

Women & Leadership in Islam

A Critical Analysis of Classical Islamic Legal Texts

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Title:

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Abstract:

The present research examines the post-formative Islamic legal literature surrounding the question of women's leadership to gauge whether and to what extent the development of Islamic legislation pertaining to women was determined by gender attitudes prevalent in Muslim society.

There are three main theories to explain the prevalence of Islamic legal rulings divesting women of leadership roles. The first is the traditional view that these rulings are best explained by the application of the theoretical and hermeneutical approaches of classical Islamic legal theory to the Islamic source texts, the Qur'ān and Sunnah. The second is that the rulings are best explained as the consequence of the widespread gender attitudes in near-eastern society during the formative and early post-formative period of Islamic Law. The third is that legal inertia is the primary factor in explaining the existing post-formative Islamic legal corpus and little can be determined from it regarding the origin and early perpetuation of the laws.

These competing theories are tested and explored by returning to a broad survey of Islamic legal texts from the four canonical schools of thought. The relevant passages from these texts are first translated and then examined according to three separate analytical approaches – a legal-hermeneutical analysis, an analysis of gender motifs, and a diachronic analysis of legal arguments – to explore the ways in which classical legal scholars arrived at and justified the prohibition of female leadership in politics, the judiciary, and congregational prayer.

Key Words:

Arabic, Islamic Law, Hadith, Usul al-Fiqh, Textual Interpretation, Subjectivity, Prayer, Gender Issues, Misogyny, Women's Rights, Leadership.

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Introduction

Historically, the majority of Muslims have regarded it as impermissible for a Muslim woman to act as an imam and lead men in congregational prayers. A small number of Muslims today are beginning to challenge this stance, and they face considerable opposition from the broader Muslim community. Likewise, women have historically been regarded as legally unqualified to hold high public office. Though there is more openness today to the idea of women serving as political leaders, it still faces considerable opposition in conservative Muslim circles and in many Muslim countries where women's leadership is regarded as contrary to Islamic teachings.

These prohibitions are articulated in Islamic Law as specific legal rulings pertaining to prayer, judicial procedure, and political authority. This research investigates the post-formative Islamic legal literature to explore why Muslim jurists arrived at those legal rulings, and why those rulings have persisted.

The Islamic legal corpus provides a body of rulings governing religious and worldly practices. Some of these rulings define the role of women in religion and society, including those which prohibit women from assuming various positions of leadership. Traditionally-minded Muslims defend these rulings as the inevitable consequence of embracing the Qur'an and Sunnah as the primary sources of Law. Recently, feminist scholarship has challenged this assumption, arguing that such rulings are dependent upon the patriarchal nature of the society in which Islamic Law developed, which they claim must have inevitably introduced bias into the interpretations of the (almost exclusively male) Muslim juristic community. For instance, Amina Wadud contends that "interpretations of the textual sources, applications of those interpretations when constructing laws to govern personal and private Islamic affairs and to construct public policies, and institutions to control Islamic policies and authority, are based upon male interpretive privilege."¹

¹ Amina Wadud, *Inside the Gender Jihad: Women's Reform in Islam* (Oxford: Oneworld Publications, 2006), 22.

As for the patriarchal nature of pre-Islamic and early Muslim Near Eastern society, this has been well documented by Leila Ahmed², Fatima Mernissi³ and others. Within the context of feminist scholarship, this has been presupposed to be sufficient to explain the existence of Islamic legal rulings disfavouring women's leadership.

The present research contends that this is not sufficient. Though Near Eastern society was patriarchal in nature, it is a mistake to jump to the conclusion that this was the primary factor in the development of Islamic legal rulings prohibiting women from leading prayer and holding public office. The evolution of Islamic Law was a complex process shaped by numerous cultural, historical, political and social factors, and the importance of scriptural sources (the Qur'an and Sunnah) to this process cannot be dismissed. The factors and influences that shaped the reasoning, interpretations and deductions of the juristic interpretive community should be evident in the jurists' writings, and a careful analysis of their legal texts is needed to bring those influences to the fore. Assumptions about women, just like any other influences, need to be demonstrated from the legal texts themselves rather than pre-supposed. Furthermore, it needs to be determined whether or not the same rulings could have come about for other reasons in the absence of those assumptions.

This research analyses the relevant passages from a broad survey of Islamic legal texts representing the four canonical Sunni schools of law. These texts are selected from various eras, and are of the kind that provide arguments and justifications for the legal rulings. The passages that elaborate rulings about women's leadership are presented in translation (as an appendix to the research) and then subjected to a variety of critical analyses to identify the reasons, influences, and assumptions underlying those rulings.

² See: Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992).

³ See: Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*, trans. Mary Jo Lakeland. (New York: Basic Books, 1991).

I. SURVEY OF THE LITERATURE

The current debate in the Muslim world regarding the status of women in Islam, and especially with respect to holding public office and leading prayers, has led to a considerable body of writings debating these issues, as well as studies surveying current Muslim attitudes, and writings detailing the present state of women's rights under Shari'ah law in various countries.

A number of these studies identify tradition cultural attitudes towards women as the primary factor to explain traditional Islamic teachings about women. Etin Anwar⁴ explores how cultural perceptions of gender influenced the way classical Muslim scholars understood and interpreted the sacred texts and focuses mainly on philosophical questions, from ontology to ethics, but does not engage much with the legal literature or the particulars of Islamic Law.

Amina Wadud provides alternative readings to a number of verses of the Qur'an which she argues have been traditionally understood to promote inequality due to "historical androcentric reading and Arabo-Islamic cultural predilections".⁵ This is useful in demonstrating the possibility of alternate readings. However, her research does not critically explore the standard interpretations of the verses and the ways in which those interpretations came about, nor does she address their use within Islamic legal texts.

Fatima Mernissi focuses on how pre-Islamic misogynistic tendencies that existed in Arabia during the Prophet's lifetime and shortly thereafter could have helped shape the character of rulings that would later be adopted by Muslim society, which she argues did not conform with the Prophet's teachings themselves.⁶

Leila Ahmed traces how meaning of gender in Abbasid society – and its unique blending of the Judaic, Christian, and Persian heritage – helped to shape society at crucial junctures in the development of Islamic Law. She provides considerable detail

⁴ See: Etin Anwar, *Gender and Self in Islam* (London: Routledge, 2006).

⁵ Amina Wadud, *Qur'an and Woman: Rereading the Sacred Texts from a Woman's Perspective* (New York: Oxford University Press, 1999), ix.

⁶ Mernissi, *Veil*.

regarding gender practices and perceptions during those times. Ahmad contends that these were “inscribed into the literary, legal, and institutional productions of the age – productions that today constitute the founding and authoritative corpus of establishment Muslim thought” and that it is this “technical, legalistic establishment version of Islam... that continues to be politically powerful today.”⁷

Khaled Abou El Fadl explores how gender attitudes may have influenced the development of Islamic Law and addresses specifically how patriarchal attitudes might have biased jurists in favour of the hadith of Abū Bakrah.⁸ Though his focus is generally on the formative period of Islamic Law, he also engages in a critique of some contemporary Saudi *fatwa* regarding women and evaluates the underlying assumptions of those *fatwa*. He does not engage exhaustively with the post-formative legal literature or the development of particular traditional legal rulings.

Nevin Reda looks at the Qur’an and early sources to argue that gender segregation in prayer was not instituted in the earliest era, and that it came about by the end of the third Islamic century, since by that time a “system of total segregation and seclusion of women had been instituted, and women no longer had the right to participate freely in public life.”⁹ She does not engage with the post-formative legal literature in asserting this claim.

Works like those of Ahmed, Mernissi, and Reda mentioned above are typical in focusing on the gender perceptions and norms during the earliest Islamic era up to the formative period of Islamic Law, meaning until the third century when rigidity began to set in with the supposed “closing of the doors of *ijtihad*”.¹⁰ Such research has always taken the historical, sociological, and cultural analysis of Muslim society as a point of departure for studying Islamic legal positions. What is needed is the reverse:

⁷ Ahmed, *Women and Gender in Islam*, 238-239.

⁸ Khaled Abou El Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001), 114.

⁹ Nevin Reda, “Women in the Mosque: Historical Perspectives on Segregation.” *American Journal of Islamic Social Sciences* 21, no. 2 (2004): 93.

¹⁰ Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1979), 71-72. Khaled Abou El Fadl argues that this notion is a myth which “seems to have emerged in the nineteenth century as a simplistic explanation of the purported stagnation of the Islamic legal system and as a justification for the legal reforms of the time.” Khaled Abou El Fadl, “The Islamic Legal Tradition” in *The Cambridge Companion to Comparative Law*. ed. Mauro Bussani and Ugo Mattei (Cambridge: Cambridge University Press, 2012) p. 304.

to engage with the legal texts as the point of departure for identifying the ideological, social and cultural influences present within them. It may be easy to prove historically that the societies of the Near East during the formative period of Islamic Law (from the advent of Islam to the beginning of the fourth Islamic century) were strongly patriarchal. However, it is wrong to assume that one can then simply assume gender bias on the part of Islamic jurists and jump to the conclusion that this is sufficient to explain the Islamic legal rulings that disinvest women of leadership positions. Proving the existence of a patriarchal worldview may be necessary to assert the *possibility* that gender perceptions are primarily responsible for the development of those rulings, but it is not sufficient to conclude that this is indeed the case. Failure to make this distinction, as Sa'diyya Shaykh warns¹¹, means we run the risk of anachronism, making summary judgements about the past from a contemporary frame of reference. She then identifies the need to “ask critical questions about the nature of human beings and gender differences assumed within the traditional *fiqh* discourse.”¹²

Just as supporters of women in leadership often claim that it is culture and not religion which denies women the right to lead prayers and hold public office, opponents claim that the methods of classical Islamic jurisprudence are soundly based upon the sacred texts and those methods have demonstrated the impermissibility of women's leadership. For instance, in direct response to Amina Wadud leading Friday prayers in 2005, the famous Egyptian scholar Yusuf Al-Qaradawi declared: “Rulings pertaining to leadership in prayer are established by evidence of authentic hadiths as well as the scholarly unanimity of Muslims. They are based on religious teachings, not on social customs as it is has been claimed.”¹³

Zaid Shaker, responding to arguments presented by Nevin Reda¹⁴, provides a description of “the Sunni legal and linguistic tradition, as it has been historically

¹¹ Sa'diyya Shaikh, “In Search of al-Insān: Sufism, Islamic Law, and Gender,” *Journal of the American Academy of Religion* 77, no. 4 (2009), 5. Citing Rita Gross, she emphasises the need to make a distinction between an analysis and description of the past on the one hand, and passing judgements on the other.

¹² Shaikh, “In Search of al-Insān”, 8.

¹³ Yusuf Al-Qaradawi, “Woman Acting as Imam in Prayer” *OnIslam.net*, 1995, <http://www.onislam.net/english/ask-the-scholar/acts-of-worship/prayer/congregational-prayer/170796.html> (30 December 2010).

¹⁴ He is responding to her article “What Would the Prophet Do? The Islamic Basis for Female-led Prayer” in 2005 on www.muslimwakeup.com in support of Amina Wadud leading Friday prayer.

understood. This is the tradition of the Islamic orthodoxy, which remains until today the only religious orthodoxy that has not been marginalized to the fringes of the faith community it represents.”¹⁵ He offers legal evidence and arguments, focusing on the four schools of law. The assumption underlying his response is that the Sunni legal tradition is sufficient to explain why the rulings regarding women’s prayer leadership exist as they are.

Hina Azam, also responding to Reda and Wadud, argues that the ruling prohibiting women from leading men in prayer are a direct consequence of the application of Islamic legal theory. She states confidently that the only way to change this ruling would be to “provide an alternate methodology that is more capable than the existing one at discerning the divine intent.”¹⁶

Notwithstanding her challenge to provide a new juristic methodology as a basis for Islamic Law, there are more essential questions that need to be asked:

1. To what extent does the jurists’ acceptance of the Qur’an and Sunnah as their primary sources of law explain the classical rulings on women’s leadership?
2. Also, to what extent do the application of their various methods of textual interpretation, rules of evidence, and other sources of Law, explain the rulings?
3. Conversely, to what extent can those rulings be explained as the result of other influences, particularly the perceptions about women and their role in society, that were prevalent among Muslims at the time?

Very recently, and often concurrently with the present study, there has been a positive trend in surveying post-formative legal literature to explore various rulings concerning women.

¹⁵ Zaid Shakir, “An Examination on the Issue of Female Prayer Leadership (2005),” in *The Columbia Sourcebook of Muslims in the United States*, ed. Edward L. Curtis IV (New York: Columbia University Press, 2009), 240.

¹⁶ Hina Azam, “A critique of the argument for woman-led Friday prayers” *AltMuslim*, 2005, http://www.altmuslim.com/a/a/a/a_critique_of_the_argument_for_woman_led_friday_prayers/ (3 June 2009).

In an early example of this kind of engagement, Cristina de la Puente studies Mālikī legal works to investigate the legal capacity of women in Islamic Law. In doing so, she distinguishes between a woman's "juridical capacity" and her "capacity to act".¹⁷ This is a very important distinction to make, since it explains how jurists could assert the essential equality of women and men as full legal entities while greatly restricting women's capacity to act in numerous instances. This has the potential to address the arguments made by Amina Wadud and others who cite the essential equality of Muslims before God as a basis to critique gender discriminatory legal rulings, since it pinpoints where this falls short as a basis for critique. Everyone would agree, for instance, that children and the insane are restricted in their legal capacity, though they share with adult, sane Muslim men and women the same essential equality before God. This focuses the question on why the jurists equate female gender with minority and insanity as factors for determining legal capacity, insofar that "only free adult Muslim males have total and complete capacity to act."¹⁸ De la Puente presents many instances where Mālikī jurists make (often unfavourable) comments on women, their status, and their public role, but she does not trace how these attitudes contributed to the development of particular rulings, nor the extent to which those rulings are grounded in scriptural sources. Since her purpose is to use the legal texts to shed light on the social reality of women in the Medieval Islamic West, she follows many other researchers in assuming that social values are operating behind the rulings. Though she does not tackle questions of leadership, she is among the first to go beyond family law when investigating questions of gender in the Islamic legal corpus.

Ahmed Alewa and Laury Silver, while examining contemporary responses to Amina Wadud leading Friday prayer, briefly address the classical literature on women prayer leadership. They discuss the ḥadīth evidence that can be used to support women leading prayer and classical scholars' responses to those ḥadīth. They conclude that their differing methodologies regarding the use of weak ḥadīth played an important

¹⁷ Cristina de la Puente, "Juridical Sources for the Limitations of the Female's Capacity to Act According to Mālikī Law." In *Writing the Feminine: Women in Arab Sources* edited by Manuel Marin and Randi Deguilhem (London: I.B. Taurus, 2002) 96.

¹⁸ de la Puente, "Juridical Sources", 97. The consequence of a person acting outside of their capacity is that the act will be void if the person is deemed incapable of acting on their own behalf in the matter in question; or voidable if the person has a restricted capacity to act.

role in how those particular ḥadīth were received.¹⁹ They do not delve deeply into the evidence and arguments the jurists used to prohibit women's prayer leadership, nor do they discuss the dynamics of gender attitudes on the development and presentation of those rulings.

Scott C. Lucas undertakes a diachronic survey of post-formative Shāfi'ī legal works to explore two gender-related questions: the disproportionate compensation for death or injury between women and men, and the question of women's court testimony. He emphasises the importance of legal texts, because they: "have long served and continue to serve as the curriculum for aspiring jurists, judges, and jurisconsults, and thus influence the ethical and legal perspectives on a host of issues, including gender."²⁰ After meticulously detailing legal arguments presented in the texts, he concludes that despite a stability in the rulings over time, there is instability in the evidence and arguments used to support them. He also identifies weak hadith as playing a disproportionate role in supporting the rulings, as well as heavy reliance on consensus and analogy. He exposes weaknesses in some of the analogical arguments and calls into question the "quality of a school's supporting evidence". He also contends that "flagrant sexism" is on display in the jurists' statements, but often cites the rulings themselves as proof of this. His research does not explore the actual role played by gender attitudes, or how they interacted with interpretive methodology, in the formulation and perpetuation of those rulings.

Karen Bauer undertakes a diachronic survey of a large selection of post-formative Islamic legal works of the various schools of law regarding their rulings on women serving as judges and acting as witnesses. In doing so, she seeks to determine how jurists justified their rulings and explores to what extent their arguments, including arguments about women's status and intellect, were developed to defend established legal rulings. She finds that certain attitudes about women are constant over time, these being "that men are in authority over them, and this authority is generally justified by the sexes' inherent mental and physical differences" and that that this "represent a coherent picture of a 'natural' social hierarchy and 'natural' gender roles"

¹⁹ Ahmed Elewa and Laury Silver, " 'I Am One of the People': A Survey and Analysis of Legal Arguments on Woman-Led Prayer." *Journal of Religion & Law* 26, no. 1 (2010-11): 156.

²⁰ Scott C. Lucas, "Justifying Gender Inequality in the Shafii Law School: Two Case Studies of Muslim Legal Reasoning". *Journal of the American Oriental Society* 129, no. 2 (2009): 256.

which “explains women’s disadvantages in the law in general.”²¹ At the same time, she argues that differing opinions regarding women’s capacity reflected in legal arguments do not necessarily represent differences in the jurists’ attitudes towards women, but “must be seen in light of their function within the juridical manuals as points in a debate that lasted for many centuries.”²² She specifically argues that certain relatively positive Ḥanafī depictions of women’s intellect and authority were later defences against their Shāfi‘ī opponents that “developed over time precisely in order to justify the existing Ḥanafī rules on testimony and judging,”²³ and that “the Ḥanafī view of women’s capacities is not essentially different from the dominant idea of the gender hierarchy.”²⁴ Her work comes closest in methodology to the present research; however, she does not explore to what extent the jurists’ arguments might or might not conform with or be explained by the underlying legal principles of their respective schools.

Behnam Sadeghi engages in an in depth, diachronic study of Ḥanafī legal rulings regarding women and prayer, using a vast number of Ḥanafī legal source works.²⁵ His work overlaps with the present research in addressing a woman leading other women in prayer, which he analyses in meticulous detail. He only touches very briefly upon the issue of women leading men in prayer. Intent on unlocking the logic behind the formulation of those laws, he asserts that the laws have an inner dynamics and concludes that very little can be determined about society, attitudes, ideology, or even religious tenets from the law. He argues that the desire to defend established legal rulings is a primary motivation for the persistence and defence of laws in the post-formative legal corpus.

From the literature surveyed above, three reasons emerge as possible factors to explain the presence and perpetuation of Islamic legal rulings prohibiting women from assuming leadership positions. These are:

²¹ Karen Bauer, “Debates on Women’s Status as Judges and Witnesses in Post-Formative Islamic Law,” *Journal of the American Oriental Society* 130, no. 1 (2010): 2.

²² Bauer, “Debates”, .2

²³ Bauer, “Debates”, 13.

²⁴ Bauer, “Debates”, 10.

²⁵ See: Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition* (Cambridge: Cambridge University Press, 2013).

1. *The Traditional View*. According to this view, legal rulings are primarily determined by scriptural sources, or by adherence to certain hermeneutical and juristic principles in combination with those sources. At the very least, the perpetuation of these rulings during the post-formative period can be explained on this basis. Among those who advocate this “classical” view are Hina Azam and Zaid Shakir. This is also the view of the majority of religious scholars in the Muslim world who uphold the legal rulings.

2. *Legal Inertia*. The second view is that the jurists’ desire to defend the preferred rulings of the school of law is a strong determinative factor in their citing evidence and developing arguments, rather than the evidence and arguments determining the rulings or accurately representing the reasons behind them. This is supported by a clearly conservative tendency among later jurists to preserve the rulings they inherited from tradition. According to this view, the legal literature tells us very little about the the rulings’ true causes. This case has been strongly argued by Sadeghi.

3. *Gender Attitudes*. A final possible factor is the often asserted but insufficiently proven contention that prevailing attitudes in the Muslim world about women and their role in society were a decisive factor in both the formation and perpetuation of these laws. The existence of attitudes and perceptions shaped by a patriarchal worldview has been well established by Leila Ahmed and others, though the extent to which these attitudes actually explain specific classical legal rulings has yet to be satisfactorily explored.

II. THEORETICAL FRAMEWORK & RESEARCH METHODOLOGY

Islamic legal texts are multi-textured documents, and they must be analysed from multiple angles in order to explore what they can tell us about the reasons for the development and persistence of legal rulings disallowing women's leadership.²⁶ The

²⁶ There is a growing awareness that the analysis of religious texts not only permits but may require the application of multiple approaches to answer a particular question. One example of this is Vernon Robbins’ socio-rhetorical criticism. Of course, Robbins focuses on the New Testament, while the present research focuses on Islamic legal texts which have different demands, particularly the analysis of the texts’ legal-hermeneutical dimensions along with their social and cultural dimensions.

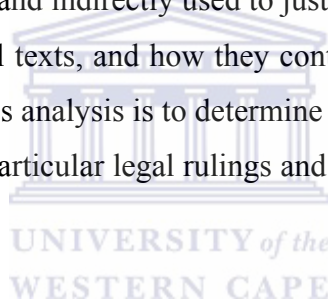
need for a multi-dimensional analysis stems from the conviction that merely identifying the existence of various social contexts, attitudes and objectives within the interpretive community is not a sufficient condition for concluding that those factors have determined or influenced particular conclusions. What the present research does assume is that the legal texts should contain indications of these reasons and influences, which can be revealed if the texts are analysed from the relevant dimensions.

The critical approaches that are applied to the surveyed texts have been chosen for their potential to assess the relative importance of the three potential causative factors for the legal rulings which have been identified in the literature review. The surveyed texts have been subjected to three separate analyses, each presented as a distinct chapter in the work. These approaches are as follows:

1. Legal-hermeneutical analysis. The four schools of law recognize the authority of revelation and conceive of the law as being God's law. Traditionally, it has been assumed that a particular ruling is either derived from the sources of revelation or is the result of the jurists applying hermeneutical principles to those sources. The present research contends that the degree to which this is actually the case must be ascertained from the texts themselves. A synchronic legal-hermeneutical analysis is employed by focusing on the jurists' ideological and methodological framework, Islamic legal theory (*usūl al-fiqh*). The purpose of this analysis is to determine the extent to which the legal rulings pertaining to women's leadership can be explained by textual sources (the Qur'an and Sunnah) and by the jurists' application of preconceived methodological and hermeneutical principles. The legal arguments found in the surveyed texts are identified according to the theoretical rubrics they come under, and are then analysed with respect to how well they conform to those rubrics. Legal arguments found in the texts which do not correspond exactly with the theoretical ideals of the school, but which nevertheless exhibit significant legal reasoning, are also identified and analysed within the rubric they are most closely related to, since these arguments may also explain or indicate the reasons for the ruling. This is important because legal theory developed after the codification of Islamic Law was at an advanced state. Therefore, a lack of perfect correspondence between theory and practice may not be indicative of extra-legal influences, but may

be the consequence of other legal approaches that were simply not well articulated or accurately represented in the legal theory literature. The legal theory literature simply provides a structural framework for the analysis.

2. Analysis of gender motifs. Considerable work has been done by Leila Ahmed and others to demonstrate the patriarchal nature of Near-Eastern society during the formative period of Islamic Law. However, this is insufficient to conclude that any particular ruling about women resulted from, or was significantly influenced by, a patriarchal worldview. This needs to be demonstrated by identifying and analysing the gender assumptions found explicitly or implicitly in the legal texts. Various motifs are identified from their appearance in the texts and subsequently explored, including: the woman as temptress, women's perceived deficiency and how it relates to authority, and the presence of gender hierarchies. The focus of this synchronic analysis is on how these motifs are directly and indirectly used to justify the rulings, how they affect the interpretation of scriptural texts, and how they contribute to the structure of legal arguments. The purpose of this analysis is to determine to what extent gender attitudes can explain the existence of particular legal rulings and how much they influenced the thinking of legal scholars.



3. Diachronic analysis. The jurists were certainly concerned with preserving the legal traditions they worked in. However, we cannot assume that particular legal rulings were advocated for this reason alone. The extent to which this is the case needs to be demonstrated through a diachronic analysis of the legal texts. Changes in arguments over time can indicate the extent to which they were constructed to defend the rulings, while changes in the rulings themselves can be used to gauge the strength of legal inertia.

These separate analytical approaches are used to determine the relative extent to which each set of factors contributed to shaping the legal arguments and verdicts pertaining to women in leadership. Consequently, the role of gender attitudes on the origin and persistence of those rulings can be properly assessed.

III. SCOPE OF THE STUDY & DELIMITATION OF THE STUDY AREA

A. Legal Schools

The present study surveys the legal literature of four canonical Sunni schools of law – the Ḥanafī, Mālikī, Shafī‘ī and Ḥanbalī schools. This may seem ambitious, but it is essential to provide the breadth of examples needed to derive the broad conclusions sought about the relationship between gender attitudes and the development of particular legal rulings. Abou El Fadl identifies all “Sunni schools of legal thought” as possessing sufficient overlap in their methodologies of discourse to constitute a single interpretive community, with each of the four schools constituting communities of interpretation within this broader one.²⁷

Only by comparing the arguments and evidence cited by all four schools, as well as points of convergence and disagreement, can broad patterns be discerned for each of the three possible factors identified in the literature review. Also, since temporal trends are important to determine the trajectories of rulings and arguments, especially with regards to legal inertia, it needs to be seen how these trends play out in multiple instances.

B. Legal Questions

Two distinct sets of legal rulings are brought under scrutiny. The first set deals with rulings on judicial appointments, and to a lesser extent political leadership. The reason why political leadership is not addressed equally is because it is not as well developed in the Islamic legal literature. However, political appointments are often discussed in conjunction with judicial ones, and therefore these questions are addressed together in the present research. The second set of rulings deals with prayer leadership. There are two questions. The first is the question of a woman leading men in prayer, and the second is that of her leading a congregation exclusively made up of women. In Ḥanafī

²⁷ Abou El Fadl, *Speaking in God’s Name*, 124.

Law, there is a question of what happens when a woman comes in line with a man in prayer which is closely tied in with the ruling of her leading men in prayer. Though this question is not the focus of the present study, it will be addressed to the extent that it has relevance to the question of her prayer leadership.²⁸

Consequently, two types of leadership are examined: leadership in civil society and spiritual leadership. This allows for a comparison between how concepts of leadership and authority are handled by Islamic legal scholars in two different spheres of activity. The degree of overlap and divergence can be examined for each of the three factors brought under scrutiny, providing a broader and deeper understanding of how women's leadership, spiritual agency, and social roles were conceived by the jurists and brought to bear for various legal questions.

A number of legal theorists, especially later ones, made a sharp distinction between laws pertaining to acts of worship (*ibādāt*) and laws dealing with human societal interactions (*mu'āmalāt*). By exploring questions that fall under both categories, the importance of this theoretical distinction can be examined as well as how much it holds true in actual practice.²⁹ Also, since a larger and more diverse sampling of leadership questions are examined, there is a larger number of examples for determining general historical trends and trajectories.

C. Legal Literature

The scope of the study encompasses the post-formative legal literature of the four canonical Sunni schools. The focus is on post-formative literature, because the formative period of Islamic Law prior to the time of the founding of the four schools is poorly documented. Though opinions attributed to the Companions, Successors,

²⁸ This question is treated exhaustively by Behnam Sadeghi in *The Logic of Lawmaking in Islam*, 50-75.

²⁹ This distinction is not always clear-cut. Khaled Abou El Fadl says: "Beyond this clear categorical division, negotiating the extent to which a particular human act or form of conduct, whether it be public or private, primarily involved *ibadat* or *mu'amalat*, was not a simple or unequivocal issue." He then cites the prohibition of fornication and alcoholic beverages as matters in which scholars differed regarding their categorisation. Abou El Fadl, "The Islamic Legal Tradition", 306.

and earlier jurists are sometimes narrated, they are fragmentary, rarely cite justifications, and almost never provide complete arguments.

Moreover, the post-formative legal literature has been recognized as authoritative by the Muslim community for most of its history, and it is also the body of literature that is referred to today by traditionally-minded Muslims to justify prohibiting women from holding positions of political and spiritual leadership. It is in these legal works where we find the views of their foundational scholars being narrated in detail, sometimes along with narrations of some of their predecessors and students. It is also these works which provide the scriptural evidence and legal reasoning each school uses to support its rulings, as well the arguments used in refuting the conclusions and evidence of those who disagree.

A broad survey of post-formative texts are used to determine each of the schools' rulings for various questions of female leadership as well as the evidence and arguments they present to justify their rulings. Classical legal works representing the four schools of thought in different historical eras have been chosen for their authoritativeness and thoroughness in presenting evidence. In an appendix, a complete translation is provided for the relevant sections of the surveyed works.

IV. LIMITATIONS & CHALLENGES

A. Limitations of Legal Theory & Legal Texts

Classical jurists of Islamic Law claimed to be seeking God's rulings. They laboured under the belief that this legislative imperative began with God communicating His law to humanity by revealing it to the Prophet. At the same time, they differed widely in the interpretations and legal conclusions they derived from the revealed texts, and they admitted it was impossible to know in many cases who had hit upon the correct ruling. Islamic legal theory (*uṣūl al-fiqh*) purported to objectify this process through established methods of interpretation and deduction. Therefore, classical scholars claimed that Islamic Law, though it had to negotiate uncertainty and accommodate

disagreement, still aspired to be an objective science and that the body of legal rulings was none other than their best attempt to approximate God's own law.

Umar Abd-Allah cautions, however, that juristic theory for the most part developed after the formative period, and was largely deduced by later scholars from the rulings and statements of the each school's foundational jurists, and as a consequence the legal theory of the school may not accurately represent the way in which the earlier jurists conceived of the law.³⁰

Bauer makes the salient point that the arguments and evidence brought by later jurists in their legal works do not necessarily reflect the actual reasons why the rulings were determined in the formative period, just like she cautions that certain arguments about women advanced to justify certain laws might have less to do with the jurists' attitudes towards women than with the simple need to justify the established rulings of their school. She also contrasts the idea of jurists basing their rulings on "systematic methods of interpretation of the canon, undertaken by generations of jurists through time" with the idea of "most rulings [being] actually received law, the ideas of the earliest jurists handed down, which the jurists of each subsequent generation need to justify".³¹

Sherman Jackson concurs with the latter possibility when he argues that legal theory is not a primary determiner of law, but rather "provides the parameters within which practical, religious, ideological or other views can be validated as law."³²

Sadeghi goes further and argues that it is not possible to determine what the original causes of the law are, not from legal theory, nor from the methodological principles implicit in the legal works themselves, since he sees legal inertia as the primary factor that perpetuates the law through time, and only a severe clash with later values can bring about a change in the law.³³ He asserts that since the received laws are "the starting point for the jurist", the "role of the methods of interpretation, therefore, is

³⁰ Umar Abd-Allah, "Malik's Concept of 'Amal in the Light of Maliki Legal Theory" (PhD dissertation, University of Chicago, 1978), 6-7.

³¹ Bauer, "Debates", 2.

³² Sherman Jackson, "Fiction and Formalism" in *Studies in Islamic Legal Theory*, ed. Ruud Peters and Bernard G. Weiss (Leiden: Brill, 2002), 200.

³³ Sadeghi, *Logic* 145.

not to generate the laws, but rather to reconcile them with the textual ‘sources,’ the Qur’an and the Prophet’s sayings.”³⁴

These are valid points. Even a cursory perusal of the legal literature in the present survey makes it clear that post-formative jurists were generally interested in justifying and defending the rulings formulated by their school’s foundational scholars. All the same, the post-formative jurists were the direct inheritors, both historically and geographically, of the legal tradition of the formative period. In their desire to preserve the legal tradition, they expended their intellectual energies and gave what was their best defence. As Bauer points out: “Jurists’ justifications may or may not reflect the actual source for, or cause of, the law; they are, however, their best attempts to explain why the law makes sense.”³⁵

This is informative even when the jurists’ arguments fail to conform with their respective school’s attested theoretical and methodological underpinnings. Fortunately, a number of the jurists whose legal works are surveyed in this research also produced works of juristic theory which can be compared to their practice. Where they deviate in practice from their own professed theory, it shows that their theoretical framework is not flexible enough for them to produce within its context a justification for the ruling, and it also eliminates the possibility that the purported theoretical principle gives an accurate indication of how the ruling came about.

Though legal inertia is definitely an important factor in the persistence of legal rulings, the laws regarding women and leadership are not wholly static. By contrast, attitudes and norms pertaining to gender remained largely consistent over the same time period.³⁶ There are cases where later jurists disagreed with or departed from the established rulings of their school, or where the school started out with more than one opinion. This can be revealing in a number of ways: first, by looking at the reasons why the particular jurists disagreed, and second by seeing how these rulings were handled by subsequent jurists in the school. Were those rulings adopted or rejected? Looking at the texts diachronically, it can be determined if there was a historical

³⁴ Sadeghi, *Logic* xii.

³⁵ Bauer, “Debates”, 2.

³⁶ Ahmed, *Women and Gender in Islam*, 238.

trajectory, whether variant rulings favourable or unfavourable to women's leadership were more likely to be accepted. To the extent that a trend is found, it is possible to ask what factors caused the trend, how long those causes were in operation, and to what extent legal inertia worked against a trend towards change and was able to resist it. It can also give clues as to why certain rulings from the formative period persisted and other competing rulings did not.

Therefore, the temporal dimension is critical, especially since the interpretive community whose texts are being studied – the community of Islamic jurists – shared essential epistemological assumptions, goals, and basic values.³⁷ Changes, variations, and historical trends in the texts can provide insights into the ideas and influences that helped to shape the development of the laws, and give clues to their origins. These patterns become clearer when the texts are considered together and in reference to their place in the historical development of the various legal schools to which they belong as well as when compared to contemporaneous texts from the other canonical schools.

In the legal works of the four schools, we find an historical process where commentaries are written on older legal texts, followed by later writers appending glosses to those commentaries, and finally even later writers composing abridgements of the earlier commentaries and glosses into new texts, which, in their turn, become the focus of another cycle of commentaries and glosses. This process can be understood as each legal community's attempt to remain faithful to their respective legal traditions while interpreting those traditions in a way that is relevant and accessible to their own times and localities. It is a process of both continuity and change. Gadamer emphasises how interpreters of earlier texts will bring a pre-understanding to the text from the vantage point of their own historical situation, even when they belong to the same tradition.³⁸ These later interpreters will have to achieve a "fusion of horizons"³⁹ with the perspective of the text of an earlier historical era, which will be successful when the interpreters are able to relate the insights obtained

³⁷ Abou El Fadl, *Speaking in God's Name*, 122.

³⁸ Hans Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall (London: Continuum, 2004), 296.

³⁹ Gadamer, *Truth and Method*, 305.

from engaging with the text to their own purposes.⁴⁰ This is true even when the goal of the interpreters is to strictly follow the intent of the earlier works of their tradition, since it is not possible for them to view those works except from their later historical vantage point.

Therefore, when jurists justify a ruling by giving value judgements about women or by making claims about gender, it reveals what they think society, or at least the religious scholarly class, believes about women. It may also reflect their personal convictions as individuals, but not necessarily. Admittedly, their motivation is to defend a pre-existing ruling, but they would only invoke an argument they thought would be convincing to others. An exception to this could be made where particular claims about gender are being disputed within a polemical debate against another school's ruling, as is the case with the Ḥanafī examples cited by Bauer. Even then, the fact that these attitudes are being debated sheds light on the ruling's possible cultural background. Furthermore, when gender perceptions are implicitly assumed, or underlie a textual interpretation, or are subtly embedded in analogies and other legal arguments, it is less likely that they are being invoked for their own polemical value in a way that disconnects with the jurist's own values. Instead, as Shaikh points out, they would more likely indicate "the specific understandings of gender relationships assumed by dominating discourses in the *fiqh* canon."⁴¹ This means that Islamic legal texts can provide a record of the gender attitudes prevalent in the society at the time of their writing, especially when they are consistent across a number of legal texts and different schools of thought. When certain attitudes reappear in different eras, this is a strong indication that those attitudes remained constant and were pervasive in society, and therefore could have had an effect on the initial development or persistence of specific legal rulings.

B. Delimiting the Influence of Gender Attitudes

Since this research seeks to determine the role that attitudes about women and gender played in the development of specific legal rulings, it is important to identify how

⁴⁰ Gadamer, *Truth and Method*, 307.

⁴¹ Shaikh, "In Search of al-Insān", 8.

those attitudes operated behind the formal interpretive principles. Consequently, the research does not call the scriptures and interpretive principles into question, but focuses on how they were understood and used by the jurists.

For example, it must be acknowledged that the Sunni interpretive community accepted the Qur'an as God's word. This was essential to their methodology. Otherwise it could be argued that the Qur'an is a product of its historical and cultural contexts and reflects the gender attitudes prevalent in Arabian society at that time. What matters in this study, however, is not how the Qur'an came about, but rather how it was used by Islamic legal scholars to deduce and defend certain laws about women. The questions being asked are: To what extent are those legal rulings a consequence of the jurists' acceptance of the Qur'an as a primary source of law? How much are those rulings based on applying arguably gender-neutral hermeneutical principles to the Qur'an? How much, by contrast, do they depend on other assumptions, especially gender assumptions, held by the interpretive community?

The same approach is taken with the Sunni ḥadīth corpus. This is important, because Stowasser argues that the surviving ḥadīth literature reflects the concerns and biases of the early Muslims. She writes: "...even in Bukhari and Muslim and other *Sahih* collections, contradictory traditions abound that give both sides of an argument, with the noteworthy exception of traditions on some women's issues – especially regarding matters of social status and rights – in which only one side of the argument, the restrictive side, is documented."⁴² Similar assertions are made by Ahmed⁴³ and Barlas.⁴⁴ These allegations of "absent narrations" are not relevant to the present study. The early Muslim traditionists showed great concern for the Prophet's words. If a direct, memorable and significant prophetic ḥadīth about women in leadership had been circulating at the time of the Companions and Successors, it is unlikely to have gone unrecorded by later generations, regardless of its content. It would tend to remain in circulation among ḥadīth transmitters, if for nothing other than its value as a unique narration. Though selective bias would have been a factor in what narrations

⁴² Barbara Freyer Stowasser, *Women in the Qur'an, Traditions, and Interpretation*. (New York: Oxford University Press, 1994), 105.

⁴³ Ahmed, *Women and Gender in Islam*, 47.

⁴⁴ Asma Barlas, *"Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an*. (Austin: University of Texas Press, 2002), 46.

would be fabricated later on, it is certain that a portion of the recorded ḥadīth were genuinely related from the Companions and Successors⁴⁵, and the preservation of these ḥadīth would have been less vulnerable to selective bias. Therefore, whenever the ḥadīth corpus is silent on a matter, it is safe to assume that relevant ḥadīth were not in circulation during the time of the Companions and Successors, and that discussion of the matter was a later development.

Moreover, by the post-formative period, the ḥadīth corpus came to be fixed and recognized by jurists as a primary source of Islamic Law, and as such, Muslim jurists claimed to deduce legal rulings from it. What needs to be gauged is how gender perceptions may have influenced the way jurists used or disregarded various ḥadīth texts. For instance, a lack of coherence or consistency in the use of a particular ḥadīth indicates that it was not influential to the ruling's development. How conclusions about women are read into or drawn from the ḥadīth can reveal the interpreters' underlying gender assumptions.

Also, since the ḥadīth literature developed during the formative period, even weak and fabricated ḥadīth are historically significant.⁴⁶ This is especially true for narrations that were not attributed to the Prophet by the ḥadīth narrators themselves, but co-opted as such by later legal thinkers. These inauthentic narrations are still statements Muslim thinkers made during the first two centuries, and as such they reflect the legal issues and concerns of that era. Their later incorporation into the legal literature as “ḥadīth” provides valuable information on the relationship between the formative and post-formative periods.

⁴⁵ See, for instance, Mustafa Azami, *On Schacht's Origins of Muhammadan Jurisprudence*. (Riyadh: King Saud University, 1985), and Nabia Abbott, *Studies in Arabic Literary Papyrus, II: Qur'anic Commentary and Tradition*. (Chicago: The University of Chicago Press, 1967). These works demonstrate the early origins of ḥadīth literature and answer the claims made by Goldziher and Schacht that the ḥadīth came into existence at least a century after the Prophet's death, as later legal opinions were back-attributed to earlier authorities and ultimately the Prophet. See: Ignaz Goldziher, *Muslim Studies*. (Chicago: Aldine, 1971) II, 89-125, and Joseph Schacht, *Origins of Muhammadan Jurisprudence*. (Oxford: Clarendon Press, 1967).

⁴⁶ Sectorsky appreciates the historical value of these weak narrations, arguing that even weak ḥadīth “contain information that was part of the scholarly understanding of the past, regardless of whether they are preceded by a ‘reliable’ chain of transmitters.” Susan A. Sectorsky, *Women in Classical Islamic Law*. (Leiden: Brill, 2010), 9. Musallam also uses these traditions for their historical value, where he says: “regardless of whether these traditions can be traced back to the Prophet or not, they are authentic documents of the first two Islamic centuries”. B.F. Musallam, *Sex and Society in Islam*. (Cambridge: Cambridge University Press, 1983) 15.

C. Disclaimer

This research is not normative. It does not seek to place a value judgment on the rulings arrived at by the various legal schools regarding women's leadership, nor is it concerned with determining whether those rulings are "right" or "wrong". Likewise, in evaluating the methodological approaches employed by the jurists in their legal texts as well as those outlined in their works of juristic theory, the purpose is not to determine the inherent soundness or strength of those methods, but rather how those methods were employed and to what effect.



CHAPTER ONE
***LEGAL THEORY: IDEOLOGICAL &
 METHODOLOGICAL JUSTIFICATIONS***

I. INTRODUCTION

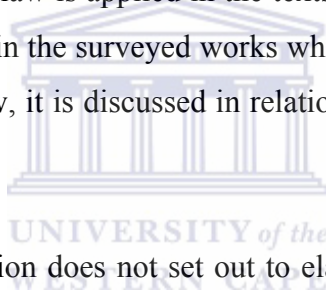
This chapter is concerned with the evidence and methodological approaches used in the surveyed legal texts to justify rulings pertaining to women and leadership. Classical Islamic legal theory is used as an organisational framework for presenting and analysing the arguments and evidence. The degree to which the arguments in the surveyed works conform with theoretical expectations is examined as well as the role of legal arguments found in the works that do not conform with what is outlined in theory, but which nevertheless may reflect the actual legal thinking behind the rulings.

Islamic legal theory, or jurisprudence, is referred to in Arabic as *Uṣūl al-Fiqh*, meaning “the principles or foundations of the law”. It is widely held that Islamic legal theory was first established as an independent discipline by al-Shāfi‘ī (d. 204/820), with the writing of the *Risālah*. This view has recently been challenged by Lowry, who argue that mature legal theory is quite different than what al-Shāfi‘ī conceived, and he identifies the work of the Ḥanafī jurist al-Jaṣṣās (d. 370/980) as being the first work representative of the discipline in its classical form.⁴⁷ In either case, it means that the development of legal theory took place sometime after Islamic Law began to be systematically codified, but before the composition of the major post-formative legal works which provide the evidence and rationales for their respective schools’ legal rulings. The works of legal theory identify the sources from which laws can be derived as well as the methods for interpreting those sources and deriving laws from them.

⁴⁷ Joseph Lowry, *Early Islamic Legal Theory* (Leiden: Brill, 2007), 360-361.

There are four primary sources of law that are agreed upon by all the canonical schools of law. They are: the Qur'an, the Sunnah, consensus (*ijmā'*), and juristic analogy (*qiyās*).⁴⁸ There are other sources recognized by some but not all the legal schools. They are: juristic preference (*istihsān*), preventative legislation (*sadd al-dharā'i'*) which refers to preventing legal loopholes or preventing the means to sin, considerations of general welfare (*al-māṣāliḥ al-mursalāh*), general practice of the people of Madīnah (*'amal ahl al-Madīnah*), and local customs (*'urf*). Moreover, even where the schools agree on recognizing a source of law, they differ in many ways regarding their understanding and approach to using that source.

This chapter is divided into sections corresponding to the sources of law mentioned above. Each section begins with a general introduction providing a brief overview for that particular source of law, which is followed by a discussion of every identifiable instance where this source of law is applied in the texts under survey. When a formal legal argument is brought up in the surveyed works which does not conform perfectly with one of the sources of law, it is discussed in relation to the source it most closely resembles.



The introduction to each section does not set out to elaborate on all the questions of Islamic legal theory related to that source of law, which would be an exhaustive work in its own right. Instead, it highlights the important areas of convergence and disagreement between the four schools. Elaborations on the finer points of theory are introduced as needed in the discussions of the particular legal arguments drawn from the surveyed texts.

⁴⁸ The early Ḥanafī legal theorist, al-Shāshī is probably the first to list the four sources in this way in a legal theory text, where he writes: “The sources of Islamic Law are four: God’s Book, the Sunnah of His Messenger, the consensus of the community, and analogous reasoning (*qiyās*), and it is imperative to study each of these in order to know how to derive legal rulings from them.” Aḥmad b. Muḥammad al-Shāshī, *Uṣūl al-Shāshī*. ed. ‘Abd Allah Muḥammad al-Khalīlī. (Beirut: Dār al-Kutub al-‘Ilmiyyah, no date), 12. See also: Muḥammad b. Aḥmad al-Kalbī, *Taqrīb al-Wuṣūl ilā ‘Ilm al-Uṣūl*. ed. Dr. Muḥammad Mukhtār b. Muḥammad al-Amīn al-Shinqīṭī. (Madinah: Published by the editor, 2002), 265; Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *al-Mustaṣfā fī ‘Ilm al-Uṣūl*. ed. Najwā Daww. (Beirut: Dār Ṭhyā’ al-Turāth al-‘Arabī, no date) 1:99; and Muḥammad b. Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī*. ed. Dr. Rafiq al-‘Ajam. (Beirut: Dār al-Ma’rifah, 1997), 1:290-291. The four sources are not always mentioned together explicitly as the “agreed-upon”, but they are always included in the works of jurisprudence. Some theorists, like Ibn Qudāmah, list *istiḥāb* (the assumption that a previously established ruling has not changed in the absence of evidence to indicate a change) as the fourth agreed-upon source of law. ‘Abd Allah b. Aḥmad b. Muḥammad b. Qudāmah al-Maqdisī. *Rawḍah al-Nāzir wa Jannah al-Munāzir*. ed. Dr. ‘Abd al-Karīm al-Namlah. (Riyadh: Maktabah al-Rushd, 2003), 1:264.

II. THE QUR'AN

The Qur'ān is the first source of Islamic Law recognized in works of Islamic jurisprudence.⁴⁹ Its authority is above question, since all Sunni Muslims accept the theological doctrine that the Qur'an is God's complete, direct and infallible word.⁵⁰ Moreover, the Qur'ān is unanimously regarded by all legal theorists as being of undisputed authenticity (*qaṭ'ī al-thubūt*), meaning that its textual integrity is a matter of absolute certainty. They support this claim by arguing that the text has been confirmed through numerous chains of transmission from the Companions, and these various lines of transmission validate one another to the point of certainty.⁵¹ They also cite verses from the Qur'an to argue that it is a matter of faith that the Qur'an is divinely protected from corruption.⁵²

In spite of the authoritative status that the Qur'ān enjoys as a source of Islamic Law, one thing that becomes clear from the legal works in the survey is that Muslim jurists rarely support their arguments against women's leadership with the Qur'an. The majority of the surveyed texts do not cite the Qur'an at all. In fact, there is only a single instance where a jurist cites a verse of the Qur'an as direct evidence for

⁴⁹ See, for example: al-Kalbī, *Taqrīb al-Uṣūl*, 265; 'Abd al-Malik b. 'Abd Allah b. Yūsuf al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*. ed. Dr. 'Abd al-'Azīm Maḥmūd al-Dīb. (Mansoura: Dār al-Wafā', 1999), 1:72; *al-Ghazālī, al-Mustasfā*, 1:99; Ibn Qudāmah, *Rawḍah al-Nāzir*, 1:266; and al-Sarakhsī, *al-Uṣūl*, 1:291.

⁵⁰ Al-Ṭaḥāwī sums up the orthodox Islamic position on the Qur'ān as follows: "The Qur'an is the speech of God, emanating from Him in a manner that is incomprehensible to man, as a word, and sent down to His Messenger as revelation. The believers believe it to be the truth and they are certain that it is literally the speech of God." 'Alī b. 'Alī b. Abī al-'Izz, *Sharh al-'Aqīdah al-Ṭaḥāwīyyah*. ed. Dr. 'Abd Allah b. 'Abd al-Muḥsin al-Turkī and Shu'ayb al-Arna'ūt. (Beirut: Mu'assasah al-Risālah, 2003), 1:254. A number of jurists and legal theorists were Mu'tazilites in their theology, and upheld the doctrine that the Qur'an is created. This is especially the case for some of the earlier legal theorists, like the important Shafī'ī scholars al-Qāḍī 'Abd al-Jabbār al-Hamadānī and Abū al-Husayn al-Baṣrī. Be that as it may, since the Qur'an refers to itself as "the speech of God" [*Sūrah al-Tawbah*: 6], all legal theorists, whether they believed the Qur'ān to be God's eternal attribute or His created speech, agreed that the Qur'an is indeed God's word, not the word of any human being, nor the human expression of a divinely inspired meaning. Hence, they do not speak about "the authors of the Qur'an", nor do they describe it as the result of Prophet Muhammad expressing the divine inspiration in his own words as best he could.

⁵¹ See: al-Kalbī, *Taqrīb al-Uṣūl*, 268-269; *al-Ghazālī, al-Mustasfā*, 1:100; Ibn Qudāmah, *Rawḍah al-Nāzir*, 1:267-268; and al-Sarakhsī, *al-Uṣūl*, 1:291-292.

⁵² The verses most often cited in this regard are: "Indeed, We have sent down the Reminder, and indeed We are its protectors." [*Sūrah al-Hijr*: 9] and: "Indeed it is a Mighty Book. Falsehood cannot approach it from before it or behind it; a revelation from One who is Wise and Praiseworthy." [*Sūrah Fuṣṣilat*: 41-42]

disallowing women's leadership. Then there are two other isolated instances where a verse is cited by a jurist within the context of a more complex argument.⁵³ These three verses will be discussed.

A. *Sūrah al-Nisā'* (4), Verse 34

The verse reads in full:

Men are responsible (*qawwāmūn*) for women because God has favoured some over others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as God has guarded; and (as to) those on whose part you fear desertion, admonish them, and leave them alone in the sleeping-places and beat them; then if they obey you, do not seek a way against them; surely God is High, Great.

The Shāfi'ī jurist al-Māwardī cites the first part of verse in *al-Ḥawī al-Kabīr* to argue against women holding judicial authority. He is the only one to do so, saying:

“Men are responsible (*qawwāmūn*) for women on account of what God has favoured some over others,” meaning in intellect and opinion, so it is not permissible for them [women] to be in positions of responsibility over men.

He cites the verse again to rule that women cannot lead men in prayer. For prayer leadership, he is following al-Shāfi'ī's lead in *al-Umm*, who supports his ruling against women leading men in prayer by saying: “God has appointed men to be

⁵³ A further two verses are mentioned in the surveyed literature, but as support for other matters. One is cited merely to give a linguistic precedent for defining a word found in a ḥadīth. It is verse 1 of *Sūrah al-Hujurāt*, which reads: “O you who believe, let not a people (*qawm*) ridicule another people (*qawm*), perhaps they might be better than them. Nor let women [ridicule] other women, perhaps they might be better than them.” The verse is cited by the Shāfi'ī jurist al-Māwardī and the Mālikī jurist al-Māziri to define the meaning of the Arabic word *qawm* (a people). They cite a verse of classical poetry for the same purpose. This is to help them advance certain arguments in their discussion of the ḥadīth “The most well-versed among the people (*qawm*) should lead them in prayer.” Their arguments will be discussed in detail in the next chapter on the Sunnah. The other verse is cited by the Ḥanafī jurist al-'Aynī to assert a general legal premise. He cites part of verse 33 of *Sūrah Muḥammad*: “and do not nullify your deeds.” to support the general legal obligation of safeguarding acts of worship from being rendered invalid.

responsible (*qawwāmūn*) for women and restricted them [women] from being people in authority, among other things.” Al-Māwardī is one of the only Shāfi‘ī jurists in history to take up this argument.⁵⁴ Likewise, none of the jurists surveyed from the other three schools suggest this verse as evidence.

Al-Shāfi‘ī does not cite the verse outright in *al-Umm*, but vaguely alludes to men being responsible (*qawwāmūn*) without explaining its connection to the ruling of leading prayer. Al-Bayhaqī, in his biographical work *Manāqib al-Shāfi‘ī*, quotes from al-Shāfi‘ī a more elaborate argument than the one which appears in *al-Umm*, which is worth repeating in full:⁵⁵

We are told by Abū Sa‘īd b. Abī ‘Amr from Abū al-‘Abbās al-Aṣamm from al-Rabī‘ that al-Shāfi‘ī said:

It is impermissible for a woman to lead a man in prayer, as they are restricted in it where men are not, because God said: “Men are responsible (*qawwāmūn*) for women”, and He said: “And men have a degree above them.”⁵⁶

Since prayer is a matter in which the imam stands in charge of the follower (*yaqūm bihi*), it is impermissible for the woman subject to a man who is responsible over her (*qayyim*), to be in the position of a responsibility (*qayyimah*) over that man who is in a position of responsibility over her.”

