks bargaining, money-growth, and wealth-acquisition, thus tolerating *gharar*.

I said: Suppose two men inherited houses or merchandise—or bought them—and the divider apportioned them between them and then drew lots; when one man's lot came out he said, 'I don't accept this' Do you regard this as risk-taking (*mukhāṭara*) [i.e., *gharar*], or is the share that came out for him binding or not? He said: That is binding for him according to Mālik. I said: Why did Mālik bind him to this while you do not allow this in sales and deem it risk-taking? ... Why did he permit it in *qisma*? He said: Because division by lot, according to Mālik, is not a sale; and division differs from sales in some situations according to Mālik. In division, these people were partners; in a sale, the buyer is not a partner with the seller.⁴⁸

But Mālik's leniency in allowing *gharar* in *tabarru'* (e.g., a true gift) or in dispositions that fail al-Qarāfi's three-feature test (e.g., *qisma*) must be balanced by his strictness toward aleatory arrangements. A revealing case is his voiding of a last-survivor clause in a tontine-like joint trust, along with similar wager-style agreements, expressly on grounds of *gharar*. Notably, the text shows that appeals to the *ḥadīth*-derived maxim that "Muslims are bound by their stipulations" were already made in Mālik's time⁴⁹—just as today's *takāful* discourse does—yet Mālik's categorical ruling makes clear that the maxim does not extend to wager-like instruments.

⁴⁸ 4 *id.* at 288.

⁴⁹ ABŪ DĀWŪD, SUNAN ABĪ DĀWŪD, *ḥadīth* 3594, <https://sunnah.com/abudawud:3594> (last visited Mar. 1, 2026).

Mālik was asked about a house jointly owned by two men which they made as a *ḥabs* (endowment) for themselves, on condition that whichever of them dies first, his share shall be held for the benefit of the survivor. Mālik said: 'This is invalid,' because it is *gharar*—they have exposed themselves to a wager: if this one dies, that one takes his share; if that one dies, this one takes his share This is not among the conditions of Muslims, and sales do not validly conclude on such a term.⁵⁰

The foregoing excerpts illustrate a consistent pattern: while Mālik is comparatively lenient about *gharar* in gratuitous dispositions or non-commutative allocations (e.g., a true gift, *qisma*), he is stringent with wager-like or aleatory structures. The categories—not a single catch-all rule—govern the outcomes. I conclude my reading of *al-Mudawwana* with another clear passage that, though framed as a prepayment sale (*salam*), maps directly onto insurance: it treats charging a fee for a stand-alone financial guarantee without any delivered good or service as impermissible and explains the prohibition in wager terms.

I said: Is it permissible for me to engage in *salam* (prepayment contract) for a specific, existing commodity ... and to defer taking possession until a later time? He said: No I said: Why? ... He said: Because, according to [Mālik], this involves *gharar* I said: What if the buyer does not advance the payment? He said: Then the *salam* contract is invalid anyway, and it becomes a speculative wager Ashhab said: It is not permissible because ... a portion of the purchase price is effectively compensation for the seller's guarantee, and that is impermissible because: Guarantees should not have a price ... as such a transaction is *gharar* and gambling (*qimār*). If the guarantor knew that the commodity would perish ... he would never agree to guarantee it for even double the payment he received. And if the beneficiary of the guarantee knew the commodity would remain safe,

50 2 MĀLIK, *supra* note 18, at 467–68.

he would never agree to pay the guarantor even a single dirham for it. If the commodity remains safe, the guarantor takes the beneficiary's money unlawfully, giving nothing in return. But if it perishes, the guarantor must compensate for it from his own property, despite never owning the goods, having no proprietary claim to them, and having received no benefit from them at all, not as a porter nor a worker.⁵¹

The foregoing analysis urges a refinement of the first meta-assumption about taxonomic lineage, shifting the focus from contract labels of *mu'āwada* and *tabarru'*, as commonly assumed, to functional features, as authentically transmitted. Assessing the second meta-assumption of transposability, a mapping of *takāful*'s features to al-Qarāfi's three *tabarru'* disqualifiers indicates that a typical *takāful* engages all three, albeit to varying degrees. While bargaining is limited in retail *takāful* policies that are largely contracts of adhesion with standardized take-it-or-leave-it terms, institutional and large-account placements involve negotiated pricing, individually negotiated riders or endorsements (adjusting perils, limits, deductibles, or adding additional insureds/loss payees etc.) and inter-operator competition. Wealth growth appears in accumulation and investment of pooled funds and profit shares. Wealth acquisition appears in a priced, legally enforceable claim to indemnity within defined perils and operator fees. On al-Qarāfi's calibration, these features place *takāful* at least in the hybrid middle (*wāsiṭa*); in many commercial *takāful* implementations, alignment with the exchange pole is plausible. In either case, the doctrinal consequence is not a categorical suspension of *gharar* rules in *takāful* but their graded operation: tolerance of minor or 'urf-typical uncertainties, and constraint upon major uncertainties—a line that Ḍarīr himself acknowledges is difficult to draw,⁵² in which case prudence requires caution.

51 3 *id.* at 77–78.

52 ḌARĪR, *supra* note 31, at 672.

Mālik's Trichotomy vs the Popular Dichotomy

Having analyzed al-Qarāfi's feature-based classification of legal dispositions, I now turn to Mālik's (d. 179/795) classification of the same in his tripartite bipolar-plus-hybrid scheme. It's important to note that while al-Qarāfi distinguishes two rules—thereby effectively positing a dichotomy of contracts without explicitly naming it *tabarru'–mu'āwada*, a label later made explicit by Ḍarīr—he himself attributes to Mālik a more nuanced tripartite scheme rather than a mere dichotomy. The passage is largely self-explanatory, but certain clarifications help bring out its nuances.

Mālik's necessity-justified custom carve-out resists extension to insurance. The first hurdle is methodological: exceptions pass only through *ta'āruḍ wa-tarjīh* (reconciling conflicting proofs and determining the preponderant view), a well-developed juristic rubric that binds the jurist to evaluate competing costs and benefits before exercising judgement. The second obstacle concerns the kind of uncertainty: in *al-Mudawwana* cases where limited vagueness was tolerable within the confines of *mu'āwada* (e.g., portage with an unspecified load or route), *urf* supplies the missing particulars of load, route, place of tender, or time, thereby curing indeterminacy. By contrast, wager-like arrangements remained impermissible despite customary practice (e.g., tontine-style last-survivor clauses) because usage cannot supply who dies first. Likewise in insurance, the indemnity's very existence, quantum, and timing are indeterminate at formation, and neither custom nor actuarial regularities convert them into determinate terms for the insured; the carve-out is therefore difficult to extend to insurance.

Second, on Mālik's tripartite scheme, *takāful* most naturally sits in *mu'āwada*; even if one credits its cooperative spirit and relocates it to the mediating hybrid, this licenses minor *gharar*, not major. Mālik's exemplars are instructive: a stray camel marks major *gharar*, whereas an unspecified camel among many illustrates minor *gharar*.⁵³ This aligns with the broader juristic hierarchy in which uncertainty of existence/

53 AL-QARĀFI, *supra* note 42.

non-existence—with comparable probabilities—constitutes the higher degree of *gharar*, while uncertainties of quantity or delivery time are classed as lesser *gharar* or *jahāla*. Insurance is problematic because it implicates both levels: the insured typically does not know when indemnity will be due, in what amount, or whether it will occur at all.

Third, the above excerpts from *al-Mudawwana*—illustrated by the case of the “compensatory gift” treated the same as “sale” and not as “pure gratuity” or even “the middle hybrid”—underscore that contracts are judged by their substantive reality rather than by their labels.⁵⁴ Tolerating *gharar* in gifts or charity presupposes a truly gratuitous transfer with no reciprocal expectation. Yet in practice, expectations are often mixed or indeterminate: how can we confidently say that contributors or policyholders in an Islamic cooperative or *takāful* are moved primarily by cooperative intent rather than exchange? We therefore need a more knowable line between *tabarruʿ* and *muʿāwada* than asserted motive, a line which Mālik provides.

Mālik’s Rationale for Gharar Tolerance in Tabarruʿ

While Mālik admits parties’ intent into his synthesis—a criterion that, like labels, is prone to elastic self-description—his operative rationale for tolerating *gharar* in pure gratuity is more determinate: the absence of a paid countervalue at risk of loss or non-reciprocation. In pure gratuity transfers (*hiba/ṣadaqa/ibrāʿ*), the benefactor does not expend consideration that could be ‘lost’ if the hoped-for benefit fails to materialize. Notably, the ‘lost paid countervalue’ logic—captured by the contrast between *fa-ʿinnahu lam yabdhul shayʿ* in pure gratuitous dispositions and *ḍāʿa al-mālu al-mabdhūlu fī muqābalatihi* in pure exchange—targets consideration paid by reason of the very contract under review, as evident from *fī muqābalatihi* (“in exchange for it”), not to sunk costs incurred earlier. If one donates a stray camel, the price he once paid to acquire it is historically sunk; no new countervalue is paid to effect the gift, so no consideration is wasted if the camel is never found, hence *gharar* is not harmful

⁵⁴ 4 MĀLIK, *supra* note 18, at 462.

because it is not wasting a paid countervalue. By contrast, in *takāful*—even if indemnification is styled as a gift—participants presently pay priced contributions to bring the arrangement into legal effect; those payments are considerations exposed to non-reciprocation when the uncertain state materializes (e.g., no accident occurs that would justify an insurance claim). Hence, the justificatory premise for broad *gharar* tolerance in pure gratuity—the absence of consideration lost by this transaction—does not hold in *takāful*.

A further indication of limited transposability of *takāful* to the pure *tabarru'* pole appears in Ḍarīr's own conclusion. He acknowledges the doctrinal complexity of insurance, deeming conventional, fixed-premium insurance an onerous contract and therefore impermissible, while treating cooperative insurance as permissible—but not as a polar instance of pure *tabarru'*, or (using Mālik's terms) *iḥsān*; rather, as a *sui generis* donative arrangement. In doing so, he effectively treats cooperative insurance as an exceptional *tabarru'*-type contract rather than locating it squarely within Mālik's bipolar-plus-hybrid taxonomy as a hybrid. He says:

Cooperative insurance, even though it features *gharar*, as in fixed-premium arrangements, is not vitiated by that *gharar* because it falls within the class of gratuitous (*tabarru'*) dispositions, as the donative character is more salient in it than exchange: participants are not seeking profit; their object is mutual assistance in bearing misfortunes. In my view, this is a *sui generis tabarru'* contract—without an exact analogue among the familiar gratuitous contracts in Islamic jurisprudence—just as fixed-premium insurance is a novel commutative contract with its own constitutive elements.⁵⁵

In sum, the rationale that permits *gharar* in *tabarru'* is largely absent in *takāful*. It is perhaps for this reason that jurists like Ḍarīr who laid the doctrinal groundwork for *takāful* often

55 *Id.* at 643.

hedged claims of pure gratuity even while invoking the Mālikī *tabarruʿ–muʿāwada* dichotomy to justify it.

Before concluding, it helps to contrast the doubtful gratuity of many *takāful* designs with a case of pure gratuity where *gharar* is tolerated. Consider employer-matching programs: an employer commits to donate whatever amount employees end up giving within a period. The employer does not know *ex-ante*, the amount, whether employees will give, or when, yet the commitment is permissible as a gratuitous disposition. In Mālik’s scheme, this sits in pure *tabarruʿ*: the employee’s donation does not flow to the employer, nor the employer’s to the employee; the employer’s transfer is a reward directed to a third party, so there is no hidden exchange ‘circulated’ between the two parties. On al-Qarāfī’s screen, the first feature (bargaining/exchange) is absent, and there is no wealth-growth or wealth-acquisition for either side; the matching is therefore permissible. The upshot is that juristic restraint toward insurance-like contractual arrangements does not reflect hostility to innovation in contracts or organizational design, but to innovations that run against Islamic moral-juristic principles—chief among them the non-commodifiability of unbundled risk. Innovation that encourages true gratuity remains squarely within that economy.

A gratuitous, gift-based model is not utopian. Civil society philanthropy can substitute for or outperform formal risk-pooling, notably for disaster relief and catastrophic, low-frequency illnesses that often drive demand for insurance.⁵⁶ In Pakistan for instance, given low insurance uptake, non-market solutions have emerged: the Indus Hospital & Health Network, the Sindh Institute of Urology and Transplantation, and the Shaukat Khanum Memorial Cancer Hospital and Research Centre deliver high-cost oncology, hepatology, and nephrology treatment, free of cost for low- and middle-income families, financed chiefly by donations rather than premiums.⁵⁷ These organic solutions

⁵⁶ Humanitarian Outcomes, *Floods in Pakistan: Rethinking the Humanitarian Role* (2022).

⁵⁷ *FAQs*, INDUS DEV. FOUND., <https://indushospital.ca/faqs/> (last visited Feb. 27, 2026); *Donate*, INDUS HOSP. & HEALTH NETWORK, <https://donate.indushospital.org.pk/> (last visited Feb. 27, 2026); Mirza Naqi Zafar & Syed Adibul Hasan Rizvi, *Providing “Free” Access to Dialysis and Transplant to the Disfranchised: A*

risk displacement once *takāful* becomes prevalent, and it would not be a linear substitution of donations for premiums at an institutional level but a self-reinforcing reconfiguration of the moral economy at an anthropological level. Not just patterns of giving and receiving, but our thoughts and habits would fundamentally shift: from risk-conscious vigilance to risk-blind negligence, from strategic planning to impulsive risk-taking, from productive investment to the unproductive purchase of illusory protection; from spiritually driven charity to commercially motivated gambling; from socially embedded solidarity to socially estranged pooling; from obligation-centered giving to entitlement-centered taking; from integrity-driven savings to compliance-monitored expenditures; and from a value-generating, serve-others charity sector to a value-extracting, self-serving, administrative industry.

One can already observe this last distortion, in which insurance supplants the charity sector, in the United States, particularly after the implementation of the Affordable Care Act (ACA), where insurance markets supplanted philanthropic models of care.⁵⁸ Some may underestimate the impact of this displacement, arguing that the key outcome has not changed: patients previously treated through publicly funded charity are now covered under federally supported insurance programs like those expanded by the ACA. However, this is precisely where the anthropological perspective becomes crucial: the issue lies not in the outcome itself, but in the transformative processes that underlie it. The shift from charity to insurance is not merely a passive logistical change reallocating resources from charity to insurance but a self-reinforcing structural transformation reconfiguring the individual behavior and social contracts that drive

Sustainable Model for Low and Low Middle Income Countries (LMICs), 36 *TRANSPLANT INT'L* 11290 (2023); *Fund Collection: SIUT Launches Online Donation Facility*, EXPRESS TRIB. (July 10, 2013), <https://tribune.com.pk/story/574802/fund-collection-siut-launches-online-donation-facility>; *Financial Assistance Programme*, SHAUKAT KHANUM MEM'L CANCER HOSP. & RESEARCH CTR., <https://shaukatkhanum.org.pk/patients-families/financial-assistance-programme/> (last visited Feb. 27, 2026); *Zakat*, *id.*, <https://shaukatkhanum.org.pk/donors/zakat/> (last visited Feb. 27, 2026).

⁵⁸ Harriet Blair Rowan, *Charity Care Spending By Hospitals Plunges*, KFF HEALTH NEWS (Aug. 13, 2019), <https://kffhealthnews.org/news/charity-care-spending-by-hospitals-plunges/>.

the demand for either charity or insurance in the first place. And the cost of this displacement is not merely borne by the direct stakeholders—insurers and insureds, donors and donees—but by society as an interconnected, complex system. These costs include both real and opportunity costs: the real costs of moral hazard, adverse selection, and administrative overhead, and the opportunity cost of eroding the moral-social ecology that sustains community-based support.

If the risk of this displacement is real and empirically observable, it calls into question the common proposal that fully gratuitous charity and semi-gratuitous *takāful* can simply be treated as complementary partners; they are competitors contending for limited resources and societal priorities, each driven by divergent incentives. When choosing between the two, charity emerges as the more efficient and effective solution, despite its inherent limitations. If an Islamic financial product is designed around the concept of unconditional charity or pure *tabarruʿ* and does not exhibit any of the three disqualifying features outlined by al-Qarāfī, either in letter or spirit, the issue of *gharar* would not apply, and the product would be unanimously permissible without doubt.

CONCLUSION

This article has traced the origins of a prevalent justification for *takāful*—that the Mālikī school treats *gharar* as vitiating onerous contracts but tolerable in gratuitous contracts—and recovered its classical moral-juristic nuances to enable the realignment of this purportedly Islamic instrument with its authentic bearings.

Before delving into *gharar*-based doctrinal inquiry, I sought to situate the inquiry within the broader landscape of the insurance problem and its potential solution. Section 1 outlined how insurance is typically debated, how it needs to be examined for better understanding and resolution, and how this inquiry aims to conduct that examination within the constraints of space. After mapping the six salient registers through which insurance is debated, I reasoned why the anthropological lens—focusing on the formation of moral agency and its cascading effects—has

been chosen by our research program, because it encompasses the other registers and addresses not only risk-management but also risk-creation and risk-amplification through human actions. I then identified the *taklīf-dhimma* framework as the *fiqh* analogue of this anthropological lens and explained how it matches the comprehensiveness of the anthropological framework by integrating both micro-level *fiqh* technicalities and macro-level *maqāṣid* reasoning. This, in turn, helped clarify that these micro-level *fiqh* nuances are neither pedantic quibbles nor mere technicalities but small yet critical doctrinal fuses embedded throughout the law that prevent local deviations from cascading into systemic breakdown. They must be understood in their essence and preserved in spirit, as they uphold the broader *taklīf-dhimma* framework, which is essential to social, moral, and political order. I illustrated, through comparative examples, how these nuances are flattened under illegitimate pressures and how *takāful* tends to flourish where such pressures prevail. I concluded by arguing that the solution lies in recovering the social-moral ecology that renders insurance unnecessary. This shift in solution-making—from institution-substitution to society-recovery—tracks the anthropological lens, which foregrounds not only individual moral agency but also the social structures, values, and norms that form, channel, and sustain it within a community.

The discussion in Sections 2 and 3 then shifted to the micro level: my examination of the classical origin of this claim, Distinction 24 of the seventh/thirteenth century Mālikī jurist al-Qarāfī, has shown that the two meta-assumptions behind the received claim require recalibration. I recalibrated the first meta-assumption of taxonomic lineage and authenticity by showing how the prevailing, label-driven *tabarru'–mu'āwada* dichotomy diverges from al-Qarāfī's feature-based test, which classifies a contract as *gharar*-operative whenever it exhibits any of three features: bargaining, wealth-growth, or wealth-acquisition. I discovered two further points, counter to the prevalent view and attributable to Mālik himself: first, that his scheme of legal dispositions for allocating *gharar* operability is tripartite rather than strictly binary; second, that, unlike the indeterminate

appeal to cooperative motive in contemporary discourse, his more objective rationale for permitting *gharar* in gratuitous contracts hinges on the absence of a paid countervalue exposed to loss through *gharar*. I recalibrated the second meta-assumption of transposability by demonstrating that Islamic insurance sits, at best, in the hybrid middle that tolerates minor custom-bounded *gharar* but not major, aleatory uncertainty. To preempt the objection that *sharī'a* compliance stifles innovation, I showed that innovative solutions can emerge within pure gratuitous structures. By briefly analyzing employer matching programs as an example, I argued that the core issue in *takāful* is not innovation as such, but the commodification of risk. I concluded Section 3 by addressing the common conception that insurance and charity can simply co-exist, arguing instead that they often function as competitors for limited resources and societal attention. In low-insurance-uptake contexts such as Pakistan, this raises the risk that existing charity-based arrangements—often more socially embedded and administratively light—may be crowded out by insurance expansion, with potentially significant anthropological distortions.

Having outlined what the inquiry accomplished, I now turn to its limits. I have sought to keep two horizons in view at once: the anthropological problem space that animates the project and the juristic “fine-grained” work through which that problem is pursued. That ambition necessarily carries trade-offs. Accordingly, I have intentionally confined the argument to the genealogy and deployment of the *tabarru'–mu'āwada* dichotomy as attributed to al-Qarāfi. Because the claim under examination is, in the first instance, a textual one, the analysis has proceeded primarily through textual evidence and close reading. The cost of this choice is that the anthropological realities presupposed by those texts remain unelaborated, owing both to space constraints and to the partial irrecoverability of past social realities. Yet even in the absence of that reconstruction, one finding is analytically insightful: despite being separated by roughly five centuries, the eighth-century *Mudawwana* and the thirteenth-century *Furūq* converge on structurally similar conclusions. That cross-temporal convergence suggests that what

is at stake is not merely a local custom or a period-bound policy adjustment, but a more fundamental principle in the juristic grammar of *dhimma* than it may initially appear.

A further limitation is the absence of an explicit reflexive account, along with a sustained, logical deconstruction of the assumptions and premises underpinning *this* inquiry. In particular, I advance the central premise of non-commodifiability of unbundled risk here largely as a warranted inference rather than arguing for it directly on its own terms. These tasks are deferred, not dismissed.

Finally, whether Islamic finance is best understood primarily through a moral economy or a political economy remains contested.⁵⁹ Yet whichever emphasis one adopts, analysis and reform require holding both poles in view: the ethical formation of individual actors and the political-institutional architecture of the system. To describe contemporary *takāful* as purely gratuitous would be misleading; to insist that it should become so would be institutionally naïve. *Takāful's* structural constraints are real, as are the socio-economic ruptures that condition its practice. In such a structural dilemma, clarity itself is a gain, clarity not only about how we might get “there,” but also about how we ended up “here.” Reform, in this setting, is a fraught and constraint-laden terrain, where the journey matters more than the destination. What matters, then, is to remain *on the path*, to see the problem clearly and to pursue solutions earnestly.

59 For example, compare Asutay's genealogy, which situates Islamic finance as the institutional expression of modern Islamic Moral Economy currents emerging in the late 1960s–early 1970s, with El-Gamal's account, which treats the industry's rise as substantially state-sponsored and politically motivated (petrodollar-backed “capitalist Islamism”) rather than primarily a moral-economic project. Mehmet Asutay, *Conceptualising and Locating the Social Failure of Islamic Finance: Aspirations of Islamic Moral Economy vs the Realities of Islamic Finance*, 11 *ASIAN & AFR. AREA STUD.* 93 (2012); Mahmoud A. El-Gamal, *Working Paper: “Islamic Finance” After State-Sponsored Capitalist-Islamism* (Rice Univ. Baker Inst. for Pub. Pol'y, Dec. 2017), <https://www.bakerinstitute.org/sites/default/files/2018-02/import/elgamal-islamicfinance-dec2017.pdf>.

BEYOND CONSENT: SOCIAL COERCION, GENDERED
OBLIGATION, AND INHERITANCE GIFTS IN LATE
MĀLIKĪ *FATWĀS* FROM THE MOROCCAN HIGHLANDS

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Abstract

In this article, I examine how Mālikī jurists in the Moroccan Atlas confronted a recurring practice in which women renounced their Qur'ānic inheritance shares in favor of male kin through ostensibly voluntary transfers. I situate these renunciations within a moral economy of family cohesion, modesty, and communal landholding, in which women's proprietary claims were reframed as threats to patrilineal solidarity. Against this background, I analyze how late Mālikī nawāzil developed evaluative tools for distinguishing formal compliance from legally operative riḍā (genuine consent) under conditions of social pressure. The study centers on a fatwā by Shaykh al-Kīkī (d. 1185/1772), who invokes the makhzan/sība divide to argue that consent produced in tribal settings marked by customary compulsion and weak judicial enforcement cannot be treated as legally dispositive. Through a close reading of al-Kīkī's reasoning alongside earlier Mālikī discussions of ikrāh (coercion) and consent, I show how Maghribī jurists rendered non-physical pressures legally salient. By foregrounding the jurisprudential significance of political geography and rural legal practice, I offer an internally grounded account of how Islamic law could accommodate custom while delimiting it when it undermined protected rights.

Keywords: compulsion/coercion (*ikrāh*), consent (*riḍā*), custom (*'urf*), endowments (*waqf*), inheritance (*irth, farā'id*), judicial opinions (*'amal*), juristic opinions (*fatwās, nawāzil*), Mālikī jurisprudence, Morocco (Maghrib), women and gender

INTRODUCTION

In the highland tribal societies of Morocco, particularly across the Atlas Mountains, women's "voluntary" renunciation of their inheritance shares in favor of male relatives was a recurring socio-legal pattern.¹ Although such renunciations were typically formalized as *hibas* (gifts or donations) and recognized as legally valid, they often unfolded within a cultural matrix structured by *ḥayā'* (modesty), family cohesion, and the moral economy of tribal solidarity.² I argue that, in these contexts, female renunciation functioned less as an expression of individual will than as a normatively encoded obligation to preserve group unity. This pressure was further reinforced by the economic logic of tribal landholding, in which agricultural property was frequently treated as a male collective asset and female ownership was perceived as a threat to patrilineal land tenure.

In this article, I investigate how Mālikī jurists in the Maghrib, particularly those operating in rural and tribal environments, responded to such cases. The study centers on a remarkable *fatwā* by Shaykh Muḥammad al-Kīkī (d. 1185/1772), in which he invokes the socio-political distinction between *bilād al-makhzan* (lands under state control) and *bilād al-sība* (lands beyond it) to argue that, in tribal zones shaped by customary pressure and assumptions of male communal ownership, women's renunciations of inheritance shares cannot be treated as legally valid. I show that al-Kīkī's position reflects a wider juristic sensitivity, evident among some late Mālikī authorities, to forms of social and symbolic coercion that operate even in the absence of physical duress.³ Read in this light, the *makhzan*/

1 See David S. Powers, *Law and Custom in the Maghrib, 1475–1500: On the Disinheritance of Women*, in *LAW, CUSTOM, AND STATUTE IN THE MUSLIM WORLD: STUDIES IN HONOR OF AHARON LAYISH* 25 (Ron Shaham ed., 2006).