Also, since prayer leadership is a degree of favour, it is impermissible for her to have a degree of favour over the one whom God has given a degree of favour over her.

⁵⁴ I have surveyed forty-seven Shāfi‘ī legal works for the use of this verse, and have found only one instance of a later scholar following al-Māwardī’s example of citing it for prayer leadership or judicial authority. The verse is cited in both contexts by al-Ḥiṣnī in *Kifāyah al-Akhyār*. He seems to like following al-Māwardī’s lead, since he also cites: “Send them to the back...” as ḥadīth evidence to prohibit women from leading men in prayer, which the overwhelming majority of Shāfi‘ī scholars do not do. Abū Bakr b. Muḥammad al-Ḥiṣnī, *Kifāyah al-Akhyār fī Ḥall Ghāyah al-Ikhtisār*. ed. ‘Alī ‘Abd al-Ḥamīd Balṭajī and Muḥammad Wahbī Sulaymān. (Damascus: Dār al-Khayr, 1994), 131 and 550.

⁵⁵ Abū Bakr Aḥmad b. al-Ḥusayn al-Bayhaqī, *Manāqib al-Shāfi‘ī*. ed. Al-Sayyid Aḥmad Ṣaqr (Cairo: Dār al-Turāth, 1970), 1:358-359.

⁵⁶ *Sūrah al-Baqarah* (2), verse 228.

Since it is from the Prophet's Sunnah – and then that of Islam – that she is supposed to stay back behind the men, it is not permissible for her to be ahead and right in front of them.

If someone were to say: “a slave is disfavoured”, [the reply would be:] likewise the free man can be disfavoured. Then it is possible that someone could come along who is favourable to him. It might be that the slave is better than the free man. He might come into circumstances where he will be manumitted and become a free man, but under all circumstances he is one of the men. The woman will never be, in any circumstance, anything but a woman with someone from among the men responsible over her in the generality of her affairs.

The two verses cited in this passage are interpreted in the most general terms possible. The position of responsibility that verse 4:34 refers to is taken as all-inclusive, so a woman is never to be put into any situation where she is in a position of responsibility over a man. Then the “favour” in verse 4:34 is linked to the “degree” of 2:228, to arrive at the conclusion that a woman must be prevented from attaining any “degree of favour” over a man whatsoever, since that would be against the divine will. Moreover, a woman is always under a man's responsibility, so her disfavour is a constant state for her, unlike that of a slave, who has the potential for manumission.

These arguments are highly subjective and in stark contrast to the type of language and careful arguments we find in *al-Umm* and in al-Shāfi'i's many other writings. This difference is quite clear when we compare this passage to the passage from *al-Umm* in the surveyed texts, where we find al-Shāfi'i to be far more reticent. It is significant that he refers to the verse without actually citing it, since he does not hesitate to quote the verse in numerous other places in *al-Umm*.⁵⁷ By not citing the verse here, he is able to discuss the implications of God making men responsible for

⁵⁷ Al-Shāfi'i has no difficulty in quoting the verse directly in *al-Umm* on at least eight different occasions, all of them dealing with marriage. He enumerates the verse as one of the verses where “God mentions the duties between the husband and wife.” (940). He mentions it with regard to a wife's disobedience to her husband (961 and 1034). He cites it as evidence for the man's obligation to pay a woman a dowry (915 and 1004). The closest he comes to al-Māwardī's way of looking at the verse is when he cites it in reference to a woman not being able to enter into a marriage on her own, without her guardian's consent. (878, 1010, and 1356). Muḥammad b. Idrīs al-Shāfi'i, *al-Umm*. ed. Ḥassān 'Abd al-Mannān. (Amman: Bayt al-Afkār al-Dawliyyah, no date).

women without being encumbered by the verse's context. His language is careful, referring the matters of responsibility and authority to prayer leadership while avoiding any sweeping generalisations that would strip women of their legal agency altogether.

Another issue in the passage from *Manāqib* quoted above is that some of the generalisations are contrary to other rulings in the school. For instance, the conclusion that a woman has "...someone from among the men responsible over her in the generality of her affairs" contradicts a number of rulings where the woman is a legally independent agent.

What can account for this? We need to consider that the sources of the two texts are very different. The text in *Manāqib* is related from al-Shāfi'ī's student al-Rabī', whereas the passage in *al-Umm* is what al-Shāfi'ī is recording for posterity in a highly systematic and rigorously argued book of law. The most likely possibility is that al-Shāfi'ī was freer in his words when speaking to his students than when he set down to write his *magnum opus*. It may also be that the details of the argument narrated from al-Rabī' have been altered somewhat in their wording, whereas the text in *al-Umm* is in al-Shāfi'ī's own carefully chosen words. Though al-Rabī' is regarded as al-Shāfi'ī's strongest and most precise student in narrating his opinions⁵⁸, and the others in the chain of transmission are regarded as highly reliable⁵⁹, narration by paraphrase was quite common, even with prophetic ḥadīth, and it is easy to conceive how an oblique reference to a verse can turn into a full quotation, and cautiously worded arguments can become more general and sweeping in their terms and implications. Long, elaborate arguments like the one above are highly vulnerable to such alterations during transmission.

⁵⁸ Al-Rabī' b. Sulaymān al-Murādī was the principle narrator of al-Shāfi'ī's books. Al-Shāfi'ī referred to him as "my narrator". He is given preference to all of al-Shāfi'ī's other students in what he relates from him, even to al-Muzanī. See: Tāj al-Dīn 'Abd al-Wahhāb al-Subkī, *Ṭabaqāt al-Shāfi'īyyah al-Kubrā*. ed. Maḥmūd Muḥammad al-Ṭanāḥī and 'Abd al-Fattāḥ Muḥammad al-Ḥilū (Cairo: Hajar, 1992), 2:131.

⁵⁹ Muḥammad b. Ya'qūb al-Aṣamm studied under a number of al-Shāfi'ī's students and compiled the ḥadīth collection *Musnad al-Shāfi'ī* from the ḥadīth narrations he heard from al-Shāfi'ī's students. al-Subkī, *Ṭabaqāt*, 1:292. Abū Sa'īd b. Abī 'Amr al-Ṣayrafī al-Naysābūrī, whose given names were Muḥammad b. Mūsā b. al-Faḍl b. Shādān, was a student of al-Aṣamm who related a considerable amount of material from him. He is graded as a very reliable narrator. Al-Bayhaqī was his student and relied upon him heavily. Muḥammad b. Aḥmad al-Dhahabī, *Siyar A'lām al-Nubalā'*. ed. Ḥassān 'Abd al-Manān. (Amman: Bayt al-Afkār al-Dawliyyah, 2004), 3:3730.

Whatever the case, al-Māwardī does not take his cue from al-Shāfi‘ī’s reticence in *al-Umm*. Instead, he goes further and makes the assumption that the favours in question are “intellect and opinion” and concludes that the disparity between men and women in these qualities is severe enough to prevent women from holding any leadership position over men. This line of reasoning also necessitates that he understands the word *qawwāmūn* (plural of *qawwām*), translated here as “responsible” to refer to positions of authority in general.⁶⁰

Since al-Māwardī’s book is a commentary on al-Muzanī’s abridgement of *al-Umm*, it is understandable that he would draw some of his arguments from the original source work. However, this line of argument is not seen again in the legal works under survey, nor in almost any other Shāfi‘ī legal text. Even his younger contemporary al-Juwaynī, whose work is also a commentary of al-Muzanī’s work, did not follow suit.

In order to understand why, it is necessary to turn to the commentary of the Qur’an to determine how the majority of Islamic scholars and jurists understood the verse and its implications. What this reveals is that exegetes and jurists took the verse to refer only to marriage. The earliest commentators of the Qur’an are consistent in discussing the term *qawwāmūn* – and the verse as a whole – strictly in the context of marital relations. This can be seen in the *Tafsīr* of Ibn Jarīr al-Ṭabarī, which is an early compendium of the opinions expressed by the Companions and Successors on the meanings of the Qur’an. They interpret each and every term and phrase of the verse with reference to the husband-wife relationship.

For instance the Companion Ibn ‘Abbās defines *qawwāmūn* in terms of marital duties, saying: “It means that they are in charge. She has to obey him in what God

⁶⁰ Translating the word is problematic. Kecia Ali makes this point by surveying how the major English Qur’an translations differ in rendering *qawwāmūn* as: “‘bread earners’, ‘maintainers’, ‘protectors and maintainers’, ‘the managers of the affairs of’, ‘in charge of’, ‘have authority over’, or ‘shall take care of.’” In her note on this passage, she adds: “These are the translations of, respectively, Ahmed Ali, Shakir, ‘Abdullah Yusuf Ali, Arberry, Pickthall, Dawud, and Asad.” Ultimately, she opts to define *qawwām* literally as: “one who ‘stands over’ or ‘stands up for,’ thus potentially encompassing both authority and responsibility. These dual elements were recognized by classical commentators on this verse.” Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur’an, Hadith, and Jurisprudence*. (Oxford: Oneworld Publications, 2006), 117-118, and note 24 on p. 184.

commanded her to obey him in. This obedience is for her to be good to his family and to safeguard his wealth.”⁶¹

Al-Ṭabarī relates from two of the Successors that the word refers essentially to the husband’s right to discipline his wife, which is consistent with the claim that the verse was revealed after a woman complained to the Prophet about her husband beating her.⁶²

In this light, al-Ḍahḥāk defines *qawwāmūn* in terms that clearly refer to the husband’s authority in marriage: “The man is in charge of the woman. He orders her to obey God, and if she refuses, he can beat her without causing injury.”⁶³ He relates from al-Suddī: “They (the men) take them (the women) by the hand and discipline them.”

The phrase “because God favoured some over others” is interpreted by the Companions and Successors as being a definite preference of men over women. In the words of Sufyān, this is “by God favouring men over women.” But how do they understand the nature of that preference? They do so strictly in terms of marital responsibility. Al-Ṭabarī and Ibn Abī Hātim relate from Ibn ‘Abbās: “His favour over her is in his spending on her and his providing for her.” Al-Ṭabarī relates the same from al-Daḥḥāk.

Al-Ṭabarī provides no alternative reading in what he relates from the Companions and Successors, nor does he suggest any alternative reading in the conclusions he arrives at himself.⁶⁴

It means by what God has given preference to men over their wives by their rendering to them [the wives] their dowries, spending their wealth on them and providing for them their daily needs. This is God’s preference for the [men] over

⁶¹ Muḥammad b. Jarīr al-Ṭabarī, *Jāmi‘ al-Bayān fī Tafsīr Āy al-Qur’ān*. ed. Dr. ‘Abd Allah b. ‘Abd al-Muḥsin al-Turkī. (Giza: Hajar, 2001), 6:687; and with a slightly different wording in Jalāl al-Dīn al-Suyūṭī, *al-Durr al-Manthūr*. ed. Dr. ‘Abd Allah b. ‘Abd al-Muḥsin al-Turkī. (Cairo: Hajar, 2003), 4:384.

⁶² al-Ṭabarī, *Jāmi‘ al-Bayān*, 6:688-690, where he gives various accounts of the incident.

⁶³ This and all subsequent opinions cited are found in al-Ṭabarī, *Jāmi‘ al-Bayān*, 6:687-688 and al-Suyūṭī, *al-Durr*, 4:384-385.

⁶⁴ al-Ṭabarī, *Jāmi‘ al-Bayān*, 6:687.

them. This is how they become responsible for them, carrying out their authority over them in what God has given them charge.

The verse goes on to deal with shunning the bed and beating in the same general language with which it begins. Therefore, it would be difficult to argue, as al-Māwardī seems to do, that the generality of the wording in the first part of the verse extends to legal rulings beyond the scope than marriage. No one would suggest that the second part of the verse applies to all women within every societal context, political, judicial, economic and so forth. Since the injunctions dealing with shunning the bed, disciplinary beatings and so forth appear in the same verse, this strongly indicates a unity of context restricted to marital relations. Al-Māwardī's suggestion that the responsibility in the verse can be extended to political and judicial appointments, and even to leading prayer, takes considerable interpretive liberties with the verse's context. It might be argued that these rulings are alluded to by the verse,⁶⁵ but it is far more difficult to suggest that they can actually be deduced from it.

Therefore, it is not surprising that later scholars of the Shāfi'ī school refrain from following al-Māwardī's precedent. The same applies to the other three schools of law. Even the author of the Mālikī work, *Sharḥ al-Talqīn*, who seems to have borrowed heavily from al-Māwardī's arguments in *al-Ḥāwī al-Kabīr*, chooses not to include this verse in his own discussion.

⁶⁵ Many later commentators of the Qur'ān elaborate on "what God has favoured some over others" by listing a number of legal rulings where men are given preference to women. They also elaborate on men's "greater possession of reason and organized thinking", to quote al-Qurṭubī. Muḥammad b. Ahmad al-Qurṭubī, *al-Jāmi' li-Aḥkam al-Qur'an*. ed. 'Abd al-Razzāq al-Mahdī. (Beirut: Dār al-Kitāb al-'Arabī, 2001) 5:162. Indeed, a number of commentators use this occasion to propound at length on all the ways men are better than women, with Ibn Kathīr going as far as to proclaim categorically that "men are preferable to women and the man is better than the woman". Ismā'īl Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm*. ed. 'Abd al-Razzāq al-Mahdī. (Beirut: Dār al-Kitāb al-'Arabī, 2002), 2:261. It is significant that we do not see these legal rulings being suggested by the Companions or the Successors when discussing this verse, but only by later commentators who come well after the formal codification of Islamic Law. These commentators are, by their own admission, reading these rulings and ideas about women back into the verse, with statements like "They mention some ways in which men are given preference to women..." Muḥammad b. Yūsuf Abū Ḥayyān al-Andalusī. *al-Baḥr al-Muḥīṭ*. (Beirut: Dār Iḥyā' al-Turath al-'Arabī, 2002), 3:335. They do not argue that the verse establishes these rulings, but rather that the authority in marriage which is established by the verse is another such ruling. In their commentaries, they are quite consistent in restricting the verse's actual legal dimension to the marital relationship. In the same way, al-Qurṭubī discusses *qiwāmah* as comprehending a broader understanding of authority, saying: "It means that they [the men] spend on them [the women] and protect them. Also, included among [men] are those who are rulers, governors, and soldiers, and this is not to be found among women." al-Qurṭubī, *al-Jāmi'*, 5:161. He is reading these meanings back into the verse, not deducing them from it, and he presents these meanings in the context of clarifying the rationale for the *qiwāmah* of men over women in the marital relationship.

In stark contrast to al-Māwardī's approach, we find some scholars of the Shāfi'ī school citing the verse as evidence for removing the husband's authority over his wife if he fails to provide for her, by arguing that the verse makes the effective legal cause of his being in charge of her that he provides for her from his wealth.⁶⁶ This illustrates how counter-intuitive al-Māwardī's interpretation is to the preponderance of legal reasoning on the subject in the Shāfi'ī legal school.

Indeed, al-Māwardī reverses his opinion regarding the general scope of the verse. Elsewhere in *al-Ḥawī al-Kabīr*, he argues that the verse's meaning should be restricted to the issue of the husband's responsibilities in marriage. He even takes certain scholars to task⁶⁷ for using the verse as evidence to prohibit a woman from disposing of her own money without her husband's permission, objecting to their line of reasoning by saying: "Its meaning is that the men are authorized with respect to their women to discipline them to carry out their obligations."⁶⁸ He then explains that the verse was revealed was to clarify the matter of a husband beating his wife and concludes: "So the verse does not contain the evidence for what Mālik cites it to prove."⁶⁹ Here, al-Māwardī quite forcefully rejects the possibility of applying the verse to matters outside of the husband's responsibilities in marriage. This is in direct contradiction to his own use of the verse to prohibit women from being judges and leading prayers.

The development of these legal arguments gives us clues as to the kinds of changes that took place between the formative to the post-formative eras. The passage quoted in *Manāqib* reveals the kinds of arguments that were in circulation at the critical period in history when the schools of law were crystallising, especially the ways in

⁶⁶ Imād al-Dīn b. Muḥammad al-Ṭabarī Ilkiyā al-Harrāsī, *Aḥkām al-Qur'ān*. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2001), 2:449.

⁶⁷ He specifically identifies Mālik b. Anas.

⁶⁸ Abū al-Ḥasan ʿAlī b. Muḥammad al-Māwardī, *al-Ḥawī al-Kabīr*. ed. ʿAbd Allah Muḥammad Najīb ʿAwwāmah. (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 2009), 8:16. He reaffirms this meaning when discussing a husband punishing his wife for her disobedience (12:172). Elsewhere, he argues that the verse proves the wife "is in her husband's possession" and this could be used as a possible argument for a woman not having to face criminal punishment for stealing from her husband, since "what she has stolen is still in her husband's possession." (17:154) He also cites it as proof that a husband is responsible to provide financially for his wife (15:3-4), since "one who is responsible for someone else must undertake to meet their needs."

⁶⁹ al-Māwardī, *al-Ḥawī*, 8:16.

which the Qur'an's verses were being contextualised in relationship to the value of women and their perceived role in society. In the *Manāqib* passage, we see al-Shāfi'ī appealing to general principles about women to assert the ruling, with the Qur'an being used to help establish the principles. These principles are that a woman should never be in a position of responsibility over a man and that she should never be in a position which shows her to have a degree of favour over him. The passage in *al-Umm* follows the same line of reasoning in a more cautious way, without explicitly quoting the texts or articulating the principles in detail. Nevertheless, this is still law drawn from broad principles about women. If this is how the ruling about women leading men in prayer came about in Shāfi'ī Law, it is very different from the legal theory al-Shāfi'ī envisioned, and which the school continued to uphold, which derives essential legal rulings from direct textual evidence, or from consensus, or by way of clear analogies on rulings established by those sources.

It is significant that verse 4:34 was not understood by the earliest generation of Muslims to pertain to these issues and that it again disappears from discussions of women's leadership in the post-formative legal works. Likewise, verse 2:228 mentioned in the *Manāqib* passage is not used as a direct argument against women's leadership in the post-formative corpus and is not even alluded to in *al-Umm*. This locates the time of these explorations into women's leadership within the legal thinking of the formative period. It also demonstrates that the formal codification of law and legal theory had a real impact on the arguments and evidence that later jurists would use, since these verses were dropped from their discussions. This shows how legal theory has the potential to obscure the origins and initial development of specific legal rulings.

B. *Sūrah al-Baqarah* (2), Verse 228

The verse reads in full:

And they [women] have [rights] like [the obligations] they are under with beneficence, and men have a degree above them, and God is Ever-Mighty, Ever-Wise.

This verse is mentioned by the Ḥanafī scholars al-‘Aynī and Ibn Nujaym to support the validity of using a particular ḥadīth as evidence that women cannot be in line with men in prayer. The ḥadīth in question, “Send them to the back, whence God has sent them to the back”, is a individual-narrator ḥadīth, so it is not suitably authoritative on its own in the Ḥanafī school to establish the ruling. To get around this, they argue that the ḥadīth merely clarifies an ambiguity in the above verse, so its weakness in transmission is not an issue. Therefore, the verse is not cited to say anything about prayer, but rather to give a window within the framework of Ḥanafī juristic methodology for using the individual-narrator ḥadīth as evidence. Consequently, discussion of this verse will be deferred until the discussion of that particular ḥadīth in the next section.

C. *Sūrah al-Baqarah’ (2), Verse 282*

The verse provides a lengthy exposition on commercial transactions. It is, in fact, the longest verse in the Qur’an. The crucial section reads:

And call to witness, from among your men, two witnesses. And if two men be not (at hand) then a man and two women, of such as you approve as witnesses, so if one of them errs the other one can remind her.

1. *Ḥanbalī Use of the Verse*

The Ḥanbalī jurist Ibn Qudāmah cites a portion of this verse, “...so if one of them errs the other one can remind her” in his discussion on judicial appointments. He does not try to claim that it is direct evidence to prohibit women from being judges, but rather to establish about women “their propensity to err and their forgetfulness”. This in turn is used to bolster his general contention about women that they are “deficient in intellect, lacking in opinion, and unsuited to be present in the assemblies of men.” He is followed in this use of the verse by al-Zarkashī.

After al-Zarkashī, Ḥanbalī jurists continue to take up this description of women’s deficiencies to justify their being unsuited to serve as judges, but they do not enlist the

support of this verse. This is in spite of their reiterating Ibn Qudāmah's description of women almost verbatim, and their citing this verse elsewhere in the same works (with reference to witnesses) without bringing up the topic of intellectual deficiency.⁷⁰

This raises the question of why they did not follow Ibn Qudāmah's precedent of quoting the verse, in spite of their almost verbatim copying of his arguments in general. The answer may be that the verse specifically relates to forgetfulness, and strictly with reference to commercial contracts.⁷¹ This could have a potential limiting effect on the scope of the alleged intellectual deficiency that can be attributed to women. Since the Ḥanbalī argument against women's leadership, as we shall see, is heavily dependent on asserting the intellectual inferiority of women, any evidence with the potential to limit the extent of this inferiority might be viewed as counter-productive.⁷²

2. *Ḥanafī Use of the Verse*

Ḥanafī jurists cite this verse to differentiate between the types of cases where a woman can give testimony and those cases where her testimony is invalid. This is important for the question of women presiding as judges, because in the Ḥanafī school, the authority to serve as a judge hinges on the capacity to give testimony. In Ḥanafī law, prescribed capital punishments, like the death penalty, cutting off the hand, or flogging, and likewise cases of retribution, cannot be executed in the face of suspicion.

In the case of a woman witness, there is a suspicion in the notion that the two women witnesses are serving as a substitute for the one man.⁷³ This is referred to as

⁷⁰ Ibrāhīm b. Muḥammad b. Muflīḥ, *al-Mubdi' Sharḥ al-Muqni'*. ed. Muḥammad Ḥasan Muḥammad Ḥasan Ibrāhīm al-Shāfi'ī. (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 8:333; Muṣṭafā b. Sa'd al-Suyūṭī al-Ruḥaybānī, *Maṭālib Ūlī al-Nuhā fī Sharḥ Ghāyah al-Muntahā*. ed. Abū Muḥammad al-Aṣyūṭī. (Beirut: Dār al-Kutub al-'Ilmiyyah, 2009), 6:468; and Maṣṣūr b. Yūnus al-Bahūṭī, *Kashshāf al-Qunnā' 'an Matn al-Iqnā'*. ed. Muḥammad Adnān Yāsīn 'Darwīsh. (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1999), 6:464.

⁷¹ Refer, in particular, to the Ḥanabī exegete Abū al-Faraj Ibn al-Jawzī, *Zād al-Maṣīr fī 'Ilm al-Tafsīr*. ed. Muḥammad Zuhayr al-Shāwīsh, Shu'ayb al-Arna'ūt, and 'Abd al-Qādir al-Arna'ūt. (Beirut: al-Maktab al-Islāmī, 2002), 172. This is the understanding of the majority of commentators from the earliest times, and the one determined to be most correct by al-Ṭabarī, *Tafsīr*, 5:91-93.

⁷² This may also explain the behaviour of jurists with reference to the ḥadīth referring to women as "deficient in intellect and religion", as will be discussed in the next section.

⁷³ Maḥmūd b. Aḥmad Badr al-Dīn al-'Aynī, *al-Bināyah Sharḥ al-Hidāyah*. ed. Ayman Ṣāliḥ Sha'bān. (Beirut: Dār al-Kutub al-'Ilmiyyah, 2012), 6:358.

the “suspicion of substitution”. It is merely a suspicion, since unlike other examples of substitution, like using dirt for ablutions in the absence of water, it is possible to accept the testimony of women even if men are available, so the women are not really acting as substitutes. Nevertheless, the “suspicion of substitution” is deemed sufficient grounds in the Ḥanafī school to prohibit the testimony of women in capital crimes, and consequently to prohibit them from serving as judges in such cases. However, since women’s testimony is valid in other cases, they can preside as judges in those cases as well. This verse, therefore is evidence for the scope of cases in which women can preside as judges, both confirming their legal capacity to do so and setting limitations on it.

D. Summary

Only one verse of the Qur’an, 4:34, is cited as providing evidence against women’s leadership, and this in only the earliest of the Shāfi‘ī works in the survey. Due to the weakness of the argument, this line of evidence is not taken up by later jurists, neither within the Shāfi‘ī school of thought, nor within the other schools. The overwhelming juristic stance on the verse is that it pertains only to the marital relationship. Moreover, al-Māwardī, who cites this verse, concedes elsewhere in the same work that the verse is only suitable as evidence for rulings concerning marriage.

Consequently, it can safely be concluded from the legal works in the survey, as well as from numerous other legal texts, that classical Muslim jurists have generally not used the Qur’an as a basis to derive, deduce, or seek support for their respective schools’ legal rulings regarding women’s leadership in Islam. It can be seen as a testament to these jurists’ objectivity that they did not resort to interpretive gymnastics in order to find verses of the Qur’an to prove their positions against women’s leadership, in spite of the decisive authority that the Qur’an has as a source of Islamic Law.

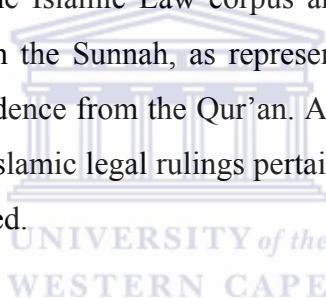
At the same time, it must be understood that the Sunnah is such a strong textual authority in Sunni Islam that jurists working within this legal framework would not have felt too strong a compulsion to cite the Qur’an in establishing their legal

positions. The Sunnah is the second of the four primary sources of Islamic Law, and it is deemed to be sufficient on its own as a basis for establishing legal rulings. This is what will be discussed below.

III. THE SUNNAH

The Sunnah is the second of the four primary sources of Islamic law accepted by all four legal schools.

The Sunnah, at least as defined by post-formative jurists and legal theorists, comprises what has been received from the Prophet Muhammad of his statements, his actions, and those matters for which he gave his tacit approval. In general, a far greater number of legal rulings in the Islamic Law corpus are supported either directly or indirectly with evidence from the Sunnah, as represented by the ḥadīth, than those which are supported with evidence from the Qur'an. As we have already seen, this is very much the case with the Islamic legal rulings pertaining to women and leadership, where the Qur'an is rarely cited.



Even though the Sunnah is regarded as an undisputed source of religious knowledge, the same cannot be said of the total body of ḥadīth literature through which the Sunnah is generally known in the post-formative period.⁷⁴ The authenticity of individual ḥadīth can vary considerably, and this has engendered a number of Islamic sciences related to the criticism of ḥadīth.

With the exception of a very few ḥadīth which have been widely transmitted by the masses so that that their authenticity is deemed beyond question (none of which are cited as evidence for the legal issues in the present survey)⁷⁵, ḥadīth are related from

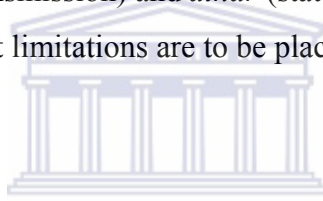
⁷⁴ A ḥadīth is a report. In the context of the Prophet, it is a report conveying something of the Sunnah. Refer to: Aḥmad b. 'Alī b. Ḥajar al-'Asqalānī, *Nuzḥah al-Nazar fī Tawdīḥ Nukhbah al-Fikr*. ed. 'Alī b. Ḥasan al-Ḥalabī al-Atharī. (Dammam: Dār Ibn al-Jawzī, 2003), 52-53.

⁷⁵ With respect to how a ḥadīth reaches us, it is classified either as a report of the general masses (*khbar mutawātir*) or a report of individual narrators (*khbar al-wāḥid* pl: *akhbār al-āḥād*). For a narration to qualify as being a report of the general masses (*mutawātir*), it must be conveyed by such a large number of people that it is, according to the norms of nature, impossible for them to have conspired upon a falsehood. This number must be sustained in every level of the narration's chain of transmission from the beginning to the end, and the topic being reported about must stem from the

generation to generation by one or more individual narrators. It is necessary to determine the authenticity of these individual-narrator reports (*akhbār al-āḥād*). This is a matter of general agreement among scholars. The Ḥanbalī jurist Ibn Taymiyah writes: “No one possessing sense has ever claimed that the report of every individual bequeaths knowledge.”⁷⁶

A. The Sunnah and the Schools of Law

Different schools of law have applied different standards as to which individual-narrator hadith are acceptable as evidence for deriving Islamic legal rulings.⁷⁷ They differ as to the conditions under which isolated individual-narrator hadith can be relied on as a source of law. They likewise differ as to whether *mursal* hadith (hadith with incomplete chains of transmission) and *āthār* (statements of the Companions) are valid sources of law, and what limitations are to be placed on that validity.



direct sensory experience of those reporting it. See: Abū Muẓaffar Maṣṣūr b. Muḥammad al-Samʿānī, *Qawāṭiʿ al-Adillah*. ed. Muḥammad Ḥasan al-Shāfiʿī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997), 1:325; Aḥmad b. Qāsim al-ʿAbbādī, *al-Āyāt al-Bayyināt*. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1996), 3:272-273; and al-Kalbī, *Taqrīb*, 287. In other words, they must have seen or heard what they are reporting. *Mutawātir* hadith are accepted as being certain in their authenticity (*qaṭʿī al-thubūt*), in the same way as the text of the Qurʾān is considered to be authentic. This is a matter of consensus among scholars. Aḥmad b. Muḥammad al-Ḥarrānī, *al-Muswaddah fī Uṣūl al-Fiḥ li-Āl Taymiyah*. ed. Dr. Aḥmad Ibrāhīm ʿAbbās al-Dharwī. (Riyadh: Dār al-Faḍīlah, 2001), 1:467. Probably the most well-known *mutawātir* hadith is the Prophet’s statement: “Whoever invents a lie and attributes it to me intentionally, let him prepare his seat in the Fire.” [*Ṣaḥīḥ al-Bukhārī* (110) and *Ṣaḥīḥ Muslim* (3).] Other *mutawātir* narrations include the hadith relating to the fountain of Kawthar in the Hereafter, the hadith about the believers seeing God in the Hereafter, the hadith about wiping over leather socks, and those relating to the prohibition of all intoxicants. These hadith are quite rare. None of the hadith cited in the legal literature to prohibit women from leadership positions fall into this category.

⁷⁶ Quoted in al-Ḥarrānī, *al-Muswaddah* 1:490.

⁷⁷ According to scholars of hadith criticism, individual-narrator hadith are not accepted as authentic until both their texts and their chains of transmission are subjected to a careful and rigorous scrutiny. It is in order to carry out such an assessment that the sciences of hadith criticism were developed. Different types of evidence are used to evaluate a report and assess its degree of authenticity. Taken into consideration are factors like the reliability and honesty of the narrators, the ability to demonstrate that all the narrators met one another and that there is no break in the chain of transmission, and the absence of any inconsistency between the text and other texts that are comparable with it. Uthmān b. ʿAbd al-Raḥmān b. al-Ṣalāḥ, *Muqaddimah fī ʿUlūm al-Ḥadīth*. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1995), 15-16. Equipped with these methods, scholars of hadith criticism grade individual-narrator hadith on the basis of how likely it is that those hadith are true. These grades include authentic (*ṣaḥīḥ*), good (*ḥasan*) – which are generally accepted for establishing Islamic teachings – as well as weak (*ḍaʿīf*), rejected (*munkar*), and fabricated (*mawḍūʿ*), which are not accepted. Scholars of law, however, have developed different standards for accepting and rejecting individual-narrator reports, and this is one of the important points of divergence between the four schools of law.

1. *The Mālikī School*

It appears that Mālik b. Anas had a broader view of the Sunnah than to restrict it to the ḥadīth corpus.⁷⁸ For him, the Sunnah represented the pattern of life passed down from the Prophet to the Companions and through their words and practice to the Successors and subsequent generations who came afterwards, which may or may not be recorded in the ḥadīth. Likewise, any single ḥadīth may or may not be representative of the overall normative pattern that comprises the Prophet's Sunnah.⁷⁹ The shift from ascertaining the Sunnah from the practice of the Muslim community as well as from ḥadīth to taking it exclusively from the ḥadīth corpus had already occurred within the Mālikī school well before the time of the post-formative legal texts in this study, which take the “classical” view that the Sunnah is represented solely by the ḥadīth corpus.⁸⁰ Nevertheless, Mālik's broader concept of the Sunnah shaped the conditions that would later be elaborated in Mālikī legal theory for accepting ḥadīth, as well as how ḥadīth would be presented, interpreted, and understood in the legal literature of this school of law.

For instance, the Mālikī school places restrictions on the validity of isolated ḥadīth as evidence for legal rulings, even if those ḥadīth have sound and complete chains of transmission. One of these restrictions is that the ḥadīth must not be contrary to the practice of the people of Madīnah, a rule which stems directly from the view that the Sunnah is preserved in their practice.⁸¹ Another is that it cannot contradict an analogy on the generally accepted precepts of the school.⁸²

⁷⁸ Umar Abd-Allah asserts: “Mālik regarded both ḥadīth and *āthār* or *fatwā* of the Companions to be sources of *sunnah*.” He also writes: “In light of the relatively few ḥadīth transmitted from the older and more prominent Companions, the use of their *āthār* and *fatwās* to establish the content of the Prophetic *sunnah* has special value.” Abd-Allah, “Malik's Concept”, 165; 168.

⁷⁹ Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madinan Amal*. (London: Routledge Curzon, 2002) 168.

⁸⁰ Both Abd-Allah and Dutton refer to this as the “classical” view of the Sunnah, since it was held by jurists and legal theorists of all four schools of law during the post-formative period, including those of the Mālikī school. Abd-Allah, “Malik's Concept”, 121; Dutton, *Origins*, 169.

⁸¹ Abū al-Ḥasan 'Alī b. 'Umar b. al-Qaṣṣār, *al-Muqaddimah fī al-Uṣūl*. ed. Muḥammad b. al-Ḥasayn al-Sulaymānī. (Beirut: Dār al-Gharb al-Islāmī, 1996), 77. This early Mālikī legal theorist writes: “The reports about [the practices of] the people of Madīnah are reports of the general masses, so they take precedence over individual-narrator reports.” Likewise, 'Abd al-Wahhāb al-Baghdādī writes: “If an individual narrator report is related that contradicts their unbroken practice, it must be rejected and their practice adopted, since their practice comes in the same way as a report of the general masses... We assume the [single-narrator] report to be the result of a mistake on the part of the narrator, or that the report had been abrogated, or that some other factor necessitates its being rejected. This has nothing to do with the allegation that we reject reports that are not reinforced by [Madinite] practice, for if a report is found on a matter about which nothing is substantiated from the practice of the people of

At the same time, the Mālikī school acknowledges the validity of *mursal* ḥadīth from the most trusted narrators, for whom it can be demonstrated that they only narrate ḥadīth from other equally trustworthy and reliable narrators. If this condition is met, *mursal* hadith are regarded equally as authoritative as ḥadīth with complete chains of transmission. One reason for this was the belief that if a reliable narrator heard a ḥadīth from a large number of sources, he would leave out mention of those numerous sources and attribute the ḥadīth directly to the person those sources related it from.⁸³

The statements of the Companions were also a potential source of the Sunnah for Mālik, who certainly adopted the opinions of a number of Companions. Abd-Allah argues that Mālik held the Companions' statements to be similar in their authority as sources of law to individual-narrator ḥadīth, and that the *āthār* and legal verdicts of older and more prominent Companions had special value, due to their intimate knowledge of the Prophet's Sunnah and the long time they spent in his presence. He supports his claim with a number of Mālik's legal decisions and what Mālik said in his famous letter to Layth b. Sa'd.⁸⁴

However, the authority of a Companion's statement and its evidentiary nature was a matter of considerable discussion for Mālikī legal theorists. The early Mālikī theorist Ibn al-Qaṣṣār considers the authority of a Companion's statement to be based on a presumption of consensus (*ijmā'*), and that it only stands as evidence of no other Companion is on record expressing a dissenting view.⁸⁵ In *Iḥkām al-Fuṣūl*, al-Bājī

Madinah, we accept it." 'Abd al-Wahhāb b. 'Alī b. Nasr al-Baghdādī, *al-Mu'awwanah 'ala Madhhab Ahl al-Madīnah*, published with Ibn al-Qaṣṣār's *al-Muqaddimah*, 247. A similar justification is given by Ibn Rushd al-Jadd. See: Muḥammad b. Aḥmad b. Rushd al-Jadd, *al-Bayān wa al-Taḥṣīl*. ed. Muḥammad Ḥajjī *et al.* (Beirut: Dār al-Gharb al-Islāmī, 1988), 17:331.

⁸² Ibn al-Qaṣṣār explains the justification for this as follows: "A individual-narrator report might be abrogated, or affected by error or omission, or be a lie, or be specified by something else. There is only one possibility for falsehood with an analogy (*qiyās*), and that is whether the original ruling is truly brought about by the [identified] effective cause. Therefore, it is stronger than a individual-narratorreport and must be given preference." *al-Muqaddimah fī al-Uṣūl*, 110-111. This argument is repeated verbatim by Ibn Rushd al-Jadd, where he adds: "That which can possibly be falsified as evidence from many angles is weaker than that which can only be falsified from one." *al-Bayān wa al-Taḥṣīl*, 17:332.

⁸³ Ibn al-Qaṣṣār, *al-Muqaddimah fī al-Uṣūl*, 71-74.

⁸⁴ Abd-Allah, "Malik's Concept", 161-169.

⁸⁵ He writes: "In Mālik's view, it is permissible to specify the apparent meaning [of a text] with the statement of a single Companion if no other [Companion] is known to have said something else and that Companion's statement had become open knowledge. It becomes a binding statement requiring the

identifies the authority of a Companion's statement to be a contentious issue wherein the earliest Mālikī scholars differed.⁸⁶ In *al-Minhāj*, he asserts the same disagreement, but subsumes the entire question under the rubric of *ijmā'*.⁸⁷ However, he also mentions that Mālik b. Anas may have personally regarded the statement of a Companion as evidence, even if it did not become widely circulated.⁸⁸ Ibn al-Ḥājjib resolves that "it does not stand as evidence", and identifies the opposing view to be strictly that of the Ḥanafī and Hanbalī schools.⁸⁹

2. The Shāfi'ī School

The Shāfi'ī school is closest in methodology to the approach of ḥadīth scholars as to which ḥadīth it deems acceptable. The Sunnah is known through what is recorded in authentic ḥadīth. It is no accident that most of the pivotal scholars in the development of ḥadīth criticism have been from the Shāfi'ī school.

The Shāfi'ī school accepts isolated authentic ḥadīth (those that have sound and complete chains of transmission) as valid evidence for legal rulings. In the terms of ḥadīth scholars, these are the *ṣaḥīḥ* and *ḥasan* ḥadīth. Indeed, in the absence of evidence to establish that an authentic ḥadīth has been abrogated, it is obligatory to accept it.⁹⁰

specification of [the text] with it, because it is effectively a form of consensus." Ibn al-Qaṣṣār, *al-Muqaddimah fī al-Uṣūl*, 104.

⁸⁶ Abū al-Walīd al-Bājī, *Iḥkām al-Fuṣūl*. ed. 'Abd al-Majīd Turkī. (Beirut: Dār al-Gharb al-Islāmī, 1995), 1:274

⁸⁷ Abū al-Walīd al-Bājī, *al-Minhāj fī Tartīb al-Hijāj*. (Riyadh: Maktabah al-Rushd, 2004), 41-42.

⁸⁸ al-Bājī, *al-Minhāj*, 229.

⁸⁹ Ibn al-Ḥājjib not only resolves that "it does not stand as evidence", but also identifies the opposing view to be that of the Ḥanafī and Hanbalī schools. 'Uthmān b. 'Umar b. al-Ḥājjib, *Mukhtaṣar Muntahā al-Su'l wa la-Amal fī 'Ilmay al-Uṣūl wa al-Jadal*. ed. Nadhīr Ḥamādū (Beirut: Dār Ibn Ḥazm, 2006) 2:845.

⁹⁰ Al-Shāfi'ī writes: "As for what is found in the Sunnah reported by individual narrators wherein it is possible for disagreement to exist and wherein interpretation is possible, when such reports come to us from individual narrators, then I would say that the evidence it contains has the force to make us abide by it, so they cannot reject what is stated therein any more than they can reject the testimony of a reliable witness. This is not because there is absolute certainty in the report like there is in the text of the Qur'ān or in a report of the general masses about God's Messenger. If anyone is in doubt about this point, we would not tell him to repent. We would say to him: If you were a person of knowledge, you would have no right to doubt it, just as you would have no right if you were a judge to offer a judgment except in accordance with the testimony of reliable and trustworthy witnesses. Though a mistake is a possibility, you must pass judgment on the face value of their honesty, and God assumes responsibility over what you cannot perceive from them." Muḥammad b. Idrīs al-Shāfi'ī, *al-Risālah*. ed. Aḥmad Muḥammad Shākir (Beirut: al-Maktabah al-'Ilmiyyah, no date), 461.

In the Shāfi'ī school, unlike the Mālikī and Ḥanafī schools, *mursal* ḥadīth are not accepted as evidence for legal rulings.⁹¹ The early Shāfi'ī theorist, al-Khaṭīb al-Baghdādī writes: “An individual-narrator ḥadīth is not accepted until the integrity of its narrators and the continuity of its chain of transmission are verified.”⁹² The reason for this is that the unmentioned narrator's acceptability cannot be ascertained. Even if the narrator who makes this omission is of the highest calibre, there is no guarantee that the narrator made a correct assessment of the reliability of un-named person from whom the ḥadīth was received.⁹³ Shāfi'ī scholars, likewise, do not accept the statements and legal opinions of the Companions as evidence.

3. The Ḥanbalī School

The Ḥanbalī school accepts isolated authentic ḥadīth as an independent source of law in the same way that the Shāfi'ī school does, and they regard those ḥadīth as possessing the same degree of legislative authority. Ḥanbalī scholars differ from their Shāfi'ī counterparts in accepting *mursal* ḥadīth⁹⁴ as well as certain ḥadīth with other forms of weakness in their transmission.⁹⁵ They also accept the *āthār* and legal rulings

⁹¹ al-Shāfi'ī gives a number of stringent conditions for accepting the *mursal* narrations of senior Successors, but these conditions require corroborative evidence that relegates such reports to a mere supporting role. The *mursal* narrations of the elder Successor Sa'īd b. al-Musayyib were among those most readily accepted, some of which are cited in *al-Risālah*. However, none of the ḥadīth that appear as evidence in support of legal rulings concerning women's leadership come from this narrow category of *mursal* narrations. Al-Shāfi'ī, *al-Risālah*, 461-464.

⁹² Aḥmad b. 'Alī al-Khaṭīb al-Baghdādī, *Kitāb al-Faqīh wa al-Mutafaqqih*. ed. 'Ādil b. Yūsuf al-Ghazāzī. (Dammam: Dār ibn al-Jawzī, 2000), 1:291.

⁹³ al-Khaṭīb al-Baghdādī, *al-Faqīh*, 1:292.

⁹⁴ Muḥammad b. Ḥusayn Abū Ya'lā al-Farrā', *al-'Uddah fī 'Uṣūl al-Fiqh*. ed. Aḥmad b. 'Alī b. Sīr al-Mubārakī (Riyadh: published by the editor, 1993), 3:906.

⁹⁵ Abū Ya'lā al-Farrā', *al-'Uddah*, 3:941. Abū Ya'lā explains that the weakness Aḥmad accepts is quite limited in scope. He writes: “When Aḥmad says [he accepts] weak narrations, he means weak according to the ḥadīth scholars, because they describe as weak things that jurists are not compelled to regard as weak, like *mursal* narrations, chains of transmission with ambiguous terms of narration (*tadlīs*), and a single narrator relating a ḥadīth with additional wording not narrated by the rest of the narrators. This is found in their books: ‘So-and-so is the only one to come with this.’ So when he says: ‘It is weak’, this is what he is referring to. When he says: ‘It is to be acted upon’, he is referring to [what is acceptable] according to the jurists.” This means that the degree of weakness tolerated by Aḥmad is minor. Indeed, Ibn al-Qayyim asserts that the weak narrations Aḥmad accepts would actually be categorised as good (*ḥasan*) narrations in the terminology of ḥadīth specialists: “Mursal and weak ḥadīth are accepted if there is nothing else on the topic to take precedence over them, and they are what takes precedence over analogical reasoning (*qiyās*). He does not mean by weak that which is false (*bāṭil*) or rejected (*munkar*), nor what has a suspect narrator in its chain of transmission, for acting upon such narrations cannot be justified. Rather, what he refers to as a weak ḥadīth is a division of what is authentic (*ṣaḥīḥ*), specifically it is a category of a good (*ḥasan*) ḥadīth. He did not categorise ḥadīth as authentic (*ṣaḥīḥ*), good (*ḥasan*), and weak (*ḍa'īf*). Instead, he categorised them as authentic (*ṣaḥīḥ*) and weak (*ḍa'īf*), with weak having many levels. If he did not find on a topic a narration, a statement of a Companion, or consensus which indicted something else, he would act upon this [weak ḥadīth] and

of the Companions as sources of law.⁹⁶ For this reason, Abd-Allah observes that Ḥanbalī legal theory accepts more textual sources to be valid than any of the other schools.⁹⁷

These sources are accepted with various conditions and have different degrees of textual authority. However, Ḥanbalī jurists will not resort to analogical reasoning (*qiyās*) or any other approach to deriving laws until they have exhausted all of these textual possibilities.⁹⁸ Whereas Mālikī and Ḥanafī acceptance of *mursal ḥadīth* can be traced back to what was originally a broader and understanding of the Sunnah, one that was inclusive of the practices and understandings of the community, this cannot be said for the Ḥanbalī school, whose jurists have always regarded the ḥadīth as the sole repository of the Sunnah. It is rather that their commitment to textual evidence is so strong that they prefer reliance upon a weak ḥadīth to any exercise of juristic reasoning.

4. The Ḥanafī School

The Ḥanafī school, like the Mālikī school, traces its development back before the time the Sunnah became strictly synonymous with a standardised ḥadīth corpus. This had a similar influence in shaping Ḥanafī legal theory regarding the acceptance of ḥadīth. Like the Mālikī school, a number of restrictions are placed on the use of isolated individual-narrator ḥadīth as a source of law, though the restrictions themselves differ. Many of these conditions reflect the authority that the established practices of the community had in contrast to a individual-narrator ḥadīth, irrespective of the soundness of its chain of transmission. For instance, a individual-narrator ḥadīth cannot contradict the well-known general axioms of the Ḥanafī school, nor the well-known Sunnah, nor the practice of the Companions and Successors. Significantly, a individual-narrator ḥadīth cannot refer to something that would have to be generally known by the broader Muslim community (*‘umūm al-balwā*), especially if the

give it precedence over *qiyās*.” Muḥammad b Abī Bakr b. Qayyim al-Jawziyyah, *I‘lām al-Muwaqqi‘īn ‘an Rabb al-‘Ālamīn*. ed. ‘Iṣām Fāris al-Ḥarastānī. (Beirut: Dār al-Jīl, 1998) 1:45.

⁹⁶ Abū Ya‘lā al-Farrā’, *al-‘Uddah*, 4:1178.

⁹⁷ Abd-Allah, “Mālik’s Concept” 125.

⁹⁸ Ibn al-Qayyim writes: “If Imām Aḥmad did not find any textual evidence on the issue, nor the opinion of the Companions or of one of the Companions, nor a *mursal* or weak narration, he would then resort to the fifth source of law, *qiyās*, out of necessity.” Ibn Qayyim al-Jawziyyah, *I‘lām al-Muwaqqi‘īn*, 1:47.

ḥadīth's ruling is not found to have been expressed by the jurists.⁹⁹ On the other hand, they treat *mursal* narrations and ḥadīth with connected chains of transmissions as having equal strength, as long as all of the narrators are reliable and trustworthy who in turn only narrate ḥadīth from other equally trustworthy and reliable narrators.¹⁰⁰ They regard the *āthār* and legal rulings of the Companions as additional sources of evidence for determining and clarifying the Sunnah.¹⁰¹

From the above, we can see that Ḥanafī scholars recognise an inherent uncertainty in individual-narrator ḥadīth. Ḥanafī legal theory places great emphasis on the certainty or uncertainty of evidence. Unlike the other three schools of law, they make a distinction between legal obligations, designating some as compulsory (*farḍ*) and others as obligatory (*wājib*). The former are more heavily binding due to their being established with evidence that engenders certainty (*qaṭʿ*), while the latter rulings are less emphatic due to the uncertainty (*ẓann*) of the evidence upon which they are



⁹⁹ Al-Kawtharī explains the logic behind these conditions as follows: “Regardless of whether a report has a connected chain of transmission or is *mursal*, a condition for its acceptance is that it does not go against their generally accepted axioms. This is because the jurists exercised every effort to account for all textual sources from the Qurʿan, Sunnah, and verdicts of the Companions, until they referred every comparable and agreed-upon textually-supported ruling back to a general axiom that it could be derived from, the general axiom being what all comparable rulings fall under. They did this for every set of comparable rulings, until they had thoroughly examined and surveyed everything. In this way, they developed general principles – which are elaborated in books dedicated to the topic of axioms and divergent rulings – and they used these to critique individual-narratorreports. Whenever a [single-narrator] report contradicted or deviated from these principles, they regarded it to be in conflict with what constituted more firmly grounded evidence, since a principle derived from multiple sources of law is equivalent to a report of the general masses.” Muḥammad Zāhid al-Kawtharī, *Fiqh Ahl al- Irāq wa Hadīthuhum*. ed. Muḥammad Sālim Abū ʿĀṣī. (Cairo: Dār al-Baṣāʿir, 2009), 35. He also says: “Another of their principles is to reject individual-narratorreports in matters which would clearly have to be known to everyone and therefore the need to relate it would make the report widespread. The circumstances therefore attested to its falsehood. It is also a condition that the report is well-known by the generality of the jurists.” *Fiqh Ahl al- Irāq*, 36.

¹⁰⁰ Al-Sarakhsī invokes the possibility that *mursal* narrations from trustworthy narrators might actually be stronger, because these narrators leave out mentioning their sources only when they have heard the ḥadīth from a large number of reliable sources. He cites statements to this effect from prominent early narrators like Ibrāhīm al-Nakhaʿī and ʿĪsā b. Abān. Al-Sarakhsī, *Uṣūl*, 1:371.

¹⁰¹ With respect to matters wherein there is no room for the exercise of reason, Ḥanafī legal theorists are agreed that the statement of a Companion is legal proof if there is no contradictory opinion expressed by another Companion. Al-Sarakhsī says: “There is no disagreement among our earlier and later scholars that the statement of one of the Companions is legal proof in matters wherein analogical reasoning (*qiyās*) has no role in determining the ruling. This includes the determination of quantities that cannot be known through the exercise of opinion. Therefore, we adopted ʿAlī’s statement that the dowry is set at ten silver coins.” As for other matters, he mentions some disagreement about which is given precedence, but favours the view that the Companion’s statement takes precedence over *qiyās*. al-Sarakhsī, *Uṣūl*, 2: 110 and 2:108.

established.¹⁰² This is unique to Ḥanafī Law. The terms *farḍ* and *wājib* are essentially synonymous in the other legal schools. The Ḥanafī school makes an equivalent distinction with respect to prohibited things. The term “prohibited” (*ḥarām*) is used for prohibitions established by certain evidence, while the term “disliked as prohibited” (*makrūh taḥrīman*) is used for prohibitions established by uncertain evidence.¹⁰³

Likewise, Ḥanafī scholars regard any addition to the meaning of a ruling in the Qur’an to be a form of abrogation requiring evidence providing certainly to make such additions.¹⁰⁴ A individual-narrator ḥadīth, being uncertain, cannot provide anything that adds to or modifies a ruling in the Qur’an. It can, however, be strengthened by other factors which enable it to do so. One of these is to claim that the ḥadīth should be graded as well-known (*mash-hūr*), which means that though it begins by being narrated by a limited number of Companions, it subsequently then becomes widespread in later stages of its narration.¹⁰⁵

In summary, the Ḥanafī and Mālikī schools set conditions upon the acceptance of individual-narrator ḥadīth that give them greater leeway in rejecting a ḥadīth with a sound chain of transmission if it goes against established general precepts or practices within the school, whereas the Shāfi‘ī and Ḥanbalī schools place the final authority in

¹⁰² A ruling is *farḍ* if “it is established by evidence which is certain, containing no uncertainty” and *wājib* if “it is established by evidence containing uncertainty, like a verse requiring interpretation or an authentic individual-narratorreport.” al-Shāshī, *Uṣūl*, 239.

¹⁰³ The ruling of “disliked as prohibited” (*makrūh taḥrīman*) should not be confused with “disliked as disdainful” (*makrūh tanzīhan*), the latter being equivalent to the ruling of “disliked” (*makrūh*) in the terminology of the other three schools of law. It is rather a subcategory of what the other schools of law recognize as “prohibited” (*ḥarām*). Nevertheless, the expressions of the Ḥanafī theorists sometimes add to the confusion. Ṣadr al-Sharī‘ah discusses the discrepancy between the terminology’s wording of the and the actual division of the rulings as follows: “The ruling of being disliked is two types: disliked as disdainful, which is closer to the ruling of permissibility, and disliked as prohibited, which is closer to the ruling of prohibition. According to Muḥammad [al-Shaybānī]: ‘Indeed, [disliked as prohibited] is the ruling of prohibition, but with evidence that is uncertain, in the same way as *wājib* is to *farḍ*.’” Ṣadr al-Sharī‘ah ‘Ubayd Allah b. Mas‘ūd al-Maḥbūbī, *Tanqīḥ al-Uṣūl*. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2001 – published with *al-Talqīḥ*), 453.

¹⁰⁴ Al-Sarakhsī says: “An addition to a text is abrogation, so it cannot be established except with what can establish abrogation, and abrogation cannot be established by a individual-narratorreport, so likewise, an addition cannot be established by it.” He also says: “An addition to the text takes the form of a clarification [of the text], but is an abrogation in its actual meaning, regardless of whether the addition is to the [ruling’s] cause or to the ruling [itself].” al-Sarakhsī, *Uṣūl*, 1:126 and 2:81-82.

¹⁰⁵ Al-Sarakhsī explains: “It is permissible to use this type of report to establish an addition to the text, since the scholars received it with full acceptance and acted upon it. This indicates that it is binding evidence, because consensus (*ijmā‘*) occurring in the second and third eras is binding evidence. Therefore, we permit it to establish an addition to the text.” al-Sarakhsī, *Uṣūl*, 1:303.

the text of the ḥadīth as long as its chain of transmission is sound. Ḥanafī and Mālikī jurists accept *mursal* narrations – those in which some of the narrators are not mentioned – as being comparable in authority to narrations with continuous chains of transmission as long as the narrators who are mentioned are trustworthy. This is because of their conviction that a trustworthy narrator would not neglect to mention a source unless that source was also trustworthy, or because the omission was possibly due to the large number of sources that the narrator heard it from. Ḥanbalī scholars accept *mursal* narrations as being of lesser authority than ones with complete chains of transmission, while Shāfi‘ī jurists reject nearly all *mursal* narrations. All four schools of law agree on the principle of rejecting narrations with extremely weak, unreliable, or suspect narrators in their chains of transmission.

The ḥadīth that are cited as evidence in the surveyed legal works will now be discussed in detail. For each ḥadīth, the text of the ḥadīth is given, followed by where it appears in the surveyed works. The authenticity of its chain of transmission is then briefly discussed to provide a frame of reference for the jurists’ potential acceptance and rejection of the ḥadīth on that basis, bearing in mind that different jurists will have been aware of, or concerned with, these considerations to varying degrees, depending on their school of law and the time period in which they lived. Finally, how that ḥadīth is used by the jurists’ in their legal arguments is analysed in detail.

B. A People Who Grant a Woman Authority to Rule Them

Al-Ḥasan al-Basrī relates from Abū Bakrah:¹⁰⁶

God benefited me during the days of the [Battle of the] Camel with words I had heard from God’s Messenger, after I had almost joined in the fight on the side of the companions of the Camel.¹⁰⁷ When God’s Messenger had heard that the

¹⁰⁶ *Ṣaḥīḥ al-Bukhārī* (4425) and in a slightly abridged form (7099).

¹⁰⁷ This was the faction led by the Prophet’s widow ‘Ā’ishah in opposition to the faction led by his cousin and son-in-law ‘Alī b. Abī Ṭālib at the battle of the camel which took place in Basra in the year 656 CE. ‘Alī’s faction was victorious.

Persians appointed Khosrau's daughter¹⁰⁸ to rule them, he said: "A people who grant a woman authority to rule them will not succeed."

1. *Its Citation in the Surveyed Works*

This ḥadīth is the primary textual evidence cited in the classical legal literature to prohibit women from assuming positions of political leadership, often to the exclusion of other textual evidence. This is the case for all four schools of law¹⁰⁹, though it is only cited in the Ḥanafī works quite late. The hadith is also cited consistently regarding judicial appointments by the texts of the three schools of law that prohibit women from serving as judges. Only the Mālikī jurist Ibn Rushd refrains from mentioning it from among the Mālikī jurists who cite textual evidence. Though the Ḥanafī school does not categorically prohibit women from being judges, the ḥadīth is cited by later Ḥanafī scholars, from Ibn al-Humām onwards, to argue that anyone who appoints a woman to a judicial post has committed a sin.

Regarding prayer leadership, it is mentioned in two of the surveyed Mālikī works as direct evidence for prohibiting a woman from leading prayers, *Manāhij al-Taḥṣīl* and *al-Fawākih al-Dawānī*.¹¹⁰ It is neglected by the other works which come before and after them, and does not appear to be a serious line of evidence for Mālikī arguments against women's prayer leadership.

It is also rarely cited in the early and middle-period works of the Shāfi'ī school of law, though it is hinted at by al-Shāfi'ī himself in *al-Umm*. The only early scholar who mentions it is al-Māwardī.¹¹¹ This line of evidence is not taken up by his

¹⁰⁸ Ibn Ḥajar al-ʿAsqalānī identifies Purandokht as the daughter in question, adding on the authority of al-Ṭabarī that her sister Azarmidokht also ascended the throne. Aḥmad b. ʿAlī b. Ḥajar al-ʿAsqalānī, *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*. ed. ʿAbd al-ʿAzīz b. ʿAbd Allah b. Bāz. (Cairo: Dār al-Ḥadīth, 1998), 8:149.

¹⁰⁹ What is true for the classical texts still holds for Muslims who argue against women leaders today. Fatima Mernissi says: "This Hadith is the sledgehammer argument used by those who want to exclude women from politics" since "it is practically impossible to discuss the question of women's political rights without referring to it, debating it, and taking a position on it." Mernissi, *Veil*, 4.

¹¹⁰ It's mentioned under prayer leadership in *Manāhij al-Taḥṣīl* as evidence for prohibiting a woman from political leadership. The work expressly states that the ruling prohibiting prayer on this basis is by way of analogy on political leadership. Therefore, this is not a case where the ḥadīth is directly being used as evidence to prohibit prayer leadership. This will be discussed in depth in the chapter on *qiyās*.

¹¹¹ It will become clear that al-Māwardī's strategy in *al-Hawī al-Kabīr* is to mention all possible lines of evidence, regardless of their questionability or methodological soundness. We have already seen an example of this in his use of Q 4:34 to prohibit women from leadership. Therefore, his use of evidence cannot be seen as indicative of Shāfi'ī methodology unless it is taken up by later scholars.

immediate successors, nor by the revisionist scholars of the middle period. Significantly, it becomes more or less the exclusive evidence later Shāfi‘ī scholars rely upon by for prohibiting women from leading men in prayer.

It is not cited at all with reference to prayer in the Ḥanbalī and Ḥanafī works.

2. *Validity of the Ḥadīth*

This ḥadīth is found in the canonical collection *Saḥīḥ al-Bukhārī*, the ḥadīth compilation which enjoys the highest reputation for authenticity in Sunnī Islam. The chain of transmission given by al-Bukhārī is solid and unbroken.¹¹² No jurist or ḥadīth scholar would have any reason to objection to it. It is supported by other corroborative transmissions, all going back to Abū Bakrah.¹¹³ Indeed, it is the soundest and strongest ḥadīth cited with reference to women in leadership in the legal works under survey. Classical scholars faced with these chains of transmission would have no reason to doubt that Abū Bakrah narrated this account of the Prophet’s reaction to hearing the news that a woman had ascended the Persian throne. It is therefore not surprising that this ḥadīth shows itself to be the favourite piece of textual evidence for scholars of all four schools of law to justify preventing women from assuming political and judicial authority.

A number of contemporary scholars have challenged this assessment. For instance, Fatima Mernissi argues that Abū Bakrah’s integrity as a narrator is impugned because he was flogged by ‘Umar for the crime of false accusation. She goes so far as to say that his narrations would have to be rejected according to the principles of Imam Mālik.¹¹⁴ She also feels that the narration is suspect because of possible political motives that Abū Bakrah might have had for narrating the ḥadīth when he did, after

¹¹² This chain of transmission is as follows: ‘Uthmān b. Haytham from ‘Awf al-A‘rābī from al-Ḥasan al-Baṣrī from Abū Bakrah. Ibn Ḥajar al-‘Asqalānī mentions that all the narrators in this chain of transmission are from Baṣrah and that al-Ḥasan al-Baṣrī heard ḥadīth from Abū Bakrah. al-Asqalānī, *Fath al-Bārī*, 8:149.

¹¹³ Nufay‘ b. al-Ḥārith (d. 52/672), known as Abū Bakrah, was a slave from Tā‘if, a town located to the east of Mecca. He acquired his freedom during the Prophet’s siege of the city in of the year 630.

¹¹⁴ Mernissi, *Veil* (60-61). She quotes Mālik as saying he would reject the ḥadīth of narrators whom he saw to be dishonest in their daily relationships. However, Mālik was not referring to the Prophet’s Companions when he said this. Mālik was born in 93 AH / 711 CE, and would not have met any of the Companions. The senior narrators Mālik relied on from were from the generation of the Successors.

the defeat of ‘Ā’ishah’s forces at the Battle of the Camel.¹¹⁵ What adds to her suspicions is that no one else cited gender as an issue among those who opposed ‘Ā’ishah or advocated remaining neutral in the conflict, though their discussions and objections are all well-documented.¹¹⁶

There are two methodological reasons, shared by all four schools of law, why these objections would not cause classical legal theorists, jurists, and ḥadīth scholars to call the ḥadīth’s authenticity into question. First, there is the theological principle that all the Companions are just.¹¹⁷ To cast suspicion on the integrity of any one of the Companions is held by the majority of Sunnī scholars to be a violation of a theological tenet. It is possible for any jurist to fault a Companion’s memory or the completeness of transmission for a particular ḥadīth. Likewise, Ḥanafī and Mālikī scholars might dismiss a ḥadīth if it contradicts a sound analogy or established practice, on the basis that the Companion may have unwittingly changed the meaning through paraphrase. However, the Companion’s honesty and integrity are never called into question.

The second methodological principle is the distinction legal theorists and ḥadīth scholars make between narration and testimony¹¹⁸, a distinction which means that Abū Bakrah being flogged for false accusation does not prevent his narrations from being accepted.¹¹⁹

¹¹⁵ Mernissi, *Veil*, 53.

¹¹⁶ Mernissi, *Veil*, 56-58.

¹¹⁷ Al-Sam‘ānī writes: “Know that the Companions are all just and upright, and their narrations must be accepted without exception.” al-Sam‘ānī, *Qawāṭi*, 1:343.

¹¹⁸ In al-Qarāfi’s celebrated book *al-Furūq* (The Differences) wherein he analyses 274 sets of differences and distinctions which exist in Islamic law and methodology, the first set of differences he addresses is “the difference between testimony and narration”, showing the centrality this distinction had in Islamic thought, both for ḥadīth criticism and legal theory. Aḥmad b. Idrīs Shihāb al-Dīn al-Qarāfi, *al-Furūq*. ed. ‘Abd al-Ḥamīd Hindāwī. (Beirut: al-Maktabah al-‘Aṣriyyah, 2002), 1:9-22.

¹¹⁹ Badr al-Dīn al-Zarkashī explains the effect of a failed accusation of adultery on the accuser’s testimony and narration as follows: “If the accuser [of adultery] makes the accusation in terms of giving testimony, and the accusation does not stand, then his narrations are accepted even though his testimony is rejected, as long as he is of upright character, because Abū Bakrah’s testimony was rejected but his narrations were accepted. This is because his wrongdoing is by way of interpretation. However, if he makes an accusation of adultery outside of the context of giving testimony, then his narrations are rejected unless he repents. This is because his wrongdoing by casting doubt on lineage is confirmed, whereas in the context of giving testimony, it is the exercise of judgment.” Badr al-Dīn Muḥammad b. ‘Abd Allah al-Zarkashī, *al-Nukat ‘ālā Muqaddimah Ibn al-Ṣalāh*. ed. Zayn al-‘Ābidīn Muḥammad Bulā Furayj. (Riyadh: Dār Aḍwā’ al-Salaf, 1998) 3:410. Ibn Qudāmah understands the distinction differently: “The one punished for accusation made it in terms of giving testimony, then his narrations are not rejected, because the insufficient number [of accusers] was not due to his action. This

Had early scholars made no distinction between narration and testimony, it would have meant the rejection of all uncorroborated ḥadīth narrated by individual women, since they do not recognize a lone woman's testimony to be sufficient in the majority of cases. However, they accept the ḥadīth narrations of lone women without hesitation. Therefore, it would appear that this principle of distinguishing between narration and testimony is gender-neutral in and of itself, and was certainly not established merely to preserve this particular tradition of Abū Bakrah.¹²⁰

Khalid Abou El Fadl brings a different suggestion, the possibility that Abu Bakrah might have misremembered the ḥadīth. He suggests the Prophet might have said: “A people who are led by *this* woman will not succeed.”¹²¹ However, this particular possibility seems unlikely, since the Prophet would not have known anything about the leadership qualities of the woman in question, so there is no reason why classical jurists would have had reason to suspect this particular error in transmission.

It can be concluded that there is nothing exceptional about the jurists of the four legal schools accepting this ḥadīth as sufficiently authentic for the purpose of establishing legal rulings.

3. *Its Use in Questions of Political and Judicial Authority*

An important question that Abou El Fadl raises is the possibility that the Prophet was making a general comment on the political situation in Persia. He points out that the wording of the ḥadīth – as it appears in its most authoritative narration in *Sahīḥ al-Bukhārī* and elsewhere – “leaves open the possibility that the Prophet was simply predicting the downfall of Persia, i.e. the Prophet was saying, ‘With this woman in

is the reason why people narrated from Abū Bakrah and agreed on doing so, though he was punished for accusation. If [an accusation of adultery] is made outside of the context of giving testimony, then his narrations are not accepted unless he repents.” Ibn Qudāmah, *Rawḍah al-Nāzīr*, 2:405.

¹²⁰ Leila Ahmed denies the gender-neutrality of the principle distinguishing between narration and testimony, and argues that the rule of needing two female witnesses to equal the testimony of one man was simply not considered binding in the early days of Islam when the ḥadīth narrations were collected from ‘Ā’ishah and other female Companions. Had the two-witness condition been regarded as binding, she argues, many of their ḥadīth would not have been accepted. She further argues that the undeniable and indispensable presence of these early women-narrated ḥadīth is precisely what ensured the continued toleration of female ḥadīth narration in later eras. See: Ahmed, *Women and Gender in Islam*, 74.

¹²¹ Abou El Fadl, *Speaking in God's Name*, 113.

power, Persia will fall.’”¹²² He supports this interpretation by observing that some ḥadīth compilers did not relate this ḥadīth in their books in the chapter on governance.

This is a highly pertinent point. The fact that the ḥadīth is a comment on a particular political development raises serious hermeneutical difficulties for jurists wishing to derive a general prohibition from it. There are two ways a prohibition can be derived from a text. The first is directly from the text’s structure, specifically a negative imperative statement like “*Do not...*”. This follows a principle in Islamic legal theory that a negative imperative indicates prohibition in the absence of evidence to the contrary.¹²³ If the structure does not indicate a prohibition, the other approach is to consider contextual indicators (*qarā’in*) to make a claim that the speaker intended a prohibition when uttering the statement.¹²⁴

“A people who grant a woman authority to rule them will not succeed.” is neither a command nor a prohibition. It is statement, an observation. Furthermore, the context does not indicate that any command or prohibition was intended by it.¹²⁵ As a result,

¹²² Abou El Fadl, *Speaking in God’s Name*, 136.

¹²³ The vast majority of legal theorists from all four schools of law hold that the imperative literally indicates obligation and the negative imperative literally indicates a prohibition. Their use of these verb tenses for other purposes, like encouragement or discouragement, is regarded as metaphorical. See al-Juwaynī, *al-Burhān* 1:159 and 1:199.

¹²⁴ When a statement is intended by the speaker to be a command or prohibition, it is understood by legal theorists to do so metaphorically, so evidence is needed to justify interpreting it in that way. The Shāfi’ī legal theorist Badr al-Dīn al-Zarkashī discusses this at length in *al-Baḥr al-Muḥīṭ* and gives the following textual examples: “A woman does not marry off another woman”, “A journey [of pilgrimage] is not made to other than three mosques”, and the Qur’anic verse: “None touch it save those who are purified.” Badr al-Dīn Muḥammad b. ‘Abd Allah al-Zarkashī, *al-Baḥr al-Muḥīṭ*, ed. ‘Abd al-Qādir ‘Abd Allah al-‘Ānī. (Kuwait: Ministry of Endowments and Islamic Affairs, 1992) 2:371.

¹²⁵ A general prohibition would be understood from a statement negating success where its context clearly relates to the Hereafter. This means God’s punishment and therefore indicates that the activity causing it is sinful and prohibited by God. This is the case with many verses of the Qur’an, like 10:69: “Say: indeed those who forge a lie against God will not succeed. They have some enjoyment in this world, then to Us is their return and then We will make them taste the severe punishment on account of their unbelief.” and Qur’an 23:117: “And whoever invokes besides God another god for whom he has no proof, then his account is only with his Lord. The unbelievers will not succeed.” In his work on the sciences of the Qur’an, Badr al-Dīn al-Zarkashī presents a list of dozens of textual forms, among which are “negating success” and “making avoidance of something the cause of success”, and then says: “The likes of these indicate forbidding the activity, and their indication of prohibition is greater than their indication of dislike.” Badr al-Dīn al-Zarkashī, *al-Burhān fī ‘Ulūm al-Qur’ān*, ed. Muḥammad Abū al-Faḍl Ibrāhīm. (Egypt: Dār Iḥyā’ al-Kutub al-‘Arabiyyah, 1957), 2:10-12. Ibn ‘Abd al-Salām also mentions these form and then lists a number of the Qur’an’s verses that negate success, along with the ḥadīth of Abū Bakrah. In this way, he fails to make a distinction between the way the phrase is used in the Qur’anic context with reference to the Hereafter and its use in the ḥadīth for worldly concerns. See: ‘Izz al-Dīn ‘Abd al-‘Azīz b. ‘Abd al-Salām, *al-Imām fī Bayān Adillah al-Aḥkām*, ed. Riḍwān Mukhtār b. Gharbiyyah. (Beirut: Dār al-Bashā’ir al-Islāmiyyah, 1987), 105 and 111.

the act of deriving a categorical prohibition from the statement is a highly subjective interpretive move.

Nevertheless, we see that the jurists uniformly cite the ḥadīth as if it were a general prohibition. This begs the question as to whom the prohibition is addressed. The Ḥanafī jurist Ibn al-Humām is the only one to discuss this point, arguing that the ḥadīth is addressing those who would grant a woman authority, informing them that they will be unsuccessful if they do so. This obliges him to make a broad appeal to the “innate deficiency” of women’s intellects to show why this lack of success should be expected most of the time. However, the Prophet was commenting directly on the news from Persia, and the news itself was not about Persia’s downfall, but only about a woman taking the throne. It is far from obvious how the Prophet’s statement here can be construed as advice to those who would grant people authority. The context indicates a prediction about Persia’s political situation, not advice about what not to do. Ibn al-Humām is redirecting and restricting the ḥadīth’s intended addressees to those who would appoint women to authority, and this highlights the contrived nature of the prohibition.

It also highlights the fact that, in spite of the statement’s general wording, its general application to all women at all times cannot be taken for granted. Had the Prophet been quoted as issuing a generally-worded prohibition like: “Do not grant a woman authority to rule you,” two widely held theoretical principles would have made a presumption of generality the default assumption. The first is the principle that “consideration is given to the generality of the wording, not the specificity of the occasion in which it was uttered”, though there are some qualifications to this rule.¹²⁶ The second is the principle that “the generality of individuals requires the generality of circumstances, times, and places.”¹²⁷ These principles are upheld by a good number

¹²⁶ For a discussion of this principle, the circumstances where it applies, and the disagreements surrounding it, see : Taqī al-Dīn ‘Alī b. ‘Abd al-Kāfī al-Subkī and Tāj al-Dīn ‘Abd al-Wahhāb al-Subkī, *al-Ibhāj fī Sharḥ al-Minhāj*. ed. Sha’bān Muḥammad Ismā‘īl. (Mecca: al-Maktabah al-Makkiyyah, 2004), 2:1002.

¹²⁷ Zakariyyā b. Muḥammad al-Anṣārī, *Ghāyah al-Wuṣūl Sharḥ Lubḥ al-Uṣūl* (Cairo: Dār al-Kitāb al-‘Arabiyyah al-Kubrā, no date) 74. Al-Qarāfī offers a somewhat nuanced variation of this principle where he argues that when a statement is general in the individuals it refers to, it is assumed to be unqualified (*mutlaq*) in time, place, and circumstances, and not general in these factors. Aḥmad b. Idrīs Shihāb al-Dīn al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*. ed. Muḥammad ‘Abd al-Raḥmān al-Shāghūl. (Cairo: al-Maktabah al-Azhariyyah lil-Turāth, 2005) 186.

jurists and legal theorists of all four schools of law. However, these rules are not absolutes, neither in theory nor in practice, and it is common in all four schools of law for jurists to specify a text's general meaning on the strength of its context.

In this case, there is no general prohibition to begin with, so the jurists would have to appeal to the ḥadīth's context, at least implicitly, to argue that the Prophet intended a prohibition when he spoke. This means the specific circumstances of the ḥadīth cannot be bypassed by appealing to the principles mentioned above. Since the ḥadīth speaks about Persia's immediate situation, this indicates a restricted intent, so the statement's general wording would be understood in the first instance to refer to the scope of circumstances relevant to the political critique, and not to the inevitability of an unsuccessful outcome for every woman in every time and place.

However, this inevitability is what the jurists rely upon in their use of the ḥadīth. Likewise, to prohibit women from being judges, jurists have to see an unsuccessful outcome as inevitable not only in political leadership, but whenever women exercise authority of any kind. This means that for their interpretation of the ḥadīth to hold, they have to already be convinced that women are unsuited for such roles. Indeed, as we shall see, many of them make broad appeals to women's deficient intellects and weakness when mentioning this ḥadīth.¹²⁸ This shows that the ḥadīth is being recruited as a convenient piece of textual evidence to support the rulings and is not the real reason behind them. This conclusion is strengthened by the fact that before Ibn al-Humām, Ḥanafī scholars did not refer to the ḥadīth, since it did not suit their purposes to do so. Even then, Ibn al-Humām advances counter-arguments to uphold the unique Ḥanafī position that a woman's judicial verdicts are valid, and in doing so, provides a glimpse into how other equally plausible legal conclusions could have been derived from the ḥadīth.

4. *Its Use to Prohibit Prayer Leadership*

If the use of the ḥadīth is problematic for establishing rulings about political and judicial authority, these problems are exacerbated when trying to apply it to prayer

¹²⁸ The relationship between this ḥadīth and the perceived deficiency of women is discussed again in the section on *qiyās*, with reference to comparing judicial authority to political leadership. See pp. 111-112.

leadership. Nevertheless, it is mentioned by some Mālikī scholars, and it is the argument that the Shāfi'ī school of law ultimately settled upon.

There are good reasons why the majority of legal scholars avoided using the ḥadīth to prohibit women from leading men in prayer. It entails subsuming an act of worship under a ruling for civil procedure. These two domains of law are generally kept distinct from one another. Even making juristic analogies between the two is problematic, and the extent of this problem will be taken up in the section on *qiyās*. Nevertheless, those among the Mālikī and Shāfi'ī jurists who cite it go further and suggest it is directly relevant to prayer, implying that prayer leadership is a species of the same authority which encompasses political and judicial leadership.

The way the ḥadīth is used in the Shāfi'ī school of law to prohibit prayer leadership shows a particularly interesting pattern. The ḥadīth is hinted at by al-Shāfi'ī in *al-Umm*, where he says: “God has appointed men to be responsible (*qawwāmūn*) for women and restricted them [women] from being people in authority, among other things.” This is not a citation of the ḥadīth, but a general appeal to women being restricted in their access to positions of authority. Moreover, he does not give this reason alone, but groups it together with men’s responsibility (*qawwāmah*) of women, and ends by referring vaguely to other similar rulings. This is a general appeal to women’s subordinate status and not to any particular textual evidence or rulings. The two texts he alludes to here are not related to matters of worship. It is significant that this is a very early work by the school’s founder that straddles the boundary between the formative and post-formative periods. This indicates how a strong perception about the status and role of women may have influenced the interpretation of these texts from a time before the principles of legal theory came into play. Al-Shāfi'ī is not referring to legal principles nor to direct textual evidence, but rather to a general sense of a woman’s place in society. At the same time, al-Shāfi'ī, being an astute legal theorist, is well aware that the texts do not relate to prayer, and therefore refrains from citing them as evidence or suggesting an analogy on their basis.

Al-Māwardī goes further, like he does with verse 4:34, and cites Abū Bakrah’s ḥadīth explicitly in his discussion. He mentions it in a long list of suggested evidence without any further explanation. He is not followed by this by the Shāfi'ī scholars

who come after him, nor by the scholars of the middle period. This is probably due to their awareness of the awkward analogy that is implicit in using the ḥadīth. Instead, they turn to other lines of evidence, particularly a very weak ḥadīth which is later dismissed by the revisionist scholar al-Nawawī in *al-Majmū‘*, who provides no other evidence to support the ruling. Then, when we get to the three commentaries on the *Minhāj*, the final Shāfi‘ī works in the survey, the ḥadīth reappears as the primary justification for the ruling in two of them. Why did they return to this ḥadīth? It is probably due to the emphasis that the Shāfi‘ī school places on sound ḥadīth transmission. The ḥadīth of Abū Bakrah is the only ḥadīth with an acceptable chain of transmission that can be used to prohibit women from holding leadership positions. The alternatives would be to rely on extremely weak ḥadīth narrations, like some middle period jurists do, or to assert the ruling without any evidence to support it, as al-Juwaynī and al-Nawawī do. The Shāfi‘ī school ultimately settled upon using Abū Bakrah’s ḥadīth, opting for the only available authentically narrated textual support to prohibit women from leading men, in spite of its not being related to prayer.



C. *Deficient in Intellect and Religion*

‘Abd Allah b. ‘Umar relates:

God’s Messenger said: “O assembly of women! Give charity and seek forgiveness often, for I have seen that you form the majority of the denizens of Hell.”

A well-spoken and perceptive woman from among them asked: “Why, O Messenger of God, are we the majority of the denizens of Hell?”

He replied: “You curse frequently and are ungrateful to your husbands. And I have not seen from among those who are deficient in intellect and religion anyone so capable as you are of overwhelming a sensible man.”

She then asked: “O Messenger of God, what is the deficiency in intellect and religion?”

He said, ‘As for the deficiency in intellect, the testimony of two women equals the testimony of one man. This, then, is the deficiency in intellect. She spends many a night without offering prayers, and she abstains from fasts during Ramaḍān. This, then, is the deficiency in religion.’”

1. *Its Citation in the Surveyed Works*

The ḥadīth is cited by the Mālikī jurist al-Rajrājī in *Manāhij al-Taḥṣīl* while discussing women leading men in prayer. Al-Māzirī does not cite the ḥadīth outright, but alludes to it, saying: “The woman is attributed with a deficiency of intellect and religion, while a slave is not attributed with these qualities.”

While discussing judicial authority, the Ḥanbalī jurist al-Zarkashī says: “A woman is deficient in intellect, which is established by textual [evidence],” though he does not identify the ḥadīth itself.

The ḥadīth is cited by the Ḥanafī jurists al-Bābartī, al-‘Aynī and al-Zayla‘ī, in their discussions about women being witnesses. However, they bring up the topic of political authority in the course of of their discussions and explain how the ḥadīth shows women are not qualified for that authority.

2. *Validity of the Ḥadīth*

The ḥadīth is authentic. It is narrated from various Companions with sound chains of transmission in *Ṣaḥīḥ al-Bukhārī* and *Ṣaḥīḥ Muslim*.¹²⁹ There is no reason why jurists of any of the four schools of law would have reason to object to this ḥadīth on the basis of its chain of transmission.

3. *Its Use as Evidence*

Al-Rajrājī cites the ḥadīth to follow up his contention that: “prayer leadership is a degree of honour and a lofty station, so only someone who is complete in religion and in essence should assume it.” He cites the ḥadīth to prove that women are deficient on both counts, so they cannot be allowed to lead prayers. He does not explain how he

¹²⁹ In *Ṣaḥīḥ al-Bukhārī*, it is related from Abū Sa‘īd al-Khudrī (304, 1462, 1951, and 2658). In *Ṣaḥīḥ Muslim*, it is narrated from ‘Abd Allah b. ‘Umar (79) and Abū Hurayrah (80).

jumps from the deficiency in intellect mentioned in the ḥadīth to the deficiency in “essence” which he asserts.

The ḥadīth is conspicuously absent from most discussions. This is significant for two reasons. First, the ḥadīth is authentic and well-known. Second, the idea of women’s deficiency is central to many of the jurists’ arguments. Why, then, do they refrain from using it?

It could be argued that since the ḥadīth is famous, and since it is often cited in the same works under the topics of menstruation and testimony, the authors did not feel a need to remind their reader about it when they invoke “deficiency” in their discussions of judicial appointments and prayer leadership. However, this is not the style of these jurists in presenting their arguments. They will quote a ḥadīth they want to use as evidence, or at least refer to it, even if they have quoted it elsewhere for other legal questions.

The best illustration for this is al-Māwardī. He does not even hint at the ḥadīth, though he invokes the “deficiency of being female” to prohibit women from being judges and from leading men in prayer.¹³⁰ Deficiency is central to both his arguments, and he recruits a lot of textual evidence to prove it, including Qur’an 4:34 as we have seen. None of the texts he cites provides straightforward evidence for women’s deficiency. However, here is a ḥadīth that directly states women are deficient in intellect and religion, so why does he ignore it?

We can also ask why later Mālikī scholars refrain from follow al-Rajrājī’s precedent in citing the ḥadīth. They continue with the argument that women are too deficient to lead prayers but recruit other evidence to show it. Al-Qarāfī contends that a woman is worse off than a child, but cites “Send them to the back...” as his evidence for it. Al-Nafrawī follows al-Rajrājī closely in arguing that “leadership in prayer is a position of honour in religion and in the rites of the Muslims”, but he enlists the ḥadīth of Abū Bakrah to show how women fall short of this honour.

¹³⁰ Al-Māwardī is aware of the ḥadīth. He cites it in full while discussing the rulings of menstruation in *al-Ḥāwī al-Kabīr*, 1:384.

Ironically, it is the centrality of deficiency to the jurists arguments that prevents them from citing the ḥadīth. Many of their argument hinge on the innate and categorical deficiency of women, and this ḥadīth has the potential to place limits on it, which would be detrimental to their case. We have already seen the reluctance of Ḥanbalī jurists after Ibn Qudāmah to quote Qur'an 2:282 for similar reasons, and it is significant that this ḥadīth makes direct reference to that verse.

In the ḥadīth, the Prophet is asked to explain what the deficiency in intellect and religion refer to, and he answers with specific examples.¹³¹ He relates the deficiency in intellect to the ruling that women need corroboration when acting as witnesses, which in Qur'an 2:282 refers to forgetting details of commercial transactions. It is difficult to generalize from the deficiency depicted here to disqualify women from political leadership and judicial posts. A woman's deficiency in religion, as depicted in the ḥadīth, is equally restricted in scope. It does not follow from her being unable to pray during menstruation that her prayers at other times are less than those of men.

Another pertinent fact about the ḥadīth is that it comes in the context of exhortation. The Prophet was encouraging the women to give in charity, and instilling fear in them by reminding them of their negative qualities. This is not to suggest that jurists would have understood the ḥadīth to be misrepresenting the truth or making an exaggeration¹³², but it would encourage a narrow understanding of what is meant by deficiency, since the style of the delivery would naturally be stronger and harsher than in other contexts. Therefore, by defining the two aspects of deficiency the way it does, the ḥadīth could be seen as clarifying the full extent of its meaning.

Due to the ḥadīth's potential to place a narrow limit on the nature and scope of the deficiency that can be attributed to women, it is understandable why the majority of

¹³¹ In some, but not all, of the narrations in *Ṣaḥīḥ al-Bukhārī*, the ḥadīth is narrated from Abū Sa'īd al-Khudrī with the variant wording: "that, then, is from the deficiency in her intellect" and: "that, then, is from the deficiency in her religion." The preposition "from" opens up the possibility that there might be other examples of deficiency. Nevertheless, only one example is given for each type of deficiency, and this is presented as a satisfactory answer to the woman's question. In *Ṣaḥīḥ al-Bukhārī* (1951), the ḥadīth is attributed to Abū Sa'īd al-Khudrī without the added preposition.

¹³² On the other hand, Gibril F. Haddad identifies two rhetorical devices in operation in this ḥadīth: hyperbole (*mubālaghah*) and synecdoche (*majāz mursal*). The former is in the Prophet's description of the "sensible" type of man being led astray, and the latter in using "reason" to mean a specific form of legal testimony and "religion" to refer to prayer and fasting. Gibril F. Haddad, "Women's Intelligence Hadith Again". Living Islam. http://www.livingislam.org/k/wiha_e.html. 2006 (December 3 2009).

jurists would avoid referring to it outright in their arguments about prayer leadership, political positions, and judicial posts. They are on firmer ground simply declaring women to be deficient, or co-opting the phrase “deficient in intellect and religion” as a universal maxim, or supporting their claim with indirect evidence like “Send them to the back...” or the ḥadīth of Abū Bakrah. In this way, they imply that women’s deficiency is common knowledge, and they can conceptualise it in the broadest possible terms. As we will see in the next chapter, this is important for them, because the alleged deficiency of women is the most ubiquitous and pervasive argument the jurists give for preventing women from assuming leadership roles.

4. al-Bābirtī’s Discussion

Interestingly, al-Bābirtī and the Ḥanafī jurists who follow him bring up political authority in an attempt to place limits on the rulings that the ḥadīth applies to. His discussion comes in the context of women being witnesses, where quoting the ḥadīth is commonplace in the legal literature. However, al-Bābirtī’s argument is atypical. He is trying to justify why the Ḥanafī school accepts many forms of testimony from women that the other schools of law reject. He does so by presenting an elaborate philosophical categorisation of mental abilities based on an Aristotelian distinction between the active and passive intellects. He then reads this back into the ḥadīth by saying: “The Prophet’s statement ‘They are deficient in intellect’ refers to the active intellect...” In this way, he invokes the ḥadīth’s authority to conclude that women are deficient in abstract reasoning, one of the consequences of which is they cannot be political leaders. However, they can still be witnesses in the majority of cases, which presumably only demands from them basic reasoning skills. Needless to say, there is nothing in the ḥadīth’s wording that alludes to this complex argument.

D. Judges are Three: One in Heaven and Two in Hell

Buraydah relates that God’s Messenger said:

Judges are three: one in Heaven and two in Hell. As for the one in heaven, he is a man who knows the truth and judges accordingly. A man who knows the truth

and strays from ruling accordingly, he is in Hell. A man who judges upon ignorance, he is in Hell.

1. *Its Citation in the Surveyed Works*

This ḥadīth appears only in the Ḥanbalī work *Sharḥ al-Zarkashī* with reference to women being judges.

2. *Validity of the Ḥadīth*

This ḥadīth is found in *Sunan al-Tirmidhī* (1322), *Sunan al-Nasā'ī al-Kubrā* (5891), *Sunan Abī Dāwūd* (3573) and *Sunan Ibn Mājah* (2315). It has a number of mutually supporting connected lines of transmission going back to Buraydah through his father, and there is no reason why a jurist of any of the four schools of law would consider it its chain of transmission unacceptable.

3. *Its Use as Evidence*

It is clear that this ḥadīth is not speaking about women being judges. However, al-Zarkashī argues that the Prophet is limiting the types of judges possible to the three types that are enumerated in the ḥadīth. Since the Prophet explicitly used the word man (*rajul*) when doing so, then the judge cannot be anything other than male.

In Ḥanbalī jurisprudence, words which specifically refer to men, even their plural forms like “men” and “males”, are not assumed to include women implicitly in their meanings.¹³³ This is in contrast to the masculine plural forms of words which can possibly include women, words like “Muslims” and “believers”, for these are implicitly assumed to include women in their general meaning.¹³⁴

Therefore, al-Zarkashī is conforming to the Ḥanbalī schools’ broad theoretical assumptions in stating that the apparent meaning of the word “man” excludes women. However, this word’s indication that it refers to males to the exclusion of women is not absolute, but open to interpretation. This is why al-Zarkashī refers to it as being

¹³³ Ibn Qudāmah, *Rawḍah al-Nāzir*, 2:702.

¹³⁴ See Abū Ya’lā, *al-’Uddah*, 2:351-355 and Ibn Qudāmah, *Rawḍah al-Nāzir*, 2:703-704.

the word's "apparent" (*zāhir*) meaning¹³⁵, indicating he is aware it could be interpreted otherwise. There are many cases in the ḥadīth literature where the Prophet uses the word "man" where clearly the issue being discussed applies to women as well. The Ḥanbalī legal literature is replete with such examples.¹³⁶ This is because contextual indicators are a valid basis in Ḥanbalī legal theory for reinterpreting the apparent meaning of a word.¹³⁷

In this instance, it is clear from the context that the issue of the judge's gender has nothing to do with the statement's intent, but rather the honesty and integrity of the judge. Moreover, it is talking about the fate of people in the Hereafter, which is itself universal in meaning. In such a context, it is easy for the word "man" to be spoken casually without any gender restriction being intended by it.¹³⁸ This makes the ḥadīth's evidence for excluding women from being judges tenuous at best, and it is not surprising that we do not find this argument being taken up by other Ḥanbalī jurists.



¹³⁵ Ibn Qudāmah defines *zāhir* as: "what comes readily to mind from a word when it is mentioned in isolation, though other meanings are also possible." He also defines a term as being *zāhir* when "it has two possible meanings, one of which is more apparent than the other." Ibn Qudāmah, *Rawḍah al-Nāzir*, 2:563.

¹³⁶ For instance, to prove their position that owing a debt makes a person exempt from paying the Zakāh tax, they cite the following ḥadīth on the authority of Mālik's students: "If a man has a thousand dirhams and owes someone a thousand dirhams, then he does not have to pay Zakāh." Also, to prove that there are no legal consequences when a person swears an oath merely as a figure of speech, they cite the ḥadīth from *Sunan Abī Dāwūd* (3254): "It is when a man in his home says 'No, by God' or 'Nay, by God'." See: 'Abd Allah b. Aḥmad b. Muḥammad Ibn Qudāmah al-Maqdisī, *al-Mughnī Sharḥ Mukhtaṣar al-Khiraqī*. ed. 'Abd Allah b. 'Abd al-Muḥsin al-Turkī and 'Abd al-Fattāh Muḥammad al-Ḥilū. (Riyādh: Dār 'Ālam al-Kutub, 1997), 4:264 and 13:450. These are but two of numerous examples in the Ḥanbalī law books where they cite a ḥadīth using the term "man" but understand it to establish rulings applicable to men and women alike.

¹³⁷ See: Ibn Qudāmah, *Rawḍah al-Nāzir*, 2:564.

¹³⁸ By contrast, when a noun or adjective is clearly intended in the text to specify the ruling attributed to it, then Ḥanbalī jurisprudence excludes from the ruling everything that is not included in the word. This is called *dalīl al-khiṭab* (the indication of the statement) in the terminology of Ḥanbalī legal theory. The classic example cited in the works of jurisprudence is the ḥadīth: "In free grazing sheep, the Zakāh tax is levied." The indication here is that sheep which are not free-grazing are exempted from the tax. See Abū Ya'lā, *al-'Uddah*, 2:448-452 and Ibn Qudāmah, *Rawḍah al-Nāzir*, 2:775-776.

E. *Send Them to the Back*

The statement is found in *Muṣannaf ‘Abd al-Razzāq* attributed to Ibn Mas‘ūd as follows:

From Sufyān al-Thawrī from A‘mash from Ibrāhīm from Abū Ma‘mar from Ibn Mas‘ūd that he said: “The men and women of the Children of Israel used to pray together, and a woman who had a boyfriend used to would wear high wooden blocks to stand level with her boyfriend. So menstruation was thrust upon them (the women).” Ibn Mas‘ūd did say: “Send them to the back whence God has sent them to the back.”

1. *Its Citation in the Surveyed Works*

It is mentioned by al-Māwardī as evidence that a woman cannot lead men in prayer. It is not taken up by any of the other Shāfi‘ī scholars in the survey¹³⁹ and can be attributed to al-Māwardī’s practice of indiscriminately including every possible line of evidence in his exposition. It is also cited in the Mālikī works *Manāhij al-Taḥṣīl*, *Bidāyah al-Mujtahid*, and *al-Dhakhīrah*, in discussing prayer leadership.¹⁴⁰

It cited in all the Ḥanafī texts about prayer. Indeed, it is the primary evidence the Ḥanafī school relies upon to prohibit women from leading men in prayer. It is the only proof given in *al-Mabsūṭ*, which frames its entire argument around it. In *Badā’i‘ al-Ṣanā’i‘*, it is again the primary basis for argument, in conjunction with another ḥadīth, “The best ranks for women are the last ones and the worst are the first ones.” which is briefly mentioned in a clarifying role, and probelmatically treated as if it were part of the same ḥadīth.

Ibn al-Human rejects the statement and searches for other evidence and arguments to support the Ḥanafī position, specifically the ḥadīth of Anas.

¹³⁹ As will shortly be made clear, it is safe to assume that most Shāfi‘ī scholars avoided this text due to the extreme weakness of its narration. It is not even attributed to the Prophet in any of the primary ḥadīth sources wherein it is found.

¹⁴⁰ It is also mentioned in the context of judicial authority by al-Qarāfi of the Mālikī school (as well as by al-Māwardī of the Shāfi‘ī school), but as the basis for a juristic analogy on prayer leadership and not as direct evidence to prohibit a woman from being a judge. This will be discussed in the section on *qiyās*.

The ḥadīth persists in the Ḥanafī literature however. It is cited in *al-Baḥr al-Rā'iq*, though he briefly acknowledges Ibn al-Humām's objections. However, he also takes up the other ḥadīth argument introduced by Ibn Humām.

2. Validity of the Ḥadīth

The statement is related from Ibn Mas'ūd in *Muṣannaḥ 'Abd al-Razzāq* (5115), *Ṣaḥīḥ Ibn Khuzaymah* (1700), and *Mu'jam al-Ṭabarānī al-Kabīr* (9484 and 9485). In every instance, it is a statement of Ibn Mas'ūd that discusses the origin of menstruation. Its chain of transmission going back to Ibn Mas'ūd would generally be regarded as authentic¹⁴¹, but there is no basis for the claim that it is a prophetic ḥadīth, and Ḥanafī scholars were aware of this. In *Naṣb al-Rāyah*, Jamāl al-Dīn al-Zayla'ī¹⁴² says: "Its attribution to the Prophet is strange. It is found as a statement of Ibn Mas'ūd in *Muṣannaḥ 'Abd al-Razzāq*."¹⁴³

The statement in *Tabyīn al-Ḥaqā'iq* that the ḥadīth is well-known (*mashhur*) is clearly mistaken, since this requires that the ḥadīth was narrated in its early stages with at least an acceptable chain of transmission. Ibn al-Humām sees to be addressing this point directly when he declares: "This is not even attributable to [the Prophet], let alone it being a well-known narration."

However, since it provides a ruling that is additional to what is found in the Qur'ān, it needs to be a well-known (*mashhūr*) prophetic ḥadīth. This is why the author of *Tabyīn al-Ḥaqā'iq* goes to such pains in arguing that it is. Al-'Aynī points out that even if it is not a well-known ḥadīth, it clarifies an ambiguity in verse of the Qur'an "And men have a degree above them." However, he adds that this is a moot point, unless it can be established that the report is a prophetic ḥadīth.

¹⁴¹ Al-Albānī says: "As a statement that stops [with Ibn Mas'ūd], its chain of transmission is authentic, but it cannot be cited as evidence because it stops with him, and it appears to be a story from the *Isrā'īliyyāt*." Nāṣir al-Dīn al-Albānī, *Silsilah al-Aḥādīth al-Ḍa'īfah wa al-Mawḍū'ah*. (Riyadh: Dār al-Ma'rifah, 1992), 2:319.

¹⁴² Not to be confused with Fakhr al-Dīn al-Zayla'ī, author of *Tabyīn al-Ḥaqā'iq*.

¹⁴³ Jamāl al-Dīn 'Abd Allah b. Yūsuf al-Zayla'ī, *Naṣb al-Rāyah li-Aḥādīth al-Hidāyah*. ed. 'Abd al-'Azīz al-Diyubandī al-Finjānī. (Beirut: Mu'assasah al-Rayyān, 1997), 2:36.

In *al-Baḥr al-Rā'iq*, Ibn Nujaym abandons the argument that it is a well-known ḥadīth, probably because he recognises the futility of doing so after al-‘Aynī’s and Ibn al-Humām’s objections to the report. Instead, he accepts that it is individual-narrator report, but then argues in favour of al-‘Aynī’s assertion that it clarifies an ambiguity in a verse of the Qur’an. Of course, this does not answer the objection that the report is not a ḥadīth in the first place, but it is still necessary for Ibn Nujaym to assert why it can be used, assuming it is a individual-narrator ḥadīth. Since it could at best be described as a statement of a Companion, it does not even reach that level of authoritativeness.¹⁴⁴

In any case, the argument that it clarifies an ambiguity in the Qur’an is a tenuous one. The clarification of an ambiguity assumes that the ruling propounded by the verse needs something to be clarified before the ruling can be carried out. What “Send them to the back...” clarifies has nothing to do with the rulings addressed by the verse. The verse discusses marital relationships, and the rulings it elaborates can be applied without recourse to “Send them to the back”, which pertains to an entirely different set of legal questions. The reasoning of al-‘Aynī and Ibn Nujaym stretches the implications of ambiguity too far. The implication of this hermeneutical move would be that any individual-narratorreport that presents a ruling disadvantageous to a woman in any way is to be accepted and understood to clarify this verse’s ambiguity. It also contradicts Ibn Nujaym’s assertion that the legal rationale for preventing a woman from coming in line with men is merely the compulsory place in prayer, and nothing else. The way he relates it to the verse necessitates that “Send them to the

¹⁴⁴ Indeed, al-Sarakhsī mentions some disagreement among Ḥanafī jurists whether *qiyās* or a Companion’s statement is a stronger form of evidence. He favours the opinion that the Companion’s statement is stronger, saying that: “the most correct view is that the legal verdict of a Companion might possibly be a narration from the one who received revelation [*i.e.* the Prophet]. It has been shown to be their habit that if one of them possessed a [ḥadīth] text, he might relate it or he might just issue a legal verdict in accordance with the text without relating it. There can be no doubt that what might possibly have been heard from the possessor of revelation takes precedence over the mere exercise of opinion. In this way, giving preference to the Companion’s statement over an opinion is effectively the same as giving preference to a individual-narratorreport over the exercise of analogous reasoning (*qiyās*). And even if what they said stemmed from their opinion, their opinion is stronger than the opinions of others, because they witnessed the Prophet’s way of explicating the rulings for new situations and witnessed the circumstances in which the sacred texts were revealed...” al-Sarakhsī, *Uṣūl*, 2:108. Even though it is possible that a Companion’s statement reflects something heard directly from the Prophet, it cannot be certain that this is the case, so it is more uncertain (*ẓannī*) and can never fulfil the function of authoritative evidence in the way a well-known (*mashhur*) prophetic ḥadīth can. In the case of “Send them to the back...” the Companion is commenting on a story from the *Isrā’īliyyāt* that contains a strange claim about menstruation, so its context weakens it all the more.

back” is an example of how men are superior to women. This would require making the woman’s inferior status the reason for the ruling.

This is precisely the case made by Burhān al-Dīn al-Bukhārī, who, about two hundred and fifty years before al-‘Aynī, seems to be the first Ḥanafī jurist to suggest this verse’s relevance to the question of the report’s acceptability. He writes:¹⁴⁵

The obligation of the man sending [the women] back is not restricted to the [individual-narrator] report. This is because sending the women back is only obligatory [for one of two reasons]¹⁴⁶, either to give men a preferential status over women, since sending the women back provides a visible manifestation of the completeness of men and the deficiency of what they [the women] have, except that this preferentiality is being enacted by sending the woman back in a single place during a single sacred rite. The preferential status of men over women is established by an unequivocal text, which is where God says: “and men have a degree above them”.

Since the argument linking “Send them to the back” to the verse for support appears nowhere else in the earlier Ḥanafī literature, it would seem that this is what al-‘Aynī and Ibn al-Nujāym are referring to when they say that “Send them to the back” clarifies an ambiguity in Qur’an 2:228.

3. *Its Use as Evidence*

This is the only text that Ḥanafī scholars cite to prove it is prohibited for women to lead men in prayer, because this entails sending them to the front while they are supposed to be sent to the back. They also use this text to support the separate ruling that if a woman is following the imām but stands before or beside other men in congregational prayer, then the prayers of those men are nullified. They argue that the men are commanded to send the women to the back and their failure to fulfil this obligation negates the validity of their prayers.

¹⁴⁵ Burhān al-Dīn Maḥmūd b. Aḥmad al-Bukhārī, *al-Muḥīṭ al-Burhānī fī al-Fiqh al-Nu‘mānī*. ed. ‘Abd al-Karīm Sāmī al-Jundī. (Beirut: Dār al-Kutub al-‘Ilmiyyāh, 2004), 1:425.

¹⁴⁶ He then goes on to discuss the other possibility, which is that sending the women back protects the men’s prayers from being ruined by the sexual distraction caused by their presence, and concludes that safeguarding the principle of safeguarding prayer is also established by decisive textual evidence.

The persistence with which this text is misrepresented as a prophetic ḥadīth in Ḥanafī legal literature – and a well-known one at that – shows how indispensable it is to establishing their particular ruling about women nullifying the prayers of the men in line with them while their own prayers remain intact. Due to the counterintuitive nature of this ruling, they could only support it through the use of juristic preference (*istiḥsān*) with the support of this ḥadīth. This will become clear from the discussions on the next two ḥadīth below, and the discussion on *istiḥsān* further on.

The Mālikī works that cite the text also represent it as if it were a prophetic ḥadīth. Ibn Rushd presents it as the only textual evidence to prohibit women from leading men in prayer. Al-Rajrājī also cites it as evidence to prohibit women from leading men, for he does not regard women-only congregations as being unlawful. Both of these scholars give the straightforward argument that being an imām entails standing in front of the congregation, and since the woman must go behind the men, it is impossible for her to be their imām. Al-Qarāfī, on the other hand, cites it in the general context of prohibiting women from leading prayers for either men or women. He argues that the command to send her to the back makes her situation worse than that of a child, who is not commanded to be sent to the back. This means that he understands her being sent to the back as an indication of her deficiency which is so severe as to preclude her from leading prayer, even when it does not necessitate her standing in front of men.

Would it still function as evidence for those Mālikī scholars who recognise a Companion's statement as a source of law? In this particular case it would be problematic, since the text has Ibn Mas'ud commenting on a story from the *Isrā'īliyyāt*¹⁴⁷ about the misconduct of women in the temple, a story that makes a strange claim about the origins of menstruation.¹⁴⁸ This compromises its possible

¹⁴⁷ This is a term for the stories that Muslims narrated from the traditions of the Jews and Christians that they came in contact with. The *Isrā'īliyyāt* are not necessarily from Jewish or Christian scriptural sources.

¹⁴⁸ Ibn Ḥajar al-'Asqalānī discusses the difficulties this poses in light of other texts indicating that menstruation already existed, particularly the authentic ḥadīth where the Prophet tells `Ā'ishah: "This is something that God has decreed for the daughters of Adam." [*Sahīh al-Bukhārī* (294)] Ibn Ḥajar initially dismisses the statement of Ibn Mas'ud as being a narration from the *Isrā'īliyyāt*, but then suggests some tentative ways it can be reconciled with the ḥadīth. However, he then goes on to cite

legal ramifications. The only way that it could have legal weight were if the statement “Send them to the back” was not a vague comment on a Judeo-Christian story, but was actually given as a direct legal verdict about women in the mosque. Of course, in the Mālikī texts that cite it, this is exactly how it is represented, without the back story, and moreover, with Prophet Muhammad as its source.

It is also worth noting that a number of Ḥanbalī jurists cite “Send them to the back...” while discussing certain rulings about how men and women should be positioned in congregational prayer, and they also always attribute it to the Prophet.¹⁴⁹ None of them, however, cite it with reference to prayer leadership.¹⁵⁰

The way these various rulings about women’s participation in congregational prayers can be connected with a story from the Judeo-Christian tradition, and particularly one which presents women in a negative light, reveals something important about the relationship between specific Islamic rulings and the broader cultural milieu. In the story, a woman brings sexually flirtatious behaviour into the temple and thereby earns God’s wrath upon women through menstruation and their marginalization in the temple where they used to be equal participants. This gives clues about the social and cultural attitudes that might have influenced the development of Islamic legal rulings during the formative period regarding women’s participation in congregational prayers. Since the statement “Send them to the back...” is presented in the legal texts as a prophetic ḥadīth divorced from the context of the original story, it provides an example how pre-existing attitudes and concepts about women can influence Islamic legislation while appearing as if that legislation has an Islamic, textual origin.