2 For analyses of how modesty and renunciation operate as socially enforced norms within honor-based and subsistence communities, see LILA ABU-LUGHOD, *VEILED SENTIMENTS: HONOR AND POETRY IN A BEDOUIN SOCIETY* (updated ed. 1999); DAVID D. GILMORE, *HONOR AND SHAME AND THE UNITY OF THE MEDITERRANEAN* (David D. Gilmore ed., 1987).

3 Here and throughout, I use "late Mālikī jurists" descriptively and as a periodizing label, not as the technical Mālikī distinction between *al-mutaqaddimūn* and *al-muta'akhkhirūn* (a divide often dated from Ibn Abī Zayd al-Qayrawānī

sība distinction, rooted in Morocco’s political geography, serves as a framework for examining how legal reasoning responds to informal domination under conditions of weak enforcement.

Recent scholarship has begun to address these themes. Notably, Muhammad al-Marakeby analyzes late Ottoman Egyptian Mālikī *fatwās* on women’s inheritance donations, showing how some jurists, such as Muḥammad ‘Illīsh (d. 1299/1882), acknowledged the impact of social norms of modesty and, in certain cases, invalidated women’s renunciations when coercion was evident.⁴ While al-Marakeby’s study demonstrates how Mālikī jurists incorporated social pressure and moral constraint into their doctrinal assessments, it remains situated within an Ottoman Egyptian context marked by relatively stable legal institutions and established mechanisms of adjudication. By contrast, this article turns to the tribal highlands of the Moroccan Atlas, where law and custom often operated amid uneven or intermittent state reach, and where inheritance practices were deeply entangled with political geography, land scarcity, and patriarchal structures.

I base this article on Mālikī *nawāzil* (sg. *nāzila*) texts, which I treat as a genre of *responsa* literature recording juristic interventions in disputes embedded in particular social worlds. Individual *fatwās* constitute the basic units through which this *nawāzil* corpus circulated and acquired meaning. As Jocelyn Hendrickson observes, such *fatwās* are especially valuable for historical research because they served as sites for negotiating moral boundaries and legal change, registering concrete concerns rooted in specific historical and geographic contexts rather than abstract doctrinal principles alone.⁵ In rural and Saharan settings, Ismail Warscheid similarly shows that *nawāzil* collections and practices of *iftā’* (issuing a *fatwā*) were integral to local social and legal life, mediating between juristic authority

[d. 386/996] onward). In this article, I use “late” more narrowly to refer to fifteenth-century and later Maghribī *muftīs* and *nawāzil* writers.

4 Muhammad Al-Marakeby, *Women’s Gifting of Their Inheritance Share to Male Kin Is Void: A Study of Late Ottoman Fatwās on Social Coercion*, 52 BRITISH J. MIDDLE EASTERN STUD. 867, 867–88 (2025).

5 JOCELYN HENDRICKSON, LEAVING IBERIA: ISLAMIC LAW AND CHRISTIAN CONQUEST IN NORTH WEST AFRICA 21–22 (2021).

and communal expectations in landscapes marked by uneven governance.⁶ Building on these insights, I approach the *nawāzil* corpus not simply as a repository of doctrine, but as a record of how Maghribī jurists assessed voluntariness under constraint. Whereas classical *uṣūl al-fiqh* (jurisprudence) often framed coercion (*ikrāh*) through paradigms of physical duress (*mulji*’ vs. *ghayr mulji*’), *nawāzil* literature illustrates how emotional, symbolic, and social pressures could become legally salient, particularly in disputes involving women’s proprietary claims.

In this article, I synthesize insights from scholarship on symbolic power, gender norms, gift exchange, and the social construction of legal agency. I draw selectively on feminist and anthropological approaches to coercion and consent in order to develop a context-sensitive account of legal voluntariness. This approach allows me to reassess women’s inheritance donations not simply as formal legal transactions, but as acts shaped by social expectations and normative pressures that complicate outward expressions of consent.

One of the article’s central contributions lies in examining the jurisprudential distinction between tribal and urban legal sensibilities, which I conceptualize as *fiqh al-sība* (juristic reasoning developed in regions operating beyond effective state enforcement) and *fiqh al-makhzan* (juristic reasoning shaped within settings of stable political authority and institutional adjudication). Although this spatial differentiation has received limited sustained attention in the secondary literature, it helps explain why jurists such as al-Kīkī reached divergent rulings based on social conditions of enforcement rather than on doctrinal disagreement. I argue that Mālikī jurists treated law as a responsive interpretive practice, one capable of confronting informal domination and articulating ethical redress within constrained institutional settings.

6 See Ismail Warscheid, *Nawāzil de l’Ouest saharien (XVIIe–XXe siècles): Une tradition jurisprudentielle africaine*, in *ENCYCLOPÉDIE DES HISTORIOGRAPHIES: AFRIQUES, AMÉRIQUES, ASIES 1274–76* (Nathalie Kouamé, Éric P. Meyer & Anne Viguier eds., 2020); ISMAIL WARSCHIED, *DRIT MUSULMAN ET SOCIÉTÉ AU SAHARA PRÉMODERNE: LA JUSTICE ISLAMIQUE DANS LES OASIS DU GRAND TOUAT (ALGÉRIE) AUX XVIIIe–XIXe SIÈCLES*, 128–54 (2017).

The article is structured in six sections. Section 1 outlines Islamic inheritance law and women’s entitlements in order to clarify what is at stake in cases of “voluntary” renunciation. Section 2 introduces the theoretical landscape of symbolic coercion and social domination. Section 3 develops the distinction between urban and tribal legal reasoning in Morocco as a juristic expression of the broader *makhzan/sība* political order. Section 4 traces juristic treatments of coercion (*ikrāh*), contrasting classical legal theory with the situational reasoning found in the *nawāzil* literature. Section 5 offers a close reading of al-Kīkī’s *fatwā* as the article’s central case study. Finally, Section 6 reflects on how Mālikī jurists, operating under conditions of weak enforcement, recalibrated evidentiary presumptions and standards of validity in order to prevent doctrine from reinforcing structural vulnerability.⁷

SECTION 1: ISLAMIC INHERITANCE LAW, WOMEN’S SHARES, AND THE PROBLEM OF LANDED PROPERTY

To understand why women’s “voluntary” inheritance renunciations recurred so persistently in the Moroccan Atlas, it is necessary to begin with the internal architecture of Islamic succession and the tensions that arise when inheritance is closely tied to landed property. Islamic inheritance law operates through a structured hierarchy: heirs with fixed Qur’ānic shares (*ahl al-farā’id*) take priority, while agnatic heirs (*al-‘aṣaba*) inherit only what remains.⁸ In Sunnī law, Qur’ānic heirs constitute a defined category of relatives, including spouses, parents, daughters, and certain siblings, whose entitlements are specified as fixed shares within the succession scheme.⁹

This structure marked a decisive departure from pre-Islamic inheritance practices in Arabia, which were largely

7 Unless otherwise indicated, all translations from Arabic to English are my own.

8 See the Prophetic report: “Assign the prescribed shares (*al-farā’id*) to those entitled to them; whatever remains goes to the nearest male agnate (*awlā rajul dhakar*).” 8 MUHAMMAD B. ISMĀ’IL AL-BUKHĀRĪ, *Saḥīḥ al-Bukhārī*, 423 (Dār al-Ta’ṣīl 2012).

9 N.J. COULSON, *SUCCESSION IN THE MUSLIM FAMILY* 35 (1971).

governed by agnatic principles privileging adult male kin capable of bearing arms and routinely excluding women and minor children.¹⁰ A well-known report concerning Sa‘d b. al-Rabī‘ (d. 3/625) illustrates this transformation. Upon Sa‘d’s death, his brother initially claimed the estate as the nearest male agnate, leaving the widow and daughters without a share. The Prophet’s ruling reversed this outcome by assigning two-thirds of the estate to Sa‘d’s daughters and one-eighth to their mother, leaving the agnatic heir only the remainder.¹¹

The significance of this report lies in what it reveals about the priority logic of Islamic succession. Fixed Qur’ānic shares operate as enforceable entitlements that structure the order of inheritance, while agnatic claims are confined to what remains once those shares are satisfied. Through this arrangement, succession integrates fixed rights within an agnatic environment without collapsing into lineage-based monopolization.¹²

Women’s inheritance thus forms an integral component of the legal design of Islamic succession as a system of enforceable rights. Sunnī law characterizes the Qur’ānic heirs’ shares with specificity and internal calibration through doctrinal rules governing conditional restriction, relative exclusion, and residue.¹³ A wife, for instance, inherits one-eighth in the presence of descendants, while daughters inherit one-half (for a single daughter) or two-thirds (for two or more) in the absence of sons; these allocations change when a son is present.¹⁴ Within this framework, women inherit property, including land, as legally recognized heirs, and the succession scheme presumes their capacity to hold inheritable assets in their own names.¹⁵

The tension, then, arises less from Islamic inheritance law as such than from its distributive effects in contexts where land functions as the material foundation of a patrilineal corporate

10 *Id.* at 30.

11 *See* 3 MUHAMMAD B. ‘ISĀ AL-TIRMIDHĪ, AL-JĀMĪ‘ AL-KABĪR (SUNAN AL-TIRMIDHĪ), 598 (Bashshār ‘Awwād Ma’rūf ed., Dār al-Gharb al-Islāmī 1996).

12 COULSON, *supra* note 9, at 30; *see also* Richard Kimber, *The Qur’anic Law of Inheritance*, 5 ISLAMIC L. & SOC’Y 291, 291–92 (1998).

13 COULSON, *supra* note 9, at 35–38.

14 *Id.* at 41.

15 *Id.* at 40.

estate. David Powers frames this friction as a tension between “the science of the shares” and local inheritance customs, particularly where property remains under the control of the male patriline.¹⁶ In his account, two recurring pressures drive this tension: the progressive fragmentation of property through fractional succession and the perceived risk of alienation through “out-marrying females.”¹⁷

Powers further suggests that Muslim communities historically responded to these pressures through a range of strategies. Some were social, including kinship arrangements such as cousin marriage that limited dispersal without openly contesting Qur’ānic succession. Others were legal, relying on techniques that shaped inheritance outcomes through lifetime transactions, including gifts, nominal sales, and family endowments. Still others bypassed “the science of the shares” altogether by distributing property according to local custom.¹⁸ For my purposes, the analytical value of this typology lies in how it situates women’s “inheritance gifts” within a broader continuum of practices through which families sought to reconcile Qur’ānic entitlements with locally compelling imperatives of preserving land as an undivided family asset.

This dynamic helps explain the salience of *hiba* in rural settings. Because the rules of succession take effect only upon death (or during terminal illness), lifetime dispositions provide a legal space for shaping devolution in advance.¹⁹ *Hiba* thus functions as a central mechanism of estate arrangement.²⁰ The ethical stakes sharpen, however, where formally valid transfers conceal asymmetries of power and obligation, especially when women are pressured to renounce their shares to preserve family cohesion or to avoid the social costs of disrupting patrilineal landholding.²¹

16 Powers, *supra* note 1, at 20.

17 *Id.* at 21.

18 *Id.*

19 COULSON, *supra* note 9, at 195.

20 See David S. Powers, *The Islamic Inheritance System: A Socio-Historical Approach*, 8 ARAB L. Q. 13, 20–24 (1993).

21 One useful conceptual frame for this dynamic is Robert E. Goodin’s notion of “asymmetrical exits,” which captures how apparent consent may arise in contexts where the social and economic costs of refusal are unevenly distributed. See

At this point, it is important to attend more closely to the normative environments in which such transfers occurred. In the Atlas and adjacent regions, customary norms operated not merely as informal social expectations but as articulated normative orders, complete with local institutions, procedures, and vocabularies. As Michael Peyron notes, in the Middle Atlas, customary law was known in Tamazight as *azerf*, while Arabic-speaking communities referred to it as '*urf*.'²² Further south, another term appears, *ta'qqit*, and communities could also invoke custom through descriptive expressions such as "the path of the ancestors."²³ This terminology matters for my purposes because it clarifies how communal pressure surrounding inheritance could be experienced by participants within these communities as law-like rather than as interpersonal coercion alone. When women renounced shares through *hiba*, they were not necessarily responding to isolated demands by individual male relatives but navigating a normative landscape in which land was symbolically tied to collective honor and to the survival of the patrilineal unit, conditions that could shape the meaning of apparent "consent" in ways that jurists later sought to assess.

A brief comparative note sharpens the stakes of landed inheritance beyond Morocco. Beshara Doumani's account of family *waqfs* (pious endowments) in Ottoman Nablus shows how endowers sought to constitute the family as a corporate entity, placing a premium on keeping the material base consolidated within the male line.²⁴ This logic carried clear gendered implications: because family endowers viewed women as potential "transmitters of property," they were likewise a source of

Robert E. Goodin, *Women's Work: Its Irreplaceability and Exploitability*, in *ILLUSION OF CONSENT: ENGAGING WITH CAROLE PATEMAN* 119–38 (Daniel I. O'Neill, Mary Lyndon Shanley & Iris Marion Young eds., 2008).

²² Michael Peyron, *Customary Law and Women's Rights among the Imazighen of the Middle Atlas and Southeast Morocco*, in *WOMEN AND SOCIAL CHANGE IN NORTH AFRICA: WHAT COUNTS AS REVOLUTIONARY?* 290 (D.H. Gray & N. Sonnevild eds., 2018).

²³ *Id.* at 290.

²⁴ Beshara Doumani, *Endowing Family: Waqf, Property Devolution, and Gender in Greater Syria, 1800 to 1860*, 40 *COMPARATIVE STUD. SOC'Y & HIST.* 3, 3–41 (1998).

possible fragmentation of family wealth, what Doumani strikingly describes as the “Achilles Heel” of the corporate unit.²⁵ I draw on this Ottoman material as a comparative lens to sharpen a problem attested in Maghribī *nawāzil*: while Qur’ānic inheritance allocates property through enforceable entitlements, local strategies for preserving wealth and authority often privilege patrilineal concentration, rendering women’s capacity to inherit a recurring focal point of anxiety.²⁶

Two further clarifications follow from this discussion. First, tensions surrounding landed inheritance do not negate women’s formal legal capacity to inherit. Read in this light, renunciation appears less as the simple forfeiture of a right than as a negotiated practice framed in terms of security and belonging. Second, and crucial for the arguments I develop in subsequent sections, assessing the legal validity of such renunciations cannot rest on outward form alone. Even where parties execute a transfer through a recognizable legal instrument such as *hiba*, the juristic question turns on whether the act reflects meaningful *riḍā* (consent) or merely formal compliance. As Brinkley Messick has shown in another doctrinal domain—marriage contracting—jurists were attentive to the instability of consent as a legal indicator when silence, modesty, or fear shaped outward behavior.²⁷ In the Atlas materials I examine below, this concern becomes especially acute in rural and tribal environments, where communal expectations surrounding land and lineage raise the social costs of refusal and render acquiescence “natural,” even when it remains legally contestable.

Taken together, these considerations clarify the problem I pursue in this article. While Islamic inheritance law recognizes women’s claims as enforceable entitlements and

25 *Id.* at 39–40. For a broader perspective, see BESHARA DOUMANI, *Property and Gender*, in *FAMILY LIFE IN THE OTTOMAN MEDITERRANEAN: A SOCIAL HISTORY* 224–74 (2017).

26 See ETTY TEREM, *Refashioning Notions of Gender and Family*, in *OLD TEXTS, NEW PRACTICES: ISLAMIC REFORM IN MODERN MOROCCO* 111–40 (2014) (illustrating, in Moroccan case study, how Qur’ānic inheritance entitlements were rearticulated within strategies of preserving patrilineal property and authority).

27 Brinkley Messick, *Interpreting Tears: A Marriage Case from Imamic Yemen*, in *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW* 162–63 (Asifa Quraishi & Frank E. Vogel eds., 2008).

treats landed property as inheritable wealth, the distributive effects of *farā'id* (Qur'ānic shares of inheritance) can generate tension in settings where agricultural land is imagined as the patrimony of a patrilineal collective. It is within this tension that lifetime transactions, especially *hiba*, emerge as a key site for managing inheritance outcomes before succession takes effect. The central question, therefore, concerns how jurists assessed women's apparent renunciations of property: when such acts reflected legally meaningful *riḍā*, and when jurists instead understood them as shaped by *ikrāh* operating through social and communal pressure.²⁸ The next section outlines the theoretical vocabulary I use to address these non-physical forms of constraint.

SECTION 2: THEORETICAL FRAMEWORK

Women's relinquishment of inheritance shares to male relatives in tribal, highland Moroccan contexts calls for an analytical lens that extends beyond legal doctrine. Although women often carry out such acts through recognizable legal forms, the meanings attached to these transactions emerge within dense social worlds shaped by kinship obligation, reputational discipline, and gendered expectations. This section presents a compact analytical vocabulary for approaching "consent" as a socially mediated condition rather than as a purely interior state.

Pierre Bourdieu's account of symbolic domination provides a useful point of departure. Bourdieu describes domination as operating not only through overt constraint but through the internalization of classificatory schemes that render hierarchy ordinary and legitimate, enabling dominated actors to participate in the reproduction of their own subordination.²⁹ I draw on this framework to shift the analytical focus toward the social

28 For a feminist legal-theoretical perspective on consent, see Kecia Ali, *Just Say Yes: Law, Consent, and Muslim Feminist Epistemologies*, in *Jihad for Justice: Honoring the Work and Life of Amina Wadud* 121–34 (Kecia Ali, Juliane Hammer & Laury Silvers eds., 2012).

29 PIERRE BOURDIEU, *LA DOMINATION MASCULINE* 1–10 (Éditions du Seuil 1998); *Id.*, *OUTLINE OF A THEORY OF PRACTICE* 164–70 (1977).

conditions that narrow the range of imaginable refusal, even in the absence of explicit coercion.³⁰

Anthropological discussions of honor and moral economy illuminate a related dimension of property and inheritance. Julian Pitt-Rivers characterizes honor as publicly recognized moral standing, while James Scott emphasizes the role of reciprocal obligation in communities organized around mutual protection.³¹ Together, these accounts show how disputes over property often unfold as moral tests rather than as contests over abstract entitlements. In the contexts I examine here, I use these insights to explain why asserting a legal right may entail symbolic and social costs that exceed its material value, and why compliance can function as a strategy for preserving belonging and security.

Gender theory further clarifies how normative expectations shape women's conduct within these settings. Judith Butler's account of gender performativity explains how modesty, silence, and deference become stabilized as intelligible signs of "proper" femininity, while Saba Mahmood highlights the ethical meanings that an action may carry within normative structures, even under asymmetrical relations of power.³² I rely on these perspectives to situate women's conduct within moral worlds that remain intelligible to the actors themselves.

An intersectional perspective highlights how these pressures converge. Kimberlé Crenshaw underscores how gendered vulnerability emerges from overlapping structures of authority and marginalization, including kinship discipline, economic dependence, geography, and access to enforcement.³³

30 Carole Pateman observes that "unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of 'consent' in any genuine sense." Carole Pateman, *Women and Consent*, 8 *POL. THEORY* 149, 150 (1980).

31 Julian Pitt-Rivers, *Honor and Social Status*, in *HONOR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY* 21–23 (Jean G. Peristiany ed., 1965); JAMES C. SCOTT, *THE MORAL ECONOMY OF THE PEASANT: REBELLION AND SUBSISTENCE IN SOUTHEAST ASIA* chs. 2–3 (1976).

32 JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 25–34 (1990); SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* 15–22 (2005).

33 Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 *STAN, L. REV.* 1241, 1245–51 (1991).

I apply this framework to the rural settings examined here to show how intersecting constraints heighten the social costs of refusal and render acquiescence more readily legible as socially appropriate.

Marcel Mauss's analysis of gift exchange clarifies the social logic of lifetime transfers. Mauss emphasizes that gifts generate obligations that bind participants within enduring social relations.³⁴ I draw on this account to explain how a transfer may function simultaneously as a legally valid act and as a socially compelled one, where refusal risks rupture, stigma, or exclusion.

Taken together, these approaches provide a focused vocabulary for analyzing consent under non-physical constraint. They highlight symbolic domination, honor-based evaluation, gendered propriety, and moral obligation as forces that shape outward behavior without taking the form of explicit threats. I use this vocabulary to explain why the Mālikī jurists I examine below did not treat *riḍā* as a presumption inferred mechanically from outward compliance but instead scrutinized it in light of social pressure and structural dependence.

This framework serves an instrumental purpose. It functions as a toolbox for reading Mālikī *nawāzil* in their social contexts, where formal legality and lived compulsion intersect in complex ways. In the next section, I turn to the regional jurisprudential settings in which these disputes took shape, with particular attention to the urban–tribal divide and the doctrinal mechanisms through which jurists evaluated custom, obligation, and consent.

SECTION 3: *AL-ʿAMAL AL-SŪSĪ* AND THE LIMITS OF JURISTIC PROTECTION FOR WOMEN'S INHERITANCE

Morocco's regional and political geography shaped divergent trajectories in Mālikī legal reasoning, particularly through the category of *ʿamal*, the authoritative practice of local courts and

34 MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* 13 (W. D. Halls trans., 1990).

communities.³⁵ Far from being a monolithic tradition, Mālikī law in Morocco developed along urban-tribal lines, producing distinct theories of legal obligation, custom, and juristic authority. This divide, rooted in the historical dichotomy between *bilād al-makhzan* (territories under centralized rule) and *bilād al-sība* (zones of tribal autonomy), generated contrasting expectations about what the law could achieve and for whom. Within these shifting landscapes, *al-ʿAmal al-Sūsī* emerged as a dynamic legal tradition—sometimes accommodating patriarchal norms that constrained women’s inheritance rights, sometimes offering flexible tools for adaptation and protection. The tension between these two trajectories, accommodation and juristic protection, frames the analysis that follows.

The French sociologist Jacques Berque described this adaptation of Mālikī legal discourse to Morocco’s social, political, and ecological realities, especially in highland and tribal zones, as the “Moroccanization” of Mālikī law.³⁶ This evolution did not stem from reformist ideology, but from internal shifts within Mālikī jurisprudence, catalyzed by the expanding role of *ʿamal*, understood both as juristic practice and a vehicle for legal localization.³⁷

Over time, jurists distinguished between two forms of *ʿamal*: *al-ʿamal al-muṭlaq*, a generalized legal habitus applicable across Mālikī territories, and *al-ʿamal al-maḥallī*, a regionally specific set of normative practices shaped by local conditions.³⁸ While the former remained relatively stable, the latter proved more responsive to local contexts, becoming a key vehicle of legal adaptation, especially during the Marīnid (seventh–ninth/thirteenth–fifteenth centuries), Waṭṭāsīd (ninth–tenth/fifteenth–sixteenth centuries), and Saʿdīan (tenth–eleventh/sixteenth–seventeenth centuries) periods, giving rise to

35 On *ʿamal* in Mālikī jurisprudence, particularly in the context of Medina legal theory, see YASIN DUTTON, *THE ORIGINS OF ISLAMIC LAW: THE QURʿAN, THE MUWAṬṬAʿ AND MADINAN ʿAMAL* 145–68 (1999).

36 JACQUES BERQUE, *LES NAWĀZIL EL MUZĀRAʿA DU MIʿYĀR AL-WAZZĀNĪ* 21 (Éditions Félix Moncho 1940).

37 ʿUMAR AL-JIDĪ, *AL-ʿURF WAʿL-ʿAMAL FĪ AL-MADHHAB AL-MĀLIKĪ WA-MAFHŪMUMĀ LADĀʿ ULAMĀʿ AL-MAGHRIB* 341–49 (Maṭbaʿat Faḍāla 1982).

38 *Id.* at 350–52.

distinct legal sub-traditions in Fez, Marrakesh, Sūs, and the Atlas Mountains.³⁹

A key turning point occurred in the late fifteenth century, following the fall of Granada and the influx of Andalusian jurists into Morocco, particularly Fez, which emerged as a center of legal consolidation where jurists systematized and disseminated local precedent, *al-ʿAmal al-Fāsī*. What began as an urban jurisprudence gradually acquired quasi-universal authority, governing matters such as irrigation, market regulation, and inheritance.⁴⁰

In southern Morocco, particularly in Sūs and Darʿa, jurists developed parallel traditions attuned to tribal realities and decentralized enforcement. Scholars like Aḥmad b. Muḥammad al-ʿAbbāsī al-Samlālī (d. 1152/1740) and Abū Zayd ʿAbd al-Raḥmān al-Jishtimī (d. 1269/1853) produced collections of *nawāzil* documenting these responses.⁴¹ This corpus gave rise to *al-ʿAmal al-Sūsī*, a legal tradition grounded in the needs and customs of rural and tribal communities.⁴²

One of the clearest expressions of this divergence between northern urban jurisprudence and southern tribal legal practice is the doctrine of *al-kadd waʿl-saʿāya* (the labor-based marital property claim), which granted Sūsī women a share in marital wealth based on their labor contributions, both agricultural

39 See AL-MAHDĪ AL-WAZZĀNĪ, TUHFAT AKYĀS AL-NĀS BI-SHARḤ ʿAMALIYYĀT FĀS 12 (Hāshim al-ʿAlawī al-Qāsimī ed., Wizārat al-Awqāf waʿl-Shuʿūn al-Islāmiyya 2001).

40 *Id.* at 13–16. For further discussion, see Ari Schriber, *Judicial Practice as Islamic Law: The ʿAmal of Fez in Post-Classical Mālikī Legal Tradition*, 78 ASIATISCHE STUDIEN – ÉTUDES ASIATIQUES 173 (2024).

41 ʿABD AL-SALĀM AL-ʿASRĪ, NAZARIYYAT AL-AKHIDH BI-MĀ JARĀ BIHI AL-ʿAMAL FĪ AL-MAGHRIB FĪ ITĀR AL-MADHHAB AL-MĀLIKĪ 133 (Wizārat al-Awqāf waʿl-Shuʿūn al-Islāmiyya 1996). See also IHYĀ AL-TĀLIBĪ, AL-TURĀTH AL-NAWĀZILĪ WAʿL-QADĀʾĪ BIʿL-JANŪB AL-MAGHRIBĪ: MANĀHIJUHU WA-MAŠĀDIRUHU 48–52 (Dār Nashr al-Maʿrifa 2020).