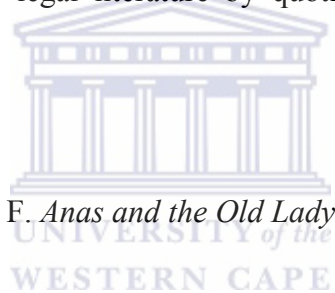
It is clear that most if not all the jurist who relied on this tradition were unaware of its full text and knew only the phrase: “Send them to the back whence God has sent them

other narrations which confirm the presence of menstruation with Eve and with Abrāhām’s wife Sarah. Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī*, 1:472-473.

¹⁴⁹ Ibn Qudāmah mentions it in three places in *al-Mughnī*, twice when discussing where a woman stands when praying alone behind male imām (3:39 and 3:53), and to establish that it is disliked for a woman to stand ahead of a male when the two of them are in congregation behind another imām (3:89). It is also cited in *al-Mubdī* (2:92) *Kashshāf al-Qunnā* (1:442 and 3:7-8), and *Maṭālib Ūlī al-Nuhā* (1:302).

¹⁵⁰ This seems to be the case for all pre-twentieth century Ḥanbalī legal texts and is probably because they regard the ḥadīth as insufficiently direct to establish a ruling of prohibition, while it is clear in establishing the positions of preference for people praying in congregation. However, their willingness to cite the tradition shows that its extreme weakness was not an issue for them.

to the back”. We see this clearly in the pains al-Bābirtī and al-‘Aynī take to show that the tradition relates to the question at hand, though the phrase itself makes no mention of prayer. They refer to an argument from Abū Zayd’s *Asrār* that the adverbial preposition “whence” indicates the place of prayer. They mention how other jurists regard “whence” as being indicative of a general reason, with the women’s being sent back a description of their comprehensive subordination in every way. Al-‘Aynī finds it necessary to downplay this second interpretation because of how it can obscure the tradition’s relevance to the question at hand, and appeals to a supposed *ijmā‘* that it is not obligatory to send women to the back outside of prayer. None of this would have been necessary had these jurists known the full text of the tradition, since it is about the conduct of the Jews praying in the temple. Mālikī and Ḥanbalī references to the tradition show that they were equally unaware of the full text. This means that these jurists had only second-hand knowledge of the tradition. Ibn al-Humām, of course, changes this situation in the legal literature by quoting the tradition in full from *Muṣannif ‘Abd al-Razzāq*.



Anas relates that his grandmother Mulaykah invited God’s Messenger [to her home] to eat food she had prepared for him. He ate from it, then said: “Get ready and I will lead you in prayer.” Anas said:

So I got up and readied a mat which had grown dark due to its lying out on the floor for so long. I freshened it with some water. Then the Prophet stood, and I and an orphan boy formed a row behind him, and the elderly lady stood behind us. The Prophet led us in two units of prayer then took his leave.

1. *Its Citation in the Surveyed Works*

This is taken up by al-Bābirtī and Ibn al-Humām as proof that a woman cannot stand beside or in front of a man in prayer, and that his prayer would be nullified if she does so. Al-Bābirtī is unique in identifying this as the essential textual evidence for the ruling, claiming that this was what al-Mārginānī intended. Ibn al-Humām suggests it as an alternative line of evidence after he discredits “Send them to the back..” as the

primary ḥadīth evidence. He is followed in this line of thinking by Ibn Nujaym in *al-Baḥr al-Rā'iq*.

The Ḥanbalī jurist Ibn Muflīḥ cites the ḥadīth of Anas in *al-Mubdi'* as possible evidence that a woman can stand alone behind a female imām.

2. *Validity of the Ḥadīth*

The ḥadīth is found in *Sahīh al-Bukhārī* (380, 727, 860, 874) and *Sahīh Muslim* (658) and its chain of transmission would be deemed authentic by any jurist.

3. *Its Use as Evidence*

Al-Bābirtī identifies the ḥadīth of Anas as the narration alluded to in al-Mārginānī's statement: "The argument for [our] juristic preference is what we have narrated and that it is a well-known narration. [The man] is the one addressed by it, so he is the one who is abandoning the compulsory place and his prayer is nullified and not hers." This is strange of him, since al-Mārginānī is clearly referring to "Send them to the back..." because he speaks about it being addressed to the man. Furthermore, al-Bābirtī does not follow through by discussing how the ḥadīth of Anas indicates the ruling. His entire discussion on juristic preference focuses on "Send them to the back..." It is unclear why he introduces the ḥadīth of Anas.

It is clear, however, why Ibn al-Humām does so. He sees it as a possible substitute for "Send them to the back...", which he has already discredited. Therefore, it is important for him to show how this ḥadīth can support the ruling. He argues that since it is disliked for a worshipper to stand alone behind the row, the woman would not have done so unless her standing in line with the men would nullify their prayers. He further presses his case by mentioning that according to the Ḥanbalī school of law, a person's prayer is nullified if they stand alone behind the row. It is therefore interesting that the Ḥanbalī work *al-Mubdi'* cites this very ḥadīth as possible evidence that a woman can stand alone behind a female imām.

It does not seem that Ibn al-Humām's argument can salvage the Ḥanafī position in the absence of "Send them to the back...". The argument there depends heavily on the idea that there is a command addressed directly to the men, so that the prayer of the

men is nullified because they failed to carry out a command directed at them. It is not possible to discern in the ḥadīth of Anas a command directed exclusively at the men. This ḥadīth is at best an action of the Prophet, or simply a tacit approval, depending on whether the placement of the woman happened upon the Prophet's explicit arrangement of the rows, or just without his objecting to it. The text of the ḥadīth does not make this clear. As an action of the Prophet pertaining to prayer, it would be regarded in the Ḥanafī school of law as a clarification of a general ruling related to prayer, but would not on its indicate whether the matter is one of preferability or obligation.¹⁵¹ This would depend on what aspect of prayer the scholars understood the ḥadīth to explain.¹⁵² The same can be said for it being a tacit approval.¹⁵³ Nevertheless, even if it is determined to indicate an obligation in this case, as Ibn al-Humām argues, it would still not be a command directed at the men to the exclusion of the women. Consequently, there does not seem to be any way to connect it with a situation where the man's prayer becomes invalid and the woman's prayer remains intact, which is what Ibn al-Humām needs to prove with this ḥadīth. The possibility that the woman's prayer becomes invalid, or both of their prayers become invalid – or simply that the degree of dislike for her being next to the man is greater than that of her being in a row by herself – are just as likely as the interpretation Ibn al-Humām suggests.

If this ḥadīth fails to establish the ruling, it means that Ibn al-Humām leaves the ruling without a textual basis after he decisively rejects the authenticity of “Send them to the back...” In light of this fact, it is important to note that Ibn al-Humām is not convinced

¹⁵¹ Al-Sarakhsī writes: “Our scholars say that whenever the Prophet's action comes as an explanation of what is in the Qur'an, regardless of what place or time it happens, the explanation occurs by his action and by what he is described as with respect to the action.” al-Sarakhsī *Uṣūl*, 2:97.

¹⁵² Al-Jaṣṣās says: “The ruling that his action indicates when it comes as an explanation of an undefined ruling could be that of obligation, preferability, or permissibility, depending on the ruling of the undefined matter. If the undefined matter pertains to an obligation, then his action indicates an obligation, if it pertains to something preferable, then his action is something preferable, and likewise if it pertains to something permissible, then his action in that case is permissible.” Aḥmad b. 'Alī al-Jaṣṣās, *al-Fuṣūl fī al-Uṣūl*. (Kuwait: Ministry of Endowments and Islamic Affairs, 1994), 3:231.

¹⁵³ Al-Jaṣṣās writes: “By refraining from condemning an action that he witnesses someone carry out in a certain context, it is as if he made a statement affirming that action within that context. If he sees that person carrying out an action within the context of an obligation, then his tacit approval of it provides an obligation. If he sees him carrying out an action within the context of something preferable, then his tacit approval of it provides for preferability. The same goes for permissibility. This is because it is not possible for him to tacitly agree with someone in something contrary to God's ruling.” al-Jaṣṣās, *al-Fuṣūl*, 3:235.

of the ḥadīth's ability to establish the ruling, since he admits that it is just "possible" evidence for it.

G. *The Best Ranks for Women are the Last Ones*

Abū Hurayrah relates that God's Messenger said:

The best ranks for men are the first ones and the worst are the last ones. The best ranks for women are the last ones and the worst are the first ones."

1. *Its Citation in the Surveyed Works*

This is cited by the two earliest Mālikī works in the survey, *Sharḥ al-Talqīn* and *Manāhij al-Taḥṣīl* as evidence that a woman cannot lead men in prayer. It is also cited in a Ḥanafī work *Badā'i' al-Ṣanā'i'* as further support for the rulings derived from "Send them to the back."

2. *Validity of the Ḥadīth*

The ḥadīth is cited in *Sahīh Muslim* (440) with two chains of transmission to Abū Hurayrah. Its chain of transmission would be deemed acceptable by any jurist.

3. *Its Use as Evidence*

It is unclear how the ḥadīth could be used in Mālikī law to argue that a woman cannot lead men in prayer, and that the prayer of a man following a woman is invalid. It merely states what row is preferable for her. A ruling that it is disliked for her to lead the prayer, since it requires her to be in a less preferred position, would seem a more likely conclusion to deduce from the ḥadīth. It is even less obvious how this ḥadīth could support the Mālikī position that a woman cannot lead another woman in prayer and that the prayers of the women who follow her are nullified. Nevertheless, al-Māziri makes it clear in *Sharḥ al-Talqīn* that the ḥadīth is evidence for her "categorical" prohibition of leading prayer. The difficulty here is that even when women are following a man in prayer, some of them will be in the front row of the women, and it is not being claimed that their prayers or those behind them are any less valid for it. Consequently, it would follow that a woman leading other women in

prayer would not invalidate her prayer or theirs simply because she is in the first row of the women. Indeed, the Mālikī school declares her own prayer to be valid even if she is leading men in prayer, let alone other women, though she is the one at front in the less preferable position.

In *Badā'i' al-Ṣanā'i'*, the Ḥanafī jurist al-Kāsānī brings up this ḥadīth in conjunction with “Send them to the back...”, while explaining why a woman coming in line with a man nullifies his prayer and not hers. It is interesting that he phrases the argument as if the two statements were made together, implying that the ḥadīth about the preferred place for women is the explicit reason for the command to send them to the back. He may be simply trying to prove that “Send them to the back...” applies to prayer and not to some other topic. It is easy to discern why this argument is not taken up again in the surveyed Ḥanafī works. The two texts are completely independent of each other, and the command to send women to the back has its own context. Secondly, if the connection were to hold, it would make the matter of sending the women to the back equally relevant to the women, since they are also outside of their place of preference. This weakens al-Kāsānī’s argument, which focuses on the man being out of his proper place, the same as if he has moved ahead of the imām. This is one of the reasons al-Kāsānī gives for why only the man’s prayer and not the woman’s is nullified by her coming in line with him.

H. *If One of You Finds [a Mistake] in Someone’s Prayer*

Sahl b. Sa‘d relates that the Prophet said:

If one of you finds [a mistake] in someone’s prayer, he should say ‘Glory be to God’. Saying ‘Glory be to God’ is for men and clapping hands is for women.

1. *Its Citation in the Surveyed Works*

The ḥadīth is mentioned by the Mālikī scholar al-Qarāfī in the context of judicial authority and paraphrased by al-Māwardī, in *al-Ḥawā' al-Kabīr* in the context of women leading men in prayer. This ḥadīth is not cited as evidence for prohibiting women from leadership positions, but rather to establish other rulings which are

then applied to women's leadership by way of *qiyās*. Therefore, discussion of this ḥadīth's legal implications will be deferred to the section on *qiyās*.

I. *A Woman Does Not Lead a Man in Prayer*

Jābir b. 'Abd Allah relates that the Prophet said in the course of giving a sermon:

A woman does not lead a man in prayer, nor an desert-dweller an emigrant, nor a flagrant sinner a believer, unless he is compelled by the ruler and fears his sword and whip.

1. *Its Citation in the Surveyed Works*

This ḥadīth is mentioned in *al-'Azīz* and in *al-Muhadhdhab* of the Shafī' school of law, but is dismissed as weak by al-Nawawī in his commentary of *al-Muhadhdhab*. It nevertheless comes up again in *Mughnī al-Muhtāj*, but not in the other two more authoritative commentaries of *al-Minhāj*. It is relied upon by the Hanbalī school as the sole textual evidence for prohibiting women from leading men in prayer. It is cited by every Hanbalī book in the survey.

2. *Validity of the Ḥadīth*

It is cited in *Sunan Ibn Mājah* (1081) with the following chain of transmission: from Muḥammad b. 'Abd Allah b. Numayr from al-Walīd b. Bukayr Abū Khabbāb from 'Abd Allah b. Muḥammad al-'Adawī from 'Alī b. Zayd from Sa'īd b. al-Musayyib from Jābir b. 'Abd Allah.

This ḥadīth suffers from numerous defects in its chain of transmission. Al-Walīd b. Bukayr Abū Khabbāb is a weak narrator,¹⁵⁴ as is 'Alī b. Zayd al-Jad'an.¹⁵⁵ This alone makes the ḥadīth less than authoritative and inadmissible for most scholars. Moreover, the ḥadīth of 'Abd Allah b. Muḥammad al-'Adawī are rejected outright

¹⁵⁴ Ibn Hajar al-'Asqalānī refers to him with the term *layyin al-ḥadīth*, which means that the narrator's weakness makes him less than acceptable. Aḥmad b. 'Alī b. Hajar al-'Asqalānī, *Taqrīb al-Tahdhīb*. ed. Muḥammad 'Awwāmah. (Aleppo: Dār al-Rashīd, 1986), 581.

¹⁵⁵ The general consensus on 'Alī b. Zayd al-Jad'an is that he is "not a strong narrator." 'Abd al-Raḥmān b. Muḥammad b. Abī Hātim, *al-Jarḥ wa al-Ta'dīl* (Beirut: Dār Ihyā' al-Turāth al-'Arabi, 1952), 6:186-187.

due to suspicions of fabrication.¹⁵⁶ This makes the ḥadīth unacceptable to any jurist, even those willing to accommodate certain weak narrations.

3. *Its Use as Evidence*

It is obvious how this ḥadīth relates to the question of women and prayer leadership. It is the only direct and explicit statement prohibiting women's leadership of any kind found in the ḥadīth corpus. The reason why it is not seized upon by the majority of scholars is because they recognize its inauthenticity. This problem is no less relevant to the Ḥanbalī school which relies upon it, so it begs the question of what they do so. The answer might be that this ḥadīth is more amicable to the strong literalist character of Ḥanbalī jurisprudence, which favours weak but direct textual evidence over any form of rational deduction. The other possible ḥadīth evidence is simply not straightforward enough for them. Ḥanbalī jurists would be acutely aware of the hermeneutical problems we have been discussing about the other ḥadīth, as exemplified by Ibn al-Qayyim's harsh criticism of those who use Abū Bakrah's ḥadīth for questions relating to prayer.¹⁵⁷

The lack of other suitable textual evidence may have compelled them to overlook the problems with this ḥadīth's chain of transmission. In essence, they were confronted with three choices. They could use circuitous reasoning in conjunction with other, less direct ḥadīth evidence and deviate from the relatively literalist character of their school of thought. Alternatively, they could assert the ruling without providing any textual evidence for it, which would be equally out of character. Finally, they could resort to citing an extremely weak but directly relevant ḥadīth which should otherwise not be admissible as evidence. They chose the final option.

¹⁵⁶ Muḥammad b. Ismā'īl al-Bukhārī says about him: "He has false narrations (*manākīr*).” Muḥammad b. Ismā'īl al-Bukhārī, *al-Tārīkh al-Awsaṭ*. ed. Maḥmūd Ibrāhīm Zāyid. (Cairo: Maktabah Dār al-Turāth, 1977). 2:103. Al-Bayhaqī said after relating the ḥadīth: "His ḥadīth are false (*huwa munkar al-ḥadīth*) and cannot be used as supporting narrations. This has been asserted by Muḥammad b. Ismā'īl al-Bukhārī.” *Sunan-al-Bayhaqī* (5780). Ibn Abī Hātim also describes him with "His ḥadīth are false (*huwa munkar al-ḥadīth*).” *al-Jarḥ wa al-Ta'dīl*, 5:156 "Ibn Ḥajar says: "He is a rejected narrator (*matrūk*). Wakī' accused him of fabrication.” *Taqrīb al-Tahdhīb*, 322.

¹⁵⁷ Ibn al-Qayyim's criticism is quoted in full in Chapter Three, pp.200-201.

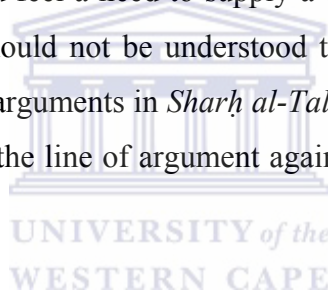
J. *The Most Well-Versed among the People Should Lead Them in Prayer*

Abū Mas‘ūd al-Anṣārī relates that he heard God’s Messenger say:

The most well-versed in God’s Book from among the people (*qawm*) should lead them in prayer. If they are equally well-versed, then the most knowledgeable of them in the Sunnah. If they equal in [their knowledge of] the Sunnah, then the earliest of them to have emigrated...

1. *Its Citation in the Surveyed Works*

This hadith is not cited in support of any of the jurists’ arguments. Rather, al-Māwardī suggests it as possible evidence for those who permit women to lead men in prayer. He identifies Abū Thawr as being an advocate for this argument, so it is understandable why he would feel a need to supply a counter-argument and explain why the ḥadīth’s meaning should not be understood to include women. The Mālikī jurist al-Māzīrī repeats these arguments in *Sharḥ al-Talqīn*, practically verbatim, from al-Māwardī. This ḥadīth and the line of argument against it are not seen again in any of the later legal texts.



2. *Validity of the Ḥadīth*

This ḥadīth is narrated in *Saḥīḥ Muslim* (673) and other sources with sound chains of transmission. No jurist would have reason to object to this ḥadīth on the basis of its chain of transmission.

3. *Māwardī’s Refutation of Its Possible Use as Evidence*

The hadith is general in its wording, and therefore its ruling would be general, that the most well-versed in the Qur’an should lead the prayers, be that person male or female, rich or poor, or any other distinction that might be advanced.

Al-Māwardī argues against this generality by positing that the Arabic word for “a people” (*qawm*) applies only to men. He cites a verse of the Qur’an and a verse of classical Arabic poetry as linguistic evidence. The verse is: “O you who believe, let not a people (*qawm*) ridicule another people (*qawm*), perhaps they might be better

than them. Nor let women [ridicule] other women, perhaps they might be better than them.” [*Sūrah al-Ḥujurāt*:1]

This argument parallels the Shāfi‘ī interpretive rule that masculine plural terms do not linguistically include women in their meaning, and require contextual indicators to show that their inclusion is intended.¹⁵⁸ Shāfi‘ī legal theorists support this position with verses similar to the one al-Māwardī cites above, where a male plural noun is followed by mention of the corresponding female plural noun. However, this rule only applies to sound plurals and other plurals that have distinct masculine and feminine forms. Shāfi‘ī legal theorists make it clear that plural nouns which do not have different masculine and feminine forms are assumed by default to include men and women equally in their meanings. Al-Juwaynī specifically identifies *qawm* as one of these words.¹⁵⁹

Al-Māwardī’s argument, then, rests solely on his claim that the word “*qawm*” itself refers only to men. This is why he proffers the linguistic precedents he does. However, even if he can succeed in asserting, contrary to the prevailing Shāfi‘ī view, the masculine meaning of the word *qawm*, it does not rule out the inclusion of women in the ḥadīth’s meaning. This is because the Shāfi‘ī principle that masculine plurals do not automatically include females in their meanings is regarded as no more than the default assumption, and a weak one at that.¹⁶⁰ Arguments to exclude women on this basis are always very tenuous, since Shāfi‘ī legal theorists admit that context is the

¹⁵⁸ See al-Juwaynī, *al-Burhān* 1:244-245, al-Ghazālī, *al-Mustasfā* 2:44, and Abū al-Ḥasan ‘Alī b. Abī ‘Alī al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*. ed. Ibrāhīm al-‘Ajūz. (Beirut: Dār al-Kutub al-‘Ilmiyyah, no date), 2:473-476.

¹⁵⁹ He writes: “There is no doubt that what we have mentioned is restricted to the sound plural forms. As for words which were set down to include both genders, there is no doubt that their meanings include her, like *al-nās* (humanity) and *al-qawm*, and others like them.” al-Juwaynī, *al-Burhān* 1:245. Al-Āmidī declares this to be a point of agreement among all Muslim legal scholars, regardless of their school of law. He writes: “Scholars are agreed that the male and female do not enter into the meaning of a plural word that is exclusive for the other gender, like *al-rijāl* (men) and *al-nisā’* (women), and [they are also agreed] that they both enter into plural words in which male and female affixes do not appear, like *al-nās* (humanity).” al-Āmidī, *al-Iḥkām*, 2:473.

¹⁶⁰ Al-Juwaynī writes: “What they mention that the masculine affix is used when trying to speak about the two genders together, this is basically correct, but they do not understand the way in which this comes about.” al-Juwaynī, *al-Burhān*, 1:245. Likewise, al-Āmidī writes: “We do no dispute that when an Arabic speaker wishes to speak about a group including males and females, that the masculine form is given predominance and is used for the expression, but this is a form of metaphorical usage.” al-Āmidī, *al-Iḥkām*, 2:475.

ultimate determining factor, and more often than not, the context shows that women are either included, or at least are not excluded by the speaker's intent.

In the case of this ḥadīth, there is a clear textual indicator that would suggest women are meant to be included in the statement. The term (*qawm*) refers to all the people in the congregation to be led in prayer. Since a congregation, in principle, is comprised of both men and women, the context indicates that women are included in what the word refers to. Therefore, the general meaning of the phrase “most well-versed among the people” cannot be limited to men even on the presumption that word *qawm* is masculine in meaning by default, as al-Māwardī argues. Therefore, the ḥadīth could still be understood the way al-Māwardī claims Abū Thawr understood it. At best, al-Māwardī casts a doubt on the necessity of including women in the generality of its meaning, which would weaken the strength of Abū Thawr's alleged argument, but not overturn it.

This line of reasoning is even more strained for al-Māzirī, since Mālikī legal theorists hold the view that masculine plural words include women by default, unless there is an indication that the intent is restricted to men, and they apply this inclusivity to all plural forms.¹⁶¹ This makes the argument irrelevant for the Mālikī school, since even if al-Māzirī can show that the word *qawm* is masculine, the burden of proof remains on him to demonstrate in this particular instance that women are excluded from its meaning. In adopting al-Māwardī's argument, al-Māzirī gives no consideration for Mālikī theoretical principles. This is an example of how tenuous the relationship between legal theory and the arguments presented in works of positive law can sometimes be.

It is therefore understandable that we do not find this line of argument being pursued by any of the later Shāfi'ī or Mālikī jurists in the survey, especially since it would be

¹⁶¹ Ibn al-‘Arabī is most emphatic: “The position adopted by us is that the feminine plural is specific for them [women] and males do not enter into its meaning under any circumstance. The masculine plural is inclusive of females, as long as the address can reasonably include them. This is a fact in language and Islamic Law that is established with decisive examples for both situations [*i.e.* the male and female plurals] with a certainty that is absolute.” Muḥammad b. ‘Abd Allah b. al-‘Arabi. *al-Maḥṣūl fī Uṣūl al-Fiqh*. ed. Ḥusayn ‘Alī al-Yadarī nad Sa‘īd Fūdāh. (Amman: Dār al-Bayāriq, 1999), 77-78. Likewise, al-Qarāfi makes the categorical assertion: “The correct position is that women are included in what is addressed in the masculine form.” al-Qarāfi, *Sharḥ Tanqīḥ al-Fuṣūl*, 184.

much simpler for them to dismiss the hadith by claiming that its generality is specified by other evidence. In the rest of the surveyed works, the ḥadīth is simply ignored.

K. *The Ḥadith of Umm Waraqah*

Three variant narrations of this ḥadīth are cited in the surveyed works. The first is cited from *Sunan Abī Dāwūd*, the second from Abū Bakr al-Marūdhī, and the third from *Sunan al-Dāraqūṭnī*. The version in *Sunan Abī Dāwūd*, which represents the most commonly narrated version of the ḥadīth, is from al-Walīd b. ‘Abd Allāh b. Jumay‘ from his grandmother and from ‘Abd al-Raḥman b. Khallād al-Anṣārī about Umm Waraqāh:¹⁶²

She used to read the Qur’ān and sought the Prophet’s permission to take a prayer caller for her locality (*dār*). He permitted her [to do so].

‘Abd al-Raḥman b. Khallād al-Anṣārī adds:¹⁶³

God’s Messenger used to visit her at her home (*bayt*), and he appointed for her a prayer caller to make the call to prayer for her and ordered her to lead the prayer for the people of her locality (*dār*). I say her prayer caller. He was a very old man.

The version narrated from Abū Bakr al-Marrūdhī is quoted as follows:

Umm Waraqah inquired with God’s Messenger, saying: “I pray, and the people of my locality (*dār*) and my wards pray following my prayer, and among them are men and women praying to my recitation. They do not possess any Qur’ān.”

So he said: “Have the men in front of you and then stand with the women while they pray following your prayer.”

¹⁶² *Sunan Abī Dāwūd* (591), quoted in brief. This is part of a longer ḥadīth that recounts other events of her life, including how she died.

¹⁶³ *Sunan Abī Dāwūd* (592).

There are two versions in *Sunan al-Dāraqūṭnī*. One is similar to the common version in *Sunan Abī Dāwūd* and simply reads that the Prophet “permitted her to lead the people of her locality (*ta’umm ahl dārihā*) in prayer.”¹⁶⁴ The other version reads as follows:¹⁶⁵

God’s Messenger permitted her to have someone make the call to prayer for her and for her to lead her womenfolk (*ta’umm nisā’aha*) in prayer.

1. *Its Citation in the Surveyed Works*

The common version of this ḥadīth, as represented by the narration in *Sunan Abī Dāwūd*, is the primary evidence cited in support of the early Ḥanbalī view that women can lead men in *Tarāwīḥ* and possibly other voluntary prayers. Ibn Qudāmah, al-Zarkashī and Ibn Muflīḥ all cite *Sunan Abī Dāwūd* in this context. Al-Zarkashī and Ibn Muflīḥ also cite the second version from al-Marrūdhī for the opinion that she stands in the back when she leads men in prayer. Ibn Qudamah and Ibn Muflīḥ bring up the alternate narration in *Sunan al-Dāraqūṭnī* as possible evidence to restrict its meaning to women-only congregations. The two final Ḥanbalī works, which completely dismiss the possibility of women leading men in prayer, do not discuss it at all in that context, though al-Bahūṭi continues to make reference to the *Sunan al-Dāraqūṭnī* version as evidence for women-only congregations.

It is mentioned in earlier Mālikī works with respect to women leading women in prayer. Al-Māzirī, who upholds the Mālikī ruling that women cannot lead other women in prayer, mentions the general version and the version in *Sunan al-Dāraqūṭnī* and then dismisses them both as unreliable. By contrast, the general version from *Sunan Abī Dāwūd* is enlisted by al-Rajrājī in *Manāhij al-Tahsil* to support the validity of women-only congregations. Ibn Rushd also mentions it, identifying it as the evidence for those who permit women to lead prayers, but he does not discuss it.

The general version of the ḥadīth from *Sunan Abī Dāwūd* is cited to support women-only congregations by all of the Shāfi‘ī works except for *al-Umm* and the final three

¹⁶⁴ *Sunan al-Dāraqūṭnī* (1506).

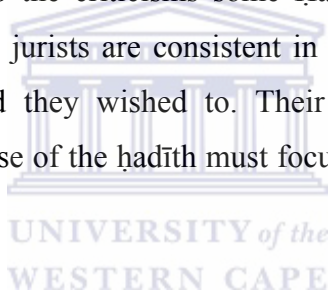
¹⁶⁵ *Sunan al-Dāraqūṭnī* (1084).

commentaries on the *Minhāj*. It is also cited by the Ḥanafī jurists al-‘Aynī and Ibn al-Humām in their dissenting view that women-only congregations are not disliked.

2. Validity of the Ḥadīth

The most prevalent narration of this ḥadīth is the general wording found in *Sunan Abī Dāwūd*. Nevertheless, its validity is a matter of disagreement.

Its weakness is relatively slight, much less than the weakness of the ḥadīth which the Ḥanbalī school relies upon for prohibiting women to lead men in prayer. There is little reason for Ḥanbalī scholars to reject the ḥadīth of Umm Warāqah in its general form, though they could find grounds for rejecting it if they had wanted to, due to the controversy surrounding the reliability of al-Walīd b. ‘Abd Allah al-Jumay‘ and the unknown quality of his grandmother as a narrator.¹⁶⁶ The defence given to the ḥadīth by al-‘Aynī is in response to the criticisms some Ḥanafī jurists raised against the ḥadīth’s acceptability. Shāfi‘ī jurists are consistent in citing the ḥadīth, though they could have dismissed it had they wished to. Their accepting it means that the discussion about the Shāfi‘ī use of the ḥadīth must focus on how they interpret it. For



¹⁶⁶ Ibn al-Jawzī, for instance, considers the ḥadīth’s defects to make it inadmissible. He says: “Al-Walīd b. Jumay‘ is weak, and his (grand)mother is unknown. Ibn Ḥibbān said: ‘The ḥadīth of al-Walīd Jumay‘ are not to be used as evidence.’” Abū al-Faraj b. al-Jawzī. *al-Taḥqīq fī Aḥādīth al-Khilāf*. ed. Muṣ‘ad ‘Abd al-Ḥamīd Muḥammad al-Sa‘danī. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1994), 2:114. Ibn Ḥibbān faults him for narrating ḥadīth with wordings at variance to those of narrators of established reliability, and says: “When this became blatant about him, it negated the viability of citing him as evidence.” Muḥammad b. Ḥibbān, *Kitāb al-Majrūhīn min al-Muḥaddīthīn wa al-Ḍu‘afā’ wa al-Matrūkīn*. ed. Maḥmūd Ibrāhīm Zāyid. (Aleppo: Dār al-Wa‘ī, 1976) 3:78-79. At the same time, a number of authorities in ḥadīth narration considered him to be an acceptable narrator. Yaḥyā b. Ma‘īn considered him reliable (*thiqah*), and significantly, Aḥmad b. Ḥanbal approved of him. See: Ibn Abī Ḥātim, *al-Jarḥ wa al-Ta‘dīl*, 9:8.

The contemporary Shāfi‘ī scholar Tauha Karaan, while responding to Amina Wadud’s use of the hadith, identifies another potential weakness in its narration, that there may be missing links between Umm Warāqah and the narrators who come immediately before her in the chain of transmission. He writes: “Ibn Hajar al-Asqalani points out that the form in which the chain of the hadith appears in the common sources hides another issue that impugns its authenticity. Neither Walid ibn ‘Abdillah’s grandmother (or grandfather), nor ‘Abd al-Rahman ibn Khallad have received this hadith from Umm Warāqah directly. Ibn al-Sakan and Ibn Mandah have recorded the hadith via Layla bint Malik (who is Walid’s grandmother), from her father, from Umm Warāqah; while Abu Nu‘aym records it via Walid, from his grandmother, from her mother, from Umm Warāqah. ‘Abd al-Rahman ibn Khallad too, is on record as having received the hadith, not from Umm Warāqah directly, but through an unknown intermediary.” Tauha Karaan, “The Pretensions of Postmodernism and the Hadith of Umm Warāqah” Cape Town: Dar Al-‘Ulum Al-‘Arabiyyah Al-Islamiyyah. No date. http://duai.co.za/Site/?page_id=589 (31 July 2013). The defect that Karaan identifies is not certain. It is possible that these irregularities are errors in the narrations of Ibn al-Sakān and Ibn Mandah, while the more common narrations represent the correct chains of transmission.

Mālikī scholars, the criticisms that can be levied against the ḥadīth's chain of transmission make it a simple matter for them to dismiss it.

As for the narration of al-Marrūdhī which states unequivocally that Umm Waraqah was ordered to lead men in prayer, and to do so from the ranks of the women, its chain of transmission has not reached us. Al-Marrūdhī was a student of Aḥmad b. Ḥanbal and a leading foundational scholar in the Ḥanbalī school of law, so to the extent that the chain of transmission was preserved, it would have been in earlier Ḥanbalī legal texts. This gives weight to the assertion of Muḥammad b. Muflīḥ in *al-Furū'* that al-Marrūdhī's chain of transmission is not authentic.¹⁶⁷ Equally significant is the fact that the Ḥanbalī ḥadīth scholar Ibn al-Jawzī does not mention it in his book *al-Taḥqīq* wherein he compiles the ḥadīth in support of legal rulings, though he mentions and discusses the narration of al-Dāraḥṭnī.¹⁶⁸ Therefore, it is reasonably safe to assume that the al-Marrūdhī narration is unauthentic. It is possibly a case where the transmission of a particular Ḥanbalī legal opinion was accidentally interpolated into the text the ḥadīth.¹⁶⁹ Moreover, due to the nature of its transmission, it would have been unknown by anyone outside a small circle of scholars and students of Ḥanbalī Law, so scholars from the other schools of law would have been unaware of it.

As for the alternative narration in *Sunan al-Dāraḥṭnī*, it is also narrated from is from Walīd b. al-Jumay' from his grandmother¹⁷⁰, and therefore shares the same potential weaknesses in its chain of transmission. The particular narrators who are unique to this chain do not introduce any new problems. The mention of “her womenfolk” as opposed to “people of her locality” is actually a variant wording, though a few of the Ḥanbalī scholars cited below refer to it as an additional clause, which would make accepting it easier on the basis that the additional clauses of a trustworthy narrator are

¹⁶⁷ Muḥammad b. Muflīḥ, *al-Furū'*. ed. 'Abd Allah b. 'Abd al-Muḥsin al-Turkī. (Beirut: Mu'assasah al-Risālah, 2003), 3:25. His specific words are that it is “prohibitively unauthentic.”

¹⁶⁸ Ibn al-Jawzī, *al-Taḥqīq*, 2:114 and 3:271.

¹⁶⁹ One of the views of the Ḥanbalī school is that the woman imām leads the men in prayer from the ranks of the women. This opinion is the one al-Marrūdhī narrates from his teacher Aḥmad b. Ḥanbal, so some later Ḥanbalī scholars could easily have confused it with the ḥadīth text itself. Something else that lends supported to the possibility of interpolation is that Ibn Qudāmāh says her leading from the back is an “arbitrary” condition. This shows he is unaware of anyone narrating it as part of the ḥadīth.

¹⁷⁰ In the chain of transmission, the word “mother” is used instead of “grandmother”, but this usage is not problematic, since it is common to refer to a grandmother in this way.

acceptable.¹⁷¹ However, since it is actually an entirely different wording which introduces a meaning that conflicts with the ḥadīth's context, it could also be regarded as a strange narration, defined in this case as a variant that contradicts how the ḥadīth is generally related in numerous other instances. This would make acceptance of the variant less likely. This explains the hesitancy we can observe in the use of the al-Dāraqūṭnī narration in most of the legal works that cite Umm Waraqah's ḥadīth.

3. *Its Use as Evidence for Women Leading Men in Prayer*

The Ḥanbalī school of law is the only one of the four schools that ever permitted a woman to lead men in prayer, though there were many different opinions on the matter early in the school's history.¹⁷² It must be noted that the possibility of a woman leading men in prayer was almost completely ruled out by the time of the works in the survey. The first encyclopaedic Ḥanbalī works were written late in that legal school's development, and Ibn Qudāmah is clearly opposed to the idea, and most of the later works in the survey follow him in this opposition.

The ḥadīth of Umm Waraqah is the identified by the works in the survey as the basis for the earlier Ḥanbalī opinions that permit women to lead men in prayer. The most widely narrated version of the ḥadīth is general in its wording, and it is this generality that is cited as evidence. Of course, not only does the ḥadīth's general wording include congregations of men and women, but also compulsory prayers. Ibn Mufliḥ answers this by arguing that the ḥadīth of Umm Waraqah is restricted to voluntary prayers to reconcile it with the ḥadīth "A woman does not lead a man in prayer." This accords with a principle in Ḥanbalī jurisprudence that if two general texts contradict one another and one of them can be reinterpreted to reconcile them, then this should be done to prevent either of the texts from being discarded. The text which is left on its apparent meaning is seen as indicating the true intent of the reinterpreted text.¹⁷³ Here, Umm Waraqah's ḥadīth is the one regarded as open for interpretation.

¹⁷¹ The Ḥanbalī school accepts an additional meaning that a reliable narrator is alone in asserting when relating a ḥadīth. Ibn Qudāmah explains: "If a reliable narrator is alone in relating an addition in a ḥadīth, it is accepted, whether it comes [merely] in its wording or in its meaning, because had he been alone in relating the ḥadīth, it would have been accepted from him. Therefore, it is the same if he relates something additional. It is also not impossible that he is the only one who committed the additional content to memory, since it is possible that the Prophet mentioned it on two occasions, only once with the additional content." Ibn Qudāmah, *Rawḍah al-Nāzir*, 2:419.

¹⁷² This matter will be discussed in greater detail in Chapter Three.

¹⁷³ Ibn Qudāmah, *Rawḍah al-Nāzir*, 2:740.

Ibn Qudāmah objects to this line of reasoning. He points out that the Umm Warāqah's ḥadīth makes explicit reference to a prayer caller, which shows she was leading compulsory prayers. This means it cannot be reinterpreted in light of the other ḥadīth to refer to voluntary prayers. He provides two alternative interpretations, both of which categorically negate the possibility of women leading men. His first suggestion is to understand the ḥadīth of Umm Warāqah as referring to women-only congregations, for which he cites the alternate wording from *Sunan al-Dāraquṭnī*. He insists that even without al-Dāraquṭnī's narration, it would have to be understood in this way, because he claims "there is no disagreement about her not leading men in compulsory prayers."

Ibn Qudāmah realises this solution is not ideal, since it begs the question of why the Prophet would go to the trouble of appointing a prayer caller for her if she is not formally heading the congregation for all the people of the locality. He then uses the appointment of the prayer caller as a basis for his second argument, that the permission to lead men in prayer was exclusive for her and can never be applied to any other woman. A claim of an exclusivity is one of the most difficult to make in textual interpretation. Most cases of exclusivity refer to the Prophet¹⁷⁴, sometimes to his wives, and rarely to anyone else.¹⁷⁵ In Ḥanbalī legal theory, it requires some clear indication that the ruling is unique for that person. Otherwise, any command directed at one of the Companions is assumed to be directed to everyone. Ibn Qudāmah is explicit on this point in *Rawḍah al-Nāzir*.¹⁷⁶ Yet, the only argument Ibn Qudāmah

¹⁷⁴ For instance, the Qur'an states: "[Lawful in marriage] is any woman believer, if she gives herself to the Prophet and if the Prophet desire to take her in marriage. This is for you exclusively, apart from the believers." [*Sūrah al-Aḥzāb*: 50]]

¹⁷⁵ The example of Khuzaymah is commonly cited. The Ḥanbalī legal theorist al-Ṭūfī writes: "It is established that the Prophet made Khuzaymah's testimony equal to the testimony of two people. This cannot be taken generally." Sulaymān b. 'Abd al-Qawī al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah*. ed. 'Abd Allah b. 'Abd al-Muḥsin al-Turkī. (Beirut: Mu'assasah al-Risālah, 1987), 2: 511. He cites this as an example of a command directed at an individual which cannot be generalised to include everyone else. He then discusses the opinion of some legal theorists who believe that whenever a command is directed at an individual, it cannot be taken generally. He goes on to refute them and assert the Ḥanbalī position that it must be assumed general for everyone in the absence of evidence to indicate otherwise.

¹⁷⁶ Ibn Qudāmah writes: "If God commands His Prophet with words that do not indicate specificity – like "O You who are wrapped up in garments, stand (in prayer) at night" – or asserts a ruling for him, then His followers are included with him in that command as long as there is no evidence to show it is specifically for him. Likewise, if a command is directed at one of the Companions, everyone else is included in it, even the Prophet." He also says: "The Companions used to refer for their own legal rulings to the judgments that the Prophet made for specific individuals." He then presents five examples of this. Ibn Qudāmah, *Rawḍah al-Nāzir*, 2:637 and 2:642. This is the view of the majority of

brings to restrict this command to Umm Waraqah is that she was the only woman to be appointed a prayer caller. This is a circular argument, because even if the permissibility of leading men in prayer was not exclusively for her, she would still have been appointed a prayer caller to summon the people of her locality to her congregation. Since she happened to be the only woman actually charged with leading prayer, it follows logically that she would have been the only woman known to have her own prayer caller. Therefore, Ibn Qudāmah's argument about the prayer caller brings nothing new to bear upon the issue. It is understandable that the later works in the survey do not repeat this argument. However, they also do not provide an answer as to why she would need a designated prayer caller if she was not leading a general congregation.

4. Non-Ḥanbalī Use as Evidence for Women Leading Women-Only Congregations

It is interesting that, apart from the Ḥanbalī works discussed above, only Imām al-Ḥaramayn seems to rely on the version from *Sunan al-Dāraquṭnī* to support women-only congregations. He does not cite his source for the ḥadīth, but mentions “it is narrated” that Umm Waraqah led the women of her locality in prayer. All of the others refer to the generally worded ḥadīth, most of them specifically citing *Sunan Abī Dāwūd* as the source. However, only al-Rajrājī points out that the ḥadīth's wording is general for men and women, for which he argues that it is specified by the evidence he has already presented for prohibiting women from leading men in prayer. Though al-Rajrājī, al-Māwardī, al-ʿAynī and Ibn Humām all mention she was appointed a prayer caller, none of them question why she would need one if she is not leading the general congregation for her locality. Apart from al-Rajrājī, however, none of them rely exclusively upon the ḥadīth of Umm Waraqah for evidence of women-only congregations. They cite the practice of ʿAʿishah and Umm Salamah as well.

Ḥanbalī theorists. Abū Yaʿlā says: “If a ruling is directed to an individual, then the ruling includes everyone, like the stoning of Māʿiz and cutting off the hand of the person who stole Ṣafwān's cloak.” Abū Yaʿlā, *al-ʿUddah*, 1:318-319.

L. *A Woman's Prayer in Her House is Better*

‘Abd Allah b. Mas‘ūd relates that the Prophet said:

A woman's prayer in her house is better than her prayer in her foyer, and her prayer in her private chamber is better than her prayer [elsewhere] in her house.

1. *Its Citation in the Surveyed Works*

The ḥadīth is cited by al-Zayla‘ī in *Tabyīn al-Ḥaqā’iq* to justify the Ḥanafī position that women praying together in congregation is disliked. It is subsequently dismissed by Ibn al-Humām as a weak argument and is not taken up again.

2. *Validity of the Ḥadīth*

This ḥadīth is related in *Sunan Abī Dāwūd* (570), *Sunan al-Bayhaqī* (5361), *Mustadrak al-Ḥākim* (757), and *Ṣaḥīḥ Ibn Khuzaymah* (1688). Their chains of transmission all come from ‘Amr b. al-‘Āṣim from Hammām from Qatādah, from Muwarraq from Abū al-Aḥwaṣ from ‘Abd Allah b. Mas‘ūd. Though some ḥadīth scholars, including Ibn Khuzaymah, expressed concerns whether all of the narrators actually heard from one another, the general concensus is that the ḥadīth is authentic.¹⁷⁷

3. *Its Use as Evidence*

Al-Zayla‘ī cites it to show that women's congregations are disliked. He does not elaborate on how it does so, or why it would still be disliked for two or more women to pray together in congregation in the privacy of their home.

Ibn al-Hūmam explains that the ḥadīth is being suggested as proof that women's congregations have been abrogated, and though he disagrees with the argument, he takes the trouble to explain the reasoning behind it. He says that the private chamber refers to a storage closet which would not be large enough to accommodate more than

¹⁷⁷ Shu‘ayb al-Arna‘ūt writes: “Its chain of transmission is good. Ibn Mā‘īn said that ‘Amr b. ‘Āṣim (Ibn ‘Ubayd Allah Abū ‘Uthmān al-Baṣrī) is ‘sound’. Al-Nasā‘ī said: ‘There is nothing wrong with him.’ Ibn Sa‘d declared him reliable and Ibn Ḥibbān lists him in *al-Thiqāt*.... All the other narrators are reliable and are used by al-Bukhārī and Muslim, except for Abū al-Aḥwaṣ (‘Awf b. Mālīk al-Jashmī) who is a narrator accepted by Muslim.” Shu‘ayb al-Arna‘ūt (ed.), *Musnad Aḥmad* (Beirut: Mu‘assasah al-Risālah, 1997), 9:337 – editorial note.

one person. In other words, this is the place the ḥadīth mentions as bringing a woman the greatest level of blessings in her prayer. Therefore, if praying in congregation forces her out of her private chamber in order to accommodate other worshippers, then congregating becomes disliked to the extent that it is “contrary to what is best”. In this way, he explains how the ḥadīth can be seen to abrogate the preferrability indicated by the practice of ‘Ā’ishah and Umm Salamah leading women in prayer.

This argument is obviously strained, but we must keep in mind that Ibn al-Human is presenting it as one he disagrees with, a rhetorical concession to illustrate the strongest legitimate argument his critics can mobilise in opposition to women-only congregations. He makes this clear, saying: “We cannot fail to notice how much is [lacking] in this [argument]. Even were we to hypothetically concede it, it would mean no more than the abrogation of the preferentiality [of the women’s congregation].”



M. *The Woman Does not Stand Forward*

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Asmā’¹⁷⁸ said: I heard God’s Messenger say:

It is not upon women to offer the first and second calls to prayer, the Friday prayer, and the [ritual] bath for the Friday prayer, and the woman does not stand forward, but stands in their midst.

1. *Its Citation in the Surveyed Works*

The ḥadīth is cited by the Ḥanbalī jurist al-Zarkashī as proof that the woman can lead other women in prayer. It is also mentioned by the Ḥanafī jurist al-‘Aynī in *al-Bināyah*, but for the purpose of dismissing it as a spurious narration.

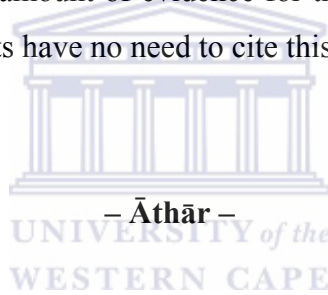
¹⁷⁸ ‘Abd Allah al-Jibrīn, in his critical notes on Sharḥ al-Zarkashī, identifies her as Asmā’ bint Abī Bakr. See: ‘Abd Allah al-Jibrīn (ed.), *Sharḥ al-Zarkashī ‘alā Mukhtaṣar al-Khiraqī*. (Riyadh: Maktabah al-‘Ubaykān, 1993), 2:98; footnote 3. This is also asserted by ‘Abd Allah al-Turkī in his critical notes to *al-Furū’*. Abd Allah al-Turkī (ed.), *al-Furū’*, 2:48, footnote 1. Al-Albānī is of the opinion that it is Asmā’ bint Yazīd. al-Albānī, *Silsilah al-Aḥādīth al-Ḍa‘īfah*, 2:269.

2. *Validity of the Ḥadīth*

This ḥadīth is related in *Sunan al-Bayhaqī* (1921), though al-Bayhaqī declares it to be weak. Ibn ‘Adī also relates it in his book of weak narrators, where he declares its narrator al-Ḥakam b. ‘Abd Allah b. Sa‘d b. ‘Abd Allah al-Ayalī to be a fabricator of ḥadīth and demonstrates the widespread condemnation of his narrations among the authorities in ḥadīth transmission.¹⁷⁹ This ḥadīth is unacceptable according to the conditions of all ḥadīth scholars and jurists.

3. *Its Use as Evidence*

It provides direct evidence that a woman imām stands in the line with the worshippers when she leads them in prayer. It is also the only ḥadīth that attributes this ruling to the Prophet’s words. Its unacceptability as a narration explains why it is not more frequently invoked by the legal scholars who allow women-only congregations.¹⁸⁰ Since there is a considerable amount of evidence for this practice from the Prophet’s female Companions, the jurists have no need to cite this extremely weak ḥadīth.



– Āthār –

N. ‘Ā’ishah and Umm Salamah

Al-Shāfi‘ī narrates in *al-Umm*:

Sufyān [b. ‘Uyaynah] informs us that ‘Ammar al-Dhahabī on the authority of a woman from his people named Ḥujayrah that Umm Salamah led them [the women] and stood in their midst.

Al-Layth narrates from ‘Atā’ from ‘Ā’ishah that she prayed the afternoon prayer with the women and stood in their midst.

He also enumerates the scathing criticism this narrator received from a long list of ḥadīth scholars. Abū Aḥmad b. ‘Adī al-Jurjānī, *al-Kāmil fī Du‘afā’ al-Rijāl*. ed. ‘Ādil Aḥmad ‘Abd al-Mawjūd and ‘Alī Muḥammad Mu‘awwad. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1997), 2:478-483.

¹⁸⁰ I have only located this ḥadīth in two other legal works from a broad survey of works in all four schools of thought. The Ḥanbalī jurist Muḥammad b. Mufliḥ mentions it in *al-Furū‘*, 3:48, and al-Māwarī cites it while discussing the call to prayer in *al-Ḥāwī al-Kabīr*, 2:51.

Ibrāhīm informs us from Ṣafwān that he said: “It is the Sunnah if a woman offers prayers with the women that she stands in their midst.”

Rayṭah narrates:

We used to be a congregation of women with ‘Ā’ishah. She would lead us in prayer, standing in our midst, and she prayed with neither the first nor second call to prayer.

Muḥammad al-Shaybānī relates in *Kitāb al-Āthār*:

Abu Ḥanīfah informs us by way of Ḥamād b. Abū Sulaymān from Ibrāhīm al-Nakha’ī that ‘Ā’ishah used to lead women in prayer in the month of Ramaḍān and stand in their midst.

1. Citation in the Surveyed Works

The practice of ‘Ā’ishah and Umm Salamah is cited in every Shāfi’ī work as the primary evidence for allowing women to lead men in prayer. It is cited in the Ḥanbalī works al-Mughnī, Sharḥ al-Zarkashī, and al-Muqni’, but not in the final two Ḥanbalī works.

The ḥadīth of Rayṭah is cited in the early Ḥanafī work al-Mabsūṭ to indicate that the calls to prayer are not made for women in congregation. It is cited in Badā’i’ al-Ṣanā’i’ and Tabyīn and al-Baḥr to establish that a women can lead other women in prayer, though it is disliked, and that she should stand in their midst. Al-‘Aynī cites the practice of ‘Ā’ishah and Umm Salamah in support of women-only congregations, and Ibn al-Humām follows suit by mentioning ‘Ā’ishah’s practice. They specifically cites the narration of Ibrāhīm al-Nakha’ī to establish that the practice of doing so was not abrogated. Al-‘Aynī goes further to explicitly state that her practice shows that it is preferable. Ibn ‘Ābidīn in *Radd al-Muḥtār* does not discuss the ḥadīth at all.

2. Validity of the Tradition

The tradition about Umm Salamah leading prayer is narrated with two chains of transmission. Al-Shāfi'ī's narration cited above suffers from Ḥujayrah being a narrator of unknown quality.¹⁸¹

The other narration is cited in *Muṣannaḥ Ibn Abī Shaybah* (4953) from 'Alī b. Mus-hir from Sa'īd b. Abī 'Urwah from Qatādah from Umm al-Ḥasan b. Abī al-Ḥasan al-Baṣrī. This is a solid chain of transmission with reliable narrators. Ibn Ḥazm asserts: “Khayrah¹⁸² is the most trustworthy of trustworthy narrators (*thiqah al-thiqāt*) and this chain of transmission is like gold.”¹⁸³ Moreover, the two narrations, being completely independent, corroborate one another.¹⁸⁴ There is no reason for any jurists to object to the validity of this tradition on the basis of its chain of transmission.

The practice of 'Ā'ishah leading women in prayer is narrated with a large number of independent chains of transmission. The strongest is the narration of Rayṭah al-Ḥanafīyyah¹⁸⁵ in *Muṣannaḥ 'Abd al-Razzāq* (5086) from Sufyān al-Thawrī from

¹⁸¹ Her name is given as as Ḥujayrah bint Ḥuṣayn in the chains of transmission in *Muṣannaḥ 'Abd al-Razzāq* (5082) and *Sunan al-Dāraquṭnī* (1508). She is mentioned in *Tabaqāt Ibn Sa'd*, and associated exclusively with this narration from 'Ā'ishah. It does not appear that any other tradition has been narrated from her. Muḥammad b. Sa'd, *al-Ṭabaqāt al-Kabīr*. ed. 'Alī Muḥammad 'Umar. (Cairo: Maktabah al-Khānjī, 2001), 10:448

¹⁸² Khayrah is the given name of Umm al-Ḥasan b. Abī al-Ḥasan al-Baṣrī (Umm al-Ḥasan being her *kunyah*), who narrates this ḥadīth from her personal experience with Umm Salamah. She had been Umm Salamah's servant. Ibn Ḥazm also says about her: “She is a well-known reliable narrator (*thiqah mashhūrah*).” 'Alī b. Aḥmad b. Sa'īd b. Ḥazm al-Andalusī, *al-Muḥallā*. ed. Ḥassān 'Abd al-Mannān. (Amman: Bayt al-Afkār al-Dawliyyah, no date), 277. She is one of the narrators Muslim relies upon in his *Saḥīḥ* (2005 and 2916), and she is listed by Ibn Ḥibbān in his book of reliable narrators. Muḥammad b. Ḥibbān, *Kitāb al-Thiqāt* (Hyderabad: Dā'irah al-Ma'ārif al-'Uthmāniyyah, 1973), 5:593-594. Ibn Ḥajar al-'Asqalānī takes a somewhat more modest view, classifying her as an acceptable narrator (*maqbulah*). *Taqrīb al-Tahdhīb*, 746. Wakī' mentions some minor confusion among early biographers about her personal name. Muḥammad b. Khakaf Wakī', *Akhbār al-Qudāt*. ed. 'Abd al-'Azīz Muṣṭafā al-Marāghī. (Beirut: 'Ālam al-Kutub, 1947), 2:5. However this was soon resolved with the vast majority of her biographers asserting that it was Khayrah. Al-Ṭabarī and Dāraquṭnī relate this on the authority of Yaḥyā b. Ma'īn, and al-Dāraquṭnī also establishes it from 'Amr b. 'Alī. See Muḥammad b. Jarīr al-Ṭabarī, *al-Muntakhab*. (Beirut: al-Mu'assasah al-'Alamī lil-Maṭbū'āt, no date), 125; and 'Alī b. 'Umar al-Dāraquṭnī, *al-Mu'talaf wa al-Mukhtalaf*. ed. Muwaffaq b. 'Abd Allah b. 'Abd al-Qādir. (Beirut: Dār al-Gharb al-Islāmī, 1986), 385. All later biographers are consistent in identifying her given name as Khayrah.

¹⁸³ Ibn Ḥazm, *al-Muḥallā*, 410.

¹⁸⁴ For a detailed discussion of both chains of transmission, refer to Nāṣir al-Dīn al-Albānī, *Tamām al-Minnah fī al-Ta'līq 'alā Fiqh al-Sunnah* (Riyadh: Dār al-Rāyah, no date), 154.

¹⁸⁵ Her name appears alternatively as Rayṭah al-Ḥanafīyyah and Rai'īyah al-Ḥanafīyyah in various ḥadīth texts. She is positively identified as Rayṭah in the catalogues of ḥadīth narrators and identified with this tradition of 'Ā'ishah. See: Ibn Sa'd, *al-Ṭabaqāt*, 10:447. She is classified by al-'Ajli as a reliable narrator from among the Successors. See: Abū al-Ḥasan Aḥmad al-'Ajli, *Ma'rifah al-Thiqāt min Rijāl Ahl al-'Ilm wa al-Ḥadīth*. ed. 'Abd al-'Alīm 'Abd al-'Azīm al-Bastawī. (Madinah: Maktabah

Maysarah b. Ḥabīb al-Hindī¹⁸⁶ from Rayṭah. This is a sound, connected chain of transmission with reliable narrators.

Each of the other chains suffer from a degree of weakness, either a narrator having a degree of imprecision or a narrator of unknown quality. These are the kinds of defects which are ameliorated by corroborating chains of transmission. For instance, the narration of the Successor ‘Āṭa from ‘Ā’ishah comes with two independent and unbroken lines of transmission. The first is in *Muṣannaf Ibn Abī Shaybah* (4954) from Muḥammad b. ‘Abd al-Raḥmān b. Abī Laylā, who is identified as having a weak memory,¹⁸⁷ and the second from Layth b. Abī Sulaym, who is identified as confusing his narrations.¹⁸⁸ Otherwise, these two chains are sound and corroborate one another to confirm the accuracy of what both narrators say they heard from ‘Āṭa.¹⁸⁹

The narrations from Abū Ḥanīfah suffer from the fact that his teacher Ḥammād b. Abī Sulaymān, in spite of his eminence as a jurist, is graded as “a very honest narrator, but with some errors” (*ṣadūq lahu awḥām*).¹⁹⁰ This is also valid as a corroborating narration.

The practice of ‘Āishah is therefore well established. There is no reason that any jurist would have to reject it on the basis of its narration. The practice of ‘A’ishah and Umm Salamah are both accepted as fact by the jurists of the Shāfi‘ī, Ḥanbalī, and Ḥanafī schools of law, though Ḥanafī jurists differ about its legal implications.

As for the Mālikī jurists’ dismissal of these traditions, there are two possible grounds for it, neither of which have to do with the strength or weakness of the chains of transmission. One reason might be that they are individual-narrator narrations at variance with established practice. The second possibility is that they are dismissed as

al-Dār, 1985). Al-Albānī seems unaware of this identification and declares that Rā’iṭah is an unknown narrator. See: *Tamām al-Minnah* 153-154.

¹⁸⁶ He is a reliable narrator from whom Sufyān al-Thawrī narrated ḥadīth. See: Ibn Abī Ḥātim, *al-Jarḥ wa al-Ta’dīl*, 8:253 and Ibn Ḥibbān, *al-Thiqāt*, 7:484.

¹⁸⁷ Ibn Ḥajar al-‘Asqalānī, *Tahdhīb al-Tahdhīb* (9:301-302).

¹⁸⁸ Ibn Ḥajar al-‘Asqalānī, *Taqrīb al-Tahdhīb*, 464.

¹⁸⁹ Al-Albānī, *Tamām al-Minnah*: 1:154.

¹⁹⁰ Ibn Ḥajar al-‘Asqalānī, *Taqrīb al-Tahdhīb*, 178.

being the equivalent of a statement of a Companion in a matter wherein the Companions disagreed.¹⁹¹

3. Use as Evidence

It may seem obvious how these traditions relate to the question of women leading other women in prayer. Yet, it must be acknowledged that these traditions indicate the actions of two Companions and not a statement of the Prophet. Furthermore, no tacit approval from the Prophet can be assumed from them, because it cannot be firmly established that these events took place during the Prophet's lifetime.¹⁹² Shāfi'ī and Ḥanbalī scholars use these traditions as evidence for permissibility. Ḥanafī scholars acknowledge their proving the validity of the prayer, though the majority regard the congregation of women to be disliked, with later scholars declaring it disliked to the point of being prohibited.

The Shāfi'ī school of law goes further than permissibility to assert that the practice of 'Ā'ishah and Umm Salamah proves it is preferable for women to participate together in congregational prayer. Shāfi'ī jurists do not regard the opinions of Companions to be valid evidence. It seems they treat their practice to have the evidentiary force of a prophetic ḥadīth, since it is a positive action on a matter central to the performance of an act of worship, and something which could not take place contrary to textual evidence as merely the opinion of the women involved.¹⁹³ Therefore, it indicates the permissibility of the act and the validity of the prayer. The preferability of women-only congregations is evident in the language of al-Māwardī, Imām al-Ḥaramain, and al-Nawawī, who all cite the practice of the Prophet's wives along with the ḥadīth of Umm Waraqah. The discussion of preferentiality is not taken up by the later commentaries, where the practice of the Prophet's wives is only cited to show where

¹⁹¹ This second possibility will be discussed shortly in conjunction with the statement of 'Alī. The first possibility will be clarified in the section on the practice of the people of Madinah.

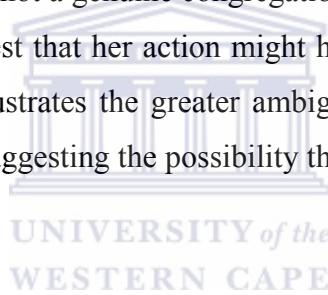
¹⁹² For those Ḥanafī jurists who suggest the congregation of women had been abrogated, they have to assume this practice did indeed take place during the Prophet's lifetime.

¹⁹³ The theoretical works on ḥadīth methodology speak about statements of the Companions that have the evidentiary force of prophetic ḥadīth (*fī ḥukm al-raf'*) and give a number of criteria for determining when this is the case. Unfortunately, the criteria they discuss focus on the words used in the narration and not on the actions related from the Companions. However, al-Suyūfī explores this issue and asserts: "One of these [criteria] is his action wherein there is no room for juristic discretion, so it is taken as if he has that on the Prophet's authority. This is like what al-Shāfi'ī said about 'Alī [b. Abī Ṭālib] offering the eclipse prayer with more than two bows in every prayer unit." Jalāl a-Dīn al-Suyūfī, *Tadrib al-Rāwī 'alā Sharḥ Taqrīb al-Nawawī*. ed. Abū Qutaybah Naṣar Muḥammad al-Fārayābī. (Riyadh: Dār Ṭaybah, 2001), 213.

the female imām should stand. Ḥanbalī scholars are less committed to the idea that women congregating together is preferable, but at least al-Zarkashī cites the practice of ‘Ā’ishah and Umm Salamah as being directly indicative of preferentiality.

They do not explain how the practice of ‘Ā’ishah and Umm Salamah supports the ruling that congregation is preferred. It might reasonably be argued that had it not been preferred, those two Companions would not have gone to the trouble of holding congregational prayer.

It is interesting to note in this regard how al-Māzirī discusses ‘Ā’ishah’s practice in *Sharḥ al-Talqīn*. He is the only Mālikī jurist to take the trouble to address this tradition, and his discussion of it indicates his awareness of its potential evidentiary force. He suggests that if the narration is authentic, the practice was either abrogated or was an act of teaching and not a genuine congregation. This is the way he is able to dismiss it. He does not suggest that her action might have been based on her juristic opinion. Nevertheless, he illustrates the greater ambiguity ingent in a practice, as opposed to a statement, by suggesting the possibility that she was merely teaching the other women how to pray.



4. *Its Use by al-‘Aynī and Ibn al-Humām*

Like the Shāfi‘ī and Ḥanbalī scholars, they cite this ḥadīth as evidence to permit women-only congregations. They are contradicting the prevailing opinion of their school of thought in doing so, which results in their having to present a more elaborate discussion. They argue that the reference to Ramaḍān in the narration of Ibrāhīm al-Nakha‘ī refers to the Tarāwīḥ prayer, which was not practiced until after the Prophet’s death, to show that women-only congregations were not abrogated. They also point out ‘Ā’ishah’s very young age when she arrived in Madīnah, and that she would not have been leading any prayers except after becoming mature. Since she was only teenager when the Prophet died, her leading prayers could only have taken place near the end of his life at the earliest.

These arguments are critical, because in order to assert that women-only congregations are prohibited or disliked, Ḥanafī scholars need to explain away ‘Ā’ishah’s practice, and they do so by declaring that it abrogated. This could only

have taken place during the Prophet's lifetime. Al-'Aynī goes further to assert that if her practice was not abrogated, then Hanafī Law would have to take it as proof that women-only congregations are not only permissible, but preferable. Ibn al-Humām does not go so far in his assertions, contenting himself to neutralise the claim of abrogation. His position seems more inclined to one of mere permissibility.

Ibn al-Human concedes that the prayers in Ramaḍān may not have been Tarāwīḥ, so they could have taken place in the early years of Islam. He likewise conceded that maybe her age was wrongly determined or that she may have only led prayers for a brief period of time before abrogation, though he does not appear himself too convinced by the likelihood of this possibility. He then rests his case on the absence of any evidence for abrogation. The response of later Ḥanafī jurists to these arguments is to ignore them.



O. Ibn 'Abbās on Women-Only Congregations

'Ikrimah relates that Ibn 'Abbās said:

A woman leads the women in prayer, standing in their midst.

1. Citation in the Surveyed Works

The opinion of Ibn 'Abbās is cited by the Ḥanafī jurist al-'Aynī in *al-Bināyah* to support his minority view in the school supporting women-only congregations.

2. Validity of the Tradition

It is found in *Muṣannaḥ 'Abd al-Razzāq* (5085) related from Ibrāhīm b. Muḥammad from Dāwūd b. al-Ḥuṣayn from 'Ikrimah.

Ibrāhīm b. Muḥammad b. Abī Yaḥyā (also: Ibn Abī 'Āṭā) al-Aslamī is accused of lying¹⁹⁴ and is rejected as a narrator.¹⁹⁵ This chain of transmission would not be

¹⁹⁴ Aḥmad b. 'Alī b. Ḥajar al-'Asqalānī, *Tahdhīb al-Tahdhīb*. (India: Dā'irah al-Ma'ārif al-Nizāmiyyah, 1908), 1:158.

¹⁹⁵ Ibn Ḥajar al-'Asqalānī, *Taqrīb al-Tahdhīb*, 93.

regarded as suitable as evidence. A further problem is that although Dāwūd b. al-Ḥusayn is regarded as a reliable narrator, his reliability is called into question with respect to what he relates from ‘Ikrimah.¹⁹⁶

3. Use as Evidence

The opinion of Ibn ‘Abbās is cited by ‘Aynī in a list of narrations recruited in support of women-only congregations. Even if its chain of transmission had been authentic, its mention would have unnecessary in the presence of stronger, more compelling traditions. Due to its invalid transmission, its mention becomes superfluous. It is not surprising that this tradition does not appear anywhere else in the legal literature.¹⁹⁷ Al-‘Aynī might have felt pressured to present a long list of evidence to support his view supporting women-only congregations because he was going against the prevailing view in his own school of thought.

P. ‘Alī b. Abī Ṭālib on Women Imāms

Ibn Wahb and Wakī‘ both narrate:

It is related from Ibn Abī Dh’ib that a ward of Banī Ḥāshim informed him that ‘Alī b. Abī Ṭālib said: “A woman does not lead prayers.”

1. Citation in the Surveyed Works

It is mentioned by in *al-Mudawwanah*, the earliest Mālikī legal source work, and is never cited again in the Mālikī texts. It is not even mentioned by al-Rajrājī in *Manāhij al-Taḥṣīl*, in spite of the fact that it is supposed to be a commentary of *al-Mudawwanah*, and al-Rajrājī’s professed intention is to ground the legal rulings on a textual evidentiary basis.

¹⁹⁶ Ibn Ḥajar al-‘Asqalānī, *Taqrīb al-Tahdhīb*, 198.

¹⁹⁷ The only other legal work I have found this tradition mentioned in is a twentieth-century commentary on the Ḥanbalī legal treatise *Zād al-Mustaḥqni*. See: ‘Abd al-Raḥmān b. Muḥammad b. Qāsim al-‘Āsimī al-Najdī, *Ḥāshiyah al-Rawḍ al-Murbi ‘Sharḥ Zād al-Mustaḥqni*. (Riyadh, no publisher, 1977), 2:340.

The Ḥanbalī jurist al-Zarkashī suggests ‘Alī’s statement as evidence for an alternate opinion related from Aḥmad b. Ḥanbal, that it is not preferable but merely permissible for a woman to lead other women in prayer.¹⁹⁸

2. *Validity of the Tradition*

The tradition is related in *Muṣannaf Ibn Abī Shaybah* (4957). It has a connected, solid chain of transmission until it gets to the ward of Banī Ḥāshim, who is ‘Abd al-Raḥmān b. Mahrān al-Madanī. Though Ibn Ḥibbān lists him as a reliable narrator¹⁹⁹, Ibn Ḥajar identifies him as a narrator of unknown quality.²⁰⁰ Also, he is not known to have narrated anything from ‘Alī. Al-Zarkashī gives al-Najjād as his source for it, but his book is no longer in existence. Moreover, he attributes the text to Ibn ‘Umar and Ibn ‘Abbās, and cites it as part of a longer statement from ‘Alī.²⁰¹ Nowhere is this attribution or this longer text found in the ḥadīth literature.

3. *Use as Evidence*

This statement is cited by Ibn al-Qāsim in support of categorically prohibiting women from leading prayers, for women as well as men. The appearance of the statement of ‘Alī in this earliest of Mālikī legal works is consistent with Umar Abd-Allah’s assertion that Mālik gave preference to the legal verdicts of older and more prominent companions to those of younger ones. Abd-Allah identifies ‘Alī b. Abī Ṭālib as a member of the former category and ‘Ā’ishah, due to her young age, as a member of the latter, in spite of her being the Prophet’s wife.²⁰² Therefore Mālik could have given preference to ‘Alī’s legal opinion over the practice of ‘Ā’ishah and Umm Salamah. At the same time, Mālik may have simply been unaware of the practice of the Prophet’s wives. The Shāfi‘ī scholar Abū ‘Abd Allah Muḥammad al-Marwazī attributes the following statement to Mālik:²⁰³

¹⁹⁸ *Al-Mudawwanah* and *Sharḥ al-Zarkashī* seem to give the only citations for this tradition in the legal literature. I have not found it cited in any other legal work of any of the four schools of law. Moreover, the only citation I have found for it in the ḥadīth literature is in *Muṣannaf Ibn Abī Shaybah*.

¹⁹⁹ Ibn Ḥibbān, *al-Thiqāt*, 5:93. Ibn Ḥibbān asserts that Ibn Abī Dhi’b heard narrations from ‘Abd al-Raḥmān b. Mahrān.

²⁰⁰ Ibn Ḥajar al-Asqalānī, *Taqrīb al-Tahdhīb*: 351.

²⁰¹ He makes this claim about Ibn ‘Umar and Ibn ‘Abbās while citing the ḥadīth in the context of discussing the call to prayer. al-Zarkashī, *Sharḥ*, 1:516.

²⁰² Abd-Allah, “Malik’s Concept”, 168. Abd-Allah takes pains to point out: “‘Ā’ishah is regarded as the most knowledgeable of Muslim women.”

²⁰³ Aḥmad b. ‘Alī al-Maqrīzī, *Mukhtaṣar Qiyām al-Layl wa Qiyām Ramadān wa Kitāb al-Witr li-Abū ‘Abd Allah al-Marwazī*. (Faisalabad: Hadith Academy, 1988), 228.

It is not appropriate for a woman to lead anyone in prayer. There were the wives of the Prophet and the emigrant women, and neither they nor any other [women] ever led prayers.

As for the opinion of Ibn ‘Abbās, assuming Dāwūd b. al-Ḥusayn actually narrated it, Mālik might have been aware of it, since he narrated ḥadīth from Dāwūd b. al-Ḥusayn. However, he never accepted any narrations of his from ‘Ikrimah.²⁰⁴ Therefore, Mālik might have been aware of ‘Alī’s verdict to the exclusion of any variant opinion from among the Companions. This would make it a possible point of evidence for him. However, it does not seem to be Mālik’s primary argument. Considering his statement quoted above, it appears that prevailing practice was his overwhelming concern.

In any event, the disappearance of ‘Alī’s opinion from the Mālikī legal literature is probably due to the fact that, as a statement of a Companion in a matter wherein other Companions disagree, it does not have any evidentiary value in the fully-formed Mālikī legal theory of the post-formative period, though its rareness and questionable chain of transmission may also have been contributing factors. This could be a case where the actual evidentiary basis for the ruling was different than what legal theorist and jurists would later recognize.

Its absence from the Ḥanbalī legal literature is understandable. Al-Zarkashī suggests it as evidence to show that women-only congregations are not preferable to their praying individually. Not only is this view, by his own admission, disfavoured by many scholars of the Ḥanbalī school including himself, the statement of ‘Alī is unwieldy evidence for it, since its apparent meaning negates the permissibility of women leading prayer. To the extent that it is understood to apply to women-only congregations, it would negate those as well; it would not merely indicate a lack of preferability.

²⁰⁴ Ibn Abī Ḥātim, *al-Jarḥ wa al-Ta’dīl*, 3:409.

Though not cited as evidence, the statement of ‘Alī, if accepted as authentic in its attribution to him, would have one very profound effect on all four schools of law. It would prevent any jurist from claiming that the permissibility of women-only congregations was the juristic consensus (*ijmā’*) of the Companions. Otherwise, with ‘Ā’ishah and Umm Salamah’s prayer leadership being an ongoing practice of theirs, a case for a “silent” *ijmā’* might have been made if no objection was on record from any other Companion.

Q. *General Observations*

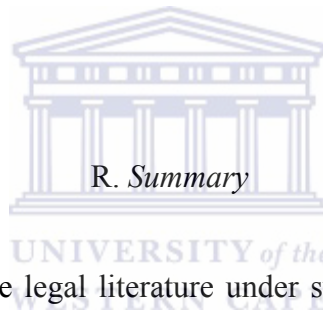
“A people will not succeed...” is the only textual evidence cited with any consistency to prohibit women from holding positions of political leadership and judicial authority. This is in spite of the fact that it is very context-specific and contains no command or prohibition that can be immediately generalised from the occasion of its utterance. This suggests that the ḥadīth is recruited for the purpose and is unlikely to be the reason instigating the ruling.

Regarding women leading men in prayer, each school of thought favours different ḥadīth evidence, in spite of their all agreeing that women must not do so, and that the prayers of the men who follow them are invalid. None of the ḥadīth are satisfactory as evidence according to the requirements of the school which cites them. In every case, either the ḥadīth’s chain of transmission is too defective to be acceptable, or its wording does not provide a sound enough textual basis to establish the ruling.

Nevertheless, it is interesting how a pattern of correspondence can be discerned between each school’s specific theoretical approach to ḥadīth and the particular texts they favour. The Shāfi‘ī school ultimately settles upon the only clearly authentic ḥadīth text available, in spite of its dubious relevance to prayer. The Ḥanbalī school, by contrast, consistently cites the ḥadīth that most literally states the ruling, ignoring the fact that it is inauthentic, in line with their tendency towards favouring a weak but literal text over any kind of analogous reasoning. The Ḥanafī school chooses the only text that can provide a rationale for the basis of their counter-intuitive ruling that a woman being in line with a man nullifies his prayer and not hers, which they establish

using the text in conjunction with their theoretical principle of juristic preference (*istiḥsān*) which will be discussed below.

By contrast, the Mālikī school is inconsistent in its ḥadīth use, with different ḥadīth evidence being suggested by different jurists. With respect to women-only congregations, they ignore or dismiss the ḥadīth evidence and traditions which indicate permissibility. (*Manāḥij al-Taḥsīl* is atypical in supporting women-only congregations, and cites the ḥadīth of Umm Waraqah in its favour.) Their uneven use of ḥadīth to prohibit women's prayer leadership may be attributed to the Mālikī emphasis on normative practice over specific ḥadīth, even in the post-formative period. Likewise, their very easy dismissal of the ḥadīth evidence and the traditions of the Prophet's wives supporting women-only congregations might be partially explained by the Mālikī principle of rejecting individual-narrator ḥadīth that go against established practice.



Many of the arguments in the legal literature under survey are phrased as if one or another ḥadīth is the basis for prohibiting women from leading prayers, but it is clear that these ḥadīth are being recruited to defend the rulings, and not the source for them. This can be seen in the inconsistency in how jurists within certain schools choose ḥadīth to defend their arguments, with later ones recruiting different ḥadīth than their predecessors and discarding others. Also, in spite of the fact that all four schools agree women cannot lead men in prayer, each school cites different texts in doing so. Nevertheless, a pattern ultimately emerges with jurists choosing texts to deny women's leadership which most closely conform to their particular schools' theoretical demands, yet none of the ḥadīth cited for that purpose actually live up to those demands. Therefore, the rulings disallowing women's leadership were not significantly determined by the ḥadīth literature, nor by the use of juristic principles in combination with the ḥadīth, since those principles are repeatedly violated in the jurists' attempt to recruit ḥadīth to bolster their arguments.

IV. CONSENSUS (IJMA‘)

Consensus, as discussed herein, refers to the formal concept of ‘*ijmā‘*’ as defined in post-formative legal theory and not to the more casual use of the term meaning “widespread agreement”. Both usages of the word *ijmā‘* are found in the legal texts, but only the formal, terminological usage refers to a primary and authoritative source of law.

A standard definition of *ijmā‘* would be: the unanimous agreement of all qualified people in a given era on a particular ruling.²⁰⁵ Specific definitions vary, due to disagreements among legal theorists as to whose agreement counts, whether they must constitute all Muslims, all Islamic legal scholars, or all specialists in a relevant field of knowledge. In any event, legal theorists concur that for questions of Islamic Law, all the competent legal scholars must be unanimously agreed.²⁰⁶ Whenever this is established, the ruling becomes a matter of binding legal certainty and disagreement about it is henceforth forbidden.²⁰⁷

The evidence cited for the principle of consensus is Qur’an 4:115: “And whoever contends with the Messenger after guidance has become clear to him and follows other than the way of the believers - We will leave him to the path he has chosen and consign him to Hell, and it is an evil destination.” They also cite the ḥadīth: “My community will not agree upon a falsehood.”²⁰⁸ Consensus is thereby seen as a sign

²⁰⁵ See: ‘Abd al-Malik b. ‘Abd Allah al-Juwaynī, *al-Talkhīs fī Uṣūl al-Fiqh*. ed. Muḥammad Ḥasan b. Muḥammad Ḥasan Ismā‘īl. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2003), 366; ‘Abd al-Malik b. ‘Abd Allah al-Juwaynī *al-Waraqāt fī Uṣūl al-Fiqh*. published with Jalāl a-Dīn al-Maḥallī, *Sharḥ al-Waraqāt*, (Beirut: al-Maktabah al-‘Aṣriyyah, 2002), 9; al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, 299; and Muḥammad b. ‘Abd al-Wāḥid b. al-Humām, *al-Tahrīr Fī Uṣūl al-Fiqh*. (Egypt: Muṣṭafā al-Bābī al-Ḥalabī, 1932), 399.

²⁰⁶ Mālikī jurists consider the consensus of the people of Madinah to be evidence in their school of law. al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, 309. However, they do not confuse it with the type of binding consensus which every Muslim is obliged to accept, which is what we are discussing at this point. The value of Madinite consensus is that it takes precedence over an individual-narrator ḥadīth in Mālikī law.

²⁰⁷ Al-Juwaynī, *al-Burhān*, 436-437 and al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, 301.

²⁰⁸ *Sunan Ibn Mājah* (3950). We should notice that this ḥadīth does not define the scope of the term community nor the temporal scope of the consensus that will be binding, nor does it rule out that the matter of agreement might simply be that which is correct for the immediate community at the time or occasion of agreement, rather than binding for the entire Muslim world for all time. Likewise, it does not specify that the matter at hand must be a matter of Islamic belief or Law. It also does not rule out that alternative opinions might also be acceptable, since it only states that what is agreed upon is not something false, without making mention of the status of any alternative or differing point of view. Be

from God indicating that the point whereupon agreement is reached is the indisputable truth and that no other possibility is allowed. In this way, consensus becomes an independent source of law. Consensus is therefore a powerful proof when it occurs, and classical scholars understood the conditions for this proof to be stringent. What is needed is absolute agreement.

Scholars differ regarding whether a direct statement from all of the relevant individuals is needed to establish its occurrence, or whether once the statement of a few is clearly publicised and known by all, the silence of the rest is enough. Generally, those who uphold the validity of this “silent concensus” place conditions on it that the matter must be one of general relevance and the opinion of those who spoke is known to have been widely circulated.²⁰⁹

Meeting the condition, in either case, is a tall order. There are tremendous practical difficulties in determining its occurrence for other than the most essential Islamic teachings, like the obligatory nature of the five daily prayers, the obligation of the pilgrimage to Mecca, the fact that Ramadan is the month of fasting, and the flesh of pork is unlawful to eat. It is even more difficult to prove in the face of claims to the contrary, and especially where there is a paucity or absence of statements about the ruling from among the Companions and Successors. Both of these problems exist for questions of women in leadership.

As a consequence, consensus is rarely invoked in the works under survey. Indeed, the questions we are exploring are not usually considered by classical jurists to be matters of consensus, and many jurists freely admit to the disagreement by citing the opposing opinions that exist. Nonetheless, the temptation for a jurist to invoke consensus is a strong one, especially when well-cherished issues are at stake whose rulings enjoy widespread acceptance in the Muslim community, like the questions we are exploring.²¹⁰

this as it may, classical Islamic scholars have understood *ijmāʿ*, whenever it occurs, to be universal and binding.

²⁰⁹ See: al-Juwaynī, *al-Burhān*, 1:447; al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, 207, and Ibn al-Humām, *al-Tahrīr*, 407-408.

²¹⁰ It is telling how Muhammad Hasan Hītū, a contemporary Shāfiʿī legal scholar from Syria, explains the function of consensus: “[Consensus] is the unreachable fortress and insurmountable barrier of this religion. It confronts those with vain desires and passions and turns them on their heels, so they are

A. Leading Prayer

The Ḥanafī scholars al-Zayla‘ī, al-Bābirtī and Ibn al-Human are the only ones in the surveyed texts who assert there is *ijmā‘* on prohibiting women from leading men in prayer. They mention it as a basis to argue why a woman nullifies a man’s prayer when she stands in line with him.²¹¹ None of them try to justify or cite a source for the initial claim of *ijmā‘*. They simply introduce it as a basis for a possible analogical argument and do not bother to elaborate upon the claim itself. For al-Zayla‘ī and al-Bābirtī, this may be because it is merely a supporting argument. However, for Ibn al-Human, the stakes are higher because of his rejection of the primary ḥadīth evidence that Ḥanafī scholars rely upon. In fact, *ijmā‘* is the only basis Ibn al-Human gives for prohibiting women from leading men in prayer.

Ibn al-Nujaym and al-‘Aynī also mention this claim of *ijmā‘* and identify al-Zāhidī’s *al-Mujtabā* as being the source for the claim, but they do not say that they agree with him, nor do they relate from al-Zāhidī any possible evidence or justification for his assertion. Al-‘Aynī goes further to point out al-Ṭabarī’s differing opinion, and he asserts that al-Zāhidī did not intend *ijmā‘* in an absolute sense, but only the agreement of the independent jurists who established the schools of thought. Be that as it may, al-Zāhidī is the likely source for al-Zayla‘ī, al-Bābirtī and Ibn al-Human.

The most famous claim for *ijmā‘* on the issue of men following women in prayer comes from the Zāhirī scholar Ibn Ḥazm in his work *Marātib al-Ijmā‘*. He writes: “They agree that the woman does not lead men in prayer, their being aware that she is a woman. If they [the men] do so, their prayers are invalid by consensus (*ijmā‘*).”²¹²

unable to plot against this religion and find no path to pursue their vanities. Many of the agreed-upon obligations are established by individual-narrator ḥadīth that are open to interpretation and which provide only uncertain evidence. Nevertheless, we find that the community of faith is agreed that it is disbelief to deny the obligatory nature [of those obligations] or to reinterpret them. This is because of consensus.” Muḥammad Ḥasan Hītū, *al-Wajīz fī Uṣūl al-Fiqh*. (Beirut: Mu’assasah al-Risālah, 2006) 334.

²¹¹ It is an argument by analogy (*qiyās*), and it will be discussed in detail in the next section on *qiyas*.

²¹² Ibn Ḥazm, *Marātib al-Ijmā‘*. (Cairo: Maktabah al-Qudsī, 1938), 27. and cited from Ibn Ḥazm by ‘Alī b. Muḥammad b. ‘Abd al-Malik b. al-Qaṭṭān’ in *al-Iqnā‘ fī Masā’il al-Ijmā‘*. ed. Zakariyyā ‘Umayrāt. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2005) 1:190.

Otherwise, the question is generally accepted by scholars to be a matter of legitimate disagreement – albeit very limited disagreement – due to what is related from al-Ṭabarī, Abū Thawr, and al-Muzanī, all of whom are affiliated with the Shāfi‘ī school of law, that women can lead men in all prayers, as well as the view found in the Ḥanbalī school that a woman can lead men in voluntary prayers, or at least the Tarāwīḥ prayer under certain conditions.

We do find the word *ijmā‘* being used in a qualified matter by the Shāfi‘ī scholars al-Ramlī and Ibn Ḥajar al-Haytamī, where they add the phrase “except for the rare disagreement...”, but this is not a claim of legally binding consensus, just an emphatic statement of how rare and exceptional they regard the disagreement that exists on the matter to be.

The contemporary American scholar Zaid Shakir has challenged the attribution to al-Ṭabarī, Abū Thawr, and al-Muzanī that they permitted women to lead men in prayer, and as a consequence he tentatively suggests that “the consensus claimed by Ibn Ḥazm concerning unrestricted female prayer-leadership, would not be impossible”.²¹³ He argues that there is no documented evidence from these scholars themselves that they believed women can lead men in prayer, nor have “any reports of unrestricted female prayer-leadership that are attributed to the Imams we have mentioned...reached us with unbroken chains” of transmission.²¹⁴

What is wrong with this argument is that most of the opinions of early legal scholars were not related like ḥadīth. Instead, they were preserved by the scholars who came after them in the early legal texts of their respective schools of law, which are often just collections of the jurists’ rulings. Such texts formed the basis for later encyclopaedic commentaries, like many of those surveyed by the present study. This is, indeed, the source for nearly all the essential rulings and opinions of the scholars from the four schools.

²¹³ Shakir, Zaid “Female Prayer Leadership (Revisited)” *New Islamic Directions*, 1988. http://www.newislamicdirections.com/nid/articles/female_prayer_leadership_revisited.

²¹⁴ Shakir, “Female Prayer Leadership (Revisited)”.

The three scholars in question are all affiliated with the Shāfi‘ī school of law. Al-Ṭabarī is regarded by Shāfi‘ī scholars as being an independent jurists affiliated with their school²¹⁵ while Abū Thawr and al-Muzanī are both considered among al-Shāfi‘ī’s students and associates, with the possibility that one or both of them ultimately reached the level of independent jurist. What it means for the school of thought when a jurist reaches this level is that whenever they adopt a ruling at conflict with al-Shāfi‘ī’s ruling, it is not recognized as a variant ruling within the school, but an independent ruling of theirs, because they were qualified to use independent reasoning and were known to have done so. Whereas Abū Thawr is generally regarded as having aspired to his own school of legal reasoning at the end, al-Muzanī remained one the most important of the first generation of of al-Shāfi‘ī’s associates, and he is the author of the *Mukhtaṣar* that both *al-Hāwī al-Kabīr* and *Nihāyah al-Maṭlab* are based.²¹⁶

As a consequence of their positioning within with the Shāfi‘ī school of law, the Shāfi‘ī legal literature is the authoritative source for their legal opinions. Al-Māwardī attributes the opinion of permissibility to Abū Thawr and cites his arguments for it, which he then systematically attempts to refute. Al-Nawawī cites the authorities al-Qāḍī Abū al-Ṭayyib and al-‘Abdarī as sources for the attribution of this opinion to all three scholars, as well as Sheikh Abū Ḥāmid as another source for the attribution of the opinion to Abū Thawr. Furthermore, considering that this view is at variance with

²¹⁵ Tāj al-Dīn al-Subkī states about al-Ṭabarī: “The four Muḥammads: Muḥammad b. Naṣr, Muḥammad b. Jarīr, Ibn Khuzaymah, and Ibn al-Mundhir are from our associates who have reached the level of independent juristic reasoning (*al-ijtihād al-muṭlaq*). This does not stop them from being among al-Shāfi‘ī’s associates who derive their [rulings] on his legal principles and who follow his school of law, because of the agreement of their juristic reasoning with his.” Tāj al-Dīn al-Subkī, *Ṭabaqāt*, 3:102.

²¹⁶ Al-Nawawī discusses this matter in depth, explaining that both of them became independent jurists affiliated with al-Shāfi‘ī’s school, with al-Muzanī’s views remaining part of the school whenever they do not conflict with those of al-Shāfi‘ī. He writes: “Al-Muzanī, Abū Thawr, and Abū Bakr b. al-Mundhir are independent legal jurists affiliated with al-Shāfi‘ī. As for al-Muzanī and Abū Thawr, they are his true associates, while Ibn al-Mundhir came later on. [Al-Shīrāzī] makes it clear in *al-Muhadhdhab* in a number of places that the three of them are associates whose views hold (*aṣḥāb al-wujūh*) and he makes their opinions alternate views in the school. Sometimes he makes their views as if they are not alternative opinions within the school, but the first stance is clearer because he presents their views and his habit in *al-Muhadhdhab* is not to mention the imams of other than our own school... In *al-Nihāyah*, Imām al-Ḥaramayn [al-Juwaynī] says: ‘Where al-Muzanī comes with his own unique opinion, then it is his own school of thought, and where he derives it from al-Shāfi‘ī, then the ruling he derives is preferable to that of anyone else. He is part of the school without question.’ What al-Imām [al-Juwaynī] said is good, and no doubt it is what should be adopted.” Abū Zakariyyā Yaḥyā b. Sharaf al-Nawawī, *al-Majmū‘ Sharḥ al-Muhadhdhab*. ed. ‘Ādil Aḥmad ‘Abd al-Mawjūd *et al.* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2002), 1:713.

the one actually adopted by the Shāfi'ī school of law, there is no motivation for Shāfi'ī scholars to attribute this view to three of their most respected and pre-eminent scholars, except out of a genuine desire to preserve an historical record of their opinions.

B. *Women-Only Congregations*

The Ḥanafī scholar al-Bābirtī asserts that there is *ijmā'* on the validity women-only congregations regardless of whether the female imām stands in the midst of the worshippers or stands ahead. This claim of *ijmā'* is untenable in the face of the Mālikī position that women-only congregations are categorically invalid, as well as the opinion of a number of Successors to that effect. Al-Bābirtī is compelled to make this assertion to explain why women-only congregations are still regarded as valid after he claims that the practice of women leading other women in prayer was abrogated. He concludes that the Sunnah nature of their congregating was abrogated but the permissibility of doing so remains on the strength of *ijmā'*. He is clearly trying to maneuver out of a difficult legal predicament. This is a good example of how *ijmā'* is sometimes invoked as an argument of last resort when other arguments fail to provide satisfactory answers.

C. *Political Leadership*

We find equally tentative claims for *ijmā'* in the question of political leadership. In the works under survey, the Mālikī scholars Ibn Rushd and al-Rajrājī assert consensus on the matter. It is also asserted by the Shāfi'ī scholar al-Juwaynī in some of his works. The argument given for this claim is very weak, simply that no woman is known to have been appointed to a position of political leadership. This is not a case of silent consensus, since that requires a positive statement or action to be carried out which the other jurists learn about and subsequently refrain from criticising. The mere absence of a woman political appointee does not require the jurists to even think on the matter, let alone object to it. The most it could indicate is that it is permissible for

women to be entirely absent from the high echelons of political authority at a given time and place.

In contrast to these assertions, al-Juwaynī's contemporary al-Māwardī does not make a claim of *ijmā'*, though he mentions the prohibition of women's political leadership in *al-Ḥawī al-Kabīr* as well as in *al-Aḥkām al-Sūlṭaniyyah*, where he goes so far to say that a woman cannot even serve as a junior minister.²¹⁷ His not suggesting *ijmā'* here is telling, since we have seen that al-Māwardī's approach in *al-Ḥawī al-Kabīr* is to mention everything that he considers to be a possible line of argument or evidence, no matter how tentative.

D. Judicial Appointments

This issue would not be a candidate for *ijmā'*, partly because of the established Ḥanafī position that a woman can give judgements in other than capitol crimes, and partly because of the well-known position of al-Ṭabarī allowing a woman to serve as a judge in an unlimited capacity. Al-Qarāfī does suggest that a tacit consensus of a practical nature can be deduced from the lack of any example in Islamic history of a woman being appointed judge. However, since he is framing this argument as a rebuttal of al-Ṭabarī's view as well as the Ḥanafī position on the matter, he is clearly not suggesting *ijmā'* in the juristic sense that constitutes a binding authority.

Al-ʿAynī suggests there is *ijmā'* that women cannot give judgments on capitol crimes. He does not mention al-Ṭabarī's view, and it is unclear whether he means *ijmā'* in the full sense of the word, or merely the consensus of the independent jurists who established the schools of law. He granted the latter to al-Zāhidī's claim of consensus regarding prayer while acknowledging al-Ṭabarī's dissenting view. The former possibility is also tenable, since al-ʿAynī misrepresents al-Ṭabarī's position on prayer as being the same as that of the early Ḥanbalīs, so he could likewise misidentify his position on a woman being a judge as being the same as the Ḥanafī view. The

²¹⁷ Abū al-Ḥasan ʿAlī b. Muḥammad b. Ḥabīb al-Māwardī. *al-Aḥkām al-Sulṭāniyyah*. ed. Aḥmad Mubārak al-Baghdādī. (Kuwait: Maktabah Dār Ibn Qutaybah, 1989), 36.

misidentification of al-Ṭabarī's opinion is somewhat common in non-Shāfi'ī legal works.

Outside the surveyed works, we find the Mālikī exegete Ibn al-'Arabī in his commentary of the Qur'ān, followed by al-Qurṭubī, in his somewhat later and lengthier commentary, questions the veracity of the claim that al-Ṭabarī permits a woman to serve as a judge, and speculates that al-Ṭabarī might have shared Abū Ḥanīfah's view that a woman can judge only in cases wherein her testimony is valid.²¹⁸

These doubts are as problematic as Zaid Shakir's doubts concerning al-Ṭabarī's opinion on prayer leadership. Since al-Ṭabarī is affiliated with the Shāfi'ī school of law, his legal opinions would be preserved and related by the Shāfi'ī scholars. We can see that al-Māwardī not only asserts it is al-Ṭabarī's view that a woman can serve as a judge in all cases, but he even cites what he claims is al-Ṭabarī's rationale for it. Since the Shāfi'ī jurists have no reservations about asserting this as al-Ṭabarī's opinion, though it is not the opinion they themselves advocate, there is little reason to give credence to the suspicions expressed by Mālikī scholars centuries later.

E. Summary

In spite of *ijmā'* being a powerful argument when asserted successfully, most of the jurists under survey refrain from invoking it. This is sufficient to conclude that the rulings pertaining to women's in various questions of leadership are not matters of *ijmā'*, at least not the binding form of consensus conceived in the works of post-formative legal theory.

²¹⁸ Muḥammad b. 'Abd Allah Ibn al-'Arabī, *Aḥkām al-Qur'ān*. ed. 'Alī Muḥammad al-Bajjāwī. (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 2001) 3:409, and al-Qurṭubī, *al-Jāmi' li-Aḥkām al-Qur'ān*, 13:165.

V. JURISTIC ANALOGY (QIYĀS)

Juristic analogy (*qiyās*) is most commonly represented in Islamic legal theory as the extension of a legal ruling from one case to another case on the basis of a similarity that justifies the presence of the ruling in both cases.²¹⁹ Though the four schools of law differ on some matters, a general description of the process can be given.

There are two widely recognised types of *qiyās*. The first is *qiyās al-‘illah* based on determining the ruling’s effective cause (*‘illah*). This is the most common and widely-accepted form of *qiyās*. It has four elements: an original case, its original ruling, the new case, and the effective cause, which is legal rationale for the extension of the ruling to the new case. The effective cause should be a meaning that is appropriate for the presence of the ruling to the original case. When this same meaning is found in a new case whose ruling is unknown, the ruling can be applied to it due to the shared presence of the effective cause.

The standard example for this is wine, which is prohibited by the Qur’an. The effective cause for this prohibition is intoxication. This ruling is extended by way of *qiyās* to other intoxicating substances, which are the new cases. In this way, the ruling established by the text of the Qur’an can be applied to many cases the Qur’an does not directly address.

Determining the effective cause is regarded as the most difficult and uncertain part of the process. When the sacred texts do not specify the rationale for the ruling in the original case, it needs to be determined by exercise of juristic discretion. Such approaches are referred to as extracting the point on which the ruling is hinged

²¹⁹ Al-Ghāzālī defines *qiyās* as: “Applying one known matter to another by establishing or negating a ruling for them both by way of something that brings them together through the assertion or negation of a ruling or attribute... and every *qiyās* must have a new case, an original case, a n effective cause and a ruling.” *al-Mustasfā*, 2:96. Al-Qarāfī defines *qiyās* as: “Establishing a ruling like that [which exists] for one known matter in another known matter due to their resembling each other in the effective cause of the ruling according to the opinion of the one who engages in it.” *Shārḥ Tanqīḥ al-Fuṣūl*, 357. Ibn Qudāmah defines it as: “Applying to a new case the ruling of an original case due to something that brings them together.” *Rawḍah al-Nāzir*, 3:797. Al-Sarakhsī describes it as: “...exercising opinion to analogize from original cases whose rulings are known by textual evidence to extend the textual ruling to new cases.” *Uṣūl*, 2:118.

(*takhrīj al-manāṭ*).²²⁰ Sometimes the effective cause can be identified from the textual evidence through a process of elimination to isolate the factor that, due to its appropriateness for the ruling, must be the effective cause. This is called clarifying the point on which the ruling is hinged (*tanqīḥ al-manāṭ*).²²¹ Then there is the method called analysis and partition (*al-sabr wa al-taqṣīm*),²²² where the jurists first determine through induction all the possible candidates they can identify for the effective cause and then systematically eliminate them one by one until they are left with only the strongest possibility.²²³ It is a contentious, uncertain process, because if one possibility is left out, that unthought-of candidate may very well be the true effective cause.²²⁴

Once the effective cause is identified, the final task is to examine the new case to see if the meaning is present there as well. This is called verifying the point on which the ruling is hinged (*taḥqīq al-manāṭ*).²²⁵ The strongest analogies are where the meaning determined to be the effective cause is more prevalent in the new case than in the original. This is referred to as an analogy of greater appropriateness (*qiyās al-awlā*).

The second widely recognised form of *qiyās* is an analogy of resemblance (*qiyās al-shabah*). This is generally understood as being where the new case is compared to other existing cases to determine which of these it most closely resembles.²²⁶ The ruling of that original case is then applied to the new case. This is what jurists must

²²⁰ al-Ghazālī, *al-Mustasfā*, 2:98-99 and Ibn Qudāmah, *Rawḍah al-Nāzir*, 3:805.

²²¹ The example usually cited for this is the ḥadīth where a desert dweller came to the Prophet confessing that he had sexual intercourse with his wife during the day while fasting in Ramaḍān and was told how to expiate for it. Factors that are eliminated as having no effect on the ruling include the ethnicity of the perpetrator and the fact that he was married to the woman he had intercourse with. See: al-Ghazālī, *al-Mustasfā*, 2:98 and Ibn Qudāmah, *Rawḍah al-Nāzir*, 3:803-804.

²²² Al-Ghazālī identifies this with the conditional disjunctive syllogism (*qiyās al-sharṭī al-munfaṣil*) in formal logic. *al-Mustasfā*, 1:48.

²²³ The candidate effective causes are usually eliminated by showing that the ruling persists in their absence or conversely, that the ruling is sometimes absent in their presence. See: al-Ghazālī, *al-Mustasfā*, 2:135.

²²⁴ Al-Juwaynī explains that this method can only provide certain knowledge if the choice is between negating or asserting a single meaning. Otherwise, it provides at best speculative (*ẓannī*) knowledge. *al-Burhān*, 2:535-536. Ibn al-Humām argues that Ḥanafī legal theory should reject this method, though he concedes that al-Jaṣṣāṣ and al-Marghīnānī accept it. He concludes that the method's legitimacy is an enduring point of disagreement within the Ḥanafī school. *al-Tahrīr*, 468.

²²⁵ al-Ghazālī, *al-Mustasfā*, 2:97 and Ibn Qudāmah, *Rawḍah al-Nāzir*, 3:801.

²²⁶ See: al-Juwaynī, *al-Waraqāt*, 10. Ibn Qudāmah gives this definition in *Rawḍah al-Nāzir*, 3:868, and then gives an alternate definition of "bringing together the original case and the new case by way of an attribute that [merely] implies it contains some wisdom for the ruling that brings benefit or repels harm." According to this definition, the appropriateness of the effective cause for the ruling is merely suspected, as opposed to *qiyās al-ʿillah* where the appropriateness for the ruling is obvious.

resort to when they are unable to determine the effective cause by way of textual evidence, *ijmā'*, or identifying an appropriate factor.²²⁷

Regardless of the form it takes, the purpose of *qiyās* is to reveal the intended scope of a ruling that is established by the Qur'an, the Sunnah, or *ijmā'*. Its function is merely to extend the ruling established by that evidence to new cases. For the Ḥanbalī school, the scope of *qiyās* is further restricted by the greater range of textual evidence the school recognises. *Mursal* ḥadīth, the reports of weak narrators, and the legal rulings of the Companions are all given priority to *qiyās*, which is looked upon as a method of last resort, when there is no admissible textual evidence that can directly address the question at hand.

By contrast, *qiyās* enjoys a strength in Mālikī law above that of isolated individual-narrator ḥadīth.²²⁸ Likewise, since Mālikī jurists regard the generality of textual statements to be conjectural, the results of analogical reasoning can easily specify the meaning of general statements of the Qur'an.²²⁹ Furthermore, Abd-Allah argues that when Mālik himself engaged in *qiyās*, he did so primarily on the basis of established legal axioms, rather than particular rulings established by textual evidence. These axioms were derived through inductive reasoning from many individual instances of law. He claims that this remained the case for Mālikī law in practice, in spite of the formulation of post-formative legal theory which represented the process differently,

²²⁷ Al-Ghazālī defines *qiyās al-shabah* as: “Bringing together the new case and the original case on the basis of a quality while admitting that the quality is not the ruling’s effective cause.” al-Ghazālī, *al-Mustasfā*, 2:142-143. He also states that it is a weaker form of evidence than *qiyās al-illah*. See: *al-Mustasfā*, 2:145.

²²⁸ Refer to al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, 361. He says: “The argument for giving preference to *qiyās* is that it concords with general axioms with respect to how it entails securing benefits and warding off harms, whereas the [individual-narrator] report that disagrees with it prevents this from being the case. Therefore, that which concords with the general axioms is given precedence over that which disagrees with them.” He also says: “The texts that form the basis for the *qiyās* are other than the text that the *qiyās* is given precedence over, so no contradiction ensues where derivative evidence is given precedence over its source, because [the contrary single-narrator ḥadīth] is not its source.”

²²⁹ Al-Qarāfī explains: “*Qiyās* is legal evidence, and so is the generality [of a text]. In the event they contradict one another, if they are both applied, two contradictories are brought together, and if both are neglected, the two contradictories are negated. If the general statement is given precedence over the specific evidence, this is impossible, because its evidentiary strength over the specific case is weaker than the evidentiary strength of the specific evidence, since a [general statement] can be made without intending the specific case, while that which is specific cannot be applied without intending its specific case, and that which is weaker is not given precedence over that which is stronger.” al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, 189.

so that most instances of *qiyās* found in Mālikī legal works are actually based on general axioms and not specific legal rulings.²³⁰

A. Comparing Judicial Authority to Political Leadership

This analogy makes an appearance in works of the three schools of law that prohibit women from being judges. It appears in the Mālikī works *Manāhij al-Taḥṣīl*, *Bidāyah al-Mujtahid*, and *al-Dhakhīrah*. It is also cited by al-Māwardī in *al-Hāwī al-Kabīr* for the Shāfi‘ī school, and by Ibn al-Qudāmah in *al-Mughnī* for the Ḥanbalī school, which are the earliest Shāfi‘ī and Ḥanbalī works in the survey. It then disappears from the surveyed works.

This *qiyās* is obvious enough. The ruling of being a judge is compared to that of being head of state because of the authority being exercised in both cases. Al-Rajrājī makes this connection explicit. He cites the ḥadīth of Abū Bakrah as the evidence for the original ruling, and then explains how the ruling is extended to being a judge because of the need to render judgments in both cases. Al-Māwardī explains its appropriateness as being due to the “deficiency of being female.”

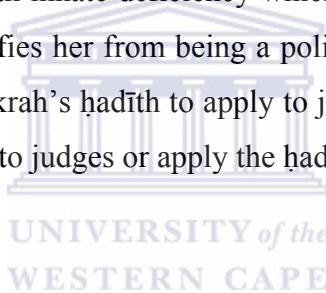
What is interesting, then, is that this *qiyās* is not taken up by any of the later texts of the Shāfi‘ī and Ḥanbalī schools, and ceases to be mentioned by the Mālikī school after al-Qarāfī. The reason for this seems to be a desire to cite the ḥadīth of Abū Bakrah as direct evidence to prohibit women from being judges. The ḥadīth is used this way by both al-Māwardī and Ibn al-Qudāmah as primary evidence. They only mention the *qiyās* much later on in their discussions as an extra piece of evidence. This exact pattern is exhibited by al-Qarāfī, the last Mālikī scholar to suggest this *qiyās*.

This presents a problem. The ḥadīth addresses political leadership. Consequently, if it is to be direct evidence against women being judges, it must first be direct evidence to prohibit political leadership. The argument from *qiyās* becomes redundant, because the same textual evidence is used to establish both the original and derived rulings.

²³⁰ Abd-Allah, “Malik’s Concept”, 124.