42 Recent editions of *nawāzil* from the Sūs region reflect the formation of *al-ʿAmal al-Sūsī* and offer valuable material on women’s legal status, an area that deserves scholarly attention. See, e.g., NAWĀZIL SĪDĪ ʿABD ALLĀH BIN YAʿQŪB AL-SAMLĀLĪ, (al-Ḥasan b. Mukhtār ed., Wizārat al-Awqāf waʿl-Shuʿūn al-Islāmiyya 2022); AJWIBAT AL-FAQH AL-ḤUDAYKĪ (Rashīd al-Yazīdī ed., Wizārat al-Awqāf waʿl-Shuʿūn al-Islāmiyya 2024).

and domestic.⁴³ This doctrine stood in contrast to the norms of Fez, where such claims were routinely denied in urban judicial practice. Affirmed by southern jurists, the doctrine shows how *al-‘Amal al-Sūsī* could at times restructure legal outcomes to enhance, rather than restrict, women’s economic rights, a contrast that sharpens when we turn to inheritance practices.⁴⁴

Another salient example of this divergence concerns the use of monetary disciplinary measures (*‘uqūba māliyya*) in judicial practice. While jurists in Fez generally rejected them for lacking textual basis and falling outside *ḥadd* punishments (fixed Qur’ānic criminal penalties) or *ta’zīr* (discretionary punishments), scholars in Sūs often accepted them as legitimate tools of social control.⁴⁵ Crucially, this acceptance was not extralegal pragmatism; rather, jurists drew on a non-dominant Mālikī opinion allowing monetary punishments as a form of *ta’zīr* in contexts in which corporal enforcement was not feasible.⁴⁶ In the tribal regions of the south, where state power was weak, such reasoning served as a context-sensitive adaptation, another instance of *al-‘Amal al-Sūsī* privileging communal stability over strict adherence to legal doctrine.⁴⁷

43 Ibn ‘Arḍūn (d. 992/1584) issued a *fatwā* in which he granted mountain women a labor-based share, endorsed in Sūs but rejected in Fez; his argument anticipates later doctrines like *al-kadd wa’l-sa’āya*. See 2 AL-MAHDĪ AL-WAZZĀNĪ, AL-NAWĀZIL AL-SUGHRĀ, 284–87 (Wizārat al-Awqāf wa’l-Shu’ūn al-Islāmiyya 1992).

44 Disputes over *al-kadd wa’l-sa’āya* appear in dedicated sections of Sūsī *nawāzil*, often concerning the division of wealth earned through spousal labor. Twelve such cases appear in NAWĀZIL SĪDĪ ‘ABD ALLĀH B. YA’QŪB AL-SAMLĀLĪ, *supra* note 42, at 257–63. See also AL-ḤASAN AL-‘ABBĀDĪ, ‘AMAL AL-MAR’A FĪ SŪS 29–49 (Wizārat al-Awqāf wa’l-Shu’ūn al-Islāmiyya 2021).

45 See further ‘ALĪ B. ‘ABD AL-SALĀM AL-TUSULĪ, AJWIBAT AL-TUSULĪ ‘AN MASĀ’IL AL-AMĪR ‘ABD AL-QĀDIR FĪ AL-JIHĀD 151–63 (‘Abd al-Laṭīf Aḥmad al-Shaykh Muḥammad Ṣāliḥ ed., Dār al-Gharb al-Islāmī 1996); MUḤAMMAD AL-‘UTHMĀNĪ, AL-WĀḤ JAZŪLA WA’L-TASHRĪ‘ AL-ISLĀMĪ: DIRĀSA LI-‘ARĀF QABĀ’IL SŪS FĪ DAW’ AL-TASHRĪ‘ AL-ISLĀMĪ 207–13 (Dār al-Amān 2017).

46 See AJWIBAT AL-FAQĪH AL-ḤUḌAYKĪ, *supra* note 42, at 263.

47 Not all scholars accepted this flexibility. Muḥammad b. Nāṣir al-Drā’ī (d. 1085/1674) condemned Bedouin communities that preferred tribal customs and monetary penalties over *sharī‘a* rulings, describing those people as *‘uṣāt* (sinners) and warning against the normalization of such practices. See AL-AJWIBA AL-NĀSIRIYYA FĪ BA‘D MASĀ’IL AL-BĀDIYA 137 (Abū al-Faḍl al-Dimyāṭī ed., Dār Ibn Ḥazm 2012). See also a parallel position in the *nawāzil* of ‘Abd al-Qādir b. ‘Alī al-Fāsī (d. 1091/1680), who rejected the displacement of *sharī‘a* norms by tribal practice; 2 AL-AJWIBA AL-KUBRĀ, 243 (Jābir b. ‘Alī al-Ḥawsanī ed., Dār Abī Ruqraḳ 2016).

These regional divergences in legal adaptation, between Fez and Sūs, urban and tribal, did not result in the fragmentation of the Mālikī school. On the contrary, the Mālikī *madhhab*, since its articulation by Imām Mālik b. Anas (d. 179/795) himself, grants wide latitude for the use of *urf* (custom), *maṣlaḥa* (public interest), and *siyāsa sharʿiyya* (pragmatic governance), all of which function as internal mechanisms of juristic reasoning.⁴⁸ Thus, jurists in both urban and rural contexts understood their interpretive choices as consistent with the school's methodology, even when they produced dramatically different results.⁴⁹ The spectrum of *amal* thus reflects not a splintering of doctrine, but a pluralistic deployment of Mālikī tools to meet the demands of distinct social environments.

The development of *al-ʿAmal al-Sūsī* was closely tied to the decline of the central *makhzan* and the rise of Saʿdian rule in the south during the sixteenth century.⁵⁰ As the Saʿdians consolidated power, they fostered legal pluralism by forging alliances with tribal and scholarly elites, and by issuing royal decrees (*ḡahīr*) that codified local inheritance practices.⁵¹ Notably, the sultans Aḡmad al-Aʿraj (r. 923–46/1517–39) and Muḡammad al-Shaykh (r. 946–64/1539–57), in coordination with southern jurists, formalized the exclusion of women from inheriting agricultural land by invoking the notion of *fath ʿanwatan* (land taken by force rather than treaty), treating such property as a *waqf* structured to restrict benefit to male kin.⁵² These measures were rigorously enforced, most notably in a *ḡahīr* issued in Dhū al-Hijja 963 (October 1556), and justified

48 4 AL-HAJAWI AL-FĀSĪ, AL-FIKR AL-SĀMĪ FĪ TĀRIKH AL-FIQH AL-ISLĀMĪ, 465 (Ayman Ṣāliḡ Shaʿbān ed., Dār al-Kutub al-ʿIlmiyya 1995).

49 See Schriber, *supra* note 40, at 175–78; TEREM, OLD TEXTS, NEW PRACTICES, *supra* note 26, at 177–80.

50 On the reliance of Saʿdians on southern jurists, particularly those from Sūs, see LUṬFĪ BUSHANTŪF, AL-ʿĀLIM WAʿL-SULTĀN: DIRĀSA FĪ INTIQĀL AL-HUKM WA-MAQAWWIMĀT AL-MASHRŪʿIYYA, NASHʾAT AL-DAWLA AL-SHARIFA FĪ AL-MAGHRIB 79–119 (2d ed. Dār Abī Ruḡraq 2024).

51 *Id.* at 359.

52 *Id.* A similar use of *fath ʿanwatan* to justify barring women from inheriting land appears in Ottoman Egypt. See Muhammad Al-Marakeby, *Could Women Own Agricultural Land? Rethinking the Relationship of Islamic Law and Contextual Reality* (Wāqīʿ), 63 DIE WELT DES ISLAMIS 184, 184–212 (2021).

in royal and juristic discourse through *maqāṣid al-sharīʿa*⁵³ and *maṣlaḥa*-based reasoning.⁵⁴

The convergence of political, legal, and customary authority under Saʿdian rule helped preserve collective estates and stabilize fragile agricultural economies.⁵⁵ In this context, jurists treated custom not merely as a tolerated practice but as a *darūra*, a legal necessity, justifying deviations from Mālikī norms.⁵⁶ Although Qurʾānic inheritance law assigns women fixed shares as a baseline, Saʿdian land-inheritance restrictions effectively reconfigured women’s access to agricultural land through customary and political rationales. These measures, endorsed amid political consolidation, did not reflect the doctrinal core of *al-ʿAmal al-Sūsī* but rather pragmatic accommodations to tribal pressure and land scarcity, in which jurists mobilized legal reasoning to uphold exclusionary norms under conditions of structural constraint, particularly in matters of women’s inheritance.⁵⁷

The logic behind this exclusion was deeply material. In the mountainous south, where arable land and water were scarce, every plot was vital to communal survival.⁵⁸ The fragmentation of ownership through female inheritance was widely perceived within tribal communities as a risk.⁵⁹ Accordingly, jurists and local power-holders deployed legal tools, often shaped more by tribal priorities than by juristic doctrine, to preserve intergenerational and intertribal balance.⁶⁰

53 *Maqāṣid al-sharīʿa* refers to the higher objectives of Islamic law, commonly identified in classical juristic literature as the protection of religion, life, intellect, lineage, and property.

54 BUSHANTÜF, *supra* note 50, at 360.

55 *Id.* at 360.

56 *Id.* On custom as legal exigency rather than autonomous source, see Ahmed Fekry Ibrahim, *Customary Practices as Exigencies in Islamic Law*, 46 *ORIENS* 222, 222–61 (2018).

57 BUSHANTÜF, *supra* note 50, at 361. Muḥammad b. Nāṣir al-Drāʿī (d. 1085/1674) described the Saʿdian inheritance policies as a collapsing edifice upheld by rulers through taxation and custom. See *AL-AJWIBA AL-NĀṢIRIYYA FĪ BAʿḌ MASĀʾIL AL-BĀDIYA*, *supra* note 47, at 163.

58 AHMAD AL-TAWFĪQ, *AL-MUJTAMAʿ AL-MAGHRIBĪ FĪ AL-QARN AL-TĀSĪʿ ʿASHAR: 1850–1912*, at 83–84 (Mohammed V Univ. 1983).

59 *Id.* at 85.

60 BUSHANTÜF, *supra* note 50, at 361–62.

While *'amal* integrated social realities into legal discourse, it could also function to legitimize dominant customary norms, particularly those reinforcing patriarchal or tribal hierarchies. The varied logics of *'amal* across Moroccan regions reveal the shifting thresholds at which women's claims were either absorbed into prevailing custom, negotiated within kin-based norms, or upheld through doctrinal rigor. Such tensions lie at the heart of the present inquiry into the legal treatment of coerced inheritance gifts and the capacity of Mālikī jurisprudence to engage with social domination from within its own tradition.

Before turning to al-Kīkī's legal intervention, it is first necessary to examine how Islamic law conceptualized coercion (*ikrāh*), and how later Mālikī jurists gradually expanded this concept to include not only overt force but also the subtler pressures of symbolic and social domination.

SECTION 4: COERCION, CONSENT, AND THE JURISTIC EXPANSION OF VOLUNTARINESS

In Islamic law, valid legal acts, particularly those involving property transfers, require not only formal compliance with the rules of offer and acceptance but also genuine consent (*riḍā*) on the part of the transacting parties.⁶¹ Classical legal theory, especially as articulated in the science of *uṣūl al-fiqh*, typically recognized two categories of coercion (*ikrāh*): *ikrāh mulji'* (compelling physical coercion) and *ikrāh ghayr mulji'* (non-compelling threats or pressures).⁶² This distinction, which was originally developed in penal and contractual contexts, laid the groundwork for later juristic inquiry into voluntariness and agency, concepts

61 This principle is grounded in the Qur'ānic requirement of mutual consent, as articulated in Qur'an 4:29 ("Do not consume one another's property unjustly, except through trade conducted by mutual consent") and 4:4 ("If they willingly remit to you anything of it, then consume it with satisfaction and ease"). See 2 MUHAMMAD AL-ZUHAYLI, *AL-QAWĀ'ID AL-FIQHIYYA WA-TATBĪQĀTUHĀ FĪ AL-MADHĀHIB AL-ARBA'Ā* 819 (Dār al-Fikr 2006).

62 See AL-BAZDAWĪ, *KANZ AL-UṢŪL ILĀ MA'RIFAT AL-UṢŪL* 781–94 (Sā'id Bakdash ed., Dār al-Salām 2021); 4 AL-QARĀFĪ, *NAFĀ'IS AL-UṢŪL FĪ SHARH AL-MAḤSŪL* 1637–39 ('Ādil Aḥmad 'Abd al-Mawjūd & 'Alī Muḥammad Mu'awwaḍ eds., Maktabat Nizār Muṣṭafā al-Bāz 1995).

that invite renewed attention through the lens of contemporary socio-legal theory.

Unlike *ikrāh*, the Sunnī treatment of *riḍā* in cases of *hiba*, particularly within kinship structures, manifested significant doctrinal divergence. In the Ḥanafī school, a gift is generally revocable even after the recipient has taken possession (*qabḍ*).⁶³ However, jurists made an exception for gifts to close relatives, which are binding after possession because revocation might sever family ties and disrupt social decorum.⁶⁴ Motives such as modesty or moral obligation were not, on their own, sufficient to challenge the validity of the gift unless those constituted *ikrāh mulji*, an explicit and compelling threat.⁶⁵

The Shāfi'īs adopted a more rigid position. Once a gift is delivered and received, it is irrevocable, regardless of the relationship between donor and recipient, whether spouse, sibling, or stranger.⁶⁶ Only demonstrable fraud or direct coercion justifies nullification. Thus, the Shāfi'ī approach was formalistic and largely indifferent to pressures that might compromise genuine consent.⁶⁷

The Ḥanbalī school also prohibited the revocation of gifts to close relatives.⁶⁸ Some early scholars, however, permitted limited judicial discretion in cases in which a gift was

63 2 DĀMĀD AFANDĪ, MAJMA' AL-ANHUR FĪ SHARḤ MULTAQĀ AL-ABHUR 359 (Aḥmad b. 'Uthmān al-Qarah-Ḥiṣārī ed., Dār al-Ṭibā'a al-'Āmirā 1328 AH; repr., Dār Iḥyā' al-Turāth al-'Arabī).

64 *Id.* at 362.

65 10 AL-KĀSĀNĪ, BADĀ'Ī' AL-SANĀ'Ī' FĪ TARTĪB AL-SHARĀ'Ī' 103, 132 ('Alī Muḥammad Mu'awwaḍ & 'Ādil Aḥmad 'Abd al-Mawjūd eds., 2d ed Dār al-Kutub al-'Ilmiyya 2003).

66 Mālikī, Shāfi'ī, and Ḥanbalī jurists all recognize one key exception to the rule prohibiting the revocation of gifts: a father may rescind a gift to his child. This exception is based on the *ḥadīth*: "A man is not permitted to take back his gift, except a father [regarding what he gave] to his child." See 7 AL-MĀWARDĪ, AL-ḤĀWĪ AL-KABĪR 546 ('Alī Muḥammad Mu'awwaḍ & 'Ādil Aḥmad 'Abd al-Mawjūd eds., Dār al-Kutub al-'Ilmiyya 1999); 8 IBN QUDĀMA AL-MAQDISĪ, AL-MUGHNĪ 277–78 ('Abd Allāh al-Turkī & 'Abd al-Fattāh al-Ḥilū eds., 3d ed. Dār 'Ālam al-Kutub 1997); 6 AL-QARĀFĪ, AL-DHAKHĪRA 266 (Muḥammad Ḥajjī, Sa'īd A'rāb & Muḥammad Bū Khubza eds., Dār al-Gharb al-Islāmī 1994).

67 7 AL-RUWAYĀNĪ, BAHR AL-MADHHAB, 244 (Tāriq Fathī al-Sayyid ed., Dār al-Kutub al-'Ilmiyya 2009).

68 IBN QUDĀMA, *supra* note 66, at 278.

the result of modesty or social pressure.⁶⁹ Still, Ḥanbalī legal texts neither fully theorized nor consistently institutionalized such considerations.⁷⁰

The Mālikīs developed a markedly different approach. While agreeing that *hiba* is complete upon offer and acceptance, they foregrounded the internal condition of *riḍā* as a doctrinal requirement, especially in contexts in which a woman's decision was influenced by *ḥayā'* and kinship obligation. If she made a gift under visible deference, unspoken pressure, or the weight of custom, Mālikī jurists might deem it invalid.⁷¹ This expansive reading of coercion, extending beyond physical duress to include symbolic and emotional constraint, laid the groundwork for *fatwās* on women's inheritance gifts in tribal settings, where law and custom were deeply intertwined.

Judges and jurists recognized these non-physical forms of coercion in the formative period before the institutionalization of the law schools. The *Muṣannaḥ* of 'Abd al-Razzāq al-Ṣan'ānī (d. 211/827) preserves numerous reports about the judge Shurayḥ (d. ca. 80/699), who adjudicated cases in which women gifted parts of their dower (*mahr*) or property to their husbands.⁷² In these cases, Shurayḥ consistently refused to validate such gifts unless there was clear evidence of genuine consent. In one report, he insisted that the husband bear the burden of proof and required the wife's oath that she had not given the gift "out of fear or humiliation": "Shurayḥ would say: 'Produce your proof that she gifted it to you of her own good will, without coercion or humiliation; otherwise, let her swear by God that she

69 *Id.* at 278–79.

70 *See, e.g.*, AL-QĀDĪ ABŪ YA'LĀ, 1 AL-MASĀ'IL AL-FIQHIYYA MIN KITĀB AL-RIWĀYATAYN WA'L-WAJHAYN 444–45 ('Abd al-Karīm b. Muḥammad al-Lāḥim ed., Maktabat al-Ma'ārif 1985); 3 AL-KHALWATĪ, ḤĀSHIYAT AL-KHALWATĪ 'ALĀ MUNTAḤĀ AL-IRĀDĀT 513 (Sāmī al-Ṣuqayr & Muḥammad al-Laḥaydān eds., Dār al-Nawādir 2011).

71 *See, e.g.*, 4 MUḤAMMAD AL-AMĪR AL-MĀLIKĪ, ḌAW' AL-SHUMU' SHARḤ AL-MAJMU' 51 (with marginalia by Hijāzī al-'Adawī al-Mālikī, Muḥammad Maḥmūd Wald Muḥammad al-Amīn al-Musūmī ed., Dār Yūsuf b. Tāshfīn & Maktabat al-Imām Mālik 2005).

72 8 'ABD AL-RAZZĀQ AL-ṢAN'ĀNĪ, AL-MUṢANNAḤ 438–39 (2d ed. Dār al-Ta'sīl).

did not give it to you freely (*tayyibat al-nafs*), but rather due to coercion or humiliation.”⁷³

In another report, he declared: “Had she truly been content, she wouldn’t have come to demand it back [i.e., the gift],” suggesting that a woman’s post-gift claim of regret was legally credible in and of itself.⁷⁴

The early juristic tendency to consider emotional or social coercion, especially in the context of spousal relationships, points to an intuitive recognition that power differentials within the household could undermine voluntariness.⁷⁵ These reports also suggest that in the formative period, Muslim jurists recognized a nascent form of context-sensitive jurisprudence (*fiqh al-wāqi‘*), a pragmatic sensitivity to social circumstances that would later be formalized and expanded in *nawāzil* literature, particularly in the Mālikī school.

This concern for genuine *riḍā* gradually became a defining feature of Mālikī legal doctrine. Drawing on the practice of the people of Medina (*‘amal ahl al-Madīna*) and favoring substance over formalism, Mālikī jurists developed nuanced tools to assess consent.⁷⁶ Over time, they came to recognize that silence, hesitation, and pressure could all signal compromised volition. Their attentiveness to these phenomena laid the foundation for later *fatwās* addressing coerced inheritance transfers among tribal women.⁷⁷

Late Mālikī jurists refined the doctrine of *riḍā* by addressing cases in which women, particularly in tribal contexts,

73 *Id.* at 438, no. 17767.

74 *Id.* at 438, no. 17770.

75 Al-Zuhrī said: “I never saw judges rescind a husband’s gift to his wife, but they would rescind a wife’s gift to her husband.” *Id.* at 438, no. 17769. This pattern reflects an early judicial awareness of gendered power asymmetries, shaped in part by the Qur’ānic emphasis on a woman’s consent (Qur’ān 4:4).

76 *See* 2 AL-SHĀTIBĪ, AL-MUWĀFAQĀT 55 (Muḥammad Mirābī ed., Mu’asasat al-Risāla 2011).

77 *See, e.g.*, 1 YA’LĀ B. MUŞALLĪN AL-MAŞMŪDĪ, MUKHTAŞAR KĪTĀB AL-FUŞŪL FĪ AJWĪBAT FUQAHĀ’ AL-QARAWIYYĪN FĪ MASĀ’IL AHL AL-BĀDIYA WA-AHL AL-JIBĀL ALLADHĪNA LĀ WALĪYA LAHUM WA-LĀ SULTĀNA LIL-IMĀM 214, 225, 355 (al-Hasan Khālid Shujayd ed., Dār al-Fath 2023); 222 ABŪ ISHĀQ IBRĀHĪM B. HILĀL AL-SIJILMĀSĪ (IBN HILĀL) AL-NAWĀZIL AL-HILĀLIYYA 395 (compiled by ‘Alī b. Aḥmad al-Jazūlī, Aḥmad ‘Abd al-Karīm Najīb ed., Markaz Najībawayh lil-Makḥḥūḥāt wa-Khidmat al-Turāth 2013); AL-ḤUḌAYKĪ, AJWĪBAT AL-FAQĪH AL-ḤUḌAYKĪ, *supra* note 42, at 315.

remained silent after male relatives had taken possession of their inheritance shares.⁷⁸ While some formative Mālikī jurists, including Ibn al-Qāsim (d. 191/809), treated such silence as tacit consent, al-Wansharīsī (d. 914/1508) rejected that inference, insisting that a woman's right "does not lapse by silence even after a hundred years," and citing judicial precedents awarding women their entitlements after fifty years.⁷⁹ He further cautioned that inheritance claims by Bedouin women should not be dismissed on the basis of silence, since asserting one's right could trigger social abandonment by one's kin; silence in such circumstances, he argued, cannot invalidate a woman's claim.⁸⁰

Similarly, the Fāsī *mufti* (jurisconsult) 'Abdullāh al-'Abdūsī (d. 849/1445) allowed women to revoke inheritance gifts given to male kin under communal pressure. He affirmed that in many such cases, a woman's initial "consent" was extracted in a social environment that rendered refusal nearly impossible, noting the frequency of this coercive pattern in his time.⁸¹

The ethical posture taken by such jurists aligned with a broader Mālikī concern for safeguarding *fiqh al-riḍā* (the jurisprudence of consent) against symbolic and social domination. It also reflected an awareness, albeit untheorized, that coercion may be encoded in silence, modesty, or customary norms.⁸² Al-Wansharīsī traced this concern back to the Mālikī *uṣūlī* (legal theorist) Ibn al-Qaṣṣār (d. 398/1007), citing his treatise '*Uyūn al-adilla* to affirm that acts arising from *ḥayā*' or social deference lack valid consent.⁸³ Although al-Wansharīsī did not elaborate on the point, his invocation of Ibn al-Qaṣṣār anchored the argument within classical Mālikī legal theory. This concern

78 MUHAMMAD AL-BARAKAH, *FIQH AL-NAWĀZIL 'ALĀ AL-MADHHAB AL-MĀLIKĪ: FATĀWĀ AL-IMĀM ABĪ 'UMRĀN AL-FĀSĪ* 130 (Dār Afīrīqiyā al-Sharq 2010).

79 5 AL-WANSHARĪSĪ, *AL-MĪ'YĀR AL-MU'RIB WA'L-JĀMI' AL-MUGHRIB 'AN FATĀWĀ AHL IFRĪQIYĀ WA'L-ANDALUS WA'L-MAGHRIB*, 263–64 (Muḥammad al-Ḥajjī ed., Wizārat al-Awqāf wa'l-Shu'ūn al-Islāmiyya 1981).

80 *Id.* at 264.

81 4 AL-WAZZĀNĪ, *AL-NAWĀZIL AL-ṢUGHRĀ*, *supra* note 43, at 231.

82 Some jurists described the social pressure exerted on women to forgo their inheritance shares as follows: "the sword of modesty (*al-ḥayā*) is like the sword of usurpation (*al-ghaṣb*)." The analogy indicates that coercion through shame or social stigma is as oppressive as physical force in stripping women of their legal entitlements. See 4 AL-WAZZĀNĪ, *AL-NAWĀZIL AL-ṢUGHRĀ*, *supra* note 43, at 221, 225.

83 9 AL-WANSHARĪSĪ, *AL-MĪ'YĀR*, *supra* note 79, at 153–54.

informed a stream of *fatwās* that collectively sought to re-center legal agency in contexts of gendered vulnerability.⁸⁴ As ‘Abd al-Qādir al-Fāsī (d. 1091/1680) later observed, the validity of a woman’s gifts is contingent on social context: whereas in an urban environment such an act might be binding, in a rural or tribal environment, it is presumptively invalid due to the lack of free legal expression.⁸⁵

This Mālikī concern for internal *riḍā* extended to voluntary transfers more broadly, including almsgiving (*ṣadaqāt*). In one *fatwā* preserved in al-Wansharīsī’s *al-Mi‘yār*, someone asks Abū Sa‘īd Ibn Lubb (d. 782/1381) about a woman who donated property out of modesty and embarrassment. Ibn Lubb held that the gift was invalid, stating that it was impermissible for the recipient to enjoy something not offered with genuine willingness. He explained: “The jurists have said that if a donation is requested from a giver, and it is understood from the giver’s demeanor that they gave it out of modesty or shyness, or without genuine consent, then it is not lawful for the recipient to keep it.”⁸⁶ Such rulings reflect a Mālikī effort to expand the legal conception of voluntariness beyond the classical binary of coercion versus free will.⁸⁷ They underscore Maghribī jurists’ attentiveness to local social conditions, particularly in rural and tribal settings, and their refusal to equate a woman’s silence or compliance with meaningful consent.⁸⁸ The following section turns to Shaykh al-

84 This concern is exemplified in *fatwās* by Mālikī jurists such as Sīdī Yahyā b. Muḥammad al-Sarrāj (d. 1007/1599), *Muḥīṭ* of Fez; Sīdī ‘Alī b. Hārūn al-Mutghrī (d. 951/1545), also a *Muḥīṭ* of Fez; and Muḥammad al-‘Arabī b. Aḥmad Burdu‘llah (d. 1133/1721), who served as judge of Fez. See 2 ‘ĪSĀ B. ‘ALĪ AL-ḤASANĪ AL-‘ALMĪ, *NAWĀZIL* 355 (Wizārat al-Awqāf wa’l-Shu‘ūn al-Islāmiyya 1983); 4 AL-WAZZĀNĪ, *AL-NAWĀZIL AL-SUGHARĀ*, *supra* note 44, at 227; *id.* at 521.