Jurist have to decide whether they want to apply the ḥadīth to both situations directly, or to use is to prohibit political leadership first and then extend the ruling to judicial authority by way of *qiyās*. They cannot have it both ways.²³¹ If the original ruling in the analogy had a different argument as its basis, then the *qiyās* could at least be seen as supporting evidence, reinforcing the ruling derived from the ḥadīth. However, later jurists in all three schools of law are consistent in citing the ḥadīth of Abū Bakrah to prohibit women from assuming political power as well as to prohibit them from being judges.²³² Their doing so explains the disappearance of the *qiyās* from their works.

The presence of this *qiyās* in the earlier works reveals the logic behind how jurists use Abū Bakrah's ḥadīth for judicial questions. The responsibilities of a head of state and those of being a judge are different, so how are the jurists linking the rulings together in their minds? This *qiyās*, as explained by al-Rajrājī and al-Māwardī, shows that they perceive the woman to have an innate deficiency which prevents her from exercising proper judgment and disqualifies her from being a political leader or a judge. This is how they understand Abū Bakrah's ḥadīth to apply to judicial authority, whether they use *qiyās* to extend the ruling to judges or apply the ḥadīth directly to the question.



B. Comparing Judicial Authority to Prayer

There are two isolated examples of this type of analogy in the surveyed works, both cited by the Mālikī jurist al-Qarāfī. The first is with reference to where a woman stands in prayer. The second refers to the ḥadīth about clapping for women.

In the first example, the original ruling is the prohibition of women standing with men in prayer, which al-Qarāfī compares to the question of women serving as judges. He mentions this analogy immediately after quoting “Send them to the back...” which he claims demonstrates “the utmost deficiency” of women. Al-Qarāfī is probably relying on this tradition as the textual basis for the original ruling. The effective cause

²³¹ Al-Āmidī writes in *al-Ihkām* 1:199: “The evidence indicating the ruling of the original case must not also indicate the ruling in the new case. Otherwise, there is no point in designating one of them as the original case and the other one as the new case, or the other way around.”

²³² Al-Māwardī does so as well. He does not address political leadership as a separate issue in *al-Ḥāwī al-Kabīr*. However, he discusses it in *al-Aḥkām al-Ṣulṭāniyyah* and cites the ḥadīth of Abū Bakrah as his sole textual evidence to prohibit women from assuming political leadership.

for the *qiyās* is the temptation that women pose for men.²³³ He claims that the prohibition involved is more appropriate for the courtroom than for prayer, since the risk of temptation is worse. However, when we turn to his separate discussion on prayer, we find him citing “Send them to the back...” again, but limiting his argument to the idea that the need to send her back prevents sending her to the front of the congregation to lead prayer. This implies a rationale based on formal ritual requirements that is not applicable to prohibiting her from being a judge. The rulings are incongruous and the analogy seems forced.

The Shāfi‘ī jurist al-Māwardī is possibly making the same analogy when he cites “Send them to the back...” in his discussion on judicial authority; however he simply tosses the alleged ḥadīth out there without any explanation. Since the text is apparently about where a woman is supposed to stand in prayer, it can be assumed he is implying some sort of *qiyās* is operating here, but we cannot be sure. This is another example of al-Māwardī’s strategy of suggesting all potential lines of evidence, no matter how unlikely.

It could be that the analogy both jurists draw from “Send them to the back...” is based on a broader idea of women’s subordination. In the Ḥanafī discussions about women leading prayer, we find al-Bābirtī and al-‘Aynī quoting Abū Zayd where he says that some scholars understand the phrase “whence God has sent them to the back” to express the effective cause of the command, and they understand this cause to be that God has sent women backwards “in giving testimony, how much they inherit, political leadership, and every other matter entailing authority.” These are Ḥanafī jurists, and they are not endorsing this interpretation, but simply mentioning it. It may not accurately represent al-Qarāfi’s and al-Māwardī’s use of it here. However, it does seem to accord well with al-Qarāfi’s assertion that it represents “the utmost deficiency” of women. Also, al-Māwardī enters into a discussion about “the deficiency of being female” immediately after citing “Send them to the back...”

In the second example of a *qiyās* comparing judicial authority to prayer, al-Qarāfi argues that a woman cannot be judge because she must speak in the presence of men,

²³³ The deeper implications of this will be explored in the next chapter on gender perceptions.

and that it is prohibited in the same way that her saying “Glory be to God” is forbidden when she notices the imam make a mistake in prayer. For this purpose, he cites the ḥadīth “If one of you finds [a mistake] in someone’s prayer, he should say ‘Glory be to God’. Saying ‘Glory be to God’ is for men and clapping hands is for women.”²³⁴ This requires that two things are understood from the ḥadīth: first, that the rationale of the ḥadīth is based on the woman’s voice being shameful; and second, that the ḥadīth directly prohibits her from saying “Glory be to God” out loud in prayer. Then, by way of analogy, he can apply this ruling of prohibition to the question of her being a judge, where she would also have to use her voice in public.

As to the first point, it is unclear from the ḥadīth why clapping is prescribed for women. There could be many reasons ventured for it. It does not itself constitute evidence that a woman’s voice is shameful. Rather, al-Qarāfi explains the ḥadīth in this way because the Mālikī school of law already accepts that a woman’s voice is shameful.²³⁵ It could be argued that this general precept, and not the ḥadīth itself, is what is operating in the *qiyās*.

However, it is not the Mālikī position to prohibit women from saying “Glory be to God” upon noticing a mistake from the imām. Instead, women are also supposed to glorify God.²³⁶ Al-Qarāfi states this ruling explicitly while discussing the conditions of prayer:²³⁷

²³⁴ This ḥadīth is authentic by the standards of all the jurists. Versions of it are found in *Ṣaḥīḥ al-Bukhārī* from Abū Hurayrah and Sahl b. Sa’d (1203, 1204) and in *Ṣaḥīḥ Muslim* from Abū Hurayrah (422). The wording cited by al-Qarāfi is found in the narration of Sahl b. Sa’d as narrated in *Musnad Ahmad* (22863).

²³⁵ Al-Qarāfi says, when defining what the shameful areas are for men and women: “The woman is shameful, because transgressions against faith and honour are expected from seeing her or hearing her speak. This being shameful does not mean anything ugly, for indeed the woman is beautiful, and people’s desires are drawn to her.” al-Qarāfi, Ahmad b. Idrīs, *al-Dhakhīrah*. (Tunis: Dār al-Gharb al-Islāmī, 2008) 2:101.

²³⁶ Ibn al-Qāsim says in *al-Mudawwanah*: “Mālik considered the opinion that women should clap to be a weak one, saying: ‘The ḥadīth of clapping has come to us, but so has what indicates its weakness, which is [the Prophet’s] saying: *If one of you finds [a mistake] in someone’s prayer, he should say ‘Glory be to God’.*’ He [Mālik] was of the view that saying ‘Glory be to God’ was for men and women alike.” Ibn Qāsim, ‘Abd al-Rahmān. *al-Mudawwanah al-Kubrā*. (Beirut: Dār al-Kutub al-‘Ilmiyyah, no date), 1:163. Refer also to *Mukhtaṣar Khalīl*: “Saying ‘Glory be to God’ is for men and women when necessary, and they [women] do not clap.” ‘Ulaysh explains in his commentary on Khalīl that the Prophet’s attribution of clapping to women “is to belittle [the practice of clapping], not to give them permission to do so. This is proven by their not acting upon it.” ‘Ulaysh, Muḥammad b. Aḥmad. *Minah al-Jalīl Sharḥ ‘alā Mukhtaṣar al-‘Allāmah al-Khalīl*. ed. ‘Abd al-Jalīl ‘Abd al-Salām. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2003), 1:208.

²³⁷ al-Qarāfi, *al-Dhakhīrah*, 2:146.

Al-Shāfi‘ī prefers [a woman] to clap, because of what is related in the two *Ṣaḥīḥs* that [the Prophet] said: “Saying ‘Glory be to God’ is for men and clapping hands is for women.” This is at variance with actual practice. Also, it is problematic in meaning, since glorifying God is appropriate for prayer while clapping is not.

It is not possible for any analogy to be made on either a text or a ruling that the school does not recognize or uphold in the first place. It is quite strange that al-Qarāfi brings up this argument. It should now have become clear that al-Qarāfi’s approach to presenting evidence in *al-Dhakhīrah* is similar to al-Māwardī’s approach in *al-Ḥāwī*.

Al-Qarāfi is explicitly representing the matter as an analogy of greater appropriateness (*qiyās awlā*). This is problematic. A woman can clap to call attention to a mistake in prayer, so there is no need for them to say “Glory be to God”. This is in stark contrast to a courtroom where there is always a need for women to stand forward and speak, since women have to give testimony, bring grievances and defend themselves. The differences between the two circumstances makes this *qiyās* not only superfluous, but unwieldy, not to mention directly opposed to the Mālikī school’s ruling that a woman says “Glory be to God” in prayer, a ruling which al-Qarāfi himself affirms.

What is more surprising in al-Qarāfi suggesting these two examples of *qiyās* is that he flatly rejects the possibility of *qiyās* between supreme political leadership and prayer in his magnum opus on legal theory, *Nafā’is al-Uṣūl*, where he writes:²³⁸

What does prayer have to do with political leadership? Indeed, there are heavy conditions imposed on political leadership that are not imposed on prayer leadership, and it is a matter of consensus (*ijmā’*) that *qiyās* is false whenever there are differences.

²³⁸ Aḥmad b. Idrīs Shihāb al-Dīn al-Qarāfi, *Nafā’is al-Uṣūl fī Sharḥ al-Maḥṣūl*. ed. Muḥammad ‘Abd al-Qādir ‘Atā. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2000), 3:441.

Here, al-Qarāfī is stating that there are unbridgeable differences between the nature of prayer leadership and political leadership, differences of such a degree that it becomes a matter of consensus that *qiyās* becomes inoperable between the two. This would apply just as well to *qiyās* between judicial authority and prayer leadership, since, as we have seen, al-Qarāfī makes a direct comparison between political leadership and judicial authority. This would make his attempt at *qiyās* here contradictory to his professed legal theory. One might argue that al-Qarāfī is only disagreeing with the possibility of a positive *qiyās* of political authority on prayer and not a negative one, since he says that the head of state has heavier conditions imposed upon him, and since the context of his statement is to refute the claim that Abū Bakr’s appointment as Caliph was indicated by his having been appointed to lead prayer. However, al-Qarāfī’s initial rhetorical question and his final mention of “differences” would rule out a *qiyās* in either direction.



C. Comparing Women to Sinners

This is also a case of comparing judicial authority to prayer, but it is more circumspect. In a complex manoeuvre, al-Māwardī first makes a negative comparison between the ruling of women leading prayer and that of sinners leading prayer. He argues that women are worse off, since (male) sinners can lead prayers but women cannot. He attributes the disparity between them to “the deficiency of being female”. It is implicit in the argument that the effective cause is deficiency in both cases – being a female and being a sinner – but the deficiency of being female is more severe. We can safely assume this because what al-Māwardī is ultimately getting at is a *qiyās awlā*, which appears in the next phase of his argument. He begins this second phase by asserting that sinners cannot be judges, presumably for the deficiency in their character, and then argues that this ruling is “more appropriate” for women, which means that the effective cause is more apparent in the derived ruling.

As a two-tiered *qiyās*, this reasoning is contrary to the way *qiyās* is supposed to be performed, which for Shāfi’ī scholars is clearly to take a ruling derived from a text for one situation and apply it to another situation by way of a shared effective cause. Here the presumed effective cause does not bring about the same ruling between women

and sinners in prayer, which violates the principle that sharing the effective cause is the basis for extending the ruling. He then tries to assert that this shared effective cause is the same for deriving a ruling about being a judge, but that since here it brings about a prohibition for sinners as well, it applies all the more forcefully to women. This *qiyās* collapses onto itself, since clearly the effective cause in prayer cannot be presumed to be the same for women and sinners, given that different rulings were produced.

This problem becomes clearer when we refer to al-Māwardī's discussion in *al-Hāwī* about appointing a sinner as a judge. There, he takes a completely different stance. He explains that the reason why a sinner cannot be a judge is because it violates the condition of being just and upright (*'adālah*), which is required for positions of authority and for giving testimony.²³⁹ He then defines this quality as entailing upright conduct, aloofness from licentious behaviour, honesty, and integrity. In other words, the person must be trustworthy in order to carry out these duties. This effective cause for prohibiting a sinner from judicial authority – a lack of *'adālah* – is not to be found in being a woman, since al-Māwardī accepts that a woman is capable of being a witness in certain circumstances if she possesses the quality of being just.²⁴⁰

Furthermore, al-Māwardī demonstrates that the need for a judge to be incorruptible and trustworthy explains why a sinner can lead prayer but cannot be a judge. He says: “His leading prayer is permitted, because it relates to a matter wherein [people have a] choice, and there is no binding necessity.”²⁴¹ Basically, people have a choice whether to follow the sinner in prayer; whereas in a court of law, the people would be legally bound by the sinful judge's verdicts, and would therefore be subjected to injustice. Since a woman leading prayer would also be a matter of choice for the followers, the effective cause for prohibiting a woman from leading prayer must be something else, something which might not necessarily be transferrable to the question of being a judge.

²³⁹ al-Māwardī, *al-Hāwī al-Kabīr*, 20:168.

²⁴⁰ This is presented in detail by al-Māwardī in *al-Hāwī al-Kabīr*, 21:5-40.

²⁴¹ al-Māwardī, *al-Hāwī al-Kabīr*, 20:169.

Admittedly, al-Māwardī could have presented his argument as a straightforward *qiyās* of women judges on sinful judges without even bringing up prayer, but then the implications of his doing so would have been starker: that being a woman is worse than committing sin. This assertion would bring him in direct contradiction with essential theological principles, let alone legal ones like her competence to give testimony. He tries to avoid this by directing attention to the ruling on prayer first, but his insistence on arguing for a *qiyās awlā* makes his underlying legal reasoning unavoidably clear.

D. Comparing a Woman Judge to a Blind Judge

Al-Māwardī compares a woman to a blind man to argue that judging in prescribed punishments is no different than judging in other cases. He is trying to refute the Ḥanafī position which differentiates between various types of cases, allowing women to preside over some but not others. Al-Māwardī is trying to oblige the Ḥanafīs to accept that it is impossible to make such a distinction. He brings up the example of a blind man, whose judgments are not enforceable in any type of case. This is a *qiyās* on the basis of a lack of substantive difference. In other words, he is arguing that there is no difference between a blind man and a woman that would bear on their aptitude to carry out the judge's duties.

Ḥanafīs could easily answer this by asserting that the reason a blind man's verdict cannot be accepted is that he is unable to see the litigants. Indeed, al-Māwardī cites this very reason in *al-Ḥāwī al-Kabīr* when he says a blind man cannot be a judge: "because he cannot distinguish between the plaintiff (*tālib*) and defendant (*maṭlūb*)."²⁴² Ironically, the terminology al-Māwardī uses here is specific to civil litigation, which justifies why Ḥanafī scholars would bar a blind man from presiding over civil cases as well as criminal ones. Since the problem of distinguishing the plaintiff and defendant is not present in being a woman, the effective cause is absent and the *qiyās* fails. Therefore, al-Māwardī cannot use this *qiyās* to prove his assertion that "where someone's judgement is not carried out in prescribed punishments, his judgement is also not carried out in other cases".

²⁴² al-Māwardī, *al-Ḥāwī al-Kabīr*, 20:166.

E. *Comparing a Woman Judge to a Slave*

This is suggested by Ibn Rushd as evidence for those who prohibit women from being judges. As is typically the case for him where the Mālikī school of law agree with other schools in the ruling, he does not specify which school of law the argument comes from, but we can assume that he finds the line of reasoning agreeable at least to Mālikī jurists. He identifies the effective cause of the ruling as the deficiency of the *ḥurmah* that exists in both cases. Ibn Rushd does not elaborate further. The most likely interpretation of this word would be “reverence” or “respect”. In this case, the argument would have to be that the woman, like a slave, does not command the respect required for her to carry out the duties of a judge. Another possibility, though less likely, would be that it refers to a deficiency in autonomy. In this case, a woman is being compared to a slave in that both have other masters, so to speak, which would impair the judge’s ability to pass impartial judgments. In this case, it would have to be understood with reference to the position of the father or other male guardian for a single woman or the husband for a married woman. The first possibility is the more likely interpretation, though in both cases, it is really the perception of a woman’s status in society that is being used as the effective cause.

F. *Comparing Judicial Authority to Testimony*

Now we turn to analogies used to permit women to serve as judges. The comparison between judging and giving testimony is the primary Ḥanafī argument in favour of this ruling.²⁴³

The crux of the Ḥanafī argument is authority, and their *qiyās* is very much dependent on how they conceive of authority. They argue that giving testimony entails the exercise of authority, and it is on the strength of the woman’s authority that her

²⁴³ This *qiyās* is also cited in the surveyed works by the Mālikī scholar al-Ḥaṭṭāb, but not to advocate the ruling itself. He uses it to speculate on the nature of Ibn al-Qāsim’s opinion. Ibn al-Qāsim was an early Mālikī scholar who may have held the view that women can be appointed judges categorically.

testimony is accepted in court. This authority derives necessarily from her legal capacity. Therefore, the same legal capacity that allows her to give testimony would permit her to exercise the authority to be a judge, provided she has sufficient knowledge.

The scholars of the other schools of thought do not conceive of authority in the same way. By contrast, they regard the lack of authority in women to be the basis for prohibiting them from all positions requiring the exercise of authority. They take pains to argue how giving testimony is either of a much lower level of authority, or that it does not constitute the exercise of authority at all.

Al-Qarāfi agrees the former. He acknowledges that being a witness entails an exercise of authority, but of a lower level. He attempts to demonstrate this by appealing to the question of her being a political leader. Since a just woman can be a witness and not a political leader, though a just man can be both, this establishes that the exercise of authority involved in being a witness is of a lower level. He also takes pains to argue that Umm Sulaym's appointment to supervise the markets is a case of "policing" and not like being a judge. Al-Qarāfi's argument by counter-analogy can easily be turned against him using the very same logic. It could be argued that being a political leader entails much greater authority than being a judge, so the two are not comparable. Further, it could be argued that arbitrating justice in the marketplace is closer in its exercise of authority to being a judge than it is to being head of state. Here, the argument breaks down into a purely subjective opinion as to how much authority is too much.

This reasoning is also implicit in Ibn Qudāmah's argument that being male is part of what provides full legal capacity. This implies that a woman's legal capacity is at best partial, so the legal authority she can exercise would be of a lesser degree. It seems that his declarations of the intellectual deficiency of women a little later on may be to some extent an explanation as to why only men have full legal capacity.

Ibn al-Humām takes it upon himself to answer this particular point. He first concedes woman's intellectual deficiency, but then argues that it is "relative and relational" and therefore cannot negate a woman's authority, since some women can have

superior intellectual abilities, even surpassing those of men. He also points out that giving testimony and managing trusts and legacies both entail the exercise of authority where intellectual ability is needed, but women can engage in these practices.

Al-Māwardī takes a different approach to refuting the Ḥanafī position. He does not compare the level of authority between the two matters, but denies that giving testimony entails the exercise of authority at all. He does not explain why this is the case. It would appear from how he uses the word authority (*wilāyah*), that he understands it to require a formal appointment, which being called as a witness does not entail. This argument has strength. It identifies a material difference between the original ruling and the derived ruling in a way that negates the existing of a unified effective cause. However, it would be possible for the Ḥanafīs to counter this argument by pointing out that a witness is summoned to appear in court and the witness's testimony can lead to a binding decision which the judge has to uphold.

Most of the surveyed Mālikī, Shāfi'ī and Ḥanbalī works do not try to rationalize how the authority present in giving verdicts is different from that of being a judge. They simply dismiss the Ḥanafī *qiyās* as contradicting the textual evidence of Abū Bakrah's ḥadīth. However, this is not sufficient to negate the Ḥanafī *qiyās*, which first identifies a case they all agree is not prohibited by the ḥadīth, and then argues that being a judge is comparable to that case.

G. Comparing Judicial Decisions to Issuing Legal Edicts

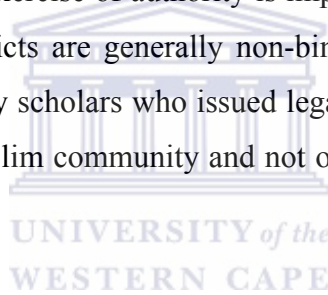
Al-Māwardī identifies this analogy as al-Ṭabarī's rationale for allowing women to be judges in all cases. Ibn Qudamah does so as well. Its attribution to al-Ṭabarī has more authority coming from al-Māwardī, a Shāfi'ī, as discussed in the previous section on consensus. This analogy is also mentioned by al-Qarāfi without attributing it to anyone.

Though we do not have an elaboration on this *qiyās* in these sources, it is clear that the resultant ruling would be broader in scope than that of the Ḥanafī *qiyās* on giving

testimony. All four schools of law agree that a woman's capacity to issue legal edicts is not restricted to any particular branches of law. She can express her opinions on any subject that she has the requisite knowledge to address. If her authority to be a judge is derived from a comparison to her authority to issue legal edicts, then that authority would indeed be unrestricted.

Al-Qarāfī argues against this *qiyās* by positing that knowing about something does not give a person the ability to assume a leadership role in that matter. He cites prayer as an example of this. He is not making a counter-analogy on prayer here. Rather, he is arguing that issuing legal edicts is wholly dependent on having the requisite knowledge, and has nothing to do with one's ability or capacity to exercise authority.

Al-Māwardī provides the same argument that he uses to refute the Ḥanafī *qiyās* on testimony, basically that no exercise of authority is implicated. His argument is much stronger here, since legal edicts are generally non-binding upon those who receive them. Also, historically, many scholars who issued legal edicts did so on the strength of their reputation in the Muslim community and not on the basis of being appointed as a muftī by the state.



H. Comparing Prayer Leadership to Political Leadership

We have already seen three examples of *qiyās* which compare being a judge to various aspects of prayer in order to disinvest women of judicial authority. In those examples, attempts were made to transfer a ruling established for prayer to the question of being a judge. The difficulties of making such comparisons were quite clear. Now we come to the reverse line of reasoning. Here we have the ruling of political leadership being transferred to prayer leadership.

This argument is cited by the Mālikī scholars al-Māzirī and al-Rajrājī, who both explicitly assert that they are engaging in *qiyās*. It can also be seen implicitly in al-Nafrāwī's use of the ḥadīth of Abū Bakrah to prohibit prayer leadership. Al-Māzirī attributes this *qiyās* to earlier Mālikī scholars. The original ruling is the prohibition of a woman assuming political leadership which al-Rajrājī claims is based on *ijmā'*. Al-

Rajrājī identifies the effective cause as the woman being undeserving of “a position of honour and a lofty station” due to her deficiency as a human being. He is therefore asserting that both political leadership and prayer leadership share in being lofty positions that require someone who is “complete in religion and essence.” He cites the ḥadīth about women being deficient in intellect and religion as proof for the effective cause, not as proof for the ruling itself, so he avoids committing the violation of using this text as direct evidence for the original and derivative rulings. Al-Māziri seems to be saying the same thing, as evidenced by his first rejecting a positive comparison between a woman and a slave because “the deficiency of being female is more certain and more severe”, and then paraphrasing the ḥadīth.

The problem here is that the ḥadīth does not provide full proof for the effective cause. They may be able to use it to argue for a woman’s deficiency and ineligibility to assume a “lofty station”, but it is unclear how the station of prayer is comparable to that of political authority in the nature of its loftiness and honour to warrant such a comparison. Perhaps, al-Rajrājī is trying to resolve this problem by invoking the “principle that everyone who is characterized by deficiency and lowliness has no share in positions of high status”, and making it a *qiyās* on a general precept. Yet, it still remains for him to assert how these two positions can be compared in the first place.

Al-Rajrājī then cites the ḥadīth of Abū Bakrah as a separate piece of evidence to prohibit prayer leadership. His use of this ḥadīth tells us that the similarity between the two leadership positions, at least for him, has to do with the exercise of authority in both cases. This leaves the question unanswered as to how he understands the spiritual authority in leading prayer to be comparable to the political responsibilities of a head of state, so that the woman’s deficiency to assume political authority can be transferred to prayer leadership where the responsibilities are quite different both in nature and scale. This is precisely the issue al-Qarāfi was objecting to when he made the statement quoted above.²⁴⁴ It is telling that al-Qarāfi does not follow them in

²⁴⁴ This is his statement in *Nafā’is al-Uṣūl*, 3:441: “What does prayer have to do with political leadership? Indeed, there are heavy conditions imposed on political leadership that are not imposed on prayer leadership, and it is a matter of consensus (*ijmā’*) that *qiyās* is false whenever there are differences.”

suggesting this *qiyās*, and somewhat ironic that he attempts virtually the opposite by applying the ruling of prayer to that of being a judge.

The later Mālikī jurist al-Nafrāwī also refers the matter back to the general precept. He quotes the ḥadīth of Abū Bakrah, then says: “This is the case even if men are absent, since leadership in prayer is a position of honour in religion and in the rites of the Muslims.” This makes it clear how the *qiyās* cited above is operating on general precepts, since this is the only way that al-Nafrāwī can enlist Abū Bakrah’s ḥadīth for prayer leadership. Of course, this reasoning only holds if women are presumed categorically and universally unworthy of “positions of honour”.

I. Comparing Clapping vs. Speaking to Leading Prayer

Al-Māwardī argues that the woman is a shameful being, and the reason why clapping was prescribed for her was to avoid her voice tempting men, and that this applies to her leading prayers as well. Casting this as an analogy presents a lot of difficulties. The first of these regards the original ruling of clapping. In Shāfi‘ī Law, as al-Māwardī states elsewhere in *al-Hāwī*, it is permissible for women to say “Glory be to God” instead of clapping, just like it is permissible for men to clap. It does not nullify their prayers and does not require a prostration of forgetfulness.²⁴⁵ It is just a Sunnah for them to do the specified act. The logic behind this is given by al-Shirāzī in *al-Muhadhdhdab* that these two acts are prescribed when the imām makes a mistake and so both fall under what is commanded in that circumstance.²⁴⁶ Therefore, it is not possible to take a ruling of doing what is less than preferred, which is weaker even than a ruling of dislike, and derive for something else a ruling of prohibition. However, al-Māwardī seems to be saying that identical rulings are in operation in both cases when he asserts: “The same applies to following her in prayer.”

²⁴⁵ al-Māwardī, *al-Hāwī al-Kabīr*, 2:164. He also says after enumerating the various ways in which a woman’s prayer is different from a man’s prayer: “If she violates these forms and follows what is for men, she is doing wrong, but her prayer is valid. As for what nullifies the prayer or requires a prostration of forgetfulness, they are the same for men and women, with no difference between them in any of these matters.” *al-Hāwī al-Kabīr*, 2:163

²⁴⁶ al-Nawawī, *al-Majmū‘*, 5:130-132.

Turning to the effective cause, al-Māwardī's identifies it as the woman being shameful in her entirety. This is problematic for a couple of reasons. First, it is not the Shāfi'ī position that a woman in her entirety, including her voice, is shameful. Al-Māwardī himself defends the Shāfi'ī position that the woman's whole body is not shameful, but that her face and hands can be shown, both in prayer²⁴⁷, and in the presence of men.²⁴⁸ He clearly states that the woman's maximum shameful area (*al-'awrah al-kubrā*) is what must be concealed in prayer and in the presence of unrelated men, and this maximum area is the body apart from the hands and face.²⁴⁹

Even assuming the ḥadīth's legal significance is exactly as al-Māwardī presents it, with a ruling of prohibition and the woman's voice being shameful, the successful application of this juristic analogy would result in contradicting two other rulings in Shāfi'ī Law. The first is that of women leading other women in prayer. There is nothing in the ḥadīth to indicate that the ruling of clapping instead of speaking applies only when the women are praying in a congregation with men. The ruling is taken as being general for all prayers, whether men are present or not.²⁵⁰ Consequently, when the prohibition is carried over to prayer leadership, it follows that it would be prohibited for women to lead all prayers. It would not be possible to assert that the original ruling is general for all prayers and then argue that since the effective cause is the woman's voice being shameful, the analogy only applies to woman leading men in mixed congregations. This would violate a condition of a valid analogy, which is that the effective cause must result in the same ruling in both cases. Here the original ruling is that women should clap in all prayers, whether men are present or not, but the effective cause is used to prohibit women only from leading men in prayer.

Even if it were to be granted that the original ruling only prohibits a woman to say "Glory be to God" when men are present,²⁵¹ and does not apply to congregations of women, it would still contradict another ruling in Shāfi'ī Law, which is that the

²⁴⁷ al-Māwardī, *al-Ḥāwī al-Kabīr*, 2:167. See also: 'Abd al-Malik al-Juwaynī, *Nihāyah al-Maṭlab fī Dirāyah al-Madhhab*. ed. 'Abd al-'Azīm Maḥmūd al-Dīb. (Jeddah: Dār al-Minhāj, 2007), 2:190.

²⁴⁸ al-Māwardī, *al-Ḥāwī al-Kabīr*, 11:39. See also: al-Juwaynī, *Nihāyah al-Maṭlab*, 12:31.

²⁴⁹ al-Māwardī, *al-Ḥāwī al-Kabīr*, 2:170.

²⁵⁰ Aḥmad b. Ḥamzah al-Ramlī, *Nihāyah al-Muḥtāj fī Sharḥ al-Minhāj*. ed. Muḥammad 'Alī Baydūn. (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003), 2:48.

²⁵¹ This opinion is, in fact, attributed to the Shāfi'ī scholar badr al-Dīn al-Zarkashī in *Nihāyah al-Muḥtāj* 2:48.

woman imām's prayer is valid while the prayers of the men who follow her are invalid. Since the prohibition of saying "Glory be to God" is directed at the women in the original ruling, it must be directed at the woman herself in the new ruling and require her prayer to be invalid, with the prayer of the followers being invalidated only secondarily. This is an unavoidable consequence of this analogy. It cannot invalidate their prayers and not hers.

All of these problems explain why this *qiyās* is not taken up by other Shāfi'ī jurists. It can therefore be attributed to al-Māwardī's approach in *al-Ḥawā* of mentioning all possible lines of evidence for a particular ruling, even if it is incompatible with Shāfi'ī legal theory and violates other legal rulings of the school, and even if it contradicts his own statements elsewhere in *al-Ḥawā*.

J. Comparing Women to the Insane

The woman is compared to an insane person on the basis that neither can give the call to prayer. Consequently, since an insane person cannot lead the prayer, this ruling should apply to her as well. This *qiyās* is an analogy of resemblance (*qiyās al-shabah*), and it is first argued by Ibn Qudāmah. He is followed in this by all but one of the later Ḥanbalī works in the survey.

Ibn Qudāmah elaborates on the nature of the resemblance in *al-Mughnī* while discussing the call to prayer. He states that an insane person does not have the legal capacity to engage in acts of worship. He then says that a woman is not among those sanctioned (*laysat mimman yushra' lahu*) to give the call to prayer.²⁵² In this way she resembles an insane person with respect to the call for prayer. He does not give any reason at this point why the call to prayer is not sanctioned for women. There are, of course, many matters that are not sanctioned for the insane, including other aspects of worship, commercial dealings, being witnesses and contracting marriages. However, we do not find Ibn Qudāmah arguing that where a woman is also restricted in some of these matters, she is like an insane person so that other somewhat related rulings

²⁵² Ibn Qudāmah, *al-Mughnī*, 3:68.

which are applied to an insane person can be applied to her as well. Why, then is he arguing this here?

The three later works that reiterate this *qiyās* in their discussions on prayer leadership provide little to help in answering this question. When we turn to their discussions on giving the call to prayer, we find nothing resembling Ibn Qudāmah's discussion. Ibn Mufliḥ in *al-Mubdi'* gives reasons why a woman should not give the call to prayer, citing a ḥadīth to that effect and arguing that it entails here raising her voice, but he does not provide the comparison with the insane person or hint at any reason why her ruling of not giving the call for prayer should be compared to an insane person's.²⁵³ Al-Bahūtī favours the view that the call for prayer is disliked for women if they do not raise their voices and prohibited if they raise them in the presence of male non-relatives.²⁵⁴ Al-Ruhaybānī also favours the ruling that it is disliked, but argues that this is because it is "the occupation of men, and therefore implies their imitating men."²⁵⁵

In spite of their varying arguments and opinions on women calling to prayer, none of them bring up the idea advanced by Ibn Qudāmah that she resembles an insane person in not having the call to prayer sanctioned for her. Nevertheless, all three of them, while discussing prayer leadership, repeat Ibn Qudāmah's statement almost verbatim, that she should not lead prayer due to her resemblance to the insane man in this way. It seems they are merely reiterating the *qiyās* argument of their predecessor without subscribing to the rationale behind it.

It is interesting that al-Zarkashī does not cite this *qiyās*, though he comes soon after Ibn Qudāmah. This might be due to his greater openness to the opinions of the earlier Ḥanbalī scholars who allowed women to lead men in certain voluntary prayers. He is the only one not to openly state his disagreement with that earlier opinion. Of course, accepting the *qiyās* of the woman on the insane man requires adopting Ibn Qudāmah's stance that a woman should never lead men under any circumstances. Indeed, Ibn Qudāmah introduces the *qiyās* specifically to achieve this purpose.

²⁵³ Ibn Mufliḥ, *al-Mubdi'*, 1:274.

²⁵⁴ al-Bahūtī, *Kashshāf al-Qinā'*, 1:322.

²⁵⁵ al-Ruhaybānī, *Matālib Ūlī al-Nuhā*, 1:208.

Yet, even for Ibn Qudāmah, this *qiyās* proves problematic. In a complete reversal, he rejects an almost identical analogy when discussing the question of women leading other women in prayer. He attributes to Mālik the argument that a woman cannot lead any prayer because she cannot make the call for it. He then dismisses this argument by saying it is only disliked for women to make the call to prayer since it entails their raising their voices, and women are not meant to do that. He then brings another *qiyās* of resemblance as a counter-argument where he asserts that women actually resemble (sane) men because prayer is equally incumbent upon them, so likewise their all-female congregations are equally allowed. This is an effective way to refute a *qiyās* of resemblance, which depends on establishing the closest resemblance. Here, he is claiming that women resemble legally accountable men more than insane men with respect to prayer, consequently invalidating the *qiyās* he himself advocated a little earlier.

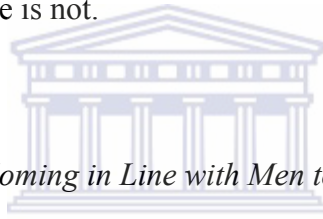


K. *Comparing Women to Slaves*

Al-Māwardī identifies this as Abū Thawr's argument for permitting women to lead men in prayer.²⁵⁶ He claims that Abū Thawr regards the slave as being more deficient than a woman, and since a slave can lead free men in prayer, a woman can do so as well. He says that Abū Thawr believes a slave is more deficient than a woman since a slave can be killed in retribution for murdering a free woman whereas a free woman cannot be killed in retribution for murdering a slave. The Mālikī jurist al-Māziri also identifies this *qiyās* as the argument for those who permit women to lead men in prayer, though he does not attribute it to anyone in particular, and does not suggest a rationale for it.

²⁵⁶ He also attributes to Abū Thawr another argument by *qiyās* in support of women leading men in prayer. This is to compare prayer followers to prayer leaders in that the capacity to follow is the same as the capacity to lead. I have not addressed this instance of *qiyās* above, because there is obviously something missing in the argument quoted by al-Māwardī, since this *qiyās* as he describes it has a number of extremely unreasonable consequences. For instance, it would mean that people who possess insufficient knowledge of how to perform prayers would be allowed to lead, since they are allowed to follow others.

A possible rebuttal to this *qiyās* would be that killing a slave is akin to destroying property and the owner's loss is purely financial, whereas the surviving family members' right to justice in the event their kinsperson is murdered is not financial in nature. This makes the difference in the ruling independent of questions of deficiency and human worth, but rather a matter of the affect the murder has on the surviving claimants. However, neither al-Māwardī nor al-Māzirī choose to invoke this argument. Instead, they choose to show that a woman is more deficient than a slave. They give different reasons why. Al-Māwardī says it is because the slave can become free whereas a woman will always be a woman, and also that a male slave does not cause temptation with his voice. Interestingly, this echoes al-Māwardī's argument above regarding a sinner. Though he does not state it explicitly there, it can be noted that a male sinner can repent and cease being a sinner. Al-Māzirī says that the woman is more deficient than a slave because she is attributed with being deficient in intellect and religion while a male slave is not.



L. Comparing Women Coming in Line with Men to Women Leading Prayer

The comparison between the two rulings is introduced by the Ḥanafī jurist al-Marghīnānī in the *Hidāyah* while discussing why a woman nullifies a man's prayer by coming in line with him. It is consequently discussed in the commentaries on the *Hidāyah* by al-Bābirtī, al-ʿAynī and Ibn al-Humām. Al-ʿAynī only mentions the comparison in passing, while al-Bābirtī and Ibn al-Humām present it as a formal *qiyās* and discuss it at length. It appears that al-ʿAynī neglects it because it depends on establishing the original ruling by way of *ijmāʿ*, which he rightly dismisses.

Al-Zaylaʿī presents the comparison formally as a *qiyās* in *Tabyīn al-Ḥaqāʾiq*, which provides the first detailed discussion for it in the surveyed works. The ruling that a man's prayer is nullified when she comes in line with him is the one he is trying to prove by way of *qiyās*. The ruling that the woman cannot lead men in prayer is the original ruling in this case, which he claims is established by *ijmāʿ*.

Al-Zaylaʿī identifies four possible candidates for the original ruling's effective cause. They are: [1] the inherent deficiency of the woman, [2] her being categorically

unqualified to lead prayer, [3] a condition of prayer being unfulfilled, or [4] the obligation of sending her back. He summarily dismisses the first three candidates. Al-Bābirtī and Ibn al-Humām take this argument further and attempt to demonstrate by way of induction that these four candidates for the effective cause are the only ones possible, and then rule out the first three of them.²⁵⁷ This is the formal means of identifying the effective cause known as analysis and partition (*al-sabr wa al-taqṣīm*). They bring up all the possible reasons they can think of for why a woman would not be allowed to lead men in prayer and then systematically eliminate them one by one until they are left with only the strongest possibility.

They eliminate the first by citing that it is valid to follow a sinner or a slave in prayer. They eliminate the second because a woman's prayer is valid if she follows another woman in prayer. They dismiss the third because a woman can fulfill all the conditions to lead a valid prayer (apart from the condition of being male, which is the point of contention). This leaves the fourth, which is abandoning the compulsory place (in other words, the obligation of her being in the back). In this way, they arrive at the very same effective cause that is deduced from "Send them to the back..." without having to resort to the ḥadīth itself.

It is critical for them to assert *ijmā'* to establish that she cannot lead men in prayer, because they need to avoid the problem of using the same text for the original ruling and the derived ruling. Moreover, *ijmā'* provides a stronger basis for the *qiyās*, and it is no accident that both the claim of *ijmā'* and the *qiyās* come at the time when "Send them to the back..." starts being challenged as suitable textual evidence.

The stakes are higher for Ibn al-Humām, since he dismisses the narration's legal validity altogether. Nevertheless, he admits this *qiyās* is only a possible line of evidence, acknowledging that this type of *qiyās* – where the original ruling is based on *ijmā'* and the effective cause has to be deduced – is not accepted by most Ḥanafī scholars, and even if it were accepted, it is not enough to establish that only the man's

²⁵⁷ Sadeghi points out that these are not the only possible candidates for the effective cause. He suggests two other possibilities: one being that it puts women in a position of authority over men and the other being the conspicuousness of the female leader who would have to stand apart from the rest of the congregation. Sadeghi, *Logic*, 71. Sadeghi is demonstrating that other candidates for the effective cause may be conceived of; he is not suggesting that these two candidates are particularly viable.

prayer is nullified by her coming in line with him and not the woman's. Even though the effective cause for the *qiyās* is the necessity of women being behind the men, they cannot show this to be a command directed at men to the exclusion of women.

The weakest aspect of this *qiyās* is, of course, how they establish the original ruling that women cannot lead men in prayer. By their own admission, the sole basis of this ruling is *ijmā'*, but it is an *ijmā'* that does not exist. The early Ḥanbalī view that permits a woman to lead men in certain voluntary prayers is sufficient to disprove the consensus they need for their argument.

M. *Comparing Women to Naked Men*

Women praying together in congregation are compared to naked men praying in congregation. This is suggested by Ḥanbalī and Ḥanafī jurists, but for different reasons. The Ḥanabali jurists ibn Qudāmah and Ibn Mufliḥ use it to argue that it is preferable for the woman imām to pray in line with the other women and not stand ahead of them. It is not an important piece of evidence for them, since they can cite the practice of 'Ā'ishah, though Ibn Qudāmah does not do so.

Ḥanafī scholars bring a different *qiyās* of the woman's congregation on the congregation of naked men to apply the ruling that it is disliked for women to pray in congregation, just like it is disliked for naked men to do so. The difference between the Ḥanbalī and Ḥanafī uses of *qiyās* is significant. The Ḥanbalī scholars seek to derive the ruling of where the woman imām stands by comparing this to the ruling of where a naked man stands. For the Ḥanafī argument, it is essential that the ruling of where the imām stands is already established in both cases, and has the same effective cause in both cases. They wish to use the similarity between the two rulings to take the additional ruling that the congregation of naked men is disliked or even prohibited and apply it likewise to the women's congregation.

The *qiyās* argument develops in the literature. In the early Ḥanafī works, the similarity in the ruling for congregations of women and those of naked men is presented more as a descriptive comparison. The effective cause they give for the why

the naked male imām should stand in the row of men is that the other men’s gaze should not fall on his shameful areas. This specific situation would not apply to a congregation of clothed women, since the women followers can look at their imām without any problem.

Al-Marghīnānī ties the comparison with naked men to the ruling of dislike for women’s congregations, bringing the dynamic of *qiyās* to the comparison. Al-Zayla‘ī elaborates on this *qiyās* to justify why the congregational prayer of women is disliked. The original ruling is that the congregation of naked men is disliked, and the effective cause is that it “necessitates one of two forbidden things”. The first of these is that the followers must avert their eyes from the imām if he stands ahead, but they are obliged to look at him and follow him. The alternative is for him to stand in their midst to shield them from seeing his shameful areas, but this is the wrong place for the imām.²⁵⁸ This effective cause of “necessitat[ing] one of two forbidden things” is also found in the case of women-only congregations. For the women, however, the problem is either increased exposure to outsiders by her standing forward or her standing in their midst to minimise that exposure. In other words, both cases share in presenting a dilemma, though the specifics of the problem are different in each case.

Since the problem for women is the need for concealment from men, he bolsters this argument by mentioning two other rulings that show concealment to be required for women in prayer, the first being that they are encouraged to pray at home, and the second being that they prostrate in a different manner than men to be less exposed.

Ibn al-Nujaym in *al-Baḥr al-Rā‘iq* states explicitly that the woman’s congregation is disliked as prohibited on the strength of this *qiyās*, but concedes that the degree of prohibition is greater for naked men. Interestingly, when Ibn ‘Ābidīn mentions the comparison, he does not really discuss the *qiyās*, but merely comments on the ways in which the comparison does not apply.

²⁵⁸ Al-Kāsānī describes this dilemma as follows: “[The follower] is commanded to look at a particular point for each circumstance [in prayer], so that the gaze will have a share in carrying out the acts of worship, just like the other limbs of the body. By averting his gaze, that aspect gets lost. This shows us there is no way for them to realize a congregation except by perpetrating something disliked; therefore, congregation is waived for them.” Abū Bakr b. Mas‘ūd al-Kāsānī, *Badā‘i’ al-Ṣanā‘i’ fī Tartīb al-Sharā‘i’*. ed. Muḥammad Adnān Yāsīn Darwīsh. (Beirut: Mu’assasah al-Tārīkh al-‘Arabī, 2000), 1:354.

The refutation of this *qiyās* is carried out by al-‘Aynī and Ibn al-Humām who disagree with the mainstream Ḥanafī ruling that it is disliked for women to pray in their own congregations. Al-‘Aynī points out that, though there are numerous similarities between the two situations, Ḥanafī scholars are inconsistent about which similarity matters, and even which situation is being compared to which. Moreover, the woman imām’s standing in line is an emulation of the Sunnah, and should not be regarded as a prohibited act itself.

Ibn al-Humām identifies the only possible reason why the naked imām should stand in the line with the other worshippers is due to increased exposure of his nakedness to those following him. He then argues that this is nowhere apparent for women who are covered from head to toe. Finally, he asserts that the reason why the woman imām prays in the line with the other worshippers is due only to the ḥadīth of ‘Ā’ishah, and that the effective cause for her doing so cannot be determined. Consequently, there is no dilemma present in the women’s congregation. The known effective cause in the former case is clearly not present in fully clothed women praying among themselves, nor can any dilemma be shown in the case of the woman imām praying in line with the worshippers. The superficial resemblance between the two cases in their performance does not mean that other rulings – like the congregation being disliked or prohibited – can be transferred from the congregation of naked men to the congregation of women.

N. *Summary*

Only a few arguments from *qiyās* represent main lines of evidence for their schools of thought, and only one of these is used to completely divest women of a leadership role. This one instance is the Ḥanbalī *qiyās* of comparing women to the insane, which nevertheless seems for the later scholars who take it up to be a mere reiteration of Ibn Qudāmah’s argument without their having any real commitment to it. Moreover, Ibn Qudāmah himself seems to dismiss this *qiyās* elsewhere in *al-Mughnī*.

The other two consistent uses of *qiyās* pertaining to female leadership appear in the Ḥanafī school, the first to prove that a woman can be a judge by comparing it to her

being a witness, and the second to argue why it is disliked for women to lead all-female congregations.

Most of the other instances of *qiyās* used to prohibit women from various leadership positions are suggested by only one or two scholars, usually with an isolated instance in the early literature of a particular school of law. Some of these are mentioned by al-Māwardī alone, while the Mālikī scholars al-Qarāfī and al-Rajrājī suggest one or two more. These constitute the bulk of the examples of *qiyās* discussed above, and are usually given as brief suggestions which their proponents do not elaborate on, and which we have seen are often contradictory to their school's own rulings and inoperable in practice. Due to the weakness of these examples, it seems likely that they are not being cited in earnest, which would explain the offhanded manner in which they are presented.

Analogy, therefore, cannot explain the presence of the rulings which divest women of leadership positions. Except for the consistently invoked but elusive Ḥanbalī analogy of women on the insane for prohibiting prayer leadership, its use in the literature is sporadic and not taken up by later works within the schools of thought where it makes its rare early appearance.

Yet, an interesting pattern can be discerned in the Mālikī use of *qiyās*. In spite of the fact that in nearly all cases, the Mālikī works present their instances of *qiyās* as being based on another established ruling which is in turn supported by specific textual evidence, closer analysis shows that this reasoning quickly breaks down, and the *qiyās* becomes more coherent if it is understood in light of general precepts. In al-Qarāfī's two instances of *qiyās* disallowing women judges, on the basis that they pray in the back and clap in prayer, the first is derived from the general deficiency of women and the general need to prevent temptation, while the second invokes the principle that her voice is shameful. Ibn Rushd's comparison of a woman to a slave for judicial purposes also seems to be more akin to the general notion of a woman's deficiency and her status in society. The *qiyās* attempted by al-Māziri and al-Rajrājī to prevent women from leading prayer based on their not being qualified for political leadership works best when understood in the context of the "principle that everyone who is

characterized by deficiency and lowliness has no share in positions of high status”, which is explicitly stated in this context by al-Rajrājī.

This supports the observation made by Umar Abd-Allah that most cases of Mālikī *qiyās* are, in actual practice, based on general precepts instead of specific established rulings. It must also be observed that the precepts identified for each of these examples are value judgments about women, so they will be taken up again in the next chapter.

V. ḤANAFĪ JURISTIC PREFERENCE (ISTIḤSĀN)

Juristic preference, or *istiḥsān*, is cited in the Ḥanafī works with reference to the question of women coming in line with men in prayer. The Ḥanafī conception²⁵⁹ of *istiḥsān* is essentially to abandon an obvious analogy on account of other evidence, which is usually a less obvious analogy, due to considerations that show the other evidence to be stronger.²⁶⁰

The Ḥanafī ruling is that a woman coming in line with a man while following the same imām in congregational prayer nullifies the man’s prayer but not hers. This ruling is at variance with *qiyās*, which is that the man’s prayer would not be nullified. Al-Kāsānī discusses in detail why this is the case. He demonstrates that if nullification of the man’s prayer would come about due to the woman’s lowliness, then lowlier creatures – he cites the dog and pig – would also nullify his prayer, which they do not. He also argues that if the question was one of temptation, then the mere presence of the woman would cause the nullification of his prayer, even if she is not following the imām in congregation, and this is clearly not the case. Moreover, as most of the Ḥanafī jurists point out, if his prayer is nullified for a certain reason, hers should be as

²⁵⁹ *Istiḥsān*, conceived differently, is also a source of law in the Mālikī and Ḥanbalī schools of law. This will be elaborated upon in the following section.

²⁶⁰ Al-Sarakhsī says: “It is evidence that goes against an obvious *qiyās* that comes immediately to mind before careful consideration, but after undertaking careful consideration of the new development’s ruling and the original cases it resembles, it becomes clear that the evidence that goes against [the obvious *qiyās*] is stronger and must be acted upon.” al-Sarakhsī, *Uṣūl*, 2:190.

well according to *qiyās*, but this is also not the case here.²⁶¹ Therefore, analogical reasoning consistently points to the conclusion that the man's prayer should remain valid.

The Ḥanafī jurists explicitly state that the nullification of the man's prayer is a ruling established by *istiḥsān*. This *istiḥsān* is supported by the statement "Send them to the back, whence God has sent them to the back." This ḥadīth is essential for their argument, which hinges on the fact that it is a command addressed to the men, so the presence of the woman in line with a man is a case where the man and only the man has failed to carry out his obligation, which he can realise by moving forward. This allows the Ḥanafī scholars to apply another, less evident analogy to the matter, that of a worshipper moving ahead of the imām. The statement "Send them to the back..." is the basis for giving preference to this less obvious analogy over the more direct one.

Al-Kāsānī identifies a second problem with respect to this ruling, requiring an additional use of *istiḥsān*. This is the ruling's applicability to cases involving preadolescent girls. He concedes that, according to *qiyās*, her praying alongside a man in congregation would have no affect on his prayer, since she is merely going through the motions. She has not yet attained legal accountability, so her prayer is not a legally accountable act. He then refers to the ruling that she is to be commanded to pray and beaten for not doing so, and therefore "made to share in the essence of prayer". This is a more tenuous rationale than that of legal accountability, but it is adopted by way of *istiḥsān*.

Of course, the most problematic aspect of the entire argument is its utter dependence on the idea that the Prophet specifically commanded men to send the women to the back. This is why only the prayers of the men are nullified and their situation can be compared to their moving ahead of the imām. The text which provides this command

²⁶¹ It is interesting to note that the Zāhirī jurist Ibn Ḥazm agrees that a woman coming in line with a man nullifies his prayer. Ibn Ḥazm offers essentially the same rationale for it, that the woman "transgresses the place that she was commanded to stay and prayed in a place other than where she was commanded." Ibn Ḥazm, *al-Muḥallā*, 410. For him, however, the woman has also violated the command, so her prayer is negated. Since he applies the ruling to the woman as well, he does not need to take recourse to *istiḥsān*, which is a form of legal reasoning his literalist school of thought categorically rejects.

is not a prophetic ḥadīth, but instead a comment that Ibn Mas‘ūd made about a story of the Israelites.

Ibn al-Humām acknowledges this fact and attempts unsuccessfully to salvage the *istiḥsān* without reference to “Send them to the back”. He cites the ḥadīth of Anas and his grandmother, but as we have seen, his argument falls short because no command can be discerned from it that would be directed to the men and not to the women. Ibn al-Humām is aware of this weakness, and admits this ḥadīth is only possible evidence.

Likewise, al-Zayla‘ī, al-Bābirtī and Ibn al-Humām suggest a *qiyās* of women coming in line with a man on the ruling that woman cannot lead men in prayer. This argument, which we have already presented, is extremely complex, and arrives at the effective cause that the woman has abandoned her proper place. However it also fails to support the *istiḥsān*, because it cannot assert a command directed at the men to the exclusion of the women. Also, the argument depends on a claim of *ijmā‘* to prohibit women from leading men in prayer, which is unsustainable in light of the well-known disagreement that exists on the matter.

Barring the weakness of the textual evidence underlying this application of *istiḥsān*, it is otherwise an eloquent argument. However, its complexity – involving two separate applications of *istiḥsān* to realise the ruling’s full legal implications – as well as the unsatisfactory evidentiary basis for it, points to the idea that the argument is specifically constructed to defend the particular ruling of the Ḥanafī school, and is not the true basis for the ruling itself.