85 2 AL-AJWIBA AL-KUBRĀ, *supra* note 47, at 388, 486–89, 606–07.

86 9 AL-WANSHARĪSĪ, *AL-MI‘YĀR*, *supra* note 79, at 153.

87 See also, with respect to *ibrā’* (renunciation) and the sale of a woman’s inheritance share under social pressure, 1 AL-AJWIBA AL-KUBRĀ, *supra* note 47, at 170–73, 187–88.

88 See *NAWĀZIL* SĪDĪ ‘ABD ALLĀH B. YA‘QŪB AL-SAMLĀLĪ (d. 1052/1642), where al-Samlālī upholds a local judge’s decision to annul a series of property transfers made by a vulnerable widow. The case involved a neighbor who manipulated the woman into gifting away her estate, then coerced her into “renting” her own home and serving him and his household. Al-Samlālī affirms the woman’s financial imprudence (*safah*), endorses the judge’s intervention, and cites jurists from Jazūla (Sūs) who emphasized the naïveté of women in such contexts. He concludes that her gifts are void

Kīkī's *fatwā*, where these themes receive their most sustained and explicit treatment.

SECTION 5: AL-KĪKĪ'S *FATWĀ* AND THE ETHICS OF JURISTIC RESISTANCE

In the eighteenth century, Muḥammad al-Kīkī emerged as a prominent Mālikī jurist in the Middle Atlas Mountains, near Demnat.⁸⁹ Though trained in Marrakesh, al-Kīkī chose to reside among tribal communities, where he combined teaching, *iftā'* (juristic consultation), and grassroots reform.⁹⁰ His scholarly standing was affirmed by contemporaries who regarded him as unparalleled in the Islamic sciences within the region.⁹¹

Al-Kīkī's *fatwā*, titled *Mawāhib dhī al-jalāl fī ba'd nawāzil al-bilād al-sā'iba wa'l-jibāl* (*Bestowals of the Majestic Lord: Selected Nawāzil from the Unruled Lands and the Mountains*), was prompted by a legal query (*istiftā'*) yet unfolds as an independent treatise on possession (*ḥiyāza*) and the contested practice of inheritance gifting among tribal women in regions where legal rulings (*aḥkām*) were not effectively enforced.⁹²

In its opening, al-Kīkī sets out the aim of the work, explains the juristic disagreements that prompted his intervention,

and that the neighbor owes her and her daughter compensation for their unpaid labor. NAWĀZIL AL-SAMLĀLĪ, *supra* note 42, at 277–79. See also al-Ḥuḍaykī (d. 1189/1775), who, when asked whether a gift given by a sister to her brother is valid, responded: “It has become the practice of *fatwā* and adjudication to invalidate sisters' gifts and donations to their brothers and male relatives under whose protection they live. This was also the view of Shaykh al-‘Abbāsī until his death.” AJWIBAT AL-FAQĪH AL-ḤUḌAYKĪ, *supra* note 42, at 315.

89 Demnat is a town in Azilal Province (Beni Mellal–Khenifra, Morocco), located roughly 100 km east of Marrakesh on the northern foothills of the High Atlas.

90 See al-Kīkī's biography in 6 AḤMAD AL-SAMLĀLĪ, AL-I'LĀM BI-MAN HALLA MARRĀKUSH WA-AGHMĀT MIN AL-A'LĀM 80 (al-Maṭba'a al-Malakiyya 1993); 7 MAWSO'AT A'LĀM AL-MAGHRIB 2397 (Muḥammad Hajjī ed., Dār al-Gharb al-Islāmī 1983).

91 2 MUḤAMMAD AL-KHALĪFĪ, AL-DURRA AL-JALĪLA FĪ MANĀQIB AL-KHALĪFA 409 (Aḥmad 'Ammālik ed., Wizārat al-Awqāf wa'l-Shu'ūn al-Islāmiyya 2014).

92 The *fatwā* is published in MUḤAMMAD AL-KĪKĪ, MAWĀHIB DHĪ AL-JALĀL FĪ BA'D NAWĀZIL AL-BILĀD AL-DĪBA WA'L-JIBĀL 25–129 (Aḥmad al-Tawfīq ed., Dār al-Gharb al-Islāmī 1997). The editor introduces the text with a brief preface in Arabic and English.

narrates the dispute that occasioned the *fatwā*, and outlines its structure. He writes:

The purpose of this work is to examine *ḥiyāza* in lands where legal rulings [*aḥkām*] are not implemented, either because they are devoid of an *imām* [i.e., an effective political ruler] or because oppression and neglect have come to prevail among [local] judges. Closely connected to this issue is the practice of tribal daughters gifting their [inheritance] shares to agnatic relatives, as well as whatever may serve as a model and guidance for people of understanding. Those who have assumed the offices of adjudication and *iftā'* in our time have differed in their rulings on these matters, both in judicial judgment and in legal opinion. Their views in such cases have contradicted one another, in affirmation and in negation Accordingly, I deemed it fitting to set forth, in this regard, what accords with the authoritative legal texts [*nuṣūṣ*], so that it may be a necklace upon a string, arranged with jewels and facets. And God alone guides to the right path

The reason for this *nubdha* [a brief introductory account] is that a questioner asked about a tribal woman whose brother sold a parcel of land jointly owned by them, amid a flare of hostility on his part toward the *shaykh* of the tribe, the one who exercised authority over its affairs. The *shaykh* then placed his hand upon it [i.e., took possession of the land], in accordance with the custom of the people of the rural countryside [*al-bādiya*], until the *shaykh* died, leaving his sons to succeed him in his chieftainship, until they perished in the plague. The seller's sister also died, and her heirs were unaware of what had occurred until their maternal uncle, the seller, told them that their mother's share remained and that he had sold only his own share. They therefore demanded their inheritance from the heirs of the purchaser [the *shaykh*]. Yet the purchaser's heirs possessed no deed of sale, and there was no one to testify that the mother had sold her share.

So, I answered [the questioner] that the mother's share remained her property [and thus remained due to her heirs after her death] for several reasons. [First], the property of tribal daughters is not subject to possession. And even if it were claimed that the brother sold the entirety, how could that be established when it has not been proven? [Second], the custom of this land [i.e., Demnat and its surroundings] is that whenever a co-owner asserts a claim against the purchaser, he takes his share unless he agrees to the sale. This custom has become so widespread and well known that it has, as it were, "filled the ears" of both the elite and the common alike [Third], the sister's share was established with certainty, and it cannot be removed except by certainty; yet there is no certainty in the lands of *al-sība* [the unruled lands].

Thereafter, a certain person [i.e., a local judge-*mufī* in Demnat and its surroundings] issued an answer that contradicted the foregoing opinion, supporting it with textual authorities, proofs, and reasons. He held that the woman in question had no claim at all, because she had remained silent throughout the period of possession; that what the first respondent [al-Kīkī] had cited applied only outside these lands; that in these lands, any daughter who asserts her claim takes her right from the hand of her agnatic kin; that dispossession through sale and the like cuts off rights with respect to both kin and non-kin alike; and that women are the full sisters of men in legal rulings, this being the purport of his words.

So, I wished, by God's power, to set forth what is required for these purposes, such that this objection is rendered void. Accordingly, I arranged this work as an introduction, four chapters, and a conclusion containing benefits and counsels for people of understanding. I entitled it *Mawāhib dhī al-jalāl fī ba'd nawāzil al-bilād al-sā'iba wa'l-jibāl*; and, if you wish, you may call it *Maṭāli' al-tamām fī 'adam al-qawl bi'l-ḥiyāza fī al-bilād allatī lā tajrī fihā al-aḥkām* (*The Dawning of*

Completion: On Rejecting the Recognition of Possession in Lands Where Legal Rulings Are Not Enforced).⁹³

This opening accomplishes several things at once. First, it clarifies al-Kīkī’s central premise: in regions “devoid of an *imām*” and lacking stable judicial enforcement, silence and non-assertion cannot be read mechanically as forfeiture of rights. Second, it frames the text as a deliberate intervention against what he presents as inconsistent local adjudication and *iftā’*, grounded not in moral exhortation alone, but in a tightly constructed Mālikī evidentiary logic. Third, it establishes that the dispute concerns a woman’s inherited share in jointly owned land, and a brother who, amid hostility, sold the property to a tribal *shaykh* who then “placed his hand upon it” in accordance with local custom. When the *shaykh*’s line later collapsed during a plague and the woman’s heirs sought to recover their mother’s portion, al-Kīkī squarely rejects the claim that her prolonged silence extinguished her right.

After this opening, al-Kīkī proceeds in a structured manner. He begins by setting out a series of governing principles, before turning to a chapter addressing cases in which women’s legal position differs from that of men. He then devotes a chapter to demonstrating that *ḥiyāza* cannot extinguish rights in lands where legal rulings (*aḥkām*) are not enforced, whether due to the absence of an *imām* or the injustice of those in authority. A third chapter challenges the validity of tribal daughters’ and sisters’ so-called “gifts” to agnatic kin in contexts where custom systematically deprives them of their inheritance. A fourth chapter examines the obligation to account for benefits (*kharāj*) imposed on anyone who exploits jointly inherited property without the consent of the other heirs, whether male or female. The work concludes with a final section of counsels and admonitions.

The governing principles that open the *fatwā* are not incidental preliminaries, but the methodological backbone of al-Kīkī’s argument. Above all, they establish that rights and ownership, once fixed, persist by default through *istiṣḥāb* (the presumption of continuity) and are not displaced except by

93 AL-KIKI, *supra* note 92, at 25–28.

definitive proof, and that ambiguous acts, such as merely “placing the hand” on property, cannot override what has been established with certainty.⁹⁴

Al-Kīkī further argues that Mālik and his early disciples recognized *ḥiyāza* as probative evidence under the moral assumptions of their time, when prevailing conditions of religious piety rendered prolonged non-assertion a meaningful indicator.⁹⁵ Yet he insists that this reliance cannot be applied mechanically across all times and places. As circumstances changed after Mālik’s era, and, in al-Kīkī’s own time, as corruption became widespread, he maintains that the probative force of *ḥiyāza* must be restricted, or even denied altogether.⁹⁶ He therefore sharply criticizes those who transplant earlier doctrinal formulations from Mālikī legal compendia into social contexts for which their underlying assumptions no longer hold.⁹⁷ This critique, in turn, presupposes that both adjudication and *iftā* “turn with custom” in matters that vary by place, such that a judge or *mufī* may not rule without knowledge of the local *urf* in which a dispute arises.⁹⁸

After these preliminaries, al-Kīkī opens with a brief chapter outlining juristic cases (*masā’il fiqhiyya*) in which women’s legal position differs from men’s, particularly in matters of worship, contracts, and testimony.⁹⁹ I read this chapter as a strategic preface to the dispute that follows. Al-Kīkī’s opponent invokes a broad claim of formal parity, “women are the full sisters of men in legal rulings,” and deploys it to foreclose scrutiny of women’s silence and non-assertion in their social setting. Al-Kīkī does not respond by constructing a hierarchy of legal status. Instead, he advances a narrower methodological claim: legal evaluation does not proceed in the abstract, but within concrete evidentiary contexts, and its meaning may shift with circumstance. This framing, in my view, clears conceptual space for al-Kīkī’s subsequent move in the *fatwā*. He refuses to treat

94 *Id.* at 35–36, 38.

95 *Id.* at 37.

96 *Id.*

97 *Id.*

98 *Id.* at 39–41.

99 *Id.* at 49–50.

prolonged silence in *bilād al-sība* as dispositive proof of *riḍā*, insisting that interpretation attend to the conditions shaping both claims and non-claims, including entrenched custom and the absence of enforceable legal procedure.

Al-Kīkī then turns to his second chapter, in which he undertakes to refute the use of long-term *ḥiyāza* as a basis for extinguishing established rights in what he repeatedly describes as *bilād al-sība*.¹⁰⁰ He supports this position by assembling a range of Mālikī *fatwās* and *nawāzil* addressing such settings, grounding his argument in the premises set out in his opening principles: a right established with certainty does not lapse except through certainty, and presumptive continuity (*istiṣhāb*) governs wherever proof remains inconclusive.¹⁰¹ Crucially, al-Kīkī frames this evidentiary critique as inseparable from institutional context. He insists that the probative force of *ḥiyāza* presupposes a setting in which legal procedure functions and rulings are reliably enforced. In *bilād al-sība*, by contrast, where centralized enforcement and judicial oversight are weak or absent, possession becomes an unstable indicator, one that readily consolidates dispossession, especially when local custom already works to prevent women from asserting inherited claims.¹⁰²

Al-Kīkī's insistence on institutional context also reflects the political landscape of eighteenth-century Morocco. The death of Sultan Moulay Ismā'īl in 1139/1727 ushered in a period of instability and factional rivalry, shaped in part by the power of the Black Guards (*ʿAbīd al-Bukhārī*).¹⁰³ A measure of order later returned under Sultan Sīdī Muḥammad b. ʿAbd Allāh (d. 1204/1790), who reasserted central authority in Demnat and other areas of the Middle Atlas.¹⁰⁴ Yet in al-Kīkī's own region, the Keroual mountains, tensions between *al-makhzan* and *bilād al-sība* persisted,¹⁰⁵ and this *borderland* positioning likely informs his sustained attention to what legal

100 *Id.* at 53.

101 *Id.* at 53–61.

102 *Id.* at 57.

103 See 7 AḤMAD B. KHĀLID AL-NĀSIRĪ, AL-ISTIQSĀ LI-AKHBĀR DAWLAT AL-MAGHRIB AL-AQṢĀ 99, 136, 150 (Dār al-Kitāb 1997).

104 8 *Id.* at 3.

105 AL-TAWFIQ, AL-MUJTAMAʿ AL-MAGHRIBĪ, *supra* note 58, at 8–9.

doctrines can plausibly accomplish in settings where enforcement remains fragile.

Earlier political formations in the Atlas had already produced a long-standing pattern of mediated rule. Berber shaykhdoms in the mountains often functioned as intermediaries of state authority under dynasties such as the Almohads (r. 524–668/1130–1269) and the Marīnids (r. 642–869/1244–1465).¹⁰⁶ When Marīnid power declined in the fifteenth century, highland regions increasingly fell beyond the effective reach of the *makhzan*, and jurists confronted a practical need to distinguish between contexts where formal judicial procedure operated and those where customary authority predominated.¹⁰⁷

It is within this landscape that al-Kīkī's *fatwā* intervenes. He does not condemn tribal autonomy as such; rather, he directs his critique at local jurists who, in his view, departed from Mālikī norms by treating possession as presumptive ownership without procedural rigor. In regions where political authority had weakened and customary practice already constrained women's inheritance claims, such evidentiary shortcuts operated to consolidate dispossession and normalize *structural injustice*.

Al-Kīkī then turns to the third chapter of his *fatwā*, devoted to establishing the invalidity of inheritance gifts made by tribal daughters and sisters to their male relatives in contexts where custom has become entrenched in depriving women of their rightful shares. He opens this chapter by citing a range of earlier jurists who had already articulated this position, including Ibn al-Qaṣṣār, al-Bājī (d. 474/1081), Ibn Lubb, Ibn Marzūq (d. 842/1438), al-Qūrī (d. 872/1467), Ibn Hilāl (d. 903/1498), al-Wansharīsī, Ibn 'Āshir (d. 1040/1631) and others.¹⁰⁸ Yet al-Kīkī does not rest his argument on doctrinal authority alone. He reinforces the juristic ruling through first-hand observations of

106 6 IBN KHALDŪN, *KITĀB AL-‘IBAR WA-DĪWĀN AL-MUBTADA’ WA’L-KHABAR FĪ TĀRĪKH AL-‘ARAB WA’L-BARBAR WA-MAN ‘ĀSHARAHUM MIN DHAWĪ AL-SHA’N AL-AKBAR* 271 (Khalīl Shaḥāda ed., Suhayl Zakkār rev., Dār al-Fikr 1981).

107 Mālikī awareness of the legal distinctiveness of *bilād al-sība* appears in the late Marīnid period. In one responsum, the Fāsī *muftī* ‘Abdallāh al-‘Abdūsī (d. 849/1446) argues that the inability to enforce rulings in such regions justifies rejecting possession as proof of ownership. See 5 AL-WANSHARĪSĪ, *AL-MĪ‘YĀR*, *supra* note 80, at 264–65.

108 AL-KĪKĪ, *supra* note 92, at 65–72.

women's lived realities in his own time and region, responding to a predictable objection as follows:

If someone were to say: all that you have mentioned is correct, but it applies to lands other than these [i.e., Demnat and its surrounding High Atlas regions]; as for these lands, matters are not as you describe; rather, the custom of their people is to grant women their rightful shares of inheritance. On this basis, you have placed the texts and reports outside their proper contexts.

We reply: this claim is refuted by direct observation and lived experience. The people of these lands exert themselves, to the extent of their ability, in depriving women [of their inheritance rights], both in the past and in the present, until women have come to despair of obtaining them. At times, this is accomplished by restricting endowments (*waqf*) to males to the exclusion of females. Indeed, we have not encountered a single endowment deed in our region that did not exclude women, including some whose dates exceed two hundred years. At times, it is done by restricting gifts (*hiba*) to males alone; at times through a father's final and irrevocable division (*qismat batt*) of [landed] property exclusively among his male heirs; at times, by preventing women from marriage (*'adl*) out of fear of inheritance claims; at times, by selling them in markets to those who remove them to distant lands, such that neither she sees her [father or guardian] nor he sees her again until the end of her life; at times, by marrying her off to a man from another tribe on the condition that no inheritance shall pass between them; and at times, she is not married to her male relative unless she first executes for him a formal release (*barā'a*) of all her rights, down to the clothing on her skin and the necklace around her neck.

We have even witnessed women being compelled to renounce what they would inherit from their father while he was still alive, such being the intensity of people's greed and the extent of their ignorance. At times,

such a renunciation is demanded of her while she is legally incapacitated and barred from financial disposition, before reaching maturity. All of this is observable reality. Whoever doubts any part of it should live among the common people of the mountains and the Berbers, a population marked by harshness and coarseness of temperament, and he will witness all of this with his own eyes.¹⁰⁹

Al-Kīkī then continues by describing additional practices through which guardians manipulate marriage arrangements to preempt women's inheritance claims:

A woman may desire an honorable man who is her equal (*kuf'*) in status, yet her guardian refuses to marry her [to him], knowing that such a man would not tolerate the forfeiture of her inheritance. Instead, he marries her off to a stranger who is submissive and poor, assuming that he will neither demand her rights nor persist in doing so, given his weakness and humiliation. As for the woman, [her guardian] knows that she herself will not demand her inheritance, even if matters were to lead to her starving to death. We have witnessed women reduced to begging during times of famine, while in the households of their brothers there was wealth enough to "fill the eyes," livestock, furnishings, household utensils, and jewelry, not to mention immovable property, yet she was unable to ask her brothers for what would suffice to meet her most basic needs.

If she does not comply by accepting marriage to someone who is not her equal, whom her guardian has proposed to her, he compels her to pay forty ounces of gold, known as *awāqī al-tabrī'a* ("ounces of disavowal"). By this they mean that she has disavowed her guardian and he has disavowed her in return, severing ties of kinship with her. As a result, she incurs grave dishonor, particularly among her closest relatives.¹¹⁰

109 *Id.* at 73–74.

110 *Id.* at 74–75.

To rebut claims of voluntariness, al-Kīkī turns to cultural evidence. He cites a well-known proverb: “What enmity is there between you and me? It is as though I took your inheritance from you!”, a saying that attests to the moral gravity attached to violations of inheritance.¹¹¹ For al-Kīkī, such proverbs give voice to a shared moral understanding in which coerced dispossession is recognized as a grave breach of social and familial norms.

He further appeals to human nature. “Do people not love wealth?” he asks, challenging his opponents to explain why, if such gifting were truly voluntary, even their own mothers, sisters, or daughters have not received their rightful shares. In practice, he argues, women receive only token portions, typically when a male relative is moved by shame or religious scruple; more often, their shares are silently absorbed into male holdings.¹¹²

In a firm assessment, al-Kīkī declares that women in the Atlas Mountain region are effectively excluded from *al-uṣūl*, immovable assets such as land and homes: “There is no way for a woman to obtain her share of it, no matter what.”¹¹³ This assessment rests on sustained observation over many years and is offered to dismantle the assumption that isolated instances of renunciation, whether genuine or coerced, can ground a general legal presumption of consent.

To underscore the injustice, al-Kīkī draws a pointed contrast between tribal regions and urban centers such as Fez, where judicial rulings are more consistently enforced and respected scholars uphold procedural safeguards. “Ask about the daughters of Fez,” he challenges. “Do you find them renouncing their inheritance to their relatives?”¹¹⁴ Through this comparison, al-Kīkī makes clear that the systematic exclusion of women from inheritance does not arise from Islamic law as such, but from entrenched custom operating in settings beyond the reach of effective legal enforcement.

Anticipating objections, al-Kīkī cites exceptional cases of women who have voluntarily relinquished their inheritance. “Is she one among a hundred thousand?” he asks. “That

¹¹¹ *Id.* at 75.

¹¹² *Id.* at 77.

¹¹³ *Id.*

¹¹⁴ *Id.*

is rare, and what is rare has no legal force.”¹¹⁵ In so doing, he invokes the legal maxim *al-nādir lā ḥukm lahu* (“the rare has no legal force”), affirming that anomalous cases cannot ground a general legal rule.¹¹⁶

Arguably, al-Kīkī’s directs his most striking critique, however, at his fellow jurists. He reports that his initial efforts to restore women’s inheritance rights bore tangible results: some men repented and returned usurped shares, and public sentiment began to shift toward acknowledging women’s claims and reversing entrenched practices of exclusion.¹¹⁷ This momentum, however, was later reversed by scholars who, in his view, clung to superficial readings of authoritative texts, such as *al-Risāla* by Ibn Abī Zayd al-Qayrawānī (d. 386/996) and *al-Mukhtaṣar* by Khalīl b. Ishāq (d. 767/1374), using them to justify a return to exclusionary custom.¹¹⁸ Recalling this reversal, al-Kīkī laments: “I was about to succeed, but one of my antagonists gave people an excuse, causing them to revive their heresy and return to their habitual practice.”¹¹⁹

This frustration points to a deeper concern: justice in the mountains is obstructed not only by entrenched custom, but also by a fragile and corrupt judicial order, marked by weak enforcement, the spread of bribery, and the complicity of local judges. Al-Kīkī notes:

The weak are unable to obtain their rights, or obtain only a portion of them, except after losing many times over what they [ultimately] gain. This is due to the injustice of judges, the weak enforcement of rulings, the prevalence of false testimony, bribery, and the forgery of written records, as well as the absence of anyone capable of discerning disputed matters because of widespread ignorance. Because rural judges and their appointed witnesses

115 *Id.*

116 On this legal maxim, see I SIRĀJ AL-DĪN ABŪ HAṬṬ ‘UMAR B. ‘ALĪ AL-ANṢĀRĪ (IBN AL-MULAQQIN), *AL-ASHBĀH WA’L-NAZĀ’IR FĪ QAWĀ’ID AL-FIQH* 506 (Muṣṭafā Maḥmūd al-Azharī ed., Dār Ibn al-Qayyim & Dār Ibn ‘Affān 2010).

117 AL-KĪKĪ, *supra* note 92, at 78.

118 *Id.*

119 *Id.*

[*'udūl*] lack endowments assigned to their offices [and receive no fixed revenues], they exercise judicial authority out of necessity, presiding over litigants who are compelled by circumstance to seek judgment before them. As a result, they [i.e., judges and their appointed witnesses] have grown accustomed to accepting bribes in exchange for issuing rulings and forging documents. They sometimes justify this by claiming that the property of the common people is licit to them on the grounds of *istighrāq al-dhimma* [i.e., that all of the people's property is forfeit] or by asserting that they possess outstanding claims against the populace that have yet to be fulfilled, along with other corrupt forms of justification

This situation has reached the point that even men have come to fear bringing claims before their courts, let alone women. A man may sell his principal asset [land or house] through a *bay' al-thunyā* [a conditional sale allowing the seller to reclaim the property upon repayment of the price], and then, when he becomes able to reclaim his asset, he hesitates and delays doing so for many years, knowing with certainty that the buyer will not permit redemption except through litigation before the courts. One may say to the seller, "Why do you not reclaim your property?" and he replies, "Until I can gather enough money with which to litigate against the buyer." So what hope is there for the poor woman, who cannot confront the one who has usurped her inheritance, let alone bring him before the courts? Such a practice has never been customary among us, and I have never seen a single woman summon her relative before judges.¹²⁰

This reflection leads al-Kīkī to a pointed question. If jurists invalidate women's gifts on the grounds of coercive social norms, should the same reasoning not apply to men who are subject to comparable pressures arising from weak judicial enforcement, corruption, and the practical barriers to litigation? "Do we confine the invalidity of the gift to women alone," he asks, "or does

120 *Id.* at 78–80.

it apply to men as well, given the generality of the cause?”¹²¹ Although he acknowledges the absence of explicit precedent for extending the ruling in this way,¹²² the question reveals a broader concern in his reasoning: juristic evaluation must attend to lived conditions of vulnerability and constraint, rather than proceed solely from formal legal distinctions.¹²³

Al-Kīkī further extends this reasoning beyond gifts to other ostensibly voluntary dispositions. He treats testamentary bequests (*waṣīyya*) extracted from women under familial pressure as invalid, grounding this legal reasoning in the same dynamics of shame and fear of social rupture.¹²⁴ He applies the same logic to property relinquished by women in exchange for permission to marry, to the appropriation of a woman’s *mahr* by her guardian,¹²⁵ and to waivers of marital rights solicited during a husband’s illness.¹²⁶ In each case, al-Kīkī insists that apparent consent, when produced under conditions of vulnerability and moral coercion, cannot sustain legal validity.

In the fourth and final section of his *fatwā*, al-Kīkī turns from invalidating coerced dispositions to establishing liability to account for benefits (*kharāj*) derived from the unauthorized exploitation of inherited property. This obligation is owed by anyone who benefits from jointly inherited assets without right.

121 *Id.* at 80.

122 *Id.*

123 In a case concerning a woman who sought marriage in the absence of any guardian other than a paternal cousin, al-Kīkī affirmed the validity of her marriage when officiated by a qualified judge who satisfied the legal requirements of integrity and knowledge. He added, however, a significant caveat: “As for most judges in the *bādiya* today, given their ignorance and disregard for the legal conditions of marriage, they do not possess such authority.” See MUḤAMMAD AL-KĪKĪ, ‘UNWĀN AL-SHIR‘A WA-BURHĀN AL-RIF‘A FĪ TADHYĪL AJWIBAT FAQH DRAJJA 304 (al-Sa‘īd Wadīdī ed., Wizārat al-Awqāf wa’l-Shu‘ūn al-Islāmiyya 2021). This distinction underscores al-Kīkī’s concern with judicial legitimacy in marginal settings, where formal roles alone cannot sustain legal validity in the absence of effective enforcement

124 AL-KĪKĪ, *supra* note 92, at 80.

125 Al-Kīkī emphasizes that women must personally receive their *mahr*, particularly when it consists of tangible goods such as livestock or household items. In a *fatwā* concerning a widow’s claim against her husband’s heirs, he states: “In *bilād al-sība*, it is imperative, for it is customary among them that a woman’s guardians appropriate her *mahr* as a matter of course.” See AL-KĪKĪ, ‘UNWĀN AL-SHIR‘A, *supra* note 123, at 302.

126 AL-KĪKĪ, MAWĀHIB DHĪ AL-JALĀL, *supra* note 92, at 80–81, 83–85.

He holds that such liability attaches whether the exploiter is a co-heir or a purchaser who entered the transaction in the absence of any plausible legal ambiguity (*shubha*).¹²⁷ He organizes this inquiry into four distinct scenarios, each calibrated to the prevailing customs of the rural contexts he describes.

In the first scenario, a co-heir exploits the inherited property while retaining possession of it. In such cases, al-Kīkī maintains that *kharāj* is owed by the exploiter unless the remaining heirs can demonstrate genuine acquiescence.¹²⁸ While verbal acquiescence may carry probative weight when it comes from male heirs, al-Kīkī emphasizes that claims of *ḥayā'* advanced by women, particularly tribal women, remain valid grounds for later recovery.¹²⁹ As for tacit acquiescence inferred from silence, he deems it weak and unreliable in his regions, since prevailing custom dictates abstention from claims out of shame and fear of social stigma, even among men.¹³⁰ He stresses that this pattern is widely observable and denied only by those unfamiliar with social realities or acting in bad faith.¹³¹

In the second scenario, male heirs partition and exploit the inherited property while their sister remains silent. Al-Kīkī holds that she retains the right, upon later asserting her claim, to invalidate the partition, to recover her share of the property itself, and to demand from her brothers the *kharāj* owed to her for the period during which they exclusively benefited from the shared asset.¹³²

In the third scenario, a woman's male relative sells only his own share of jointly inherited property, yet the purchaser takes possession of the entire estate in accordance with rural custom, without the woman's sale or consent. If she later asserts her claim, the purchaser is liable to her for the *kharāj* corresponding to her share, since he entered the transaction without legal ambiguity (*shubha*). Al-Kīkī notes that this very scenario constituted the *nāzila* that prompted the composition of his *fatwā*.

127 *Id.* at 91.

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* at 96.

In the fourth scenario, the brother sells the entirety of the jointly inherited property. Al-Kīkī distinguishes four sub-cases. If the purchaser was unaware of any co-ownership and reasonably believed the seller to be the sole owner, no liability arises and the yield remains with the purchaser. The same applies if the purchaser knew of the co-ownership but reasonably assumed the woman's consent. Liability for the yield owed to the woman attaches, however, if the purchaser knew that the seller acted against his female co-heir without her consent. In the most difficult case, where the purchaser knew of the co-ownership but it remains unclear whether he knew of the injustice inflicted upon the woman, al-Kīkī inclines toward treating the seller as a usurper, reasoning that the notorious custom of depriving women of inheritance in rural regions renders such ignorance implausible.

Al-Kīkī then states:

All that we have set out in the preceding sections applies to regions beyond effective judicial enforcement (*bilād al-sība*), as opposed to cities and villages where judgments are implemented. If such cities or villages come, for a period of time, to be devoid of effective adjudication, then their legal status becomes that of the countryside (*al-bawādī*), because [the same] operative cause is present [i.e., the absence of judicial enforcement and the breakdown of effective adjudication]. It is this cause that must be taken into account in every time and place. Attend carefully to this principle and observe it, for by doing so you will be rightly guided in your judgments, God willing.¹³³

Read in this light, al-Kīkī's *fatwā* articulates a distinctly Mālikī approach to *riḍā*, one that remains firmly grounded in doctrine while insisting that consent be evaluated in relation to conditions of enforcement and social constraint. Across his treatment of gifts, bequests, marital arrangements, and liability to account for benefits (*kharāj*), al-Kīkī consistently refuses to infer legal

133 *Id.* at 112.

validity from outward compliance alone. Instead, he ties the assessment of consent to the operative causes that structure legal life in contexts of weak adjudication, where coercion, vulnerability, and the deprivation of rights routinely distort formal transactions. In doing so, his intervention exemplifies a mode of Mālikī juristic reasoning that confronts entrenched custom without abandoning legal method, and that seeks to preserve substantive justice where the law’s institutional guarantees remain fragile.

CONCLUSION

In this article, I have argued that Mālikī jurists articulated a legally rigorous and context-sensitive understanding of *riḍā* that cannot be reduced to outward compliance or formal expression. Consent, in Mālikī legal reasoning, was not a static doctrinal prerequisite, but a condition whose legal significance depended on the social, institutional, and evidentiary contexts in which legal acts were performed, especially in settings marked by weak adjudication and entrenched customary pressure.

Through a close reading of doctrinal discussions alongside applied Moroccan *fatwās*, I have shown that Mālikī law neither accommodated custom (*urf*) uncritically nor opposed it in the abstract. Instead, jurists evaluated custom relationally: it could function as a stabilizing legal resource when it facilitated orderly transactions, but it became subject to heightened scrutiny when it operated as a mechanism of exclusion or dispossession, particularly in disputes over women’s inheritance gifts. In such cases, consent was not inferred mechanically from silence, acquiescence, or formal declarations, but assessed in light of operative factors such as shame, fear of social rupture, economic dependence, and the practical inaccessibility of judicial remedies.

Al-Kīkī’s *fatwā* crystallizes this mode of reasoning with particular clarity. Writing in a context characterized by fragile enforcement and contested authority, al-Kīkī neither rejected custom wholesale nor relied on moral exhortation. Instead, he worked squarely within Mālikī doctrinal categories—*riḍā*, *hi-yāza*, *istiṣhāb*, and *kharāj*—to recalibrate evidentiary presumptions and standards of validity in response to endemic coercion.

His intervention illustrates how juristic reasoning adapted to the breakdown of adjudication without abandoning the epistemic commitments of the school.

Taken together, the materials examined above point to a Mālikī jurisprudence of consent that was acutely responsive to conditions of enforcement. Jurists operating in environments of weak judicial authority distinguished between formal acts and legally operative will by attending to the causes shaping legal behavior on the ground. This approach complicates accounts that privilege either formal doctrinal compliance or custom as sufficient grounds of legal validity and instead reveals a Mālikī jurisprudence capable of recalibrating legal presumptions in order to prevent law from becoming complicit in structural harm.

By foregrounding juristic assessments of consent under conditions of pressure and institutional fragility, this study contributes to broader discussions of legal agency and evidentiary reasoning in Islamic law. More fundamentally, it underscores the importance of reading *fatwās* as situated legal interventions, responses to concrete configurations of power, enforcement, and vulnerability, rather than as abstract doctrinal statements detached from social life. In doing so, it highlights how Mālikī jurists confronted the limits of law not by suspending doctrine, but by rethinking how doctrine operated under constraint.

CELEBRATING THE BIRTH OF THE PROPHET
IN BRITISH INDIA: AḤMAD RAẒĀ KHĀN
BARELWĪ'S FATWĀS ON THE MAWLID

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Abstract

In nineteenth-century British India, the celebration of the birth of the Prophet or mawlid became a contested ritual amongst Muslim scholars. One such scholar, Aḥmad RaẒā Khān (d. 1340/1921), founder of the Barelwī movement and a Sufi shaykh of the Qādiriyya fraternity, advocated strongly for its permissibility. It was his understanding of the ritual that ultimately became a core differentiating factor between more than 200 million adherents of the Barelwī movement and the rest of the Muslims in the Indian subcontinent. Accordingly, this article examines the manner in which the mawlid was conducted in nineteenth- to twentieth-century British India, including the type of practices associated with its undertaking and key debates regarding the ritual amongst Muslim scholars (ulamā'). Situating Aḥmad RaẒā's views in the context of these debates, and against the backdrop of the political and communal environment of the time, I examine his thought on the legal status and significance of the mawlid celebration and associated practices. I also explore how he positioned his views within the broader Islamic tradition. I base my conclusions on a detailed qualitative and, to a certain extent, quantitative analysis of Aḥmad RaẒā's complete mawlid fatwās and treatises, which were recently gathered into a thirty-volume compendium.

Keywords: Barelwī, juristic opinions (*fatwā*), mawlid, sufism

INTRODUCTION*

The remembrance of the Leader of the Beloveds [Prophet] is the light [*nūr*] of faith [*īmān*] and joy of life. His remembrance is certainly *Raḥmān*'s [God's] remembrance.¹

In line with other parts of the Muslim world, thirteenth/nineteenth century British India witnessed wide-ranging debates over Islamic practice. Among the contested issues was the celebration of the Prophet Muḥammad's birth, commonly known as the *mawlid*.² One prominent participant in these debates was scholar and Sufi *shaykh* Aḥmad Razā Khān (d. 1340/1921).³ Recent scholars have primarily approached Aḥmad Razā's *mawlid fatwās* (non-binding juristic opinions) through the lens of the sectarian contestation between Barelwīs and Deobandīs, within which these texts occupy a central place. Mohammad Waqas Sajjad draws on selected *fatwās* from the late thirteenth/nineteenth century and early twentieth century from Aḥmad Razā and Deobandī scholars such as Aḥmad 'Alī Sahāranpūrī (d. 1296/1879) and Ashraf 'Alī Thānvī (d. 1943) to illustrate the contours of Barelwī–Deobandī polemics over the *mawlid*.⁴ SherAli Tareen, by contrast, treats the *mawlid* as a case study for comparing Barelwī and Deobandī methodologies of identifying and classifying impermissible innovation (*bid'a*), relying in part on Aḥmad Razā's *fatwās*.⁵ Building on this body of work, the present article shifts the analytical focus to the influence of the rational

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1 23 AḤMAD RAZĀ KHĀN, *FATĀWĀ RIḌWIYYA* 753 (2003).

2 MARION HOLMES KATZ, *THE BIRTH OF THE PROPHET MUHAMMAD: DEVOTIONAL PIETY IN SUNNI ISLAM* 209 (2007).

3 I have deliberately used the Urdu transliteration style for the 'Riḍā' in Aḥmad Razā Khān in recognition of the fact that in South Asia he is more widely known and recognized through the Urdu pronunciation of his middle name.

4 Mohammad Waqas Sajjad, *Contesting the Milad: Deobandis and Barelvis in British India and Contemporary Pakistan*, 31 *CONTEMPORARY SOUTH ASIA* 207 (2023); MOHAMMAD WAQAS SAJJAD, *FOR THE LOVE OF THE PROPHET: DEOBANDI-BARELVI POLEMICS AND THE ULAMA IN PAKISTAN* 203–38 (2018).

5 SHERALI TAREEN, *DEFENDING MUHAMAD IN MODERNITY* 224–82 (2020).

sciences (*ma'qūlāt*), specifically the use of logic (*manṭiq*), on Aḥmad Razā's legal reasoning and argumentative strategies.

The relationship between Aḥmad Razā's juristic reasoning and rationalist scholarly traditions remains underexplored. Previous studies have noted his connections to scholars who belonged to the Farangī Maḥal and Khayrābādī intellectual lineages, both of which emphasized logic and other rational sciences.⁶ Such observations, however, generally appear in biographical contexts rather than as an analytical lens for examining his legal output. This article seeks to address that gap and argues that Aḥmad Razā's *mawlid fatwās* display a distinctive style of juristic reasoning. In this approach, Aḥmad Razā uses logic to structure legal judgment through definition, premise qualification, controlled inference, and the careful separation of essential and secondary elements of practice. This contrasts with his counterparts from the Deobandī and Ahl-i Ḥadīs movements, who used logic mainly as a supplementary aid to legal reasoning. In this respect, Aḥmad Razā appears as not merely a legalist but as what may be described as a juristic logician—someone who integrates logical reasoning into the very structure of *fatwā* argumentation by shaping how arguments are formulated, ordered, and defended.⁷

To substantiate this claim, I undertake a focused analysis of the complete corpus of 116 *mawlid fatwās* that Aḥmad Razā issued between 1299–1339/1881–1921. Rather than treating logic simply as an intellectual influence, this study examines how it functions within legal argumentation. I achieve this by tracing argumentative structures back to the *ma'qūlāt* tradition, specifically the logic curriculum associated with the Farangī Maḥal. Using defined criteria derived from classical syllogistic reasoning, I demonstrate that logic in Aḥmad Razā's *fatwās* does not merely support textual citation but governs the derivation, scope, and conditional application of rulings.

The article consists of two sections. The first section situates the *mawlid* within its Indian social and ritual context and

6 BARBARA METCALF, *ISLAMIC REVIVAL IN BRITISH INDIA: DEOBAND, 1860–1900*, at 298 (1982); USHA SANYAL, *DEVOTIONAL ISLAM AND POLITICS IN BRITISH INDIA: AHMAD RIZA KHAN AND HIS MOVEMENT, 1870–1920*, at 59 (1996).

7 Sajjad, *supra* note 4, at 212.

provides an overview of the late thirteenth /nineteenth century *mawlid* debates. The second section surveys major themes and trends in his *mawlid fatwās* and presents Aḥmad Razā's connection to the Farangī Maḥal and related networks before moving on to a close analysis of their logical structure. This close analysis includes comparative readings of selected *fatwās* by his Deobandī and Ahl-i Ḥadīs interlocutors.

THE INDIAN *MAWLID*

By the late thirteenth/nineteenth century, communities across India widely organized and practiced *mawlid* celebrations in households and public places such as roads, marketplaces, and mosques.⁸ When participants performed the ritual in mosques, they even held it after Friday and 'Īd prayers⁹ and recited poetry.¹⁰ Occasionally, partakers held the *mawlid* at the front of a walking funeral procession.¹¹ These celebrations regularly included decoration and lighting.¹²

Scholars were invited to *mawlid* gatherings to deliver talks and recite narrations related to the ritual. At times, organizers also invited individuals who would not be viewed as scholars or who did not demonstrate outward religious piety to narrate events from the Prophet's life and sing poetry praising him in melodious voices. This was done in groups or as a chorus and in the format of the *ghazal*,¹³ and sometimes in languages that the audience did not understand.¹⁴ Furthermore, in their recitals, they associated concepts with the Prophet that scholars would consider problematic, such as God coming to the temporal world in the Prophet's body and the Prophet becoming one with God.¹⁵ There also appear to have been professional *mawlid*

8 23 RAZĀ KHĀN, *supra* note 1, at 723, 737, 744.

9 Special prayers performed in congregation on the two Islamic festivals of 'Īd al-Fiṭr and 'Īd al-Adhā.

10 8 RAZĀ KHĀN, *supra* note 1, at 123, 600; 22 *id.* at 239; 23 *id.* at 409.

11 9 *id.* at 140.

12 23 *id.*, at 258; 26 *id.* at 553.

13 A form of prose usually associated with separation from or loss of a lover, common to the Persian and Urdu languages in the Indian subcontinent.

14 6 RAZĀ KHĀN, *supra* note 1, at 605; 23 *id.* at 722, 732–34, 737.

15 15 *id.* at 299, 302–3, 305, 309.

reciters who performed for a fixed fee.¹⁶ Similarly, there were women-only *mawlid*s, where participants recited narrations and sang poetry.¹⁷ Accordingly, the ritual appears to have been quite pervasive in society, such that even those engaged in professions shunned by others (such as prostitution) might organize it,¹⁸ and even Hindus participated.¹⁹ Lastly, the Sufis were strong proponents of the ritual, with their unique practices such as *samāʿ* (devotional listening to sacred poetry with or without or music),²⁰ known as *qawwālī* in the Indian subcontinent.²¹ Practices that have always been associated with the ritual, such as the recitation of Qurʾānic verses and the distribution of food (ranging from simple sweets to lavish meals), were still characteristic of the *mawlid* in thirteenth/nineteenth-century British India.²² Furthermore, animals were slaughtered specifically for the *mawlid*, sometimes as an offering to certain religio-cultural personalities, and served to attendees.²³

There appears to be a fusion of the *mawlid* ritual with the Shīʿī practice of narrating the events of Karbala.²⁴ Another potential foreign influence on the Sunnī *mawlid* was the practice of building models and images of religious characters and deriving “blessings” from them, which was still common in Aḥmad Razā’s time.²⁵ Furthermore, the expression of deep respect and veneration in the form of the practice of standing up during the narration of the Prophet’s birth or at the end of the ceremony (*qiyām*)²⁶ was also prevalent.²⁷

16 19 *id.* at 502.

17 20 *id.* at 240, 242, 245.

18 23 *id.* at 751; 24 *id.* at 490–91.

19 23 *id.* at 723, 738.

20 For the Sufi practice and ritual of *samāʿ*, see J. Dering & R. Sellheim, *Samāʿ*, in *ENCYCLOPAEDIA OF ISLAM* (2002).

21 6 RAZĀ KHĀN, *supra* note 1, at 605; 23 *id.* at 561.

22 23 *id.* at 118, 744.

23 20 *id.* at 26–66.

24 The 61/680 battle in which Ḥusayn b. ʿAlī, the Prophet’s grandson, and his companions were killed. 23 *id.* at 747, 751; 24 *id.* at 489, 514.

25 24 *id.* at 425.

26 According to Katz, it is challenging to determine when the *qiyām* became a part of the *mawlid*; nevertheless, it appears to be prevalent by the tenth/sixteenth century in Syria, Egypt, and other parts of the Ottoman Empire. See KATZ, *supra* note 2, at 129.

27 23 RAZĀ KHĀN, *supra* note 1, at 730–31, 745.

THE MAWLID DEBATES

Debates surrounding the ritual of the *mawlid* in thirteenth/nineteenth-century British India can be divided into two categories: those on the permissibility versus impermissibility of the ritual itself, and those related to specific practices associated with the ritual. In the early thirteenth /nineteenth century, Shāh ‘Abd al-‘Azīz al-Dihlawī (d. 1239/1824) declared the ritual permissible, that is, if it was in line with how it was performed at his house.²⁸ In his view, permissibility depended upon the ritual’s proper performance, which included asking God’s blessings for the Prophet (*durūd*), reciting the Qur’ān and authentic narrations, reciting the *Fātiḥa* (the first sura of the Qur’ān)²⁹ over any available food, and arranging for someone with a melodious voice to send salutations to the Prophet (*salām*). For Shāh ‘Abd al-‘Azīz, anything other than this is against the *sharī‘a* and, therefore, not permissible.³⁰ Perhaps it was during Shāh ‘Abd al-‘Azīz’s lifetime that the ritual became problematic for specific individuals close to him. Shāh Muḥammad Ismā‘īl (d. 1246/1831), Shāh ‘Abd al-‘Azīz’s nephew and a disciple of Sayyid Aḥmad Barelvī (d. 1246/1831),³¹ viewed the ritual as impermissible, although he did not address the *mawlid* directly, focusing instead on the broader practice of the *Fātiḥa* and the death anniversaries of the saints (*‘urs*).³² He accepted that the basis (*aṣl*) of the practice was very good and in line with the *sharī‘a*, but when lavish meals and specific kinds of food were prepared, people viewed it as a requirement, dates were fixed, and it was serving a worldly purpose as opposed to its original objective, then it was no longer permissible.³³

28 SHĀH ‘ABD AL-‘AZĪZ AL-DIHLAWĪ, *FATĀWĀ ‘AZĪZIYYA* 199 (1967).

29 Although the word refers to the first chapter of the Qur’ān, in the Muslim world it is generally taken to be synonymous with the practice of *iṣāl-i thawāb*, whereby the living after reciting certain verses from the Qur’ān, pray and transmit the rewards of their good deeds to the deceased.

30 AL-DIHLAWĪ, *supra* note 28, at 199–200.

31 Sayyid Aḥmad Barelvī himself was a disciple and student of Shāh ‘Abd al-‘Azīz. For him and Shāh Muḥammad Ismā‘īl, see METCALF, *supra* note 6, at 52–63.

32 Moulavī Mahommed Ismail, *Notice of the Peculiar Tenets Held by the Followers of Syed Ahmad, Taken Chiefly from the Sirāt-ül-Mustaḥqīm, a Principal Treatise of the Sect*, 1 JOURNAL OF THE ASIATIC SOCIETY OF BENGAL 485–86 (1832).

33 This is a summary of his arguments. For details, see MUḤAMMAD ISMĀ‘ĪL, *ŞIRĀT-I MUSTAḤQĪM* 73–79 (n.d.).

Thus, there were already disagreements regarding the permissibility of the ritual at the beginning of the thirteenth/nineteenth century and within the same circle of scholars. Moreover, it appears that, up until this time, the basis of the disagreement related more to the practices and the beliefs associated with the ritual rather than the ritual itself. However, by 1289/1873, the founders of the Ahl-i Ḥadīs movement started to advocate a more restrictive view where the ritual was considered an innovation (*bid'ā*) *per se*.³⁴ In his short *fatwā* on the issue, Ṣiddīq Ḥasan Khān (d. 1307/1890) labeled the ritual and accompanying practices an innovation since it had never been performed in the first three centuries of Islam (*qurūn-i thalātha*).³⁵ Several scholars endorsed this *fatwā*, especially those associated with the Deobandī movement, whose views will be discussed shortly.³⁶ Similarly, Naẓīr Ḥussain (d. 1319/1902), in multiple *fatwās*, declared the ritual an innovation as a result all of its manifestations and practices, and hence prohibited. His main argument was the same as Ḥasan Khān's: it was never performed in the Prophet's lifetime, nor by the Companions or the Successors, and therefore cannot be permissible.³⁷ For the scholars associated with the Ahl-i Ḥadīs movement, the objective or intention behind the ritual was no longer a valid argument for its permissibility. In line with their reformist program, as the Qur'ān and *ḥadīth* did not explicitly sanction the ritual, it could never be accepted as permissible under any circumstances. Both of the

34 For background on the movement and brief biographies of its two leaders discussed here, Ṣiddīq Ḥasan Khān and Naẓīr Ḥussain, see METCALF, *supra* note 6, at 268–96.

35 There is also an indication by certain writers of Ḥasan Khān being a supporter of the *mawlid* and having written a treatise in support of it titled *al-Shamāma al-'anbarīyya min mawlid khayr al-barīyya*. See MUHAMMAD TAHIR-UL-QADRI, *MILĀD AL-NABI* 384 (2008). Unfortunately, I have not been able to verify if this work is indeed Ḥasan Khān's since he is not mentioned as the author on the version of the treatise that I have access to. Neither is this work listed by Saeed Ullah as Ḥasan Khān's treatise in his work on the scholar. See SAEED ULLAH, *THE LIFE AND WORKS OF MUHAMMAD SIDDIQ HASAN KHAN, NAWAB OF BHOPAL, 1248–1307 (1832–1890)*, at 195–198 (1973). On the contrary, Saeed Ullah explicitly states in his assessment of Ḥasan Khān's doctrines that he was someone who denounced the celebration. See *id.* at 140.

36 ṢIDDĪQ ḤASAN KHĀN, *FATĀWĀ* 177–80 (2013).

37 1 NAẒĪR ḤUSSAIN, *FATĀWĀ NADHIRIYYA* 214–15, 221–23 (1913).

Ahl-i Ḥadīs leaders were, to a certain extent, influenced by the extended scholarly circle of Shāh ‘Abd al-‘Azīz: Ḥasan Khān’s father was a disciple of Shāh ‘Abd al-‘Azīz, and Naẓīr Ḥussain himself studied from Shāh ‘Abd al-‘Azīz’s grandson.³⁸ Consequently, the idea of reforming rituals was not new; however, it acquired a new urgency in post-1857 British India.³⁹

In a similar vein were the views of the founder of the Ahmadiyya movement, Mirzā Ghulām Aḥmad (d. 1326/1908), who considered the various practices associated with the ritual, such as performing the *qiyām*, to be innovations. He advocated for the recitation of the *mawlid* but not in the form that it had taken on in the thirteenth/nineteenth century. For him, the narration of the birth of the Prophet and other events from his life, after removing the elements of *bid‘a*, was equivalent to delivering a sermon. He therefore regarded this form of remembrance (what he refers to as “*mawlid* recitation”) as not only permissible but recommended.⁴⁰ In essence, for Ghulām Aḥmad, the “proper” *mawlid* was simply a sermon narrating the events of the Prophet’s life. As Hussain Khan has observed, prior to his messianic claims Ghulām Aḥmad had close relationships with certain key members of the Ahl-i Ḥadīs movement: Muḥammad Ḥussain Batālwī (d. 1338/1920), who was his classmate and friend, and Naẓīr Ḥussain himself, who at some point became his religious teacher and performed his second marriage.⁴¹ These close relationships with the Ahl-i Ḥadīs scholars might have influenced his approach toward some issues, such as his views on the *mawlid*.