VI. PRACTICE OF THE PEOPLE OF MADINAH (‘AMAL AHL AL-MADĪNAH)

This is a uniquely Mālikī source of law. According to Abd-Allah, in its original conception it was a non-textual source of law of fundamental importance to the structure of Mālikī legal reasoning; the overarching authoritative source Mālik referred to for interpreting, evaluating, and applying the textual sources he subscribe

to.²⁶² The acceptance and rejection of individual-narrator ḥadīth was carried out with reference to Madinite practice. It was also the basis for the general precepts upon which *qiyās* was carried out, as well as the other recognised sources of Mālikī legal reasoning that will be discussed in the next section, namely *al-istiḥsān*, *sadd al-dharā'i*, and *al-maṣlahah al-mursalah*, which functioned to make exceptions to the precepts established by Madinite practice or to give preference of one Madinite practice over another.²⁶³

In the works of Mālikī legal theory, this source of law is perceived differently. It is still given precedence to individual-narrator ḥadīth; however, it is presented as a sub-category of *ijmā'*. The question becomes one of giving precedence to the unanimous legal verdicts and practices of the people of Madinah when the verdicts and practices of Muslims in other areas differ. Many theorists, however, do not regard it as an actual form of *ijmā'*, but as a form of ḥadīth narration. The reason why it is given preference to individual-narrator ḥadīth is because it is seen as equivalent to a *mutawātir* ḥadīth. Those who see it as a form of *ijmā'* allow it to apply to question where juristic discretion (*ijtihād*) has a role to play.²⁶⁴ Those who see it only as a form of ḥadīth narration either require it to have a substantiated line of transmission²⁶⁵ or require the matter to be something that can only be known by way of revelation (*tawqīf*) and not open to the discretion of the jurists.²⁶⁶ This restricts it to questions like the wording of the call to prayer and the types of wealth that the *Zakāh* tax is levied on.

²⁶² Abd-Allah, "Malik's Concept", 379.

²⁶³ Abd-Allah, "Malik's Concept", 381-382.

²⁶⁴ Al-Qarāfi attributes this view to Ibn al-'Adl, Ibn Bukayr, and the Mālikī scholars of Morocco. al-Qarāfi, *Nafā'is al-Uṣūl*, 3:421.

²⁶⁵ Ibn Rushd is of this view. He says: "The most discerning Mālikī scholars only see it as evidence by virtue of [textual] transmission. It appears to me that this is what it is based on if it is to be regarded as evidence. The transmission of the practice should be clearly expressed from one generation to the next up until it reaches the time of Allah's Messenger. This becomes evidence of his tacit approval of it, like if they say: 'This is what we found our forefathers practicing' and [they continue doing like] that until it reaches the time of Allah's Messenger." Abū al-Walīd Muḥammad b. Aḥmad b. Muḥammad b. Rushd al-Ḥafīd, *al-Ḍarūrī fī Uṣūl al-Fiqh*. ed. Jamāl al-Dīn al-'Alawī. (Beirut: Dār al-Gharb al-Islāmī, 1994) 93.

²⁶⁶ This restriction appears early on in Mālikī legal theory works, like al-Qaṣṣār, *al-Muqaddimah*, 75, al-Qāsim al-Jubayrī, *Muqaddimah fī al-Uṣūl*, 211-212; and Muḥammad b. 'Umar b. al-Fakhkhār, *Muqaddimah Kitāb Intiṣār Ahl al-Madīnah*, 223, all of which are published with al-Qaṣṣār's *al-Muqaddimah*. 'Abd al-Wahhāb b. 'Alī b. Nasr al-Baghdādī holds that it is still a source of evidence when it is based on juristic discretion but it is not a binding *ijmā'*, *al-Mu'awwanah*, 242.

Madinīte practice is not formally invoked in the surveyed Malikī legal works. Nevertheless, it is discernible in some of the assertions made about women's leadership. Al-Rajrājī cites al-Qāḍī Abū al-Walīd as saying: "It is enough for me that in the Muslims' conduct since the era of the Prophet, it has never occurred in any era nor in any land that a woman has been put forward as as a judge or a head of state." This includes Madinite practice by implication.

We also find an implication of this in al-Qarāfī's assertion of *ijmā'* for preventing women from being judges. He says: "This is why it is unheard of that a woman ever had authority as a judge in any era, and this [therefore] is a matter of consensus (*ijmā'*), since [such an appointment] is contrary to the way of the believers."

As an application of Madinite practice, this is not a strong indication of prohibition. As mentioned earlier with respect to *ijmā'*, there is no actual practice being cited.²⁶⁷ The argument is entirely negative. The neglect of an act has its evidentiary strength, but only to indicate is that it is permissible for women to be entirely absent from political or judicial authority at any given point in time. In other words, the inclusion of women in the political and judicial arenas cannot be regarded as mandatory, since the practice of the Muslims confirms that their absence is acceptable.

The role that Madinite practice has in the acceptance or rejection of individual-narrator ḥadīth is evident in the comments that al-Māziri makes about the ḥadīth of Umm Waraqah. He does not criticise its chain of transmission. He describes it as "a narration we regard as strange" and one that "some of our later associates have said... is not among those that must be relied upon." This illustrates how reliance upon individual-narrator ḥadīth is contingent in Mālikī Law on established practice, since the "strangeness" here should not be understood in way ḥadīth scholars use the term, but rather that the meaning of the ḥadīth conflicts with well-known practice.

The same can be said for Māziri's discussion of 'Ā'ishah's leading women in prayer. Elewa and Silvers argue that the Mālikī school rejected the ḥadīth which refer to her

²⁶⁷ Avoiding a practice can be evidence of the illegality of the practice in cases where the practice is an aspect of a formal act of worship whose inclusion would constitute an integral part of that worship. An example of this cited with respect to Madinite practice is lack of Zakāh on green leafy crops because that Zakāh was never paid by the people of Madinah. See: al-Qarāfī, *Nafā'is al-'Uṣūl*, 3:421.

practice due to a combination of two factors: its weakness as a ḥadīth and its being contrary to Madinite practice.²⁶⁸ This would imply that variance with Madinite practice was not sufficient on its own for Mālikī scholars to reject a individual-narrator ḥadīth. However, when we turn to the Mālikī legal literature, we find that the practice of ‘Ā’ishah (and Umm Salamah) is almost never brought up in their discussions. Al-Māzirī is the only one to do so in the surveyed works and he does not even judge its veracity. He just states that if it is authentic, then it needs to be explained away. Therefore, it appears that Mālikī jurists regarded the references to the practice of the the Prophet’s wives to be unfamiliar individual-narrator ḥadīth in contradiction with established practice and dismissed them without much concern for the strength or weakness of their transmission. Their variance with practice was sufficient grounds to disregard them or explain them away.

What can be discerned with respect to questions of women’s leadership is the consideration of received practice in a general, non-formalised sense, which reflects how Madinite practice probably operated during the school’s earliest days. The *ijmā’* of the people of Madinah, in the sense that it is discussed in Mālikī legal theory works, is neither invoked by the jurists nor is it in evidence in their practice.

VII. CIRCUMSTANCE-DEPENDENT SOURCES

There are four sources of law that result in rulings that depend on the circumstances that surround them. The first three are recognized as sources of legislation in the Mālikī and Ḥanbalī schools. These are juristic preference (*istiḥsān*) as conceived by the Mālikī and Ḥanbalī schools, preventing legal loopholes (*sadd al-dharā’i*), and considerations of general welfare (*al-māṣāliḥ al-mursalah*). Local Customs (*urf*) is recognized by all four schools, but in various limited capacities.

²⁶⁸ Elewa and Silvers, “I Am One of the People”, 156.

A. Juristic Preference (*Istiḥsān*)

Istiḥsān, in the Mālikī and Ḥanbalī schools of law, is conceived of differently than in the Ḥanafī school. *Istiḥsān* means to make an exception to a general legal precept where applying that precept would be contrary to the welfare of those who are subject to the resultant ruling.²⁶⁹ Due to the stress Ḥanbalī scholars place on direct textual evidence, it has very limited use to them, since it can never contradict specific textual evidence. Indeed, Ibn Qudāmāh argues that the ruling relied upon by way of *istiḥsān* must itself be established by the Qur'an and Sunnah.²⁷⁰ Abd-Allah argues that it is one of the least authoritative sources of evidence in the Ḥanbalī school.²⁷¹ This particular source of law is not cited for questions of women's leadership by any of the Mālikī and Ḥanbalī texts in the survey.

B. Preventing Legal Loopholes (*Sadd al-Dharā'i'*)

This source of law provides for the prohibition of acts that are in and of themselves permissible under circumstances where it is feared that those acts are being used as means for illegitimate ends. It is used primarily to prevent legal loopholes that undermine the intent of Islamic laws. Al-Qarāfī says: "Whenever a practice that is free from harm becomes a means to harm, we forbid that practice, and this is Mālik's school of thought."²⁷² Like *istiḥsān*, the purpose of *sadd al-dharā'i'* is to prevent harm and secure the welfare of the people. Its implementing requires a suspicion that the act is being engaged in for illicit reasons. It is not necessary to determine the true intention of the actor, which is impossible, but the circumstances surrounding the act itself must invoke suspicion.²⁷³

²⁶⁹ Al-Shāṭibī says: "*Istiḥsān* in Mālik's school of thought is to adopt a particular consideration of welfare in contrast to evidence of a universal scope. It entails resorting to the evidence of such a consideration in preference to *qiyās*. The one who applies *istiḥsān* is not resorting to his mere personal tastes and preferences; but rather to what he knows to be the Lawgiver's overall purpose." Ibrāhīm b. Mūsā al-Shāṭibī, *al-Muwāfaqāt*. ed. Abū 'Ubaydah Mash-hur b. Ḥasan Āl Salmān. (Cairo: Dār Ibn 'Affān: 1997), 5:193.

²⁷⁰ Ibn Qudāmāh, *Rawḍah al-Nāzir*, 2, 531.

²⁷¹ Abd-Allah, "Mālik's Concept", 246.

²⁷² al-Qarāfī, *Sharḥ Tanqīh al-Fuṣūl*, 436.

²⁷³ Abd-Allah, "Mālik's Concept", 263.

An illustrative example of the application of *sadd al-dharā'i'* is where the Mālikī Law prohibits a father to revoke a gift to a child if that child has used that gift in a subsequent transaction. The normal ruling in Mālikī Law is that a father can demand his child return the gift at any time. However, if that child has used the gift as collateral for a debt, or has used the gift as an enticement to secure a marriage suit, then the revocation of the gift becomes unlawful. This is to prevent fathers and their children colluding to use the father's option to revoke a child's gift as a means to cheat other people.

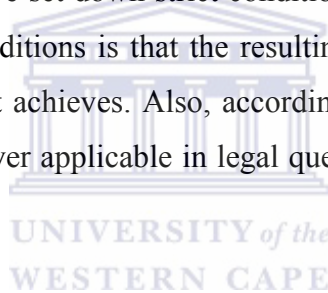
Al-Rajrājī makes reference to *sadd al-dharā'i'* as a formal legal principle in *Manāhij al-Taḥṣīl* while discussing women leading other women in prayer. He argues that Mālikī jurists prohibit women-only congregations by applying a general legal axiom that “whenever means are prevented, the category of rulings involved are to be taken as a unit.” What this means is that preventing women from leading men in prayer is a case of preventing the means to harm, and since means are being prevented, it should be done in all relevant instances. Al-Rajrājī differs with his school's ruling on women-only congregations, so he then goes on to argue that women-only congregations are not a relevant instance, since the harm which the ruling seeks to prevent is entirely absent. This illustrates how impermanent rulings based on *sadd al-dharā'i'* are, due to their dependence on circumstances, and it is this impermanence that al-Rajrājī is exploiting to refute the ruling. It must be noted, however, that al-Rajrājī is the only Mālikī jurist in the survey presenting the prohibition of prayer leadership as an application of *sadd al-dharā'i'*, and he does so to refute an established Mālikī ruling. Therefore, his claim should be taken with caution, as a possible straw-man argument.

C. Considerations of the General Welfare (*al-Maṣāliḥ al-Mursalāh*)

This refers to the application of general considerations of welfare that are not specified by any textual evidence. It allows for the establishment of new legal rulings and the suspension of earlier rulings in consideration of society's general welfare. This principle is also based on the belief that all of the rulings of Islam exist to realize

the welfare of human beings in this world and the next.²⁷⁴ Some Ḥanbalī legal theorists reject this principle outright.²⁷⁵ Others, like Ibn al-Qayyim, have a more favourable attitude towards it.²⁷⁶ Still, Abd-Allah discerns a difference in the Mālikī and Ḥanbalī application of this principle in that Mālikī Law allows for such considerations to specify or temporarily suspend rulings established by textual evidence, where Ḥanbalī Law does not.²⁷⁷ For Mālikī Law, this means that general statements in the Qur'an and ḥadīth can be specified under any circumstance where applying the general meaning would result in negating the realization of human welfare intended by the text's ruling, or in cases where doing would bring about an unintended harm.

Since the considerations of welfare that this source of legal reasoning is concerned with are those which are not expressly established by the sacred texts²⁷⁸, the legal theorists who recognise it have set down strict conditions for their validity. The most commonly cited of these conditions is that the resulting ruling does not bring about harm greater than the good it achieves. Also, according to al-Shāṭibī, considerations of the general welfare are never applicable in legal questions pertaining to matters of worship.²⁷⁹



Abd-Allah identifies two types of results that can be obtained from applying this form of legal reasoning.²⁸⁰ The first are those that introduce rulings having no precedent. A clear example of this is Abū Bakr's decision when he was Caliph to have the Qur'an compiled in a single volume. The second type of result is that which brings about a

²⁷⁴ Al-Qarāfī says: "God only sent the Messengers to secure the ongoing welfare of the servants. So whenever we find a consideration of welfare, it becomes our overwhelming belief that it is desired by the Law." al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, 424.

²⁷⁵ Ibn Qudāmah says: "If a ruling is established on the basis of one of these considerations of welfare without knowing that the Law safeguards that consideration of welfare by establishing that ruling, then this is legislating on the basis of opinion, and giving legal verdicts on the basis of mere rationalisation." Ibn Qudāmah, *Rawḍah al-Nāzir*, 2:541.

²⁷⁶ See: Ibn al-Qayyim, *I'lām al-Muwaqqi'īn*, vol. 3 for an extensive treatment of this subject.

²⁷⁷ Abd-Allah, "Mālik's Concept", 269.

²⁷⁸ Al-Qarāfī identifies three kinds of considerations: "Considerations of welfare, with reference to how they are recognized by the Law, are three categories: [1] what the Law attests to as being considered, which is the *qiyās* we have already discussed, [2] what the law attests to as being disregarded, like [the idea of] prohibiting the cultivation of grapes to curtail wine production, and [3] what it neither attests to as being considered or as being disregarded, which are the presumed considerations of the general welfare that Mālik recognises as evidence." al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, 423-424.

²⁷⁹ He also mentions that *istiḥsān* does not apply to acts of worship. Ibrāhīm b. Mūsā al-Shāṭibī, *al-I'tiṣām*. ed. Sa'd b. 'Abd Allah Āl Ḥumayd *et al.* (Saudi Arabia: Dār Ibn al-Jawzī, 2008), 2:72.

²⁸⁰ Abd-Allah, "Mālik's Concept", 276.

ruling that suspends an earlier one, like the Caliph ‘Umar’s decision to suspend the practice of distributing lands of conquered territories among the soldiers.

D. Differentiating between these Three Sources of Legislation

The primary difference between *istihsān* and *sadd al-dharā’i’* is in their effect. *Istihsān* makes allowances for acts that are otherwise prohibited, while *sadd al-dharā’i’* prohibits acts that are generally permissible.

Istihsān and *sadd al-dharā’i’* are clearly distinct from the applications of *al-maṣāliḥ al-mursalah* that introduce an unprecedented ruling. As for applications of *al-maṣāliḥ al-mursalah* which suspend pre-existing rulings, they bring about similar consequences to the applications of *istihsān* and *sadd al-dharā’i’*. Abd-Allah identifies two differences.²⁸¹ The first is that *al-maṣāliḥ al-mursalah* relates to the welfare of society at large, while the other two legal sources deal with rulings that operate on the individual level. The second is that there is a sense of emergency in applying *maṣāliḥ al-mursalah* that is not needed for the application of the other two methods of legal reasoning.

An important feature that all three sources of legislation have in common is the impermanence of the rulings that result from them.²⁸² Since these rulings are regarded as means to an end and not an end in themselves, they are subject to change whenever their intended ends are no longer being realised.

²⁸¹ Abd-Allah, “Mālik’s Concept”, 277.

²⁸² Al-Qarāfī says: “Rulings in their origins are two categories, [1] those which are intended in their own right (*maqāsid*) for how they directly pertain to benefit and harm, and [2] those which lead to (*wasā’il*) those ends through their consequences. They are conferred with the same ruling as what their consequences bring about, whether it be prohibition or permissibility, but they have a lower status than the rulings which are intended in their own right.” He then elaborates: “The principle is: Whenever the ruling intended in its own right ceases to be an issue, the ruling of what leads to it ceases to be considered, because it is subsidiary to it.” al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, 426-427.

E. Local Customs ('Urf)

Custom is recognised by all four schools of law, but it is presented in the legal theory works as having a very limited scope. Among other things, it has a crucial role to play in the practical application of Islamic legislation with respect to defining the intended meanings of terms under various circumstances. This is especially important for resolving the meaning of clauses in commercial and social contracts and determining what conditions are to be assumed to be in effect in a contract in the absence of an explicit contractual clause.²⁸³ Another use of local custom is to define the requirements of textually established Islamic laws where the sacred texts leave certain culture-dependent terms undefined. For instance, the ruling that men should not wear women's clothing is established by textual evidence. However, what constitutes women's clothing depends on the norms of the society where the law is to be enforced. Likewise it is used to define the parameters of customary usage (*ma'rūf*) when the sacred texts call towards observing it.²⁸⁴ Jurists might identify an effective cause for a ruling that depends on custom for its precise definition or for identifying its presence in a particular case.²⁸⁵

Rulings based on local custom are even more highly susceptible to change than the three forms of legal reasoning described above. They are very sensitive to changes in practice from one place to another and from one point in time to the next. They have no semblance of permanence. The limited formal recognition of custom as a source of law in works of legal theory and its contingent nature explains why custom is never formally invoked in the post-formative legal literature regarding questions of women's leadership.

²⁸³ A-Sarakhsī gives the following example: “The specification [of meaning] is according to the indications of custom, but only when there is no explicit statement of intent for another [meaning]. In the event there is an explicit statement, custom ceases to be considered. This is like when someone makes a purchase in dirhams without specifying [the currency's country]; the local country's currency is specified by way of custom. If he explicitly makes the condition that another country's currency is to be used for the purchase, custom ceases to be considered and the contract is binding according to what is explicitly stated. al-Sarakhsī, *Uṣūl*, 1:61.

²⁸⁴ For instance, Qur'an 2:233: “Mothers may breastfeed their children for two complete years for whoever wishes to complete the full period of nursing. Their support and clothing are incumbent upon the father in accordance with customary usage.”

²⁸⁵ Al-Qarāfī gives the example of high and low social status. He says regarding using a custom-dependent factor as an effective causes: “The condition is that it is consistently applicable [to the ruling] and easily discerned from other [attributes].” al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, 381.

F. Summary

These circumstance-dependent sources of law are not cited in the legal literature as evidence for the rulings under examination. The scholars understood questions of women's leadership to be essential ones – conditions for the validity of the appointment – permanent rulings that do not change in response to the situation from one place or time to another. This is especially clear with the rulings on prayer leadership. The conditions of validity for the prescribed prayers are intrinsic to the prayers themselves. The prayer is either valid or invalid. Questions of women's suitability for political and judicial appointment can easily be imagined as circumstantially dependent, but this is not how the legal scholars conceived of them. Had they placed any of these questions under one of the four rubrics discussed above, it would have been an admission to the transient nature of the rulings themselves; that they are subject to change at any time.

This means that post-formative jurists did not see these sources of law as furnishing evidence for these particular rulings. All the same, we can discern a marked impact that this form of legal reasoning has, especially on the schools of law that emphasise it. When we look at the works under survey, we find that the Mālikī and Ḥanbalī works often justify and defend their rulings by invoking the potential harms they avoid or benefits they secure. These justifications are less frequent in the Shāfi'ī and Ḥanafī works, as would be expected, but not entirely absent. This implies that these approaches to legal reasoning are more far-reaching in their effect on law than what their formal representation in legal theory indicates. They bear upon the rulings found in the post-formative legal literature, but not in a formally codified, systemantic way. The arguments invoked include the temptation women cause for men, the ineffectiveness of women in carrying out public duties, and the neglect of their proper domain of activity. Since all of these considerations deal directly with how women and their social roles are perceived, these arguments will be examined in greater detail in the next chapter.

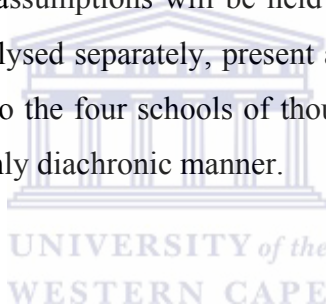
VIII. CONCLUSIONS

The rulings that divest women of leadership roles are given support by evidence and arguments of various kinds. With respect to the four primary sources of Islamic Law, the Qur'an is not generally considered by the jurists to be a source for these rulings. Only the earliest Shāfi'ī works employ a verse of Qur'an in their arguments, most notably al-Māwardī, and as has been seen, his strategy in *al-Hāwī al-Kabīr* is to present all potential lines of evidence, so his arguments in that work are not always an accurate reflection of his school's legal reasoning. The Sunnah is the source of law used most frequently to justify the legal rulings of their respective schools, though the ḥadīth cited by each school to divest women of leadership positions do not fulfil the school's evidentiary requirements. Nevertheless, each school has a demonstrably different strategy in presenting ḥadīth evidence that can clearly be traced back to its theoretical approach to ḥadīth. This establishes that legal theory does indeed influence the legal thinking of the jurists. *Ijmā'*, though occasionally invoked for political and prayer leadership, is not generally recognised as existing for the legal questions under discussion. Though a number of arguments based on *qiyās* are presented, they are found disproportionately in the surveyed works, most frequently in al-Māwardī's *al-Hāwī al-Kabīr* and the works of two Mālikī jurists, al-Rajrājī and al-Qarāfī. These are cursory in their presentation and not very workable at closer analysis. At the same time, the Mālikī use of *qiyās* seems to confirm Umar Abd-Allah's contention that Mālikī *qiyās* is actually based on general precepts of law, even when it is presented as being based on particular established legal rulings. What emerges from this analysis is that the evidence presented in the Islamic legal texts is best understood as an attempt to justify the rulings advocated by the jurists, and is not representative of the actual reasons why those rulings came about or persisted.

CHAPTER TWO

GENDER: CULTURAL & SOCIAL JUSTIFICATIONS**I. INTRODUCTION**

The purpose of this chapter is to explore the gender attitudes exhibited in the legal texts and what affect they have on the jurists' arguments. These include explicit statements about gender as well as the unarticulated gender assumptions underlying the statements and reasoning presented in the texts. The chapter is divided thematically into four topics: deficiency and inherent worth, the woman as temptress, the woman's role in society, and gender hierarchies. Of course, these topics are closely related to each other and assumptions held with regard to one of these will have consequences for what assumptions will be held for the others. However, they differ in focus, and when analysed separately, present a more complete picture. Each section is divided according to the four schools of thought, and the analysis for each school is conducted in a roughly diachronic manner.

**II. DEFICIENCY AND INHERENT WORTH***A. Mālikī Texts*

Ibn Rushd compares a woman to a slave to demonstrate why she cannot be a judge, and he cites the reason for the comparison as being “the deficiency in the reverence (*ḥurmah*) she is given”. This means that, like a slave, she does not command respect, which is a problem since a judge must be respected in order to effectively carry out the duties of the post. This indicates not only the reality of the scant regard men had for women in near-eastern society, but also the acceptability of their having such little regard. In order for such a meaning to have validity as the basis for *qiyās*, this state of affairs has to be taken for granted as something natural and unchanging. Ibn Rushd is therefore presenting it as a deficiency in the women themselves and not in the men's attitude towards them. Otherwise, the ruling would be one based on custom (*ʿurf*) and would consequently be subject to change when the attitude of men changed.

There is another plausible way to interpret the word *ḥurmah* in Ibn Rushd's statement. This is to understand it to mean that women are lacking autonomy in their decision making. In this case, Ibn Rushd would be addressing their independence, not to their intellect. His argument would be that, like a slave, a woman is subject to someone else's authority and therefore might be put under outside pressure in the legal judgments she renders. This is a less likely interpretation linguistically, and also because a woman's autonomy in Islamic Law is far greater than that of a slave, so the analogy would be an extremely weak one. This interpretation, however, also confirms a woman's diminished status in society and in men's regard.

Ibn Rushd is giving what he thinks represents the arguments of those who support the ruling, and it may not reflect his personal views on women.²⁸⁶ Nevertheless, it is inconceivable that this argument would have been constructed if such attitudes were not present and widely accepted within the juristic community and reflected in society at large. These values are implicit in the argument. It would not have developed in their absence, nor would it have been found convincing. Indeed, the very act of comparing a free woman to a slave shows that women were conceived of in a lowly manner, since slaves were of the lowest social status possible and were viewed with utter contempt. They were property, not much better in status than cattle. Moreover, a male slave is capable of becoming a free man, whereas a woman will always remain a woman.²⁸⁷ This comparison, therefore, illustrates a significant level of contempt for women and their status in society.

Al-Māziri confirms this when he discusses the question of a woman leading men in prayer. Here, he discusses the possible argument that women might be allowed to lead men in prayers if they are compared to slaves, since slaves can lead prayers. He then dismisses this possibility, saying that "the deficiency of being female, when it comes to prayer leadership, is more certain and more severe." The assertion that it is more

²⁸⁶ Catarina Belo argues that Ibn Rushd, in his philosophical writings, did not share the prevailing view that women were inherently inferior to men or unequal to men in their aptitudes. She cites where he criticises the way women were being marginalised in society. See: Catarina Belo, "Some Considerations on Averroes' Views Regarding Women and their Role in Society." *Oxford Journal of Islamic Studies* (2009) 20 (1), 1-20.

²⁸⁷ As we shall see shortly, the Shāfi'ī jurist al-Māwardī cites this point to justify his opinion that a woman is more deficient than a slave.

certain probably refers to the permanence of the condition of being female as opposed to the condition of being a slave which can come to an end through manumission. As for it being more severe, it is because a woman is “deficient of intellect and religion, while a slave is not attributed with these qualities.”

Al-Qarāfī, while speaking about prayer leadership, also confirms that “her situation is worse... than that of a slave”, because he counts as a member of the Friday congregational prayer while she does not. He also argues that the fact that she is sent back to the back ranks makes her situation “worse than that of a child.” It is important to note how al-Qarāfī makes claims about women’s worth on the basis of these legal rulings. It is not simply a matter of law that a slave’s participation counts for the Friday prayer and a child is not sent to the back. These rulings indicate, by al-Qarāfī’s admission, that women are worse off than slaves and children when it comes to their status in prayer.

Al-Rajrājī takes this idea further while discussing the question of women leading men in prayer. He describes prayer leadership as “a degree of honour and a lofty station” and argues that women are not qualified for this position due to a legal principle that “everyone who is characterised by deficiency and lowliness has no share in positions of high status.” He cites the ḥadīth about women being deficient in intellect and religion as evidence for this. Yet, the woman is not merely deficient because of these reasons, she is also possessed of “lowliness”. This begs the question: How can al-Rajrājī take her need for another woman to corroborate her testimony in court and her being exempted from prayer during menstruation as indicating her lowliness and her unworthiness of “honour and a lofty station”?

A clue to answering this question can be found earlier in *Manāhij al-Taḥṣil* where al-Rajrājī discusses the legal rulings pertaining to menstruation. He speaks at length on the matter, describing it as a “curse” and a “punishment” for the woman in her worship and her worldly life. What is most startling is that his discourse on this matter is a digression; it has no bearing on the legal rulings about purification law that he is about to explain. However, it sheds considerable on how he can connect her sitting out

during menstruation with her unworthiness to lead men in prayer, and it is worthwhile to quote the passage in full.²⁸⁸

Menstruation is something God has decreed upon the daughters of Adam.²⁸⁹ He made it a means of safeguarding lineage and a sign that a woman's womb is free [from a pregnancy]. At the same time, it is a punishment set upon them and a cause of vexation for them in worship and in everyday life.

As for how it is a punishment in worship, it is in how it causes their exemption from prayers altogether. It is also in how it affects the validity of [the women's] observance of the fast, and their ability to observe the fast at its appointed time so as to make their observance of it actually an act of making it up. This causes the reward [of the fast] to be reduced, since observing an act of worship at its appointed time is not equal to observing it after that time has passed.

Though it is true that a legally accountable person is excused for offering it late, the excuses that necessitate doing so merely exempt the person from sin, because observing an act of worship on time and late are [not]²⁹⁰ equal in the amount of blessings they confer. This is because there is no problem with the fact that a person who oversleeps or is absentminded must make up the prayer and his reward is not like that someone who prayed on time. There is no dispute in this matter. It is on account of this consideration that the Lawgiver stated the "deficiency of their [the women's] religion". This deficiency refers sometimes to a factor compromising their prayers, and sometimes to the deficiency in the reward and blessings that she receives as a consequence of fasting outside of its appointed time.

²⁸⁸ Abū al-Ḥasan 'Alī b. Sa'īd al-Rajrājī, *Manāḥij al-Taḥṣīl wa Natā'ij Laṭā'if al-Ta'wīl fī Sharḥ al-Mudawwanahwa Ḥall Mushkilātih*. ed. Abū al-Faḍl al-Dimyāṭī and Aḥmad b. 'Alī. (Casablanca: Markaz al-Turāth al-Thaqāfī al-'Arabī, 2007), 1:158-159.

²⁸⁹ Al-Rajrājī is referring here to the ḥadīth related by 'Ā'ishah that the Prophet found her weeping when they were about to perform the Ḥajj pilgrimage. He said: "What is the matter? Have you got your period?" I ['Ā'ishah] replied: "Yes." He said: "This is something God has decreed upon the daughters of Adam, so perform the ceremonies of the Ḥajj as the pilgrims do, but do not perform the circumambulation of the Ka'bah until you are purified." *Ṣaḥīḥ al-Bukhārī* (305) and *Ṣaḥīḥ Muslim* (119). In the version in *Muslim* it reads: "until you perform the [ritual] bath." It is worth noting that the statement is given in the context of comforting 'Ā'ishah.

²⁹⁰ This word is missing from the print edition, but the passage makes no sense without it.

As for how it is a punishment in everyday life, it is in how a woman practically every month is stained with filth, beset with faults, sullied with impurities, drowned in an abyss of dirtiness and pollution, and possessed of a disgusting smell. One is not drawn to her sexually but is rather repulsed by her more severely than one is frightened off by a lioness. What punishment and vexation could be worse than that? This is her inheritance from our mother Eve (peace be upon her).

This view of menstruation was widespread in Arabia in pre-Islamic times, and was held by pagan Arabs and Jews alike. There are a number of ḥadīth traditions which are regarded as authentic where Prophet Muhammad is seen as calling people away this attitude.

Equally interesting is al-Rajrājī's claim that menstruation was inflicted upon women as a consequence of Eve's disobedience. This is a matter of the unseen, and therefore one of theology, which can only be established by a verse of the Qur'an or a rigorously authenticated ḥadīth. This idea was certainly well circulated in the Muslim lands as part of the *Isra'īliyyāt*, but not as a ḥadīth.²⁹¹ The fact that al-Rajrājī, writing in 633AH, can propound this attitude about menstruation and assert that it is a curse sent down upon Eve shows how commonplace and tenacious these ideas were in Muslim society, how firmly and permanently entrenched they were in the cultural mindset, regardless of how much those ideas might contrast with accepted Islamic teachings. Moreover, since al-Rajrājī's claims about women are a digression, he is clearly not citing them to defend a ruling of the school. They can therefore be assumed to reflect his personal viewpoint and one that he thinks his readers will find amicable.

²⁹¹ Al-Ṭabarī mentions in his *Tārīkh*, and his *Tafsīr*, 1:566, a non-prophetic tradition of this kind: "His Lord called out to him: 'Adam, is it from Me that you are fleeing?' Adam replied: 'No, my Lord, but I feel shame before You.' When God asked what had caused his trouble, he replied: 'Eve, My Lord.' Whereupon God said: 'Now it is My obligation to make her bleed once every month, as she made this tree bleed. I also must make her stupid, although I created her intelligent (*halimah*), and must make her suffer pregnancy.' Ibn Zayd continued: 'Were it not for the affliction that affected Eve, the women of this world would not menstruate, and they would be intelligent and, when pregnant, give birth easily.'" As translated by Franz Rosenthal in *History of al-Ṭabarī*, New York: State University of New York Press, 1989, Vol. 1, pp. 280-281. Spellberg suspects it to be derivative from the Jewish Midrash. D. A. Spellberg, "Writing the Unwritten Life of the Islamic Eve: Menstruation and the Demonization of Motherhood" *International Journal of Middle East Studies*, 28:3 (1996), 323. Al-Ṭabarī narrates it from 'Abd al-Rahmān b. Zayd b. Aslam al'Umarī who lived in Madinah and died in 182 AH. This indicates how widely these ideas were circulating in the Muslim world from an early time.

All the same, these ideas about woman and menstruation do ultimately reflect upon al-Rajrājī's legal arguments. He brings them to bear upon the unworthiness of women to lead prayer. This shows a strong connection between the interpretation of Islamic Law and the broader social attitudes and biases under which that interpretation takes place.

As we have seen in the previous chapter, al-Rajrājī does not consider a woman unworthy of leading other women in prayer. He argues, contrary to the generally accepted Mālikī opinion, that such a prayer is valid and explains that she poses not temptation to her fellow women. This means that he views the woman's deficiency relative to the completeness of the man, and her unworthiness of honour as being relative to the man's greater worthiness.

This is not the case for the much later Mālikī scholar al-Nafrāwī. Writing in *al-Fawākih al-Dawānī*, he takes al-Rajrājī's argument about honour almost verbatim and applies it to women-only congregation. He writes: "This is the case even if men are absent, since leadership in prayer is a position of honour in religion and in the rites of the Muslims." Al-Nafrāwī, therefore, goes further than al-Rajrājī, because he asserts that a woman is not worthy of honour or any kind of leadership in her own religion, even among women where no other rationale, like temptation or the presence of someone more "worthy", exists for divesting her of such an honour. In al-Nafrāwī's argument, her unworthiness of religious honour is not relative to that of a man, but rather an assessment of her inherent worth as a human being.

B. Shāfi'ī Texts

We find a similar attitude about a woman's worthiness to lead men in prayer quoted from al-Shāfi'ī in al-Bayhaqī's *Manāqib*, which is that "since prayer leadership is a degree of favour, it is impermissible for her to have a degree of favour over the one whom God has given a degree of favour over her." This idea does not appear in *al-Umm*. However, since it comes from al-Shāfi'ī himself, this attitude could definitely help to explain the origin of the ruling within the Shāfi'ī school.

Likewise, al-Māwardī declares that a woman cannot lead prayer because it is “a position of authority and a position of honour, and a woman is not qualified to assume positions of authority.” Implicit in this is that she is not qualified for the honour it entails as well. This reading is supported by the fact that he compares women to (male) sinners with respect to being judges by explicitly invoking the “deficiency of being female”. He argues that since sinners are not allowed to be judges, it makes even more sense to prohibit women from being judges as well. The implication of this argument is that habitually and wantonly committing sin is less of a deficiency than being a woman. The same “deficiency of being female” is what he argues prevents her from holding positions of political authority.

He also declares that the deficiency of a being a woman is greater for prayer than that of being a slave, chiefly because slavery “is an accidental quality that may cease to apply, whereas being female is an essential quality that never ceases to apply.” We can recall that a similar argument is also quoted from al-Shāfi‘ī in *Manāqib*. Interestingly, this same argument could apply to a male sinner, since he can repent for his sinful behaviour and cease being deficient, but she can never remedy the deficiency of being a woman.

It is important to understand here that al-Māwardī is trying to refute an argument he attributes to Abū Thawr that a woman can lead men in prayer because a slave can. The gist of the argument is that a slave is more deficient than a woman since the slave can be killed in retribution for killing a free woman while the reverse is untrue. Al-Māwardī could have defused the argument by appealing to the fact that a slave is property and the destruction of property is different than the need for justice felt by the free victim’s kinsfolk. Al-Māwardī does not have to appeal to deficiency here at all. He chooses to do so, by emphasising the way in which a woman is more deficient than a slave.

Another thing to note is the role that deficiency plays in the argument attributed to Abū Thawr. Even though Abū Thawr is trying to prove that a woman can lead men in prayers, the argument does not assert her completeness, but depends upon comparing her deficiency relative to that of a slave. This does not necessarily mean that Abū

Thawr thought women were deficient, especially since we do not have the argument from him directly, but it does mean that deficiency was the issue of contention for why women should or should not lead men in prayer.

Al-Māwardī's contemporary, al-Juwaynī admits that the need for the imām to possess completeness could be an argument for prohibiting women from leading men. However, he does not consider this a convincing reason, since their aptitude to lead prayers is demonstrated by their ability to lead other women. Al-Juwaynī does not deny that a woman lacks completeness; he just does not see in her incompleteness a legal justification for the ruling. This shows that at least in his case, the negative attitude about women is not merely being maintained to support a favoured legal ruling, but represents what al-Juwaynī acknowledges to be the prevailing point of view, if not indeed his own.

Al-Rāfi'ī states that two of the reasons the supreme political leader must be male is that the leader must be "complete" and "respected", meaning that a woman is neither. This is significant, not only in showing how women could be regarded with disrespect, but also that this lesser respect was deemed to be a natural and necessary state of affairs, something that could be used to justify rulings of a permanent and absolute nature. We have seen a similar argument given by the Mālikī scholar Ibn Rushd.

It is worth noting that al-Rāfi'ī, while speaking about illiterate imāms²⁹², compares the deficiency of being a woman to that of being illiterate, by arguing that one woman can follow another in the same way that one illiterate person can follow another, due to the shared deficiency in both cases. It is important to stress here that he is not saying the deficiency is of the same degree, just that they the essential concept of deficiency is the same for both.

The commentators on the *Minḥāj* continue to assert deficiency as justification for prohibiting women from being judges and leading prayer. Al-Ramlī and al-Khaṭīb al-Shirbīnī cite a woman's deficiency as an independent reason for why she cannot be a

²⁹² Abū al-Qāsim 'Abd al-Karīm b. Muḥammad al-Rāfi'ī, *al-'Azīz Sharḥ al-Wajīz*. ed. 'Alī Muḥammad Mu'awwaḍ and 'Ādil Aḥmad 'Abd al-Mawjud. (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 2:159.

judge. They also both assert that “the female is less than the male” as a reason why women cannot lead men in prayer.

C. Hanbalī Texts

The Ḥanbalī texts all cite that one reason a woman cannot be a judge is due to her being “deficient in intellect”. Though mentioned briefly in each text, it is presented in a straightforward manner as a primary justification for the ruling. It is coupled with her propensity to forget, her weak opinion, and her lack of perspicacity.

Ibn Qudāmah describes four qualities as necessary for “completeness” in legal capacity. These are that a person is “adult, sane, male, and free.” This direct implication of this is that the opposite term embodies a deficiency in legal capacity. The seriousness of this deficiency can be seen when we consider the opposite terms: “juvenile, insane, female, and slave”. The state of being female is grouped with the states of childishness, madness, and being the property of others.

Why is he constructing legal capacity in this way? It can be noticed that two of the other constituents, being adult and sane, are descriptions of intellectual competence. For this to be the reason for adding being male to the list, it means that a woman’s intellectual deficiency must be assumed to be severe enough to curtail her legal capacity. She is, in other words, too intellectually incompetent to possess full legal capacity. Ibn Qudāmah does not need to take the notion of intellectual deficiency this far in order to argue against appointing a woman as a judge. It certainly goes farther than what can be drawn from the ḥadīth about a woman being deficient in intellect and religion. The fact that Ibn Qudāmah feels it is reasonable to categorise a woman in this way betrays how little regard there was for a woman’s intellectual capabilities.

D. Hanafī Texts

Ḥanafī Law is unique among the four schools in permitting women to be judges in matters wherein their testimony is allowed. Consequently, Hanafī jurists needed to

counter the other schools' argument that a woman's intellectual deficiency prevents her from being a judge. They did this by comparing her capacity to judge to that of her giving testimony. For instance, al-Zayla'ī says: "She is qualified for the legal agency by which she is qualified to give testimony. Consequently, she is qualified to be a judge." It is important to note, however, that in doing so they did not refute the principle that women are intellectually deficient.

Indeed, Ibn al-Humām takes the question head-on. He openly admits to their intellectual deficiency, saying: "There is nothing in the Law [to prevent a woman from being a judge] aside from the deficiency of her intellect, and it is well known that this does not reach the extent of negating her authority altogether." He argues that deficiency is relative and that some women can be exceptions to it. He asserts the "truth of our saying 'man is better than woman'" while allowing for individual women to be better than individual men. Nevertheless, according to Ibn al-Humām, this innate deficiency is what ensures that granting her authority will result in those doing so being unsuccessful, and he goes so far to claim that this was the Prophet's reason for saying so. His concession of this deficiency ultimately leads him to assert the ruling that appointing a woman as a judge is a sinful act, in spite of the validity of her appointment. His modification of the ruling of permissibility is readily adopted by the Ḥanafī jurists who come after him.

We also have an elaborate argument by al-Bābartī, which al-Zayla'ī and al-'Aynī adopt, which categorises the intellect in the context of an Aristotelian distinction between the passive and active intellects, and then identifies the woman's place of competence within it. They claim that a woman is competent at forming thoughts on the basis of "self-evident knowledge through the sensory perception of particular things", but she is deficient in even simple abstract reasoning. They link this conclusion to the famous ḥadīth about women's deficiency.

As Bauer rightly asserts, this argument is meant to refute the Shafī'ī claim that a woman's intellectual deficiency severely curtails her ability to be a witness.²⁹³ Bauer identifies it to be relatively more positive than the Shāfi'i view on woman's

²⁹³ Bauer, "Debates", 11.

intellectual capacity, and cautions that it does not have to reflect the Ḥanafī scholars' true attitude about women, which is probably no different than their Shāfi'ī counterparts.

However, the argument is actually not more positive; it is just elaborate, and its negativity is far in excess of the more general and dismissive claims that Ḥanafī scholars had made earlier. The only point they need to argue in countering their Shāfi'ī opponents is that intellectual deficiency does not have to be all-encompassing, so it does not have to negate a woman's competence as a witness. It is clear why they would want to recruit a Greek philosophical framework. It provides their argument with a kind of "scientific" authority it otherwise would not have. This is gained at the expense of a good fit to their purposes. The argument is too strongly negative for their needs. To say that women are fully capable of elementary thinking in processing sensory input, but are deficient in engaging with abstract thought on even a basic level, actually hurts the Ḥanafī position that not only gives women an expanded role as witnesses where processing sensory input is needed, but allows them to be judges, where abstract reasoning is required. It would have been enough for them to say that women's intellectual deficiency is real but relative, like Ibn al-Humām does, or to say that it refers to a greater propensity to forget, like al-Marghīnānī does. This latter argument accords better with the hadīth, since the ḥadīth links the deficiency to a Qur'anic verse which identifies forgetfulness as the problem.

Instead, they introduce a needless argument limiting the woman's ability to engage in abstract thought. Since they feel compelled to do this, it must have been a widely-held view of the woman's intellect at the time. This is indeed the case. For instance, al-Ghazālī actually defines abstract knowledge as something women are unable to grasp.²⁹⁴ He states this in *al-Mustasfā*, a legal theory work which enjoyed widespread popularity at the time with all four schools of law, and he is followed in this by other legal theorists. Therefore, it was a widespread view, at least among intellectuals from the fifth century A.H. onwards, that women were incapable of all but the most rudimentary abstract thought.

²⁹⁴ al-Ghazālī, *al-Mustasfā* 1, 131: "Abstract [knowledge] is that which is subject to doubt and for which [people's] circumstances vary, so that some people will know it while others will not, and it is not known by women, children and others who do not have an aptitude for abstract thinking." The Ḥanbalī jurist Ibn Qudāmah adopts the same definition in *Rawḍah al-Nāẓir*, 1, 350.

Under such pressure, Ḥanafī scholars would have had to defend their opinions. Here, a complex philosophical categorisation of the intellect is read back into a ḥadīth which gives no indication of such things. Then, women are categorised in such a way to conclude, implicitly on the ḥadīth's authority, that they cannot be political leaders. Needless to say, the ḥadīth does not refer to political leadership, and the specific context in the Ḥanafī legal texts does not call for bringing it up, since what is being discussed in both cases is a woman being a witness. The only reason it is brought up is because al-Mārghinānī presents it as point in the Shāfi'ī argument he quotes, but one he does not respond to in his refutation. Therefore, when al-Bābirtī grants this point on political leadership to his Shāfi'ī opponents, he is appealing to a point of commonality between them which he can use to contrast where their schools' positions differ. For this to work, al-Bābirtī has to be invoking an already widespread assumption about women's intellectual competence and its relationship to leadership. Later on, we will see this line of thinking having a marked affect on the Ḥanafī position on women judges, with Ibn al-Humām effectively negating the possibility. This will be discussed in more detail in the next chapter.

Though directed at their Shāfi'ī opponents, this Ḥanafī argument provides nothing for Shāfi'ī jurists to refute. This is because it does not show where to draw the line in allowing women to be witnesses, which remains a judgement call. The Ḥanafīs draw the line at matters wherein an element of doubt (*shubḥah*) negates legal consequences. This principle is intrinsic to Ḥanafī thought. It is therefore not surprising that non-Ḥanafī jurists do not take up this appeal to Greek philosophy in their discourse on women's intellectual deficiency. It is easier for them to make vague and general references to women's limited intellectual competence which they can use to justify a broad spectrum of legal consequences.

Deficiency is again addressed in the surveyed Ḥanafī works where al-Kāsānī rules out the possibility that a woman's lowliness negates a man's prayer when she prays in congregation alongside him. However, the argument he uses is that: "a woman is not lowlier than as a dog or a pig and their coming in line [with a man] does not nullify [his prayer]." This asserts her lowliness while negating its relevance to the legal ruling in question. His choice of words is telling. He specifically says she "is not lowlier

than” (*lā takūn akhassa min*), which does not rule out that her lowliness might be commensurate with theirs.

Likewise, we see no hurry on the part of al-Bābirtī and Ibn al-Humām to deny a woman’s deficiency or even minimise its extent when they discuss whether it is possible for her deficiency to be the reason why she cannot lead men in prayers. They just point out that a sinner and a slave (al-Bābirtī also adds a blind man) can lead prayer, so deficiency is ruled out as the reason. Admittedly, this implies that the woman’s deficiency is not greater than that of a sinner or a slave, but it also clarifies the nature of deficiency as these jurists understand it. It is not some abstract theoretical concept, but something acutely real with tangible examples.

E. Summary

The assumption that women are deficient is prevalent in the works of all four schools of thought. Intellectual deficiency is cited uniformly as a reason to prohibit women from being judges. Even the Hanafī jurists concede this point, with the later one’s declaring the appointment of women to judicial posts a sinful act on account of it, understanding this deficiency to be the reason why people do not succeed when women are placed in authority over them.

Notions of deficiency are not limited to specific limitations in reason and religion. They go much further. The most explicit statements in this regard are seen in the Mālikī works. Ibn Rushd compares a woman to a slave to prohibit her from being a judge, while al-Māzirī, and al-Qarāfī, while discussing prayer leadership assert that a woman’s deficiency is worse than that of a slave, with al-Qarāfī making her situation in congregational prayer “worse than a child.” Al-Rajrājī takes this line of thinking to the greatest extent, divesting the woman of any entitlement to honour in Muslim society – an attitude also expressed by the late Mālikī jurist al-Nafrāwī – and accusing her of being punished by her monthly menstrual cycle.

Such extensions of the notion of deficiency are not limited to the Mālikī school. Al-Māwardī also expresses the opinion that women are not entitled to positions of

honour. He also offers analogical arguments that depend on a woman's deficiency being greater than that of a wanton sinner or a slave, ostensibly because those other afflictions can be remedied, as opposed to the state of being a woman. We see with another Shāfi'ī scholar, al-Rāfi'ī, that a woman inherently does not command respect. He is also willing to compare the nature of her deficiency to that of an illiterate person. Likewise, the Ḥanbalī jurist Ibn al-Qudāmah defines human completeness in terms of being “adult, sane, male, and free,” lumping the condition of being female with the opposites of those other attributes. The Ḥanafī jurist al-Kāsānī has no inhibitions about making a comparison between a woman and a dog or a pig. These ideas cannot be attributed to the textual evidence found in “deficient in intellect and religion”, and therefore must represent broader attitudes about gender. It is worth noting that the attitudes identified above cover the entire geographical and temporal scope of the works in the survey.

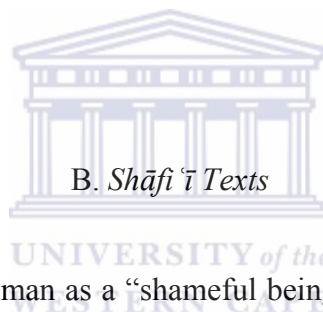


Al-Qarāfi states that a woman cannot be a judge because of the temptation she poses for the men present in court. He compares this situation with two rulings about prayer to argue that since she is not supposed to be seen or heard by men even in this most respectful and reverent of circumstances due to the temptation she poses to the male worshippers, she should likewise not appear as a judge in court where she will pose a temptation to criminals.

What is most significant in this is how he places the blame for this upon the woman herself. He does not argue that sending women to the back rows in prayer is simply for the welfare of the worshippers, but says that it represents “the utmost deficiency” for women. This casts the woman as an innate temptress, so that the desire her body inspires in men is a deficiency of her being and not of theirs, even when she is not acting in a willfully provocative manner. This is what is given here as the rationale for the analogy. It is significant, therefore, that the text he cites to assert that the woman must keep away from men in prayer is “Send them to the back...” which has its

origins in a story of a woman from the Children of Israel who was behaving provocatively in the temple, necessitating that women be sent behind the men.

Al-Māziri also justifies not allowing a woman to lead prayer because her voice is shameful. Al-Rajrājī reiterates this and goes further to describe the problems that a woman prayer leader would pose for the male worshippers who would have to look at her in order to follow her motions in prayer, describing this situation as the “utmost in temptation”. It seems almost inconceivable that a man can look at a woman without immediately sexualising her, even if she is fully dressed and engaged in prayer. Moreover, we can discern from his previously quoted discussion on menstruation that he regards her sexualisation as an important constituent of her human worth. He argues that menstruation is a punishment for her in her worldly life because it makes her less sexually attractive to men, and concludes: “What punishment and vexation could be worse than that?”



Al-Māwardī describes the woman as a “shameful being” and that her leading prayers will cause male worshippers to feel temptation towards her. One of the reasons it is allowed for a male slave to lead men in prayers but not a free woman is because his voice will not bring temptation to the men following him.

His contemporary al-Juwaynī does not agree that the risk of temptation can be the rationale to prohibit women from leading prayers, because a man would then be able to follow his wife or sister without a problem. However, he agrees with the sentiment, by declaring that otherwise the argument would not be far-fetched. His wording shows his confirmation of the idea that being visible and in public is “inappropriate for the status of women.” Al-Juwaynī finds the attitude about the temptation posed by women to be perfectly reasonable, but he does not see in it a legal justification for the ruling. This is another case where the attitude being expressed cannot be interpreted as an argument to defend the legal ruling, but rather an attitude that the jurist considers to be widespread and acceptable, and likely his own personal view.

Al-Rāfi‘ī states that it is inappropriate for a woman to be a judge because she will unavoidably sit among men and raise her voice in their presence. He describes this behaviour as “inappropriate” but does not say it is because she causes men temptation by exhibiting this behaviour. In any case, al-Rāfi‘ī’s choice of words shows he considers such behaviour to show impropriety.

All three commentators on *al-Minhāj* cite the prohibition of women mixing with men to be a reason why they cannot be political leaders, and it is reiterated again in *Nihāyah al-Muhtāj* with reference to being a judge, with the addition that a woman is supposed to remain in seclusion, and again with reference to leading men in prayers.

C. Hanbalī Texts

The Hanbalī texts consistently assert that one of the reasons a woman cannot serve as a judge is because she is “unsuited to be present in the assemblies of men.” This is a problem because the “judge is approached by men”. Though not explicitly stated, it is safe to assume the reason for this is the temptation women cause to men. It certainly indicates that a woman mixing with men is deemed impropriety, as she is not “suited” for such behaviour.

The need to prevent temptation can be seen in the justification Ibn Qudāmah and Ibn Mufliḥ give for why a woman stands in the rank with the congregation while leading them in prayer, since this is more concealing for her than standing ahead of them, because she is partially blocked from view by the women on either side. The fact that this rationale would be seen as reasonable to explain a practice in a women-only congregation which usually does not take place in view of men illustrates the great risk of temptation women were perceived as posing to men.