On the other end of the spectrum was the Aligarh movement led by Syed Ahmad Khan (d. 1315/1898), who was not against the ritual *per se* but was in favor of revising the narrations and material discussed during the ceremony. In his early years,

38 METCALF, *supra* note 6 at 276.

39 This urgency is partly the result of broader processes of social and political transformation—subsequent to the decline of Mughal power—which politicized both Muslim and Hindu rituals and entwined debates about them with broader questions of communal identity and politics in colonial India. See SANDRIA B. FREITAG, *COLLECTIVE ACTION AND COMMUNITY: PUBLIC ARENAS AND THE EMERGENCE OF COMMUNALISM IN NORTH INDIA* 126–27 (1989); METCALF, *supra* note 6, at 354.

40 3 MIRZĀ GHULĀM AḤMAD, *MALFŪZĀT* 159–60 (1960).

41 ADIL HUSSAIN KHAN, *FROM SUFISM TO AHMADIYYA: A MUSLIM MINORITY MOVEMENT IN SOUTH ASIA* 171–72 (2015).

he had published a *mawlid* work that included certain traditional narrations on the Prophet and wherein he did not mention miracles of the Prophet, which was unusual for *mawlid* texts of the time. His text focused more on the moral aspects of the Prophet's personality.⁴² However, in his later years, he even criticized some of these traditions that he had included in his text.⁴³ Similarly to scholars after Shāh 'Abd al-'Azīz, who were influenced by his approach of conducting the *mawlid* in a "proper" manner, Syed Ahmad Khan was impressed by the teachings and works of Shāh Walī Allāh (d. 1176/1762), Shāh 'Abd al-'Azīz himself, and Shāh Muḥammad Ismā'īl.⁴⁴ Furthermore, this approach of revising the curriculum of the ritual appears to be in line with his broader program for educational and social reforms.

During Aḥmad Razā's time, scholars close to the early days of the Deobandī movement were divided on the issue of the *mawlid*'s permissibility. Broadly, there were three trends: complete opposition;⁴⁵ permissibility for the elite (scholars), who could identify its objectionable aspects and reform or remove certain practices;⁴⁶ and general permissibility.⁴⁷ According to Rashīd Aḥmad Gangohī (d. 1323/1905),⁴⁸ who not only admired Shāh Muḥammad Ismā'īl but frequently referenced his works and encouraged his students to read them as well,⁴⁹ the *mawlid* was a *bid'a* and therefore impermissible, an opinion which happened to be perfectly in agreement with the Ahl-i Ḥadīs scholars.⁵⁰ He was one of the Deobandī scholars who endorsed Ḥasan Khān's above-mentioned *fatwā*.⁵¹ He was also not in favor of accepting any good that could come out of a ritual based on illegitimate

42 METCALF, *supra* note 6, at 317.

43 HAFEEZ MALIK, SIR SAYYID AHMAD KHAN AND MUSLIM MODERNIZATION IN INDIA AND PAKISTAN 274 (1980).

44 *Id.* at 261, 264, 269.

45 This was mainly associated with the group of scholars led by Rashīd Aḥmad Gangohī. See METCALF, *supra* note 6, 150.

46 Associated with Muḥammad Qāsim Nanūtwī. See *id.* at 151.

47 Associated with Imdād Allah al-Muḥajir al-Makkī and an initial position of Ashraf 'Alī Thānvī. See *id.* at 172.

48 For his biographical details, see *id.* at 78–80.

49 BRANNON D. INGRAM, REVIVAL FROM BELOW: THE DEOBAND MOVEMENT AND GLOBAL ISLAM 58 (2018).

50 *Id.* at 66.

51 ḤASAN KHĀN, *supra* note 36, at 179.

practices. However, he appears to be supportive of lectures on the Prophet's birth and life and, when someone once requested it, he even sent one of his students and disciples (a scholar in his own regard), Khalīl Sahāranpurī (d. 1927), to conduct a "proper" *mawlid* gathering. Khalīl Sahāranpurī's views regarding the *mawlid* were slightly different from his shaykh's. Although he considered the ritual to be an innovation, if it was stripped of all the "excesses" (such as quoting weak narrations, mixing genders, overindulgence in illumination) and erroneous beliefs (such as maintaining that the ritual was obligatory, declaring those who did not participate in it to be disbelievers, supposing that the Prophet was present in the gathering and as a result performing the *qiyām*), then it was no longer a *bid'a*.⁵² Incidentally, Ashraf 'Alī Thānvī later adopted this view as well,⁵³ after revisiting his earlier stance of permissibility.⁵⁴ Lastly, both Ashraf 'Alī Thānvī and Rashīd Aḥmad Gangohī's Sufi shaykh Ḥajī Imdādullāh al-Muḥajir al-Makkī (d. 1317/1899) did not consider the *mawlid* to be a *bid'a* intrinsically. Instead, Ḥajī Imdādullāh considered some of the blameworthy acts and beliefs treated as excesses by Rashīd Aḥmad Gangohī and Khalīl Sahāranpurī as minor transgressions. He saw no issue with fixing a date for the *mawlid*, performing the *qiyām*, and the belief that the Prophet could be present in such gatherings. For him, prohibiting the complete ritual was like "burning one's rug because of a single flea."⁵⁵ Ḥajī Imdādullāh was a disciple of shaykhs who themselves were Sayyid Aḥmad Barelvī's disciples.⁵⁶ However, his views on the *mawlid* seem to contrast with the consensus of scholars influenced by Sayyid Aḥmad's reformist tendencies. One of the reasons for this difference could be that he was generally not viewed as a scholar but more as a Sufi, and thus some may have considered his legal reasoning weak or "flawed."⁵⁷ In the early Deobandī movement, then, we see a reflection of all the significant viewpoints regarding the ritual up until the late thirteenth/nineteenth century.

52 INGRAM, *supra* note 49, at 67, 68.

53 For details of his life, *see id.* at 73.

54 *Id.* at 77.

55 *Id.* at 72.

56 METCALF, *supra* note 6, at 79.

57 INGRAM, *supra* note 49, at 69–70.

It was in the context of such thirteenth/nineteenth century trends, with calls either to reform the ritual itself or to declare it impermissible, that Aḥmad Razā presented his views on the *mawlid*.

**AḤMAD RAZĀ'S MAWLID FATWĀS:
CHRONOLOGY, LOCATIONS, AND TOPICS**

Before examining the use of logic in Aḥmad Razā's *mawlid fatwās*, it is necessary to situate them within their contextual circumstances. Establishing this context is essential for understanding why Aḥmad Razā adopts certain modes of logical reasoning in his responses. Accordingly, this section maps the chronology, geographic distribution, and broad themes of his *mawlid fatwās* in order to clarify the kinds of questions he responded to, who asked them, and under what conditions.

Over the forty years (1299–1339/1881–1921) during which Aḥmad Razā issued his *mawlid*-related *fatwās*, it appears that the bulk of these (almost fifty percent) emerged towards the last six years of his life (1334–39/1915–21).⁵⁸ This trend occurred due to a growing concern with *mawlid* practices during his lifetime, triggered primarily as a result of the *mawlid* debates, and Aḥmad Razā's growing popularity in the later part of his life.

In fact, for the first years, he only issued *fatwās* pertaining to specific elements of the *mawlid*, the first couple addressing the permissibility of performing the *qiyām*. It seems that the first *fatwā* on the permissibility of the ritual as a whole does not make an appearance until 1320/1902. Although, as highlighted earlier, scholars had already contested the permissibility of the ritual prior to this, with some of the initial *fatwās* on its impermissibility appearing and being disseminated in scholarly circles

58 Of the total 116 *mawlid fatwās*, four are treatises in response to petitions (*Naṭiq al-hilāl bārakh wilād al-habīb wa'l-wiṣāl*, *iqāma al-qiyāma 'alā ṭā'an al-qiyām li-Nabī Tihāma*, *khayr al-amāl fī ḥukm al-kasb wa'l-sūwāl*, and *Shifā al-wālah fī šūra al-habīb wa-mazāra wa-na'ālah*). However, given the total quantity of treatises included in his *Fatāwā* (206 to be precise), this is a tiny percentage (under 2%). For further details, see Figure 1.

for endorsement purposes by 1291/1874.⁵⁹ One reason for this is that the issuance of a *fatwā* depends upon the *mufī*⁶⁰ receiving a petition (*istiftā*⁶¹). There could be two possible explanations for Aḥmad Razā not receiving any *mawlid*-related petitions during this period. First, the impact of the *mawlid* becoming a concern for Indian Muslims, triggered to a certain extent by the growing influence of the Deobandī and Ahl-i Ḥadīs movements, would have taken some time to foment.⁶² Second, Aḥmad Razā's popularity as a *mufī* increased only towards the later part of his *fatwā*-writing career. There were three key events that raised his profile amongst his followers and the scholars associated with him: first, he was declared a *mujaddid* in a gathering of scholars in 1318/1900;⁶³ second, he issued a controversial *fatwā* declaring certain scholars guilty of disbelief in 1324/1906; and third, access to a widely circulated regional newspaper helped him to disseminate his teachings from 1328/1910.⁶⁴ A round 1328/1910, we see an increase in the number of petitions received by Aḥmad Razā on the *mawlid*. However, whether this is consistent with the overall trend for a substantial increase in petitions generally is something that requires additional research and is beyond the scope of this article. Nevertheless, there is an indication of an overwhelming number of petitions received by Aḥmad Razā towards the later part of his life, such that he arranged for several students to assist him in issuing *fatwās*.⁶⁵ This development conforms, broadly speaking, to a general trend for the growing production and public circulation of *fatwās* from the 1890s onward.⁶⁶ Figure 1 (overleaf) presents a graphic representation of the timing of Aḥmad Razā's *mawlid fatwās*.

59 The Deoband *madrassa* was in existence by 1283/1867, and one of the earliest dated endorsements of Ḥasan Khān's *fatwā* by Deobandī *mufī*s is 1290/1873. See ḤASAN KHĀN, *supra* note 36, at 179.

60 Someone qualified to issue a *fatwā*.

61 On the significance of the petition, see Muhammad Khalid Masud, *The Significance of Istiftā' in the Fatwā Discourse*, 48 ISLAMIC STUDIES 341–66 (2009).

62 METCALF, *supra* note 6, at 354–55.

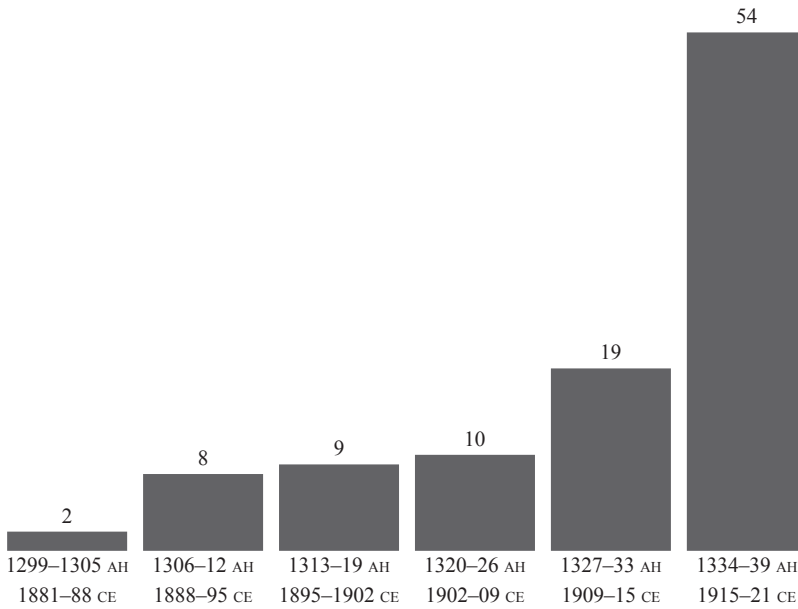
63 A reformer who seeks to revive or renew Islamic thought or practices, believed to appear at the turn of each Islamic century.

64 SANYAL, *supra* note 6, at 88, 226–27, 231.

65 *Id.* at 180–81.

66 DIETRICH REETZ, ISLAM IN THE PUBLIC SPHERE: RELIGIOUS GROUPS IN INDIA, 1900–1947, at 289 (2006).

Figure 1: Time period of the mawlid-related fatwās.



Aḥmad Razā’s *Fatāwā Riḍwiyya* addresses more than 6,500 questions on topics ranging from creeds, rituals, marriage and divorce, contracts and trading to customs. The *mawlid*-related *fatwās* form a tiny percentage of Aḥmad Razā’s output: less than two percent of the total questions answered or 116 *fatwās* in total, indicating that he was occupied with other far more critical issues. Volume 23 of the *Fatāwā* contains the most *fatwās* relevant to *mawlid*, which is to be expected given that it has a whole chapter dedicated to the *mawlid* and other rituals, such as celebrating the ‘*urs* of saints and narrating the events of Karbala. For the rest of the volumes, the *fatwās* are scattered under various topics; *fatwās* often relate to multiple topics, so that any sort of categorization is challenging. However, by first identifying the question from the petitioner and then analyzing Aḥmad Razā’s response, I was able to classify the *fatwās* into broad categories. Table 1 presents these categories with the greatest number of *fatwās*.

A quick review of the locations from where Aḥmad Razā received his petitions reveals that most of these were in and around the United Provinces of British India. This is no surprise

Celebrating the Birth of the Prophet in British India

Table 1: Categories with the greatest number of mawlid fatwās.

<i>Mawlid</i> category	Number of <i>fatwās</i>	Percentage of total
Reciter requirements	17	15%
Content	14	12%
Permissibility	13	11%
Spending	13	11%
<i>Qiyām</i>	10	9%
Wahhābīs and Deobandīs	8	7%
Food	8	7%
Relations with deniers	8	7%
Organizer requirements	5	4%
Prophetic presence	4	3%
Women	4	3%

given that the institutional bases of the movement associated with Aḥmad Razā and his earlier supporters from amongst the *'ulamā'* (Islamic scholars) were located around this region.⁶⁷ However, it might also have to do with the fact that, during this period, people in these regions widely spoke the Hindustani language (a term used by the British rulers to refer to both Urdu and Hindi).⁶⁸ Figure 2 presents petitioners' various locations, indicating that the *mawlid* had become a subject of some concern across the region, and that Aḥmad Razā was known in some of the farthest parts of British India.

Another notable aspect of these petitions is that they appear to originate mostly from individuals belonging to the non-scholarly class.⁶⁹ While there are questions from individ-

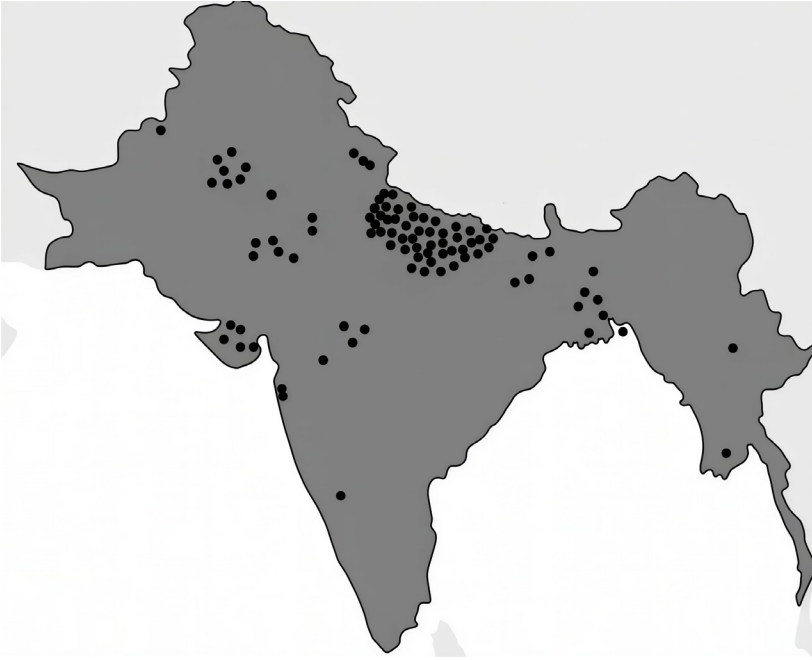
⁶⁷ SANYAL, *supra* note 6, at 69.

⁶⁸ The British did not segregate between Hindi and Urdu. These languages were loosely clubbed into three broad categories: Hindi, Western Hindi, and Eastern Hindi. For a discussion of this, see David Lelyveld, *Colonial Knowledge and the Fate of Hindustani*, 35 *COMPARATIVE STUDIES IN SOCIETY AND HISTORY* 665–82 (1993).

Based on the 1911 census of British India, out of the 98 million Indians who spoke some form of Hindi, around 72 million were residents of the region comprising the United Provinces and Bihar. For the data in support of this, see tables 20 and 21 in *STATISTICAL ABSTRACT RELATING TO BRITISH INDIA FROM 1910–11 TO 1919–20*, at 18–22 (1922).

⁶⁹ This is based on a review of the information provided in the petition relating to the petitioner. More often than not, the title before the name (such as *Mawlvī*) of the individual or other references within the question indicate whether they are

Figure 2: Locations of mawlid-related petitions.



uals who appear to be scholars, teachers, and students associated with religious institutions, these seem to focus mostly on the correct modalities for the ritual instead of its permissibility.⁷⁰ Although this might indicate that, for most scholars petitioning Aḥmad Razā, the permissibility of the ritual was a non-issue, it may also have to do with advances in infrastructure that resulted in the *‘ulamā’* reaching a wider audience than the scholarly class.⁷¹

This chronological, thematic, and geographic mapping establishes the context within which Aḥmad Razā’s *mawlid fatwās* must be read. These rulings were not abstract legal exercises but responses to recurring and contested questions that

from the scholarly class. This is based on 65 of 93 petitions (approximately 70%) where I was able to find this information.

70 There are only three such petitions from scholars inquiring about permissibility. However, they also include the various practices associated with the ritual in their petition.

71 BARBARA D. METCALF & THOMAS R. METCALF, *A CONCISE HISTORY OF MODERN INDIA* 97, 99 (2006); MUHAMMAD QASIM ZAMAN, *THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE* 25 (2002).

a largely non-scholarly audience posed across different settings. The range of issues that the *fatwās* address shows that the *mawlid* presented a group of interrelated ritual, doctrinal, and social concerns rather than a single legal problem. This complexity helps to explain why Aḥmad Razā's reasoning often moves beyond textual citation toward distinctions and conditional rulings capable of accommodating variation. It is within this space that logic (*manṭiq*) operates not just as a supporting tool but as an organizing principle of his juristic method.

Before I analyze the construction of Aḥmad Razā's arguments, I provide background on his connection to the *ma'qūlāt* tradition in British India. This context enables a fuller appreciation of his response and provides the context for my later analysis of his *fatwās*, particularly their use of heightened logical reasoning.

THE FARANGĪ MAḤAL CONNECTION

Theologically, Aḥmad Razā was influenced not only by the heightened focus on *ḥadīth* associated with the Shāh Walī Allāh trend but also by the “rationalist” (*ma'qūlī*) orientation of the Farangī Maḥal.⁷² This latter trend differed from that of Shāh Walī Allāh and his successors, such as Shāh 'Abd al-'Azīz, at the Madrasa-i Raḥīmiyya. Whereas Shāh Walī Allāh emphasized *ḥadīth*-based scholarship, the Farangī Maḥal approach placed greater weight on the rational sciences, particularly logic, which its proponents considered essential for the proper study of *fiqh*.⁷³

Aḥmad Razā's primary intellectual influence, his father Naqī 'Alī Khān (d. 1297/1880), maintained close associations with scholars linked to the Farangī Maḥal tradition, whose curricula emphasized the rational sciences, especially logic.⁷⁴ Among the close associates of Aḥmad Razā's family were the father-son duo Fazl-i Rasūl Badāyūnī (d. 1298/1872) and 'Abd al-Qādir Badāyūnī

72 USHA SANYAL, AHMAD RIZA KHAN BARELWI: IN THE PATH OF THE PROPHET 59–60 (2005).

73 FRANCIS ROBINSON, THE 'ULAMA OF FARANGI MAHALL AND ISLAMIC CULTURE IN SOUTH ASIA 46–53 (2001).

74 METCALF, *supra* note 6, INDIA at 298; SANYAL, *supra* note 6, at 59.

(d. 1319/1901). Fazl-i Rasūl studied under and graduated from Nūr al-Ḥaqq Farangī Maḥalī (d. 1238/1822) in Lucknow.⁷⁵ Aḥmad Razā later composed a commentary on one of Fazl-i Rasūl’s most significant polemical works against Shāh Muḥammad Ismā‘īl (d. 1246/1831), *al-Mu‘taqad al-Muntaqad* (*The Decisive Refutation*). In the realm of polemics, as Tareen demonstrates, Aḥmad Razā was an “intellectual heir” to Badāyūnī.⁷⁶ Fazl-i Rasūl also issued a *fatwā* in response to a petition by the last Mughal emperor, Bahādur Shah Zafar (d. 1279/1862), concerning certain practices associated with the *mawlid*.⁷⁷

Aḥmad Razā was also connected to the Badāyūnīs through Sufi networks. Fazl-i Rasūl’s father was a disciple and vicegerent (*khalīfa*) of the Sufi master Shāh Āl-i Aḥmad Barkātī (d. 1235/1819) of the Barkātiyya Sayyids of Marahra. Fazl-i Rasūl himself was later invested with vicegerency (*khirqa* or *kh-ilāfa*), and his son, ‘Abd al-Qādir, was among his disciples. The family maintained close ties with the Barkātīs well into Aḥmad Razā’s lifetime.⁷⁸ Indeed, it was ‘Abd al-Qādir who suggested that both Naqī ‘Alī and Aḥmad Razā become disciples of Āl-i Aḥmad’s nephew, Shāh Āl-i Rasūl Barkātī (d. 1296/1879).⁷⁹ Significantly, Āl-i Rasūl had also studied under Nūr al-Ḥaqq in Lucknow, further reinforcing Aḥmad Razā’s intellectual links to the Farangī Maḥal.⁸⁰

Alongside the Farangī Maḥal, another *maqūlāt* tradition was active during this period: the Khayrābādī school. Emerging from the Farangī Maḥal in the late twelfth/eighteenth century, the Khayrābādī trend had developed a distinct character by Aḥmad Razā’s time, including differences in curricular emphases and instructional texts.⁸¹ Nevertheless, considerable overlap existed,

75 REHMAN ALI, TAZKIRA-I ULAMĀ-YI HIND 329–30 (2003).

76 TAREEN, *supra* note 5, at 136–37.

77 FAZL-I RASŪL BADĀYŪNĪ, IKHTALĀFĪ MASA’IL PAR TĀRIKHĪ FATWA 35–54 (2009).

78 FAZL-I RASŪL BADĀYŪNĪ, SAYF AL-JABBĀR AL-MASLŪL ‘ALĀ A’DĀ AL-ABRĀR 8–9 (1973); for the Barkātiyya Sayyids, see Sanyal’s excellent chapter in SANYAL, *supra* note 6, at 97–127.

79 *Id.* at 59.

80 BADR AL-DĪN AḤMAD QĀDRĪ, SAWĀNIH A’LĀ ḤAZRAT 119 (1984).

81 Asad Q. Ahmed, *Logic in the Khayrābādī School of India: A Preliminary Exploration*, in LAW AND TRADITION IN CLASSICAL ISLAMIC THOUGHT: STUDIES IN

as both belonged to the broader *ma'qūlāt* tradition. Students often studied with scholars associated with both trends, and scholars maintained intellectual ties across these networks. Fazl-i Rasūl and Fazl-i Ḥaqq Khayrābādī (d. 1278/1861), for instance, were both students of Fazl-i Imām Khayrābādī (d. 1243/1828) and maintained a close friendship. Moreover, 'Abd al-Qādir studied logic under Fazl-i Ḥaqq.⁸² Aḥmad Razā himself shared a close bond with 'Abd al-Qādir, such that he even composed a poem of 105 verses in his praise.⁸³

These scholarly, pedagogical, and Sufi networks within which Naqī 'Alī and Aḥmad Razā operated, produced a distinctive scholarly orientation and approach. This intellectual formation helps explain the enhanced use of logic in Aḥmad Razā's *fatwās*, to which I now turn.

AḤMAD RAZĀ'S USE OF LOGIC IN *FATWĀ* ARGUMENTATION

What, then, would qualify someone as a *ma'qūlī* in late thirteenth/nineteenth century British India? One indicator is formal study under, and intellectual association with, scholars of the *ma'qūlī* tradition, a criterion that Aḥmad Razā clearly meets, as shown above. A second, and analytically central indicator is the way arguments are constructed and presented in written works. While intellectual affiliation establishes Aḥmad Razā's location within the *ma'qūlī* tradition, it is this pattern of argumentation that provides the primary evidence for how he operationalizes logic in his *fatwās*. It is therefore this indicator that forms the focus of the analysis that follows, which examines construction and deployment of arguments across Aḥmad Razā's *fatwās*.

Before examining selected *mawlid fatwās* of Aḥmad Razā, a number of methodological clarifications are necessary. I do not argue that Aḥmad Razā employed logical reasoning while his opponents did not. Rather, my contention is that he represents a distinctive mode of *fatwā* reasoning in which logic

HONOR OF PROFESSOR HOSSEIN MODARRESSI 234–36 (2013).

82 ALI, *supra* note 75, at 273.

83 MUHAMMAD MASOOD AHMAD, 'ĀSHIQ AL-RASŪL MAWLĀNĀ MUḤAMMAD 'ABDUL QADĪR BADĀYŪNĪ, 18 (1978).

is operationalized as an authoritative juristic tool, rather than a supplementary device. This study treats logic as supplementary when it merely reinforces a conclusion grounded independently in textual authority, and authoritative when it actively structures the derivation, scope, and conditional application of the ruling. The latter appears when reasoning drives the argument, the jurist integrates texts into that reasoning, and rulings vary according to different situations. It is this difference in the function and weight accorded to logic that distinguishes Aḥmad Razā's approach from that of his opponents, a distinction this section aims to demonstrate through targeted comparison with selected *fatwās* issued by his opponents.

Owing to the limited scope of this paper, it was not possible to undertake a corpus-wide analysis of the *mawlid*-related *fatwās* of the scholars with whom Aḥmad Razā is compared. An ideal comparative framework would have involved a similar examination of the complete body of *fatwās* addressing the prohibition of the *mawlid* and its associated practices across these scholars. Such an undertaking, however, lies beyond the parameters of the present study. Despite this limitation, a meaningful comparison remains possible. By selecting representative *fatwās* from across Aḥmad Razā's opponents this section enables a controlled comparison of argumentative strategies across different contexts and schools of thought.

It is also important to note that logic did not occupy the same curricular status within the Deobandī and Ahl-i Ḥadīs intellectual worlds that it did within the Farangī Maḥal tradition. Rashīd Aḥmad Gangohī, for instance, opposed the study of logic at Deoband, regarding it as trivial in comparison to foundational religious texts.⁸⁴ This curricular orientation inevitably shaped the manner in which scholars deployed logic within legal reasoning.

Nevertheless, this observation should not be read as a uniform judgment across all scholars associated with these movements. As will become evident, even within a single movement there were variations in the extent and manner in which logical reasoning was engaged. What does emerge

84 METCALF, *supra* note 6, at 101.

consistently from the sampled *fatwās*, however, is that scholars primarily employed logic in support of the transmitted sciences, functioning as a supporting device rather than as a dominant mode of argumentation.

The key methodological question, however, is how to link the argumentative strategies deployed in these *fatwās* to the *ma'qūlī* tradition. To link these argumentative strategies to the *ma'qūlī* tradition, I trace them back to the logic (*manṭiq*) texts that formed the core of *ma'qūlī* instruction. Based on Robinson's comparison of the number of texts taught at Farangī Maḥal and at the Madrasa-i Raḥīmiyya in the early twelfth/eighteenth century, one rational discipline stands out clearly: logic (eleven texts versus two).⁸⁵ As Asad Q. Ahmed demonstrates, this heightened emphasis on logic continued well into Aḥmad Razā's time.⁸⁶ Biographical accounts of Aḥmad Razā further suggest that he had engaged with several advanced works in logic.⁸⁷ Moreover, he authored commentaries on logical texts such as *Mullā Jalāl*, further reinforcing his strong orientation toward logical reasoning.⁸⁸

To systematically assess the application of logical reasoning, I evaluate *fatwās* using four criteria derived from classic syllogistic reasoning: (1) structural organization, (2) use of connectives, (3) incorporation of supporting texts (e.g., the Qur'ān, *ḥadīth*, and *fiqh*), and (4) treatment of multiple scenarios versus single rulings. These criteria were selected from a sample advanced logic text, *Sullam al-'ulūm (The Ladder of the Sciences)*,⁸⁹ which was taught at the Farangī Maḥal.⁹⁰ The Madrasa-i Raḥīmiyya did not include this text in its curriculum.⁹¹ Its use as a reference allows me to demonstrate that Aḥmad Razā's reasoning reflects systematic application of logical principles

85 ROBINSON, *supra* note 73, at 214.

86 Ahmed, *supra* note 81, at 236.

87 For an example, see SANYAL, *supra* note 72, at 59.

88 QĀDRĪ, *supra* note 80, at 395.

89 For a recent English translation of the *Sullam*, see ASAD Q. AHMED, *PALIMPSESTS OF THEMSELVES: LOGIC AND COMMENTARY IN POSTCLASSICAL MUSLIM SOUTH ASIA* (2022). The selected criteria appear on pp. 184–94.

90 ROBINSON, *supra* note 73, at 250.

91 G.M.D. SUFI, *AL-MINHĀJ: BEING THE EVOLUTION OF CURRICULUM IN THE MUSLIM EDUCATION INSTITUTIONS OF INDIA* 69 (1977).

rather than mere reading of texts. This curricular distinction is significant. The *Sullam al-‘ulūm* also addresses additional topics on logic such as definitions, propositions, modals, and rhetoric. These topics are either covered to a certain extent within the selected criteria or excluded because they cannot be consistently observed in actual *fatwās*. Therefore, the four criteria focus on forms of logical reasoning that are both clearly observable in the *fatwā* texts and directly involved in shaping legal rulings.

I assess the application of logical reasoning based on a six-point scale (0–5), where 0 indicates non-existent reasoning and 5 indicates the highest level. This scale enables a more precise criteria for measuring the usage of logic. The specific criteria assessed are structural organization, use of logical connectives, reliance on supporting texts, and treatment of multiple scenarios.

Structural organization ranges from simple assertions to fully articulated syllogisms with clearly identifiable major premises, minor premises, and conclusions. The use of connectives tracks the clarity and density of inferential links, distinguishing between minimal connectors (e.g., words such as “and”), weak connectors (e.g., the word “otherwise”), and clearly marked logical relations (e.g., “if ... then”). The supporting-texts criterion measures the balance between transmitted sources and independent reasoning, while the multiple-scenarios criterion captures the extent to which objections, distinctions, and alternative cases are anticipated and addressed. Table 2 presents the pointers for each criterion.

The appendix includes the detailed results. Around 38% of the *fatwās* scored 4 or higher, with eight *fatwās* achieving a perfect score of 5 across all criteria, demonstrating Aḥmad Raḏā’s skill as a logician. The mean score of 3.23 and median score of 3.0 together indicate that moderate-to-high levels of logical reasoning are not exceptional and are embedded across the *fatwās*. Furthermore, conceptually abstract issues such as the *qiyām*, Prophetic presence, and permissibility constitute 26% of the total corpus, while they account for 36.4% of the highest-scoring *fatwās* (scores of 4 or above). This disproportionate representation suggests that issues marked by conceptual

Table 2: Criteria for assessing the application of logical reasoning in the mawlid fatwās.

Logic criteria	0	1	2	3	4	5
Structural organization	Assertion only	Text to ruling (implicit)	Single principle applied	Implied syllogism	Clear rule to case to ruling	Explicit setup as major premise, minor premise, and conclusion
Use of connectives	None	Minimal	Weak connectors	One clear connector	Two clear connectors	More than two clear connectors
Supporting texts	Pure citations	Texts dominant	Mostly text plus one principle	Balanced	Mostly reasoning	No texts
Multiple scenarios	No objections handled	None shown	One distinction	Two distinctions	Three distinctions	More than three distinctions

ambiguity or theological sensitivity tend to produce more explicit and structured logical reasoning.

Another trend emerges when the *fatwās* are divided into two chronological phases: prior to 1334/1915 and after 1334/1915. The mean logic score rises from 2.90 in the period 1299–1333/1881–1914 to 3.30 in 1334–39/1915–21, with the median increasing from 3.0 to 3.5. This shift suggests not a random increase, but a consolidation of a rationalist method over time. Notably, the proportion of *fatwās* addressing deniers, Wahhābīs, and Deobandīs nearly doubles, from 10% in the earlier period to 19.4% in the later one. This rise in polemical engagement corresponds with the rise in logical reasoning, indicating that increased doctrinal contestation contributed to more explicit rational argumentation.

Accordingly, analysis of the complete corpus of 116 *mawlid*-related *fatwās* indicates that Aḥmad Razā systematically and extensively deploys logical reasoning to defend the *mawlid*, endorsing certain practices while explicitly rejecting others.

The next section substantiates this conclusion by examining a selected set of representative *fatwās*, analyzing the logical structures and argumentative techniques through which Aḥmad Razā articulates and justifies his rulings.

ON PERMISSIBILITY OF THE *MAWLID*

Aḥmad Razā's principal argument in support of the permissibility of the ritual rests on the claim that it is not explicitly prohibited. In response to a petition from the Assistant Secretary of the Ahl-i Ḥadīs association of Amritsar on providing proof in support of the *mawlid* from the Qur'ān, *ḥadīth*, and *fiqh*, Aḥmad Razā's main line of argument is clear and succinct: it has not been explicitly deemed prohibited. According to him, the scriptures or recognized books of *fiqh* provide no proof prohibiting the celebration of the *mawlid*.⁹² This hermeneutical stance aligns with what Tareen identifies as a core principle in Aḥmad Razā's legal reasoning: A practice can only be deemed impermissible through a conclusive proof text (*naṣṣ-i qaṭ'ī*), otherwise the

92 29 RAZĀ KHĀN, *supra* note 1, at 248–49.

default value was that of permissibility (*ibāḥat*).⁹³ Aḥmad Razā's response to the Amritsar petition thus operates squarely within this framework, shifting the burden of proof onto his opponents by demanding a decisive textual basis for prohibition rather than supplying evidence of explicit authorization.

This approach sharply distinguishes Aḥmad Razā from his opponents, who maintain that anything not explicitly designated as permissible by the Qur'ān, *ḥadīth*, and accepted practices of the first three centuries of Islam is not allowed. Furthermore, if the original (*aṣl*) ruling for something is permissibility, then that ruling remains applicable. A ruling of prohibition or impermissibility applies only to the reprehensible matters that become associated with it. Thus, giving the example of unauthentic and fabricated narrations being recited in *mawlid* gatherings in India, he states that this will not change the original ruling of permissibility.⁹⁴ In his response, Aḥmad Razā engages in a form of compound syllogism,⁹⁵ which was heavily used by Fazl-i Haqq Khairābādī and scholars associated with him to argue against Shāh Ismā'īl's views on God's omnipotence.⁹⁶ The presence of such structured logical reasoning underscores that Aḥmad Razā's defense of the *mawlid* is not merely rhetorical or devotional but firmly anchored in the *ma'qūlī* tradition.

A useful comparison can be drawn with one of Ṣiddīq Hasan Khān's *fatwās* endorsed by Rashīd Aḥmad Gangohī.⁹⁷ In this ruling, the prohibition of the *mawlid* rests on a single premise: it was not observed during the first three centuries of Islam, and no scriptural evidence supports it. The conclusion follows: the practice is an innovation (*bid'a*). Here, logic is employed in a basic, linear fashion from premise to conclusion without

93 TAREEN, *supra* note 5, at 257.

94 24 RAZĀ KHĀN, *supra* note 1, at 519.

95 He presents part of a Qur'ānic verse, accompanied by a statement along the following lines: "IF the Wahhabis can provide proof that ... OR ... THEN a reward of 40 rupees." See generally JOEP LAMEER, AL-FĀRĀBĪ AND ARISTOTELIAN SYLLOGISTICS: GREEK THEORY AND ISLAMIC PRACTICE (1994) (regarding syllogism in Islamic practice).

96 Asad Q. Ahmed & Reza Pourjavady, *Theology in the Indian Subcontinent*, in THE OXFORD HANDBOOK OF ISLAMIC THEOLOGY 621 (Sabine Schmidtke ed., 2016).

97 HASAN KHĀN, *supra* note 36, at 177–80.

layering or qualification. Gangohī's endorsement reinforces this simplicity; he states that such gatherings are impermissible and attending them is sinful; if someone calls out to the Prophet with the belief that he is present and observing (*ḥāẓir o nāẓir*), this constitutes disbelief (*kufr*). The reasoning is minimal and categorical, with no anticipatory handling of objections or secondary considerations.

By contrast, Aḥmad Razā consistently structures his arguments in multi-step syllogisms, qualifying premises and anticipating challenges. For instance, he explicitly maintains that the original ruling of permissibility remains applicable even when reprehensible elements appear in practice, thereby preserving the act's legitimacy while addressing potential objections. This multi-step and qualified reasoning demonstrate his advanced and distinctive use of logic compared to the basic linear approach of Ṣiddīq Ḥasan Khān and Gangohī. A key difference between Aḥmad Razā and the Deobandī scholars was that, even when some corrupt or reprehensible practices were associated with the *mawlid*, Aḥmad Razā maintained that the scholars had no authority to stop the ritual itself. Both Sajjad and Tareen make this observation.⁹⁸ I would take this a step further by arguing that Aḥmad Razā's distinctive approach lay in his systematic separation of the original ruling (*aṣl*) from the secondary or contingent aspects of the practice (*far'*). This separation was achieved through a precise form of logical reasoning using defined concepts and qualified premises to determine which aspects of the practice are legally essential and which are contingent. By isolating the core permissibility of the ritual from problematic additions, he could identify and address objections while still defending the practice. This method of drawing out underlying principles and using them to justify the ritual represents the primary logical and methodological difference between Aḥmad Razā and the Deobandī scholars.

98 Sajjad, *supra* note 4, at 211; TAREEN, *supra* note 5, at 267.

USING SCRIPTURE THROUGH LOGIC IN LEGAL REASONING

In a significant proportion of his *fatwās* (25%), Aḥmad Razā does not refer to scripture at all, which itself indicates reliance on other modes of argumentation, most notably logical reasoning. In the majority (75%) of his *mawlid fatwās* in which he cites supporting sources, he refers to the Qur'ān and *ḥadīth* in 44% and 37% of these cases, respectively.⁹⁹ This underscores the centrality of scripture in his reasoning. Crucially, however, Aḥmad Razā does not invoke scripture as isolated proof texts; rather, he incorporates it into a structured logic-based argumentative process that proceeds from the absence of explicit prohibition to a legal conclusion of permissibility. For instance, there are three verses that he frequently quotes from the Qur'ān, the first two being:

Say: In the bounty (*faḍl*) of Allah and in His mercy: therein let them rejoice. It is better than what they hoard. (Qur'ān 10:58)¹⁰⁰

Therefore of the bounty (*ni'ma*) of thy Lord be thy discourse. (Qur'ān 93:11)¹⁰¹

Aḥmad Razā quotes each of these in six separate *fatwās*, and for him the “bounty” of God is the Prophet, and this should be declared and rejoiced in; what better way than through the *mawlid*? In the first verse, exegetes have interpreted the bounty of God to be the Qur'ān, and “mercy” as referring to either Islam or the Prophet, while bounty in the second verse has had a wide range of interpretations ranging from the Qur'ān, Prophethood, or guidance, to any blessing in general.¹⁰² In addition, Aḥmad Razā quotes the following verse:

99 This approach of a *muftī* not providing their sources is not unique and has been prevalent since classical times. See Masud, *supra* note 61, at 347.

100 In Pickthall's version of the translation, this appears as verse 59 of chapter 10. MARMADUKE PICKTHALL, *THE MEANING OF THE GLORIOUS KORAN: AN EXPLANATORY TRANSLATION* 216 (1930).

101 *Id.* at 656.

102 *THE STUDY QURAN: A NEW TRANSLATION AND COMMENTARY* chapters 10 and 93 (Seyyed Hossein Nasr et al. eds. and trans., 2015).

That ye (mankind) may believe in Allah and His messenger, and may honour Him, and may revere Him, and may glorify Him at early dawn and at the close of day. (Qur'ān 48:09)¹⁰³

Exegetes have interpreted this verse in different ways; either it relates to honoring and revering God or it applies to the Prophet instead.¹⁰⁴ Aḥmad Razā prefers the latter reading.¹⁰⁵ Accordingly, he selects an interpretation as his premise that will lead to him conclude the permissibility of the *mawlid*. For Aḥmad Razā the *mawlid* is a way of honoring and revering the Prophet. As per Aḥmad Razā, these Qur'ānic verses have general applicability and one should not restrict these verses to a specific time period, such as to the first three centuries of Islam, or to certain acts and practices only.¹⁰⁶ Coincidentally, in Aḥmad Razā's *fatwā* to the Ahl-i Ḥadīs association of Amritsar, his fourth verse from the Qur'ān and accompanying statement are as follows:

Allah the Great says: And whatsoever the messenger giveth you, take it. And whatsoever he forbiddeth, abstain (from it). (Qur'ān 57:7)¹⁰⁷ If the Wahhabīs can provide proof that somewhere the Majestic Qur'ān or the exalted *ḥadīths* disallow the blessed *mawlid* gathering, then a reward of 40 rupees.¹⁰⁸

Here he uses scriptural syllogism to convert Qur'ānic silence into certainty, showcasing his textual-to-logical or scriptural-to-rational deployment.

From the *ḥadīth* literature, the texts Aḥmad Razā most often quotes are the authoritative collections of Bukhārī (thirteen times), Muslim (eleven times), and Abū Dāwūd (ten times), and he deploys these texts in a similar manner. This also indicates his concern for using sources that provoked minimum

103 PICKTHALL, *supra* note 100, at 529.

104 THE STUDY QURAN, *supra* note 102, chapter 48.

105 For an example of this, see 23 RAZĀ KHĀN, *supra* note 1, at 750.

106 29 *id.* at 251–52.

107 PICKTHALL, *supra* note 100, at 575.

108 29 RAZĀ KHĀN, *supra* note 1, at 248–49 (emphasis added).

disagreement amongst the scholars of his time when setting up his premises. Although Aḥmad Razā was a Sufi shaykh, he only refers to eight Sufi texts in the *mawlid fatwās*.¹⁰⁹ These references include al-Ghazālī's (d. 505/1111) *Iḥyā' 'ulūm al-dīn* and *Kimīyā-e sa'ādat*, and al-Zabīdī's (d. 1205/1790) *Ithāf al-sāda al-muttaqīn*, a commentary on the *Iḥyā'*, which is quoted seven times, while the rest of the Sufi texts are referred to only once. The *Ithāf* is mainly used as a source of *ḥadīths* rather than views of the Sufis, reinforcing that for Aḥmad Razā not all sources are equal in terms of their importance for the argument and they are leveraged in different ways in support of his reasoning.

Most of his sources (56% in 49 *fatwās*) are from *fiqh* texts. The most frequently cited *fiqh* manuals are Ḥanafī texts: 'Alā al-Dīn al-Ḥaskafī's (d. 1088/1677) *al-Durr al-mukhtār sharḥ Tanwīr al-abṣār* (fourteen times) and Ibn 'Ābidīn's (d. 1252/1836) commentary on it titled *Radd al-Muḥtār 'alā al-Durr al-Mukhtār* (eighteen times), and *al-Fatāwā al-Hindiyya* (10 times) composed under the Mughal Emperor Aurangzeb's (d. 1118/1707) patronage. Aḥmad Razā appears to not only rely on Ḥanafī manuals that were closer to his time but also those which were accepted and referred to by his main counterparts, the Deobandīs.¹¹⁰

From the perspective of logic, this source selection functions as a form of argument from shared premises. By grounding his legal reasoning in authorities that his opponents themselves accepted as reliable, Aḥmad Razā constrained the range of objections and shifted the dispute from questions of textual authority to the conclusions logically followed from those shared texts. In this sense, his reliance on these works reflects a conscious logical strategy, structuring the debate in a way that rendered dismissal on epistemic grounds logically untenable.

As a related observation, this concern for using sources that would be accepted as valid by his contemporaries supports Sajjad's characterization that Aḥmad Razā operates as a legalist (as opposed to a Sufi), and that the *mawlid* is an Islamic ritual for

¹⁰⁹ That is, those I was able to identify as focused on Sufi or mystical-related subjects.

¹¹⁰ INGRAM, *supra* note 49, at 42, 86, 170.

him.¹¹¹ It also confirms that his target audience was mainly the Ḥanafī Sunnī Muslims of the Indian subcontinent. At the same time, I would argue that Aḥmad Razā’s method exceeds legalism alone. His sustained emphasis on shared premises, controlled inference, and argumentative constraint reveals him to be operating as a logician within the legal tradition, rather than merely as a jurist invoking authority; someone I would refer to as a “juristic logician.”

This characterization is based on an analysis of Aḥmad Razā’s *mawlid*-related *fatwās* and should be understood within that scope. Nevertheless, these *fatwās* frequently extend beyond the *mawlid* itself, on topics such as lawful food and income, inheritance, relations with non-Muslims, and intra-Muslim disagreement. The appearance of the same forms of premise qualification and inferential control in these discussions suggests that this mode of reasoning is not confined to ritual polemics alone but arguably reflects a broader pattern in his juristic practice.

SECONDARY PRACTICES IN THE *MAWLID*

Aḥmad Razā’s logical method is most visible in cases where he explains which parts of the *mawlid* are essential and which are secondary, without relying heavily on Qur’ānic or *ḥadīth* citations. One such cluster of rulings concerns practices commonly associated with the *mawlid* but not constitutive of it, such as the distribution of sweets or food and the compensation of reciters. For Aḥmad Razā, it is not mandated that an attendee should take their share of sweets unless there is a risk that the organizer might feel personally offended. Furthermore, the distribution of sweets does not have to be equal if it is a regional custom, for example, for a young person to receive half of an adult’s share, or more generally if the recipients do not consider it insulting.¹¹² In this specific *fatwā*, where his response is based on pure reasoning, Aḥmad Razā treats the distribution of sweets or food as an accidental (non-essential) attribute of the *mawlid* rather than a constitutive requirement. He grounds this judgment in a prior

¹¹¹ Sajjad, *supra* note 4, at 212.

¹¹² 23 RAZĀ KHĀN, *supra* note 1, at 744.

definition of the ritual's essence as the remembrance (*dhikr*) of the Prophet. From this major premise, he derives several qualified rulings: participation in the distribution is not obligatory, and refusal to accept one's share is permissible, except in cases where such refusal would result in personal offense to the host. He further extends this reasoning to the question of unequal distribution, allowing it when supported by established custom (*'urf*) or when no perception of insult arises among recipients.

The same inferential structure governs his rulings on compensating *mawlid* reciters. Aḥmad Razā also deems it impermissible for a reciter to obtain compensation for a *mawlid* recital. This is because they are performing an act of worship, and it is *ḥarām* (prohibited) to obtain compensation for such deeds (major premise).¹¹³ Extending this reasoning, if the reciter is invited to have food after the event and the food is deemed as compensation for him, then this is impermissible as well. However, if the food or meal is offered by general invitation to everyone and not specifically to the reciter, and if they are not given a more significant portion or an exceptional tidbit, then the reciter is allowed to take it.¹¹⁴ This ruling of impermissibility is consistent across most of his *fatwās* on the subject.

However, in one specific *fatwā*, the petitioners highlight a practice in Bengal whereby *mawlid* reciters are compensated after the ritual. There is no prior agreement between the two parties on the time and compensation, but since it is a common practice, it is expected. Here Aḥmad Razā concludes that as the reciters are led by common practice to expect something at the end, this is impermissible. Here again, logic drives the conclusion; expectation generated by custom renders the act analogous to pre-agreed compensation.

At the same time, Aḥmad Razā displays sensitivity to local conditions by outlining two scenarios (multiple scenario handling) in which remuneration would be acceptable. In the first, the two parties expressly declare beforehand that neither will the reciters accept any compensation for the recital nor will the organizers compensate them. Any voluntary compensation

¹¹³ *Id.* at 605, 725–26; 9 *id.* at 648; 19 *id.* at 502.

¹¹⁴ 21 *id.* at 663.

by the organizer at the end is then permissible since there was no expectation or prior agreement specific to the recital. In the second, the organizers hire the reciters as labor for a fixed rate and time. They can then utilize them as they deem fit, and thus the compensation is not tied to their *mawlid* recital.¹¹⁵

These solutions might appear to be “creative” techniques employed by the *muftī* to avoid the prohibition of compensation pertaining to *mawlid* recitals. However, they do highlight the real underlying issue for Aḥmad Razā, which is his concern that the *mawlid* recital might be treated as a service or product that can be transacted and negotiated based on time and cost, even when there is no great need to do so.¹¹⁶ This case illustrates the value of examining his *mawlid fatwās* as a corpus as it allows one to trace the tensions and nuanced reasoning applied to the same issue across different contexts. Aḥmad Razā preserves a stable major premise while adjusting secondary rulings through controlled inference, offering a practical framework for regulating devotional practices without undermining their integrity. Moreover, it provides a practical model for contemporary adherents of the Barelwī movement when navigating the challenge of compensating professional reciters without compromising the devotional integrity of the ritual.

The same logic of distinguishing essence from accident also governs how Aḥmad Razā evaluates the correct form and limits of *mawlid* performance more broadly, to which I now turn.

NORMATIVE MODELS AND CONDITIONAL PERMISSIBILITY

For Aḥmad Razā, the recitation of the Qur’ān, “appropriate” poetry in praise of the Prophet but without music, distribution of sweets, illumination and decorations, and performing

115 19 *id.* at 486–88, 495–96.

116 In the same *fatwā*, he identifies certain activities for which compensation can be agreed upon beforehand, such as the teaching of the Qur’ān and other religious subjects and those associated with the *īmām* (prayer leader) and the *adhān* (call to prayer). These too, he states, have been deemed permissible by later scholars as desperate measures due to the conditions of the time (*hāl-i zamāna*) and whereby they were viewed as necessary for the protection of the religion and faith. 19 *id.* at 486, 495.

the *qiyām* were all permissible.¹¹⁷ However, he does detail the correct modalities for these practices in his *fatwās*, and one should not treat this as a blanket allowance. Permissibility is thus made conditional upon conformity to an established model, which was how the ritual was performed in Aḥmad Razā's time in the Hijaz.¹¹⁸ Just as for Shāh 'Abd al-'Azīz, whose standard for the "proper" demonstration of the ritual was defined by how it was conducted at his home, for Aḥmad Razā the holy cities of Mecca and Medina set the bar.¹¹⁹ In both cases, permissibility is determined through a form of analogical reasoning in which contemporary practice is measured against an accepted normative precedent.

In Mecca, the *mawlid* was not only held throughout the year in homes but also specifically on the eleventh and twelfth days of Rabī' al-Awwal,¹²⁰ when a grand *mawlid* was held in the Holy Mosque involving, amongst other practices, sermons on the Prophet, recitations of poetry and *mawlid* texts, feasts, lighting, and *dhikr*.¹²¹ In the Islamic tradition, the word *dhikr* has multiple meanings depending upon the context in which it is used.¹²² Aḥmad Razā considers the *mawlid* to be the *dhikr* of the Prophet. He then makes the next logical move in his argument: since remembrance of the Prophet constitutes remembrance of God, it must be permissible.¹²³ This is because, for him, the Prophet is not separate from God, and a matter (*mu'āmalā*) relating to the Prophet effectively relates to God.¹²⁴

A contrasting mode of reasoning appears in a *fatwā* addressed to Rashīd Aḥmad Gangohī. The petitioner cites Shāh

117 8 *id.* at 123; 23 *id.* at 118, 258, 730–31, 744, 745; 26 *id.* at 427–28, 553.

118 23 *id.* at 561, 739.

119 23 *id.* at 739, 748; 24 *id.* at 514.