D. Hanafī Texts

Some of the earlier Hanafī texts assert that the reason a woman nullifies a man’s prayer when a woman prays alongside him in the same congregation is due to the

temptation she poses for the man. Al-Sarakhsī writes that: “the state of prayer is one of communion, so it is inappropriate that any thoughts of lust should cross his mind. Such [thoughts] are rarely avoidable with a woman standing in line with him”. In other words, her very proximity at his side makes temptation almost inevitable for a man, even when both of them are engaged in prayer and intent on following someone else as an imām. Al-Sarakhsī cannot even argue in this case that the man would have to look at the woman in order to follow her, as would be the case with prayer leadership. Moreover, thoughts of lust are nearly inevitable regardless of the woman’s appearance, attire, personality, or deportment. Even if we were to assume that he does not intend elderly women here, it still presents a picture where men are rarely able to view women as anything other than sex objects.

Al-Sarakhsī also argues that the reason why women-only congregations should not be performed is because of “the temptation posed by their congregating.” He certainly does not mean that they cause temptation for each other. Rather, a group of women praying together brings added enticement to any men who might chance to see them.

Al-Kāsānī does not agree that the reason the man’s prayer is nullified is because the woman poses a temptation for him. The reason he gives, rather, is that the temptation is too pervasive for it to be the effective cause of the ruling. He says that “the man’s heart is occupied and stricken with lust” and then adds that: “the woman shares in this meaning with the man.” Since the woman’s prayer is still valid, he concludes there must be some other reason why the man’s prayer is nullified. He is nearly alone in the surveyed works for taking the woman’s sexual desire into consideration. Only he and al-Zayla‘ī who comes after him recognize the existence of a woman’s sexual feelings. All other discussions focus only on the temptation that that women pose for men. Still, for al-Kāsānī, it is nearly impossible for men and women to be in proximity with each other without temptation posing a threat.

Regarding women-only congregations, al-Kāsānī upholds the notion that the woman leading prayer stands in their midst because the woman’s “circumstance is based on concealment.” Concealment of women, and of women alone, is required to prevent sexual temptation; therefore, al-Kāsānī maintains al-Sarakhsī position on the matter.

This also indicates that al-Kāsānī does not intend by the mutual temptation he discussed earlier that it is equal for men and women.

Al-Zaylaʿī reasserts temptation as a rationale for the ruling about women coming in line with men and returns the focus on the temptation suffered by men, though he acknowledges women have sexual feelings. He says that in prayer: “It is not appropriate to occur to his mind any reason to excite him, on account of it possibly causing the nullification of his prayer, and her being in line with a man is not free from that most of the time.” Here, the woman’s unavoidable role as temptress is clear. She has this effect on him “most of the time.” In spite of his acknowledging the existence of desire on the woman’s part, it is only the man who is in peril by the lust provoked by her proximity, and this danger of lust is so great that even its possibility can cause his prayers to God to be nullified.

With Ibn al-Humām, the idea is put to rest that the man’s prayer is nullified due to the temptation the woman causes. However, the idea that the woman presents a temptation is still very much in evidence in the attitudes of the later Ḥanafī jurists. They uphold the idea that the requirement to “send them to the back” applies to a “woman of desirable age”, regardless of whether the woman is sexually mature. A girl of “desirable age” is described in *Tanwīr al-Abṣār* as “any woman who has reached the age of nine, but eight or seven if she is plump.” What matters for the ruling to take effect is her potential to attract men. The unavoidable temptation that women present to men is still seen to underlie the ruling, though this may not be recognised as the immediate cause of the man’s prayer being nullified. Likewise, the idea persists in later Ḥanafī works that women-only congregations cause too much exposure, in spite of arguments presented by al-ʿAynī to the contrary.

We can also note that the Ibn ʿĀbidīn justifies that women are not allowed to be heads of state because they are “commanded to remain in their homes and their circumstances are structured upon concealment.” The theme persists that women must be confined and concealed because of the threat of temptation they cause for men.

E. Summary

The idea that the presence of women causes excessive sexual temptation for men is common to all four schools of thought. It is considered a sufficient reason to prevent women from holding public office. It is also accepted that women engaged in prayer are a temptation for the men who might see them. All but the Ḥanafī scholars cite this directly as a reason to disallow women to lead men in prayers, but we find even they suggest that a woman prayer leader would cause temptation for men if she is seen standing ahead of a women-only congregation. The Ḥanafī jurist al-Zayla‘ī suggests that the mere proximity of a woman worshipper can inspire enough lust in a man to directly nullify his prayer. The concern is almost universally for the sexual desires of men, with only two works in the survey acknowledging that women feel sexual desire as well.



We have already seen that the woman is denied any participation in society in any lofty station or position of honour, due to her innate deficiency. The comparison made by Ibn Rushd between a woman and a slave wavers between the idea that she cannot command respect in society or that she is always subject to someone else's authority. All of this has been discussed above. Clearly, this indicates a very low status for women in society and an attitude that a woman's role in public life should be severely curtailed. The Mālikī texts are direct and explicit on the subject.

B. Shāfi‘ī Texts

Al-Shāfi‘ī, arguing in *al-Umm* why women should not lead men in prayer, makes a general appeal to men's responsibility over women, and their being restricted from holding positions of authority, "among other things". This is a clear reference to a woman's place in society, and it is the only reason he gives why a man's prayer is

invalid if he follows a woman. This argument is given more clarity in the passage al-Bayhaqī's quotes in his biography of al-Shāfi'ī. Here, al-Shāfi'ī depicts the man's responsibility as being absolute, so that it should never be undermined by the woman being placed in a position of authority over him. In other words, his prayer is nullified because he is allowing the woman access to what is outside and above her proper place in society. In this way, a verse about marital duties is brought to bear on the validity of a man's prayer.

Al-Māwardī also cites the verse about marital duties "Men are responsible for women..." to divest women of leadership positions, for both prayer and judicial authority. However, he provides his own rationale for interpreting the verse in this way. He argues that what God has "favoured some over others" in the verse refers to the man's intellect and opinion, and that this is why women are not to be placed in positions of responsibility over men. He is identifying two separate things here; first her intellectual capacity which is less than a man's, then her opinion, which God has given to men more than women. This latter quality is not entirely dependent on the former. It is also dependent on education and life experience. Al-Māwardī, by arguing that men are favoured over women in this matter as well, is assuming that men are blessed with greater experience and education by divine favour. Women, consequently, are of weaker opinion. What al-Māwardī is doing is taking the consequences of limited educational and advancement opportunities for women as something inherent to the women and their divinely-ordained position in society. In short, women are silly and ill-informed by nature and by nurture.

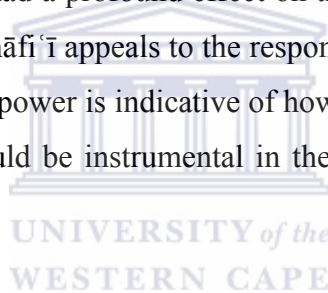
This attitude is also seen in al-Nawawī's discussion about women praying in congregation where he argues that it is better for the women to follow a man as imām instead of another woman, because the man "is more knowledgeable about prayer." His argument takes it for granted that this will be the case, and that this state of affairs is common enough to be the basis for a legal ruling.

Al-Rāfi'ī states that the head of state must be a man in order to be able to devote himself to his duties. Al-Rāfi'ī is suggesting it is not possible for a woman to be able to do so, that the proper woman's role is so intrinsically tied to domestic duties that the idea of a woman foregoing such duties is not even entertained. He is followed in

this line of thinking by al-Ramlī in *Nihāyah al-Muḥtāj*. This does not mean to say that women were actually limited to domestic roles in the society of these jurists' time, but it does show that such expectations were held to be reasonable and proper.

Al-Rāfi'ī's argument also brings up the question of a woman's perceived autonomy in society. In order to categorically rule out the possibility of a woman relinquishing domestic duties, it means that al-Rāfi'ī has to assume there is some authority in place within society to prevent her from doing so, like her relatives or her husband. Moreover, according to him, the threat of causing temptation for men makes her "(un)able to mix with men", thus further limiting her to the domestic sphere. He is followed again in this justification by the three commentators of *al-Minhāj*, with al-Ramlī asserting that women are supposed to remain in seclusion.

These perception of women had a profound effect on the rulings regarding women in leadership. The fact that al-Shāfi'ī appeals to the responsibility of men over women to divest women of positions of power is indicative of how a general attitude towards the role of women in society could be instrumental in the development of these rulings during the formative period.



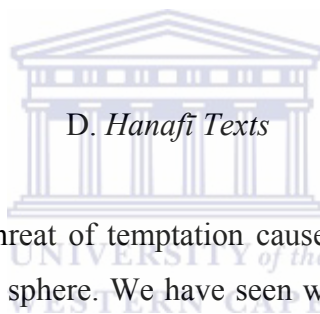
C. *Ḥanbalī Texts*

Like we have seen above with al-Māwardī, the Ḥanbalī texts distinguish between a woman's intellectual deficiency and her poor opinion. They all repeat the assertion that she is "weak of opinion" or "lacking in opinion" as well as her being "deficient in intellect." This is in opposition to the qualifications required of a judge, which Ibn Qudāmah describes as: "to be possessed of a full range of opinions, and have complete intellectual faculties and perspicacity."

Al-Zarkashī accentuates the distinction between intellectual deficiency and poor opinion by how he justifies each. He says her intellectual deficiency is "established by textual evidence", which is an obvious reference to the ḥadīth in which women are described as being "deficient in intellect and religion". He then supports his assertion that the woman is "lacking in opinion and perspicacity" by saying it is indicated by

the verse where a woman's testimony needs to be supported by that of another woman in case she errs. Again, we see the lack of worldly wisdom and broad experience cast as an inherent quality of women and the natural order of things. Women are not assumed to be capable of properly understanding the public sphere, let alone engaging in it. This can also be seen in Ibn Qudāmah's describing complete legal capacity as entailing the qualities of being "adult, sane, male, and free." A woman's public participation is limited like that of a child, a mad person, and a slave. In the first of these cases, the person does not have the worldly experience and maturity of vision to act with discretion and self-interest in matters requiring legal capacity. In the second, the person lacks the sense to do so. In the third, the person lacks autonomy.

Also, the threat of temptation women present to men requires limiting them to the domestic sphere, since any public engagement is deemed "inappropriate".



We see here again that the threat of temptation caused by women forces them into being limited to the domestic sphere. We have seen where Ibn 'Ābidīn justifies why women are not allowed to be heads of state because they are "commanded to remain in their homes and their circumstances are structured upon concealment." Indeed he presents this as the primary reason for prohibiting women from leadership positions, citing the ḥadīth of Abī Bakrah almost as if it were a confirmation of this meaning.

In the rulings on congregational prayer, we find a drastic measure to exclude women from public participation in Muslim ritual life. The imām is expected to exclude women from his intention when he leads the prayers, and thereby prevent them from being able to participate. Ḥanafī jurists argue that this is necessary to safeguard the prayers of the men from being nullified by a woman coming in line with them.

It is reasonable that the jurists would want to safeguard the men's prayers. Yet, there are many other recommendations they could have come up with, like mosque arrangements for women that are found throughout the Muslim world. Instead, they preferred to have the imām consciously exclude women from his intention. In this

way, barring women from a ritual act of worship becomes an aspect of the ritual itself. As serious as this is, Ḥanafī jurists found it much easier than devising more accommodating ways of protecting the men’s prayers.

Of course, this ease comes as a consequence of the Ḥanafī jurists’ general negative attitude towards women attending the mosque, whom they variously discourage or prohibit due to the temptation that women cause for men.²⁹⁵ They arrive at these rulings in spite of numerous prophetic traditions describing how women attended the mosque during the Prophet’s lifetime as well as traditions where he is quoted as expressly advocating for the women’s right to so, like: “Do not forbid the handmaidens of God from the houses of God.”²⁹⁶

What is significant here is how the jurists handle the threat of temptation. They do so by excluding women from the mosque, not by finding ways to accommodate them and their right to participate. This shows the effect that prevailing perceptions about women’s public role can have on the development of legal rulings. The pressures to exclude women from the mosque due to temptation first appeared during the formative period, as evidenced by traditions like the one related from Ibn ‘Umar where he tells his son that the Prophet said: “Do not forbid the women from the mosques if they seek your permission to go.”, to which his son replies: “By God, we will surely forbid them.” after which Ibn ‘Umar curses him and says: “I inform you of what God’s Messenger says and you say ‘By God, we will forbid them.’!”²⁹⁷

There is also the tradition from ‘Ā’ishah that she said: “Had God’s Messenger known what women would start doing, he would have forbidden them from the mosques just like the women of the Children of Israel were forbidden.”²⁹⁸ These traditions affirm that women attended the mosque during the Prophet’s lifetime as well as after his death, while also informing us of when and why social pressures began mounting for the practice to be discontinued.

²⁹⁵ For those who want a thorough, diachronic treatment of the Ḥanafī rulings, evidence, and legal arguments for barring women from attending the mosque, they should refer to Behnam Sadeghi, *The Logic of Law Making in Islam*, 105-127. He shows this to be a negative trend where the ruling becomes more restrictive over time, slowly overcoming legal inertia.

²⁹⁶ *Ṣaḥīḥ al-Bukhārī* (900) and *Ṣaḥīḥ Muslim* (136).

²⁹⁷ *Ṣaḥīḥ Muslim* (135 and 140).

²⁹⁸ *Ṣaḥīḥ al-Bukhārī* (869) and *Ṣaḥīḥ Muslim* (144).

The perceived problem is that social life cannot function when men and women are present together, due to the inevitable temptation that women cause for men. The solution is to exclude women, even in a matter like their right to observe prayer at the mosque. The ease by which exclusion is preferred over accommodation attests to the social values present from the formative period onwards, and it brings the Ḥanafī school to the point where it makes the imām’s mental exclusion of women a recommended aspect of the prayer ritual.

E. Summary

There is a uniform perception that women are to be limited to the domestic sphere. This is often linked with the necessity for concealment to prevent the temptation of men, who must be granted the opportunity to carry out their public functions without distractions.

There is also the notion that women are unable to devote themselves to public duties because of their domestic commitments. This is explicitly stated by the Shāfi‘ī jurist al-Rāfi‘ī and implied in the comparison made by the Ibn Rushd in his comparison between women and slaves.

The perception of women as ill-informed and unable to comprehend weighty affairs is evident in the works of all but the Ḥanafī school, which has a different understanding of women’s competence to be judges. The Shāfi‘ī jurist al-Māwardī and Ḥanbalī texts are most explicit in presenting this attitude. The strong Mālikī assertions of women’s deficiency suffice to include them as well, and ultimately the Ḥanafī jurists reveal themselves to consider women’s intellectual deficiency – which they never went so far as to deny – to be a sufficient impediment to high-level engagement in public life. There is an interesting phenomenon at work here. The inability of women to develop the competence to engage in public life in an informed and competent manner is a direct consequence of their relegation to the domestic sphere and the limitations and demands that this places on them. However, their “weakness of opinion” is not being

perceived as consequences of their limited life opportunities, but as a further justification to limit them.

V. GENDER HIERARCHIES

This topic is closely related to the notions of deficiency discussed above. Indeed it depends on them. The concept of a gender hierarchy is implicit wherever a woman's innate deficiency in essential matters is posited relative to a man's completeness, especially where the consequence is an expanded public role for men, as is the case with all four schools of thought. In a few instances, however, jurists have gone further and elaborated this hierarchical structure more explicitly. The difference is one of focus. With gender hierarchies, the focus is on the arrangement of various genders in degrees according to inherent status and the way placement within the ranking is used to justify the legal rulings.



Ibn Rushd asserts a gender hierarchy in matters of prayer when he justifies the possibility that women can lead other women since they are “of the same rank (*martabah*) when it comes to prayer”. He understands the positioning of men and women in congregational prayer to be a disparity of rank. He is discussing that “the Sunnah with respect to their prayers is for them to be kept behind the men”. He does not perceive this as a mere ritual requirement, or even simply a means to prevent temptation, but an actual disparity in status when it comes to conducting worship.

This idea is echoed by al-Qarāfī when he says that “her situation is worse than that of a child, due to the command that she be sent to the back ranks, unlike him.” The word he uses is *aswa'*, the comparative form of *sayyi'*, which means to be bad or evil. Al-Qarāfī is describing the woman's state and not the woman herself with this comparative adjective, meaning that her status in prayer is worse to that of a male child, because unlike him she is sent to the back. This is telling, since a male child is not legally accountable for his prayer, while a woman's is, but this does not prevent

him from positing a hierarchical ranking between the adult woman and the male child based solely on gender.

An interesting connection between the tradition “Send them to the back” and the subordinate status of women is made by the eight-century Mālikī jurist Ibn al-Ḥājj in his legal work *al-Madkhāl* where he uses the tradition to justify why he places the chapter on washing the corpse before the chapter on childbirth. He writes:²⁹⁹

It would have been appropriate for this chapter to be placed ahead of the previous one on washing the corpse and its aforementioned associated rulings. This is because the creation [of life] comes first and death follows thereafter. However, since the rulings of childbirth are specific to women, they are mentioned later, on account of the Prophet’s saying: “Send them to the back whence God has sent them to the back.”

It is interesting that he does not cite this tradition to support any legal ruling in the book. He only mentions it this once to justify his organization of the book’s chapters. Here, there is no question of polemical motives, since he is not debating any legal question. He sees women as being subordinated in the most general possible sense and understands the tradition to be proof of this. As a consequence, even Islamic legal rulings that pertain only to women are inherently subordinate to those that apply to men, even when the man in question is a corpse.

In *Ḥashiyah al-Dasūqī*, we see that the gender hierarchy in prayer proves problematic for Mālikī scholars coping with the question of an angel leading the prayer, as depicted in the account of the Prophet’s night journey. Since an angel is not understood as being male, what status does an angel have? One solution given is that the condition of being male only means that the person is “neither confirmed a woman nor a hermaphrodite”. This makes a woman’s status very low indeed. Others more sensibly suggest that the relevance of gender applies only to human beings, not to other beings upon whom prayer is enjoined. A consequence of this latter line of thinking is a ruling that a male *jinnī* can lead humans in prayer while a human female

²⁹⁹ Muḥammad b. Muḥammad al-‘Abdarī al-Fāsī (Ibn al-Ḥājj), *al-Madkhal*. (Dār al-Turāth, no date or city), 3:281.

cannot. It would indeed follow from this logic that a female *jinniyyah* should be able to lead human men in prayer, but al-Dasūqī is careful to assert that the *jinn* “share our legal rulings.”

B. *Shāfi‘ī* Texts

The principle that equality of status is a crucial consideration for prayer leadership is suggested by al-Rāfi‘ī in his discussion about illiterate people being able to play together as well as women being able to pray together. The issue in both cases is one of “equal deficiency”.

The rationale of inherent gender-based inferiority as the reason for women not leading men in prayer persists in the Shāfi‘ī legal literature, both within and outside the works under survey, and at times becomes very elaborate pronounced. In the following passage from the foremost Shāfi‘ī scholar of his day, Zakariyyā al-Anṣārī, people are categorized into eight levels, in ascending order, with respect to their eligibility to lead prayers, with level one, the lowest, being for the unbeliever who can lead no one in prayer and level eight, the highest, being for a person who is “safe” from the various negative qualities possessed by all the others. What concerns us are categories near to the bottom, categories three and four.³⁰⁰

The third [category] is that of one whose prayer leadership is invalid except for those who are beneath him. This is the hermaphrodite, since his prayer leadership is valid for the female, but not for a man, since he is less than [a man], nor for a hermaphrodite due to the possibility that he is a man while the [hermaphrodite] imām is a woman.

The fourth category is one whose prayer leadership is invalid save for one who is similar. This is the female and the illiterate person, [the latter being] one who mispronounces a letter from the *Fātiḥah*. The female’s prayer leadership is valid

³⁰⁰ Zakariyyā b. Muḥammad al-Anṣārī, *Tuḥfah al-Ṭullāb fī Sharḥ Tanqīḥ al-Lubāb*. ed. Khalaf Maḥdī jabr al-Muṭṭlaq. (Damascus: Dār al-Fikr, 2006), 155.

for a female like her, but not for a man or a hermaphrodite, since she is less than they are.

We can see here that prayer leadership is not status-neutral. It is linked to inherent status. There is a clear hierarchy at play based on gender. A woman is prohibited to lead men in prayer, not because of some consideration of the general welfare or simply divine writ, but rather as a consequence of her lesser worth in the gender hierarchy. She is less than a man, so she should not lead a man. We can see here that a hermaphrodite, by virtue of possessing some male characteristics, is represented as being more perfect and complete than a woman and that is why the hermaphrodite can lead a woman but not a man.

What is interesting here is how the hermaphrodite is brought into the system. The hermaphrodite provides a serious challenge to the gender binary and to any legal ruling or social system that makes sharp distinctions between male and female. This can be seen in the confusion here regarding their ranking. Hermaphrodites are placed in the third category, which is apparently below the fourth. However, the difference between the two categories is that members of the third cannot lead people of an equal rank, but only those who are below them, while member of the fourth can lead people who are equal to them in rank. However, it turns out that women, ostensibly in the fourth category, are the very people identified as being beneath the hermaphrodite in rank.

It is easy to imagine how hermaphrodites could have been made a kind of legal outcast, pushed to the farthest margins of the gender hierarchy, but this is not what we see here. Instead, hermaphrodites are placed above women. This move is understandable only if the woman is presented as representing the greatest possible human deficiency in contrast to the human completeness of the man. It then follows that to whatever extent a particular hermaphrodite possesses male genitalia, that hermaphrodite is more complete than any woman not so endowed. This idea persists in the Shāfi'ī legal literature. The idea that “the female is less than the male” is used to justify women not being allowed to lead men or hermaphrodites in prayer in the late Shāfi'ī works *Nihāyah al-Muḥtāj* and *Mughnī al-Muḥtāj*.

C. Summary and Analysis

As already discussed, gender hierarchies are implicit in all of the schools of thought, discernible through the three themes of deficiency, temptation, and limited public life. They are brought into sharper focus in certain texts. What is interesting to note is that these hierarchies are presented most explicitly in matters of spiritual leadership, rather than in reference judicial or political leadership. This appears to be in stark contrast to a number of verses of the Qur'ān that attest to the innate spiritual equality of men and women, like *Sūrah al-Aḥzāb* (33): 35:

For Muslim men and women, for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in charity, for men and women who fast (and deny themselves), for men and women who guard their chastity, and for men and women who engage much in God's praise; for them God has prepared forgiveness and great reward.

Another pertinent verse is *Sūrah al-Tawbah* (9): 71, since it establishes a reciprocal relationship between men and women as being guardians to one another and then makes an explicit reference to prayer:

And (as for) the believing men and the believing women, they are guardians of each other; they enjoin good and forbid evil and keep up prayer and pay the poor-rate, and obey God and His Messenger; (as for) these, God will show mercy to them; surely God is Mighty, Wise.

These verses would seem to negate the existence of any hierarchy in religious worship based on gender. Asma Barlas observes that “such a regime of mutuality is conceivable only in the absence of hierarchies and inequalities based in the idea of sexual differentiation.”³⁰¹

³⁰¹ Barlas, *Believing Women*, 148.

It is obvious that the jurist who felt the need to set up explicit gender hierarchies to justify why women cannot lead men in prayer. must have thought that doing so provided a more compelling argument. The question remains as to why they felt this to be the case.

These explicit hierarchies begin appearing in the legal literature at roughly the same time. We see them with Shāfi'ī scholar al-Rāfi'ī and the Mālikī scholars Ibn Rushd and al-Qarāfi. If we go back about a century, during the time of al-Ghazālī, we find that the answer might lie in the field of ethics and the manner in which it was developing in the Arab world at the time. Leila Ahmed points out that verses like 33:35 balance virtues and ethical qualities between the genders³⁰². She also points out that “the egalitarian conception of gender inhering in the ethical vision of Islam” were in stark contrast to “the social and political dimensions of virtue” espoused by Aristotle, who saw women as innately different and socially inferior to men. The development of ethical thought in Islam was very much influenced by classical Greek thinking, and this means that the intellectual classes of urban Muslim society were engaging with the perspectives found in those teaching at the very time when the four schools of thought were coming into their fullness. Indeed, Aristotelian arguments about women seem to be echoed by the Shāfi'ī scholars from the fifth century AH onwards.

Al-Rāghib al-Iṣfahānī (d. 502 AH) is a very pivotal figure in the assimilation of Greek teachings into mainstream Sunni ethical thought. He identified himself as Shāfi'ī in Law and he had considerable influence on al-Ghazālī's thinking.³⁰³ He writes:³⁰⁴

³⁰² She also points out just how much is at stake when she observes: “Ethical qualities, including those invoked here – charity, chastity, truthfulness, patience, piety – also have political and social dimensions.” Ahmed, *Women and Gender in Islam*, 65.

³⁰³ The extent of al-Iṣfahānī's influence on al-Ghazālī's ethical thought is a central thesis of Yasien Mohamed's *The Path to Virtue*. Another is the extent to which al-Iṣfahānī, in turn was influenced by Greek thought, especially through earlier Muslim philosophers like Miskawayh. Yasien Mohamed, *The Path to Virtue: The Ethical Philosophy of al-Rāghib al-Iṣfahānī*. (Kuala Lumpur: ISTAC, 2006).

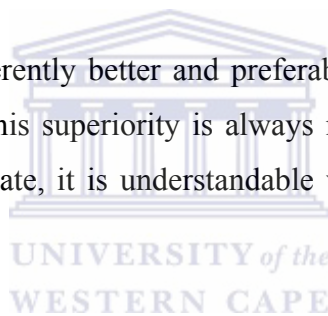
³⁰⁴ al-Ḥusayn b. Muḥammad al-Rāghib al-Iṣfahānī, *al-Dharī'ah ilā Makārim al-Akhlāq*. ed. Abū al-Yazīd Abū Zayd al-'Ajāmī. (Alexandria: Dār al-Salām, 2007), 116. Translation by Yasien Mohamed in *The Path to Virtue: The Ethical Philosophy of al-Rāghib al-Iṣfahānī*. (Kuala Lumpur: ISTAC, 2006), 522-523 with some modifications. Mohamed makes the astute observation that al-Iṣfahānī does not cite the verse concerning men as protectors, since he probably realized that the verse “cannot be used to substantiate the subservience of women.” Mohamad adds that though al-Iṣfahānī generally supports his assertions with verses from the Qur'ān, he “does not cite a single Qur'ānic verse on the subject of women.” This leads Mohamed to conclude that “Iṣfahānī's views reflect the status of women in the tenth century Arab and Persian society, and not the position of women in Islam.”

Much of what is virtuous in a woman is disgraceful in a man, like simple-mindedness, bashfulness, niggardliness, and timidity. This is why it is said that the best traits in men are the worst in women. Thus, astuteness, gallantry, and open-handedness³⁰⁵ are a disgrace in women.

His contemporary, al-Ghazālī takes matters much farther, making it an ethical mandate for the man to excel the woman, due to his innate spiritual superiority. Before relating his depictions of eminent women of piety, he says:³⁰⁶

Consider the women who have struggled in the path of God and say: “O my soul, be not content to be less than a woman, for it is despicable for a man to be less than a woman in matters of religion or of this world.”

Not only, then, are men inherently better and preferable to women, it is imperative that they act to ensure that this superiority is always manifested in the world. With men possessing such a mandate, it is understandable why a woman leading men in prayer would be intolerable.



VI. CONCLUSIONS

Negative attitudes towards women are clearly prevalent in the works of all four schools of thought. These attitudes are firmly rooted in the discussions on women and leadership, and are often presented as primary justifications for the rulings. They are also instrumental in the interpretation of textual evidence, like the interpretation of Abū Bakrah’s ḥadīth that the cause of people being unsuccessful is a consequence of the woman leader’s deficient intellect. We can also see negative gender assumptions underlying many of the instances of *qiyās* presented to justify legal rulings.

³⁰⁵ It is worth pointing out that this seems to be in direct contradiction to verse 33:35 where it says: “for men who give and for women who give”.

³⁰⁶ Abū Hāmid Muḥammad b. Muḥammad al-Ghazālī, *Iḥyā’ ‘Ulūm al-Dīn*. (Beirut: Dār al-Mā’rifah, no date) 4:414; as translated by Leila Ahmed with some modifications. She rightly points out that al-Ghazālī, though talking about universal spiritual matters, is presuming his audience to be male. Ahmed, *Women and Gender in Islam*, 68.

In a few cases, a jurist argues against justifying a particular ruling with a rationale that presents an unfavourable opinion about women. We see this in Juwaynī's argument that women's deficiency and the inherent sexual temptation they pose do not explain the prohibition of women leading men in prayer. Nevertheless, al-Juwaynī still upholds these attitudes regarding women. We can see this also in the Ḥanafī jurists' confirming women's intellectual deficiency while ruling it out as a means to overturn their preferred ruling. In these cases, they are not merely invoking these attitudes to further their arguments, so it is clear that these are attitudes they actually share or at least perceive the broader society in which they live already accept.

Gender attitudes are clearly an important factor in justifying the legal rulings divesting women of leadership positions, and this is strengthened by the fact that these attitudes are presented both explicitly and implicitly in the legal texts. They are found persistently over the temporal and geographical scope of post-formative legal activity. There is no reason to believe that such attitudes about women's intellectual capacity, inherent worth, and social functions were remarkably different in the Near East during the formative period when these laws were being developed. As discussed in the introduction, historical research attests that they were, and, in the absence of any other compelling justification for the rulings in question, it is safe to assume that these attitudes played as important a role during the formative period that they are seen to play in the post-formative legal literature.

CHAPTER THREE
***RULINGS & ARGUMENTS: THE LAW JUSTIFYING
 ITSELF***

I. INTRODUCTION

This chapter follows the legal rulings over time, along with evidence and arguments presented for them in the legal works. The chapter is divided according to school of thought. These sections are, in turn, sub-divided by legal question. Each question is traced diachronically to determine and analyse trends in the rulings themselves as well as trends in the types of arguments used to justify them.

II. MĀLIKĪ RULINGS & ARGUMENTS

A. Political and Judicial Appointments

Ibn Rushd and al-Rajrājī claim there is consensus on the prohibition of a woman aspiring to the office of head of state. However, their focus in doing so is elsewhere. Al-Rajrājī asserts it as a basis for a *qiyās* to argue that women cannot lead men in prayer, while Ibn Rushd asserts it as the basis for a *qiyās* prohibiting women from assuming judicial authority. One thing that deserves attention is al-Rajrājī's referring the prohibition of political leadership not only to the ḥadīth of Abū Bakrah, but also to the arguments he has just presented about prayer leadership, namely that it is “a degree of honour and a lofty station” requiring someone who, unlike a women, is “complete in religion and in essence”.

The arguments presented for judicial authority are applicable by implication to political authority. Ibn Rushd, interestingly, does not cite the ḥadīth of Abū Bakrah anywhere in his discussion. His is the only Mālikī work in the survey that cites textual evidence which refrains from doing so. He merely cites two instances of *qiyās*, the aforementioned one on political authority and a second one on the situation of a slave.

Al-Rajrājī cites the ḥadīth of Abū Bakrah as his primary evidence for prohibiting a woman from being a judge. He also quotes al-Qāḍī Abū al-Walīd’s statement that it is “enough” for him that a woman being appointed as a judge never occurred in the era of the Prophet or in any subsequent era. That this would be considered sufficient evidence in and of itself shows how important the Muslims’ general practice is for the Mālikī school, even when consensus is not being suggested, not even a Madinite consensus, since all we have here is the absence of an action, not an clear, agreed-upon course of action.

Al-Qarāfī cites the ḥadīth of Abū Bakrah as his chief evidence. He then argues two instances of *qiyās* on the basis of prayer leadership and an analogy on political leadership. The problematic nature of these analogies have already been discussed, and it appears that al-Qarāfī is seeking to test the range of evidence that can be brought to bear on the issue, even if such evidence is not very convincing.

He also echoes al-Qāḍī Abū al-Walīd by invoking the lack of historical examples of female judges, even suggestion a kind of *ijmā‘* on the basis that a female judge is “contrary to the way of the believers.” We can be certain that he does not mean a binding consensus upon the Muslims on this issue, since he explicitly brings this argument up to argue against al-Ṭabarī and the position of the Ḥanafī school of thought. What it does mean, however, is that al-Qarāfī considers this to be a compelling enough argument for the Mālikī school. Existing practice is paramount, even outside the formal parameters of Madinite practice. In essence, he is saying that whatever aspects of Muslim community life women have not traditionally been engaged in are things they should never be engaged in.

The later works in the Mālikī school do not focus on evidence, though the ḥadīth of Abū Bakrah is cited by ‘Ulaysh in *Minah al-Jalīl*. The discussions in these later works are typically limited to stating and clarifying the school’s rulings. However, they do provide valuable insights. For instance, Khalīl’s *Mukhtaṣar* is explicit in uniting the questions of political and judicial leadership, listing a single set of conditions for both and adding Qurayshī lineage as an additional condition for the head of state. This leaves no doubt as to how the relationship between two questions are conceived in the later Mālikī school. Al-Ḥaṭṭāb mentions in *Mawāhib al-Jalīl* that Ibn al-Qāsim

permitted women to serve as judges, possibly like al-Ṭabarī without restriction. This is quite significant. The view of one of Mālik's foremost students and one of the school's *mujtahid* imāms shows that the early Mālikī school could accommodate such a ruling and that its prohibition by the school was neither inevitable nor merely the product of legal inertia.

B. *Leading Men in Prayer*

The general Mālikī ruling is that it is impermissible for women to lead prayers at all. The prayers of the men and women who follow a woman in prayer are invalid, though the prayers of the woman imām are valid for herself. This position is held uniformly with respect to women leading men in prayer, with some disagreement regarding women-only congregations.

Al-Māzirī provides a number of arguments to prohibit women from leading prayers, whether for men or for women. He begins by citing the ḥadīth that “The best ranks for women are the last ones.” He says this is used by Mālikī scholars to argue for “the categorical prohibition” of women leading prayers. Since the ḥadīth merely shows what is preferable for a woman, it is clear that it is being used here merely to illustrate and reinforce a broader principle that women are supposed to remain behind the men, and not as direct self-sufficient evidence for prohibiting her prayer leadership.

He argues separately that a woman's voice is shameful, significantly presenting this as a distinct and independent argument. This is a direct citation of a general principle being used as evidence.

He also cites an analogy on political leadership. Though he does not immediately suggest the effective cause for the ruling, it soon comes out in his discussions that a woman suffers from “the deficiency of being female” and “a deficiency of intellect and religion.” As discussed in chapter one, a direct *qiyās* on political leadership is unwieldy due to the disparity between prayer and politics which is generally acknowledged, particularly by al-Qarāfi. When this *qiyās* is understood as based on

the general principle that those who are deficient should not lead in any capacity, it becomes more coherent.

He then follows the Shāfi‘i jurist of a century earlier, al-Māwardī, by arguing that women are not included in the generality of the ḥadīth that the “most well-versed among the people (*qawm*) should lead them in prayer.” The near word-for-word correspondence of his argument makes it certain that this is a direct borrowing from *al-Ḥawāī al-Kabīr*. Though this argument is not taken up by the later works in the survey, it is an interesting case of the influence the works of one school of thought can have on another.

In summary, though a ḥadīth text and an instance of *qiyās* are cited, in both cases it is clear that general principles are really at play. The ruling that women should not lead prayer is based on the principle that women are to be kept behind the men in prayer and also because of general considerations of their shamefulness and deficiency.

Ibn Rushd articulates two of the principles underlying the prohibition of women leading prayer. Moreover, he cites these as being the “only” reasons to prohibit her. The first is that the practice is absent from the first generations of the Muslims, and this is sufficient to indicate impermissibility. Here we again see the importance of the community’s practice, even to the extent that if there are aspects of Muslim community life women have traditionally been excluded from, they should continue to be excluded. He then states the principle that “the Sunnah with respect to their prayers is for them to be kept behind the men.” This is an explicit statement of the principle alluded to by al-Māzīrī’s ḥadīth in his use of the ḥadīth “The best ranks for women are the last ones.” Likewise, Ibn Rushd cites the text “Send them to the back...” to illustrate this principle.

Al-Rajrājī is even most explicit in citing norms and general judgments about women in his arguments. He cites that the “only” reason why jurists prohibit women from leading prayer is because: “prayer leadership is a degree of honour and a lofty station, so only someone who is complete in religion and in essence should assume it.” He then states this as a principle. “[T]his is built upon the principle that everyone who is characterised by deficiency and lowliness has no share in positions of high status.”

His makes it clear that his analogy of prayer leadership on political leadership is based on what he has “already mentioned” regarding her deficiency in assuming such leadership roles. He then cites the two ḥadīth texts mentioned by his predecessors to affirm another principle that women are to be kept behind the men. He argues as well that a woman’s appearance and voice are shameful and that making it necessary for men to look at her is “unlawful for the Muslims to take as religion.”

Al-Qarāfī’s chief argument is a reference to the deficiency of women, that her situations is “worse than a child” and “worse than a slave”, and he cites legal comparisons to other rulings to affirm this principle. He also argues that “it is impermissible to send her forward to lead the prayer” on the strength of the text “Send them to the back...”

Al-Nafrāwī focuses all attention on the principle that the deficiency of women excludes them from all positions entailing honour and status within Muslim society. He uses it to explain how the ḥadīth of Abū Bakrah is relevant to prayer and other forms of leadership. His statement “even if men are absent” is a dismissal of the considerations of temptation and of the importance of women being behind men. The matter for him hinges upon women being categorically and universally unworthy of “positions honour in religion and in the rites of the Muslims.”

The later Mālikī works follow the typical pattern of eschewing evidence and defences of the rulings in favour of further clarifications and greater detail. These later works explore the question of the hermaphrodite, and address the validity of the prayer of the woman imām for herself, even if she intends to lead others in prayer. These later works reaffirm that the ruling is upheld even when “no man is present”. This means that the school has ultimately dismissed considerations of temptation as being relevant to prohibiting women from leading prayers and has focused solely on “the principle that everyone who is characterised by deficiency and lowliness has no share in positions of high status.”

C. *Women-Only Congregations*

The ruling adopted by the Mālikī school of thought is that women are categorically ineligible for prayer leadership, even if the followers are all women. The prayers of the women who follow a female imām are invalid. However, this is not the only opinion attributed to Mālik. Al-Māzirī and al-Rajrājī identify a narration from Mālik by way of Ibn Ayman that a woman can lead other women in prayer. Al-Qarāfī also acknowledges that this permissibility has been narrated from Mālik.

Al-Māzirī limits his focused discussion on women-only congregations to addressing the views held by other schools of thought. He does not attempt to justify the Mālikī view, probably because he deems he has sufficiently addressed this in his general discussion on women leading prayers. He acknowledges that those who permit women-only congregations have textual evidence to support them. He dismisses the ḥadīth of Umm Waraqah as “a narration we regard as strange” and one that “must not be relied on.” He does not make any judgements about its chain of transmission, so it is unclear whether his dismissal has anything to do with the criticisms levied against some of its narrators, or simply its variance with accepted practice.

His dismissal of `Ā'ishah's practice is more revealing. He casts doubts on whether it is authentically established. This reveals that he perceives authenticity as requiring more than just a sound chain of transmission. He also suggests that she was merely going through the motions of prayer or that her practice was abrogated. We see here a clear response to how a Companion's practice is to be handled when it contradicts what is regarded as accepted Madinite practice, and this illustrates the importance of received practice in Mālikī Law.

Ibn Rushd, like many Mālikī scholars, does not address women-only congregations separately from the general ruling of women leading prayer. He affirms that the ḥadīth of Umm Waraqah is used as evidence by those who permit it. He does not argue in

favour of the Mālikī position on this matter, and his reticence may indicate his personal sympathy for the other point of view.³⁰⁷

Al-Rajrājī challenges the school's accepted ruling by arguing in support of women-only congregations. First, he clarifies that there are indeed two opinions in the school, so he is not going outside of the school by adopting this stance, though he concedes it is one of the school's "strange" positions. It is interesting that al-Rajrājī is the most articulate jurist in describing the principle of women's ineligibility for positions of honour and lofty stations. Here, however, he is not arguing on the basis of general principles, but with textual evidence. He upholds the ḥadīth of Umm Waraqah as establishing the practice of women-only congregations.

He further argues that the prohibition is "weak in theory", but instead of bringing up the honour and leadership principle, he tries to represent the prohibition as a case of prohibiting the means to sin. He claims the general ruling relies on the axiom that "whenever means are prevented, the category of rulings involved are to be taken as a unit." He then argues that women-only congregations fall outside of the category of rulings due to the absence of any harm, which would appear to be the threat of causing temptation.

It is difficult to reconcile this stance with what al-Rajrājī says earlier in *Manāhij al-Taḥṣīl*. His position on women-only congregations looks like a consequence of his desire to place discussions of Maliki Law on a clearer evidentiary basis, a goal for writing the work that he articulates in his introduction. What we see here is a conflict between two conceptualisations of the Law. His position on women leading men represents the Law as conceived through received practice, and his arguments clearly show this to be the case, while his opinion on women-only congregations represents an alternative conceptual vision of the Law based primarily on textual evidence, particularly individual-narrator ḥadīth.

³⁰⁷ Since the Mālikī ruling prohibiting women from leading other women in prayer hinges on their inherent inferiority and unworthiness of positions of honour, it is understandable that Ibn Rusd would not personally share this view, in light of his philosophical writings. However, here he is presenting the general opinions of the jurists. See: Belo, "Some Considerations".

The later Mālikī works do not provide separate discussions on women-only congregations, since they do not differentiate between the two issues of leading men and leading women. Ultimately, both rulings are subsumed under the single principle that women are ineligible for any position of honour or high status.

D. *Summary*

The Mālikī works rely openly upon received practice and general principles. Textual evidence and *qiyās* are better understood as supporting and clarifying those principles than as directly establishing the rulings. Many of these principles are inseparable from prevailing negative attitudes about gender.

The Mālikī rulings that women cannot be judges and that they cannot lead women in prayer were not the only opinions expressed within the school, though they were the opinions that were adopted. The only challenge to an adopted ruling was given by al-Rajrājī on women-only congregations, but it had no discernible impact on the later jurists of the school. By contrast, his depiction of women's inferiority and the principle that women are consequently unworthy of positions of honour and lofty status were embraced. This ultimately became the dominant line of reasoning for the school to divest women of all forms of leadership, as well as to explain the historical absence of women leaders. This latter point is important, since the absence of women in these roles is the only basis upon which the school can discern a pattern of general practice.

III. SHĀFI'Ī RULINGS & ARGUMENTS

A. *Political and Judicial Appointments*

The position of the Shāfi'ī school is that women cannot be heads of state or serve as judges in any capacity. At the same time, Ibn Jarīr al-Ṭabarī, who holds that a woman can serve as a judge in an unrestricted capacity, is a scholar associated with the Shāfi'ī school.

The Shāfi‘ī arguments depend heavily on the ḥadīth of Abū Bakrah, though al-Juwaynī also argues that there is *ijmā‘* on the issue of political leadership. Significantly, al-Māwardī does not assert the existence of *ijmā‘* on this matter, though he goes so far in *al-Aḥkām al-Sulṭāniyyah* to prohibit a woman from even being a junior minister “because of what it entails of [her assuming] positions of authority that are denied women” on the strength of Abū Bakrah’s ḥadīth.³⁰⁸ He also argues the woman’s deficiency in intellect and opinion makes her unsuitable for holding positions of authority. Al-Māwardī then lists a number of weak lines of evidence not taken up by the later Shāfi‘ī jurists, including verse 34 of *Sūrah al-Nisā’* and comparisons with prayer leadership.

Al-Rāfi‘ī makes his primary argument for women not being heads of state that they cannot carry out the duties of that office due to their not being complete, not commanding respect, not being free to devote themselves to their work, and not being able to be present among men. Since he cites the ḥadīth of Abū Bakrah as the only textual evidence to prohibit her from being a judge, it is safe to assume that he regards this as evidence for prohibiting her from being a head of state as well, and that he omits mention of it there for the sake of brevity.

The commentators on the *Minhāj* are uniform in citing the ḥadīth of Abū Bakrah as the only textual evidence to prohibit a woman from being head of state or a judge. They all cite that that she is not supposed to be in the company of men to prohibit her from being a head of state and al-Ramlī argues this as well with respect to her being a judge.

Ibn Ḥajar al-Haytamī and al-Ramlī also argue against a woman being head of state due to the “weakness of the woman’s intellect”. Al-Shirbīnī does not mention this, but he is alone in arguing that she will not be able to devote herself to her duties. With respect to her being a judge, al-Ramlī and al-Shirbīnī cite her deficiency, while Ibn Ḥajar al-Haytamī mentions nothing other than the ḥadīth of Abu Bakrah.

³⁰⁸ al-Māwardī. *al-Aḥkām al-Sulṭāniyyah*, 36.

The Shāfi‘ī school rests its case primarily on the argument that the ḥadīth of Abū Bakrah denies women any share of political authority. They then go on to support their interpretation of the ḥadīth on the basis of women’s inherent deficiency and weak intellects. This is why al-Māwardī takes pains to point out that issuing legal verdicts and giving testimony do not entail any exercise of authority.

B. *Leading Men in Prayer*

The position of the Shāfi‘ī school is that women cannot lead men in prayer but they can lead other women. If a woman leads men in prayer, her prayer is valid, as well as the prayers of any women present in the congregation, but the prayers of the men following her will be invalid. This position is stated clearly by al-Shāfi‘ī in *al-Umm*. He supports this ruling by arguing that God has made men responsible for women and prohibited women from positions of authority and “the like”. He is deliberately vague here, alluding to both textual evidence and to other rulings without specifically stating them. His invoking these matters as general principles about women shows his awareness that the texts cannot be used on their own to arrive at the desired conclusions. It also shows how pre-existing assumptions and legal decisions worked to limit the potential for rulings that this ḥadīth-based school would otherwise have been able to entertain. Looked at in this way, the dissenting view of al-Ṭabarī, Abū Thawr, and al-Muzanī can be seen as actualizing this unrealised potential.

Al-Māwardī makes all of al-Shāfi‘ī’s references explicit and introduces a number of other arguments, in accordance with his overall approach in *al-Ḥāwī al-Kabīr*. He cites verse 34 of *Sūrah al-Nisā’*, the ḥadīth of Abū Bakrah, the text “Send them to the back...” attributed to the Prophet, and a number of instances of *qiyās* whose unwieldiness has already been addressed.

Al-Māwardī’s approach is in stark contrast to that of his contemporary al-Juwaynī. A comparison between the two is revealing, since their works fulfil the same role of asserting the rulings within the Shāfi‘ī school of law and furnishing those rulings with evidence, arguments, and rationales. Both scholars’ works take al-Muzanī’s *Mukhtaṣar* of *al-Umm* as a starting point, and they draw upon the same generations of

al-Shāfi‘ī’s students. These two scholars, therefore, are giving the school of thought its first full presentation.

In spite of the fact that they acknowledge the same ruling prohibiting women from leading men in prayer, their strategies could not be more different. Al-Juwaynī was, in his day, the foremost authority on Shāfi‘ī legal theory. Indeed, it could be argued that, apart from his student al-Ghazālī, there is no one of greater importance in this regard for the school of thought. As a consequence, he presents a very careful and objective approach to selecting evidence in defence of the school’s opinions.

As opposed to the hodgepodge of arguments al-Māwardī presents, al-Juwaynī begins by stating a general legal principle that “whoever’s prayer is valid for himself, it is valid for those who follow him” which he argues “is consistently applied in al-Shāfi‘ī’s school except in two instances.” Women leading men in prayer is one of these instances. Since Shāfi‘ī law is based on the primacy of textual evidence and not the application of general principles, al-Juwaynī sets himself to the task of finding the evidence for this exceptional ruling, which violates the dictates of *qiyās*. He comes up with nothing, declaring the legal rationale to be “problematic”. In other words, he cannot find any direct textual evidence for the ruling, nor can he find any established ruling in the Shāfi‘ī school with an effective cause that can provide an analogy for prohibiting women from leading men in prayer.

He brings up two commonly cited arguments and dismisses them both. He rejects the idea that the ruling is due to prohibiting women from being seen by men, since this would not apply to a man following his wife or sister in prayer in the privacy of their home. He also debunks the argument of completeness, since a woman can lead other women in prayer so she must have the legal capacity to lead prayers. It is rather the man’s prayer which is nullified because he chooses to follow her.

It is significant that al-Juwaynī does not attempt to bring up direct textual evidence for the ruling. The very fact that he, a Shāfi‘ī scholar, is seeking an analogy upon which to base the ruling means that he does not consider the question to be addressed by any verse of the Qur’ān or authentic prophetic ḥadīth. Even though he may not have had access to al-Māwardī’s work, he was certainly aware of the verse from

Sūrah al-Nisā' and the ḥadīth of Abū Bakrah. Al-Shāfi'ī's references in *al-Umm* to these two texts would not have been lost on him. We can be reasonably sure that he was aware of the other ḥadīth commonly used by jurists to justify prohibiting women from leading men in prayer. This means that he did not regard any of those texts as providing evidence for the ruling, either due to their irrelevance to the question or due to their weakness.

Al-Juwaynī is not alone among Shāfi'ī scholars in reaching this conclusion. It is probably no accident that the three jurists who categorically permit women to lead men in prayer are affiliated with the Shāfi'ī school of thought and operated within that school's methodological approaches and theoretical assumptions. It is quite likely that those three jurists arrived at the conclusion they did for the same reasons al-Juwaynī presents in *Nihāyah al-Maṭlab*. However, al-Juwaynī does not go as far as they did by adopting a position at variance to his school of thought. He simply concludes that he cannot suggest a justification for the ruling. His honesty in this matter is the most eloquent example of a jurist's desire to preserve the school's rulings. It shows that this was indeed an extremely important consideration. It is a testament to al-Juwaynī's integrity that he was willing to admit not having an answer rather than suggest something at variance to the school's methodology and evidentiary standards.

Al-Rāfi'ī asserts the school's ruling that a woman cannot lead men in prayer and cites the ḥadīth "A woman does not lead men in prayer" as the basis for the ruling. His use of this ḥadīth in spite of its weakness is probably an attempt at a best-fit solution. He does not follow al-Māwardī in citing the ḥadīth of Abū Bakrah, probably because he deems it irrelevant to the question of prayer leadership. Nor does he follow al-Māwardī in citing "Send them to the back...", since he would be well aware of that text's status.

Al-Nawawī is not satisfied with al-Rāfi'ī's solution of relying on the ḥadīth "A woman does not lead men in prayer.", which is also the evidence favoured by al-Shīrāzī in *al-Muhadhdhab*. He dismisses it as weak. Al-Nawawī seems to echo al-Juwaynī's sentiment that this is simply the position of the school of thought as well as that of "the vast majority of scholars from the earliest and later generations". We cannot assume that he is basing the ruling on generally accepted practice. He is

simply refraining from providing clear textual evidence or a valid *qiyās* for the ruling, and this must be put down to his not being able to identify any evidence. Like al-Juwaynī, he is not prepared to depart from the school on this matter.

His appeal to the vast majority of jurists is not to suggest there is *ijmā'* on the issue, nor even the consensus of his own school of thought. He openly attributes the categorical permissibility of women leading men in prayer to Abū Thawr, al-Ṭabarī and al-Muzanī, and relates their opinion from al-Qādī Abū al-Ṭayyib and al-'Abdarī, who are leading authorities in transmitting the opinions of the school's earlier jurists. As if this were not enough, he also mentions Sheikh Abū Ḥāmid's affirmation that it is the opinion of Abū Thawr. Al-Nawawī leaves the ruling on no surer a footing than al-Juwaynī does. If anything, his further dismissal of evidence and his emphasising the dissenting view places the school's official position in greater doubt. However, he again demonstrates the importance of preserving the ruling of the school. In his abridged text, *al-Minhāj*, he writes: "It is invalid for either a man or a hermaphrodite to follow either a woman or a hermaphrodite in prayer."

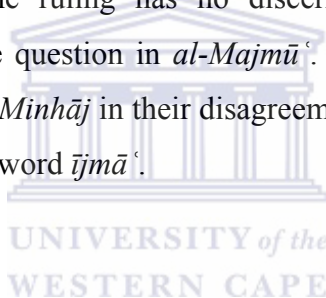
Two of the commentators of the *Minhāj*, al-Ramlī and al-Shirbīnī adopt the ḥadīth of Abū Bakrah as their primary textual evidence, despite its lack of direct relevance to the question of prayer leadership. However, as has already been discussed, it makes sense that the Shāfi'ī school would opt for the only available authentic ḥadīth that could possibly be recruited. They may have been emboldened to do so by al-Shāfi'ī's oblique reference to it in *al-Umm*. Al-Shirbīnī also enlists "A woman does not lead men in prayer." His awareness of its weakness is clear in the way he presents it. By contrast to Abū Bakrah's ḥadīth which he quotes as something "[t]he Prophet said", he tacks on the other ḥadīth by saying "Ibn Mājah narrates..."

What is peculiar is that al-Ramlī and Ibn Ḥajar al-Haytamī invoke *ijmā'* as their foremost argument. Indeed al-Haytamī does not justify the ruling with anything else. However, they do not mean any genuine kind of *ijmā'*, not even within their own school of thought. They say that the prohibition "is by consensus (*ijmā'*) for a man following a woman, except for the rare disagreement like that of al-Muzanī." Their mention of al-Muzanī instead of al-Ṭabarī and Abū Thawr is probably due to his

remaining within the school of thought, so his opinion would be a “rare disagreement” within the school rather than an opinion from outside of it.

Their invoking *ijmā