120 The third month of the Islamic calendar in which the Prophet is believed to have been born.

121 C. SNOUCK HURGRONJE, *MEKKA IN THE LATTER PART OF THE 19TH CENTURY: DAILY LIFE, CUSTOMS AND LEARNING. THE MUSLIMS OF THE EAST-INDIAN ARCHIPELAGO* 130 (2007).

122 It could mean "remembrance, reminder and invocation," or even a "repetitive recitation of the Divine Name or other sacred utterance." See ÉRIC GEOFFROY, *INTRODUCTION TO SUFISM: THE INNER PATH OF ISLAM* 162 (2010); *A TREASURY OF SUFI WISDOM: THE PATH OF UNITY* 59 (Peter Samsel ed., 2015).

123 23 RAZĀ KHĀN, *supra* note 1, at 753.

124 SANYAL, *supra* note 6, at 154.

Walī Allāh al-Dihlawī's reported spiritual experience of witnessing angels present in Mecca on the Prophet's birthday, apparently coinciding with a *mawlid* gathering. Gangohī responds by denying any normative significance to the event. He argues that the occurrence was coincidental; it happened to coincide with the Prophet's birthday, people happened to be present at the place of birth, and they engaged in his remembrance without prior planning, organization, illumination, or the distribution of sweets.¹²⁵ Here, Gangohī does not construct a formal syllogism or present a precedent to establish permissibility. Instead, he relies on basic rational explanation (*'aql*) to neutralize the evidentiary value of the report by reframing it as accidental rather than intentional. Logic, in this case, functions primarily as a tool of negation and refutation, used to deny that an isolated occurrence can serve as a legal or ritual proof. The contrast is therefore not between the presence and absence of reasoning, but between different deployments of logic. Aḥmad Razā uses logic constructively whereas Gangohī employs logic defensively.

For Aḥmad Razā, it is permissible to stop someone from attending a *mawlid* if it is not free from reprehensible and prohibited practices.¹²⁶ This position rests on a conditional distinction: the permissibility of the *mawlid* depends on its proper performance. However, if someone declares one who practices the ritual as destined for hell, then for Aḥmad Razā such a person is himself destined for hell.¹²⁷

In another *fatwā*, he states that in India the only group of people to deny the *mawlid*'s permissibility are the Wahhābīs¹²⁸—an umbrella term he uses for the Deobandīs and Ahl-i Ḥadīs.¹²⁹ Elsewhere, he argues that those who prevent people from actions that have not been expressly prohibited by the Qur'ān and *ḥadīth* are innovators themselves.¹³⁰ His logical move here is

125 RASHĪD AḤMAD GANGOHĪ, *FATĀWĀ RASHĪDIYYA* 256–57 (n.d).

126 23 RAZĀ KHĀN, *supra* note 1, at 760.

127 14 *id.* at 687.

128 29 *id.* at 204–05.

129 Usha Sanyal, *Are Wahhabis Kafir? Ahmad Riza Khan Bareilwi and His Sword of the Haramayn*, in *ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS 206* (Muhammad Khalid Masud, Brinkley Messick & David S. Powers eds., 1996).

130 23 RAZĀ KHĀN, *supra* note 1, at 745.

consistent, i.e., denying permissibility in the absence of prohibition constitutes an unjustified innovation (*bid'a*).

Extending this reasoning further, Aḥmad Razā maintains that not only are certain scholars of the Deobandīs and Ahl-i Ḥadīs disbelievers; so too are their followers who, despite becoming aware of their scholars' alleged statements of *kufr*, still view them as Muslims. For him, it is not surprising that his opponents are deniers of the "essence" (*nafs*) of the *mawlid* since they are deniers of the essence of the Prophet.¹³¹ In Aḥmad Razā's heightened Prophetology, the Prophet is conceived as the center of the universe and its reason for existence.¹³² This serves as a foundational premise in his thought and all subsequent conclusions about permissible practice, ritual, and belief flow from this starting point. In this light, disregarding alternative views, let alone accepting them, would be not only theologically unacceptable but also logically incoherent, since any challenge would contradict the first premise on which his entire argumentative framework rests.

LOGICAL REASONING AND THE *QIYĀM*

On the correct modalities for performing the *qiyām*, Aḥmad Razā states that it should be undertaken at the time of the recital of the Prophet's birth. His reasoning is that this moment constitutes a form of *dhikr* (mention) marking the Prophet's arrival into the world and is therefore the most appropriate moment for its performance.¹³³ However, here Aḥmad Razā also addresses the correct interiorization of the practice, for a question arises about whether the Prophet arrives physically at a *mawlid* gathering? To this, Aḥmad Razā responds that no one could claim to know with certainty, for it was in the Prophet's power (*ikhtiyār*) to arrive should he choose to do so, but it could not be assumed for every gathering.¹³⁴ From this, the inferential chain is clear; standing up at the end of a *mawlid* gathering did not imply that

131 15 *id.* at 524–25.

132 SANYAL, *supra* note 6, at 216, 262; MUHAMMAD MUṢṬAFĀ RAZĀ KHĀN, *MALFŪZĀT-I 'ALĀ ḤĀZRAT* 251–52 (2014).

133 26 RAZĀ KHĀN, *supra* note 1, at 523.

134 14 *id.* at 670; 23 *id.* at 749.

the Prophet had physically arrived but was only an expression of respect for him. Standing at the mention of the Prophet's birth is thus justified as a symbolic act of respect, rather than as a theological claim about presence.

Another Ahl-i Ḥadīs scholar Naẓīr Ḥussain, by contrast, adopts a far more compressed line of reasoning. In one of his *fatwās* on the *qiyām*, he declares that performing it at the mention of the Prophet's birth constitutes an innovation and is therefore impermissible. He further maintains that if this is undertaken with the belief that the Prophet is present and observing the gathering then it amounts to disbelief.¹³⁵

The contrast between the two approaches is instructive. Aḥmad Razā's *fatwā* demonstrates a higher degree of logical engagement through his systematic separation of premises, his anticipation of potential objections, and his careful delimitation of what the practice does and does not entail. By separating the act of *qiyām* from claims about physical presence, he preserves its permissibility through controlled inference. Although Naẓīr Ḥussain does distinguish between the outward act and the belief attached to it, his analysis remains relatively compressed. The ruling moves directly from classification to judgment, with limited attention to intermediate distinctions or alternative interior states. This difference highlights Aḥmad Razā's more rigorous deployment of logical reasoning in navigating contested ritual practices.

In contrast, one of Ashraf 'Alī Thānvī's *fatwās* addressing the *qiyām* illustrates his own engagement with logical reasoning, particularly through the use of compound syllogisms to challenge the purpose of the practice.¹³⁶ The *fatwā*, structured as a seven-point response, addresses various practices associated with the *mawlid*, including ignorant speakers, fabricated narrations, extravagance, treating a specific date as religiously necessary, and other matters. For the first five points, Thānvī supports his conclusions by citing from the Qur'ān or *ḥadīth*. However, when addressing the *qiyām* in point six, he shifts entirely to logical argumentation, relying on inference rather than textual proof.

¹³⁵ ḤUSSAIN, *supra* note 37, at 221.

¹³⁶ 11 ASHRAF 'ALĪ THĀNVĪ, *IMDĀD AL-FATĀWĀ* 351 (2017).

Thānvī establishes his premises by considering the beliefs of those who perform the *qiyām*: some believe that the Prophet is present and observing the gathering. From this, he reasons that if the Prophet is thought to have independent knowledge or power, it constitutes *shirk* (polytheism). Conversely, if this belief is not held, then the act is a falsehood against God and His Messenger. He further accounts for the alternative belief that angels are present, prompting participants to stand in respect. Thānvī then engages in a series of logical counterarguments, systematically questioning the internal consistency of these beliefs:

1. Angels are always present with individuals, so why single out the *dhikr* gathering?
2. Even if restricted to the *dhikr* gathering, why restrict it to the *mawlid*?
3. If limited to the *mawlid*, why specifically at the mention of the Prophet's birth?
4. If the act is performed solely out of respect for the *dhikr* of the Prophet's birth, why not stand on other occasions when it is mentioned?

Through these steps, Thānvī demonstrates internal coherence in argumentation, testing each assumption against logical consequences. He ultimately concludes that the practice is pointless and frivolous, having subjected the belief structures supporting it to rigorous analytical scrutiny.

From a logic perspective, this *fatwā* exemplifies structured compound reasoning: Thānvī identifies premises, considers multiple possible internal beliefs, anticipates objections, and traces the implications of each premise to reach a conclusion. A comparison to Aḥmad Razā's *fatwās* highlights important differences in method and depth of reasoning. In his *mawlid fatwās*, Aḥmad Razā consistently employs multi-layered compound syllogisms, linking multiple premises, textual sources, and consequences to justify permissibility while preemptively addressing objections. Thānvī's argument is logically sound but narrower in scope, structured to expose contradictions rather than to construct a positive, defensible normative conclusion. Thānvī, in this instance, thus functions more as a refutational logician, using logic primarily to critique and negate practices.

CONCLUSION

Through my analysis of Aḥmad Razā's *mawlid fatwās*, I was able to demonstrate that they display a distinctive style of juristic reasoning in which Aḥmad Razā deploys logic as an authoritative juristic tool. This contrasts with approaches in which scholars use logic as a supplementary tool to reinforce a conclusion grounded independently in textual authority. Firmly entrenched in the Farangī Maḥal trend, which placed increased emphasis on logic as necessary for the study of *fiqh*, Aḥmad Razā's argumentation in support of the *mawlid* and associated practices reflects this approach.¹³⁷ I have argued that Aḥmad Razā's distinctive approach lies in his systematic separation of the original ruling from the secondary aspects of the practice. Through this, he could respond to objections while defending the core practice. By distinguishing between what is legally essential to a ritual and what is non-essential or removable, he recognized the prevalence of reprehensible practices without declaring the ritual itself impermissible. He achieved this separation through a specific form of logical reasoning that relied on clearly defined concepts and carefully qualified premises. Furthermore, as this article has shown, Aḥmad Razā does not ignore scripture completely and in majority of his *mawlid fatwās* he refers to the Qur'ān and *ḥadīth*. This highlights the significance of scriptural support in his reasoning. However, Aḥmad Razā does not invoke scripture independently and it is part of a logic-based argumentative process.

To substantiate the above, I analyzed 116 *mawlid fatwās* of Aḥmad Razā issued between 1299/1881 and 1339/1921. I evaluated these *fatwās* using four criteria derived from classic syllogistic reasoning that are observable in the *fatwās*: structural organization, use of connectives, incorporation of supporting texts and the treatment of multiple scenarios. By scoring these on a six-point scale (0–5), and arriving at a mean score of 3.23, moderate-to-high levels of logical reasoning were observed. Moreover, issues such as the *qiyām*, Prophetic presence and permissibility account for a significant portion of

137 ROBINSON, *supra* note 73, at 46–53.

the highest-scoring *fatwās*. This suggests that conceptual ambiguity issues generated more explicit and structured logical reasoning. Furthermore, the proportion of *fatwās* addressing his opponents nearly doubles (from 10% to 19.4%) towards the later part of his *fatwā*-writing career. This arguably indicates that increased polemical engagement contributed to more rational argumentation.

However, this was not only a simple increase in rational argumentation; it was also how Aḥmad Razā deployed logic that distinguished him from his counterparts from the Ahl-i Ḥadīs and Deobandī movements. By comparing his *fatwās* to selected *fatwās* from his rivals in the Ahl-i Ḥadīs and Deobandī movements, I demonstrate that they employ logic mainly as a supporting device, whether for refuting or negating. On the other hand, for Aḥmad Razā, it was a dominant mode of argumentation. Based on this, I conclude that he operates as a logician within the legal tradition: a juristic logician.

I base this characterization on an analysis of Aḥmad Razā's *mawlid*-related *fatwās* and it should therefore be understood within this scope. However, as I observed, these *fatwās* usually extend beyond the *mawlid* itself, and cover other topics such as lawful food and income, inheritance, relations with non-Muslims, and intra-Muslim disagreement. The prevalence of the same forms of logical reasoning in these discussions suggests that Aḥmad Razā did not confine this mode of reasoning to *mawlid*-related polemics but rather reflects a broader consistent pattern in his juristic practice.

This study also illustrates the value of examining his complete *mawlid fatwās* as a corpus as it allows one to trace the tensions and nuanced reasoning applied to the same issue across different contexts. A case in point is the apparently “creative” technique used to avoid the prohibition of compensation pertaining to *mawlid* recitals, which might appear to be inconsistent when compared to Aḥmad Razā's other rulings on the matter.

As Sanyal demonstrates, what differentiated Aḥmad Razā from his contemporary reformists, mainly the Deobandīs and Ahl-i Ḥadīs, was his heightened Prophetology and venerative love for the Prophet, which is clearly reflected in the

argumentation and language of his *mawlid fatwās*.¹³⁸ However, most of Aḥmad Razā's opponents on the permissibility of the *mawlid* were drawn from the circle of scholars influenced by the *ḥadīth*-based reformist inclinations of Shāh Walī Allāh and his successors. Aḥmad Razā was impacted by Shāh Walī Allāh's *ḥadīth*-focused approach as well.¹³⁹ This inherent tension between the two assumptions and hermeneutical methods is one of the underlying causes for other disagreements between Aḥmad Razā and his contemporaries. Ahmed and Pourjavady conclude that parts of these differing traditions that is, the Farangī Maḥal and the *ḥadīth*-based approach of Shāh Walī Allāh, were absorbed separately by the two dominant movements in the subcontinent, that is, the Barelwī and Deobandī.¹⁴⁰ I contend it is not fair to assume that there was a complete disconnect between logic and *ḥadīth* in Aḥmad Razā's approach. As this article demonstrates, Aḥmad Razā synthesized the two in a unique manner and to a different degree than his counterparts. This difference in scholarly approach and methodology was one of the reasons for disagreements relating to the ritual of the *mawlid* in thirteenth /nineteenth century British India.

Finally, this article contributes to a broader understanding of how logical reasoning functioned as a critical device in shaping legal authority and managing ritual disagreement in colonial South Asia. Controversial practices tend to generate dense and varied forms of argumentation, as opponents utilize the full range of available juridical and intellectual tools. Aḥmad Razā's *mawlid fatwās* illustrate this dynamic. They show how logic, when treated as authoritative rather than supportive, can preserve legal commitments and regulate practice, under intense contestation. This study of Aḥmad Razā's *mawlid fatwās* offers a framework through which the role of the *ma'qūlāt* in modern Islamic legal thought can be assessed across other movements.

138 SANYAL, *supra* note 6, at 265–66.

139 As Sanyal observes, Shāh 'Abd al-'Azīz al-Dihlawī was viewed as a *mujaddid* by the Barelwī movement, *see id.* at 229.

140 Ahmed & Pourjavady, *supra* note 96, at 622.

APPENDIX: SCORING OF LOGICAL REASONING IN THE MAWLID FATWĀS

Islamic dates are used here because the petitions are dated according to the Islamic calendar and for the sake of brevity. N.D. = no date given.

#	Year (AH)	Month	Day	Vol.	Pg.	Structural organization connectives	Use of connectives	Supporting texts	Multiple scenarios	Mean score
1	1299	N.D.	N.D.	26	495	3	3	3	2	2.75
2	1301	N.D.	N.D.	23	760	5	5	3	4	4.25
3	1308	<i>Ṣafār</i>	21	23	116	4	4	4	5	4.25
4	1309	<i>Rabī' al-Awwal</i>	27	23	258	1	1	1	1	1
5	1311	<i>Sha'bān</i>	22	23	722	3	3	4	1	2.75
6	1311	<i>Sha'bān</i>	22	24	514	2	2	2	1	1.75
7	1312	<i>Rabī' al-Awwal</i>	15	23	118	1	1	1	1	1
8	1312	<i>Rabī' al-Thānī</i>	22	6	418	3	3	3	3	3
9	1313	<i>Rabī' al-Thānī</i>	27	23	723	4	4	3	5	4
10	1313	<i>Sha'bān</i>	14	30	660	1	1	1	1	1
11	1314	<i>Shawwāl</i>	20	7	483	2	2	3	4	2.75
12	1315	<i>Rajab</i>	22	23	730	4	5	5	5	4.75
13	1315	<i>Dhū al-Qa'da</i>	26	21	425	1	1	1	1	1
14	1316	<i>Muḥarram</i>	18	23	731	4	4	3	5	4

#	Year (AH)	Month	Day	Vol.	Pg.	Structural organization	Use of connectives	Supporting texts	Multiple scenarios	Mean score
15	1316	<i>Rabī' al-Awwal</i>	16	23	732	3	3	3	4	3.25
16	1318	<i>Jumādā al-Thāniya</i>	27	23	604	2	2	2	2	2
17	1319	<i>Jumādā al-Awwal</i>	22	6	502	4	4	3	4	3.75
18	1320	<i>Şafar</i>	15	24	490	2	3	2	2	2.25
19	1320	<i>Jumādā al-Thāniya</i>	29	23	176	3	3	3	3	3
20	1321	<i>Muḥarram</i>	18	23	734	3	3	3	3	3
21	1321	<i>Muḥarram</i>	N.D.	24	517	3	3	2	3	2.75
22	1321	<i>Rabī' al-Thānī</i>	19	20	265	2	2	3	2	2.25
23	1321	<i>Jumādā al-Awwal</i>	18	23	737	4	4	4	4	4
24	1322	<i>Rabī' al-Thānī</i>	6	23	747	4	3	4	3	3.5
25	1322	<i>Jumādā al-Thāniya</i>	2	23	737	2	2	2	2	2
26	1322	<i>Sha'bān</i>	29	23	738	4	4	3	3	3.5
27	1322	<i>Dhū al-Hijja</i>	27	23	739	3	3	3	3	3
28	1324	<i>Rajab</i>	24	16	129	3	3	4	3	3.25
29	1326	<i>Jumādā al-Awwal</i>	12	13	584	4	4	3	3	3.5
30	1330	<i>Jumādā al-Awwal</i>	16	10	312	3	3	3	3	3
31	1330	<i>Jumādā al-Awwal</i>	19	5	391	5	5	5	4	4.75
32	1331	<i>Rabī' al-Thānī</i>	6	23	744	4	4	4	3	3.75
33	1331	<i>Jumādā al-Thāniya</i>	17	29	214	4	4	4	4	4

#	Year (AH)	Month	Day	Vol.	Pg.	Structural organization	Use of connectives	Supporting texts	Multiple scenarios	Mean score
34	1331	<i>Ramaḍān</i>	10	5	326	2	2	2	2	2
35	1331	<i>Dhū al-Ḥijja</i>	20	23	745	3	3	3	2	2.75
36	1332	<i>Muḥarram</i>	N.D.	23	745	2	2	2	1	1.75
37	1332	<i>Ṣafar</i>	22	6	548	3	3	3	3	3
38	1332	<i>Ṣafar</i>	22	20	369	3	3	3	2	2.75
39	1332	<i>Rabī' al-Awwal</i>	10	23	561	2	2	2	2	2
40	1332	<i>Jumādā al-Thāniya</i>	1	21	648	3	3	3	3	3
41	1334	<i>Muḥarram</i>	7	10	255	2	2	2	1	1.75
42	1334	<i>Ṣafar</i>	4	16	152	3	3	2	1	2.25
43	1334	<i>Ṣafar</i>	12	22	239	3	3	2	2	2.5
44	1334	<i>Rabī' al-Thānī</i>	10	23	749	2	2	2	1	1.75
45	1334	<i>Jumādā al-Awwal</i>	12	23	751	3	3	3	3	3
46	1334	<i>Jumādā al-Awwal</i>	12	19	502	4	4	3	3	3.5
47	1334	<i>Jumādā al-Awwal</i>	15	22	240	4	4	3	4	3.75
48	1334	<i>Rajab</i>	17	29	629	5	5	4	4	4.5
49	1335	<i>Jumādā al-Awwal</i>	27	23	753	4	4	3	3	3.5
50	1335	<i>Sha'bān</i>	7	22	242	3	3	3	2	2.75
51	1335	<i>Sha'bān</i>	23	23	755	3	3	3	3	3
52	1335	<i>Sha'bān</i>	26	29	230	5	5	4	5	4.75

#	Year (AH)	Month	Day	Vol.	Pg.	Structural organization	Use of connectives	Supporting texts	Multiple scenarios	Mean score
53	1335	<i>Dhū al-Qa'da</i>	9	21	178	3	3	3	2	2.75
54	1336	<i>Rabī' al-Awwal</i>	19	16	450	3	3	3	2	2.75
55	1336	<i>Rabī' al-Thānī</i>	18	6	572	2	2	2	1	1.75
56	1336	<i>Rabī' al-Thānī</i>	22	21	662	3	3	2	2	2.5
57	1336	<i>Rabī' al-Thānī</i>	22	21	663	3	3	3	3	3
58	1336	<i>Rabī' al-Thānī</i>	25	9	650	4	4	4	4	4
59	1336	<i>Jumādā al-Awwal</i>	1	29	97	2	2	2	2	2
60	1336	<i>Jumādā al-Awwal</i>	12	22	245	4	4	4	3	3.75
61	1336	<i>Jumādā al-Awwal</i>	16	29	204	4	4	4	4	4
62	1336	<i>Jumādā al-Awwal</i>	21	21	663	5	5	4	5	4.75
63	1336	<i>Jumādā al-Awwal</i>	30	29	205	5	5	3	5	4.5
64	1336	<i>Jumādā al-Thānīya</i>	15	29	114	3	3	3	3	3
65	1337	<i>Şafar</i>	23	29	237	4	4	4	4	4
66	1337	<i>Rabī' al-Awwal</i>	25	14	683	4	4	4	4	4
67	1337	<i>Rabī' al-Awwal</i>	27	29	247	3	3	3	3	3
68	1337	<i>Rabī' al-Awwal</i>	27	6	578	4	4	4	4	4
69	1337	<i>Rabī' al-Thānī</i>	19	14	370	5	5	5	5	5
70	1337	<i>Jumādā al-Awwal</i>	3	14	685	4	4	4	4	4
71	1337	<i>Jumādā al-Awwal</i>	4	8	74	3	3	3	2	2.75

#	Year (AH)	Month	Day	Vol.	Pg.	Structural organization connectives	Use of connectives	Supporting texts	Multiple scenarios	Mean score
72	1337	<i>Jumādā al-Awwal</i>	7	15	299	4	4	4	4	4
73	1337	<i>Jumādā al-Awwal</i>	7	15	302	1	1	1	1	1
74	1337	<i>Jumādā al-Awwal</i>	8	15	303	3	3	3	3	3
75	1337	<i>Jumādā al-Awwal</i>	8	19	519	5	5	4	5	4.75
76	1337	<i>Jumādā al-Awwal</i>	14	29	258	4	4	4	4	4
77	1337	<i>Jumādā al-Thāniya</i>	15	29	267	3	3	3	3	3
78	1337	<i>Ramaḍān</i>	6	15	305	4	4	4	4	4
79	1337	<i>Ramaḍān</i>	10	26	553	4	4	4	4	4
80	1337	<i>Ramaḍān</i>	10	30	127	4	4	4	4	4
81	1337	<i>Ramaḍān</i>	16	29	282	4	4	4	4	4
82	1337	<i>Shawwāl</i>	11	26	553	4	4	4	4	4
83	1338	<i>Ṣafar</i>	10	8	600	4	4	4	4	4
84	1338	<i>Rabī' al-Awwal</i>	1	14	667	3	3	3	3	3
85	1338	<i>Rabī' al-Awwal</i>	19	19	167	3	3	3	3	3
86	1338	<i>Ramaḍān</i>	12	25	648	2	2	2	2	2
87	1338	<i>Ramaḍān</i>	14	9	597	1	1	1	1	1
88	1338	<i>Dhū al-Hijja</i>	8	23	104	1	1	1	1	1
89	1339	<i>Muḥarram</i>	18	14	386	5	5	4	5	4.75
90	1339	<i>Muḥarram</i>	20	16	253	3	3	3	3	3

#	Year (AH)	Month	Day	Vol.	Pg.	Structural organization connectives	Use of connectives	Supporting texts	Multiple scenarios	Mean score
91	1339	Şafar	28	22	691	4	4	4	4	4
92	1339	Rabī' al-Awwal	N.D.	15	520	2	2	2	2	2
93	1339	Rabī' al-Thānī	28	9	648	3	3	3	3	3
94	1339	Jumādā al-Thānīya	18	15	309	5	5	5	5	5
95	1339	Sha' bān	9	23	757	4	4	4	4	4
96	1339	Sha' bān	9	23	758	3	3	3	3	3
97	1339	Ramaḍān	5	8	123	4	4	4	4	4
98	1339	Ramaḍān	7	26	427	2	2	2	2	2
99	1339	Ramaḍān	8	6	586	1	1	1	1	1
100	1339	Ramaḍān	23	23	759	5	5	3	5	4.5
101	1339	Ramaḍān	29	23	409	4	4	4	4	4
102	1339	Dhū al-Qa'da	5	9	140	4	4	4	4	4
103	N.D.	Rabī' al-Awwal	2	13	590	3	3	3	3	3
104	N.D.	Rabī' al-Thānī	20	13	594	4	4	4	4	4
105	N.D.	Jumādā al-Thānīya	18	24	489	2	2	2	2	2
106	N.D.	N.D.	N.D.	23	739	5	5	5	5	5
107	N.D.	N.D.	N.D.	21	150	5	5	5	5	5
108	N.D.	N.D.	N.D.	21	633	3	3	3	3	3
109	N.D.	N.D.	N.D.	26	405	5	5	5	5	5

#	Year (AH)	Month	Day	Vol.	Pg.	Structural organization	Use of connectives	Supporting texts	Multiple scenarios	Mean score
110	N.D.	N.D.	N.D.	29	220	5	5	5	5	5
111	N.D.	N.D.	N.D.	29	249	5	5	5	5	5
112	N.D.	N.D.	N.D.	29	273	5	5	5	5	5
113	N.D.	N.D.	N.D.	29	591	2	2	2	2	2
114	N.D.	N.D.	N.D.	6	605	4	4	4	4	4
115	N.D.	N.D.	N.D.	19	486	3	3	3	3	3
116	N.D.	N.D.	N.D.	19	494	3	3	3	3	3

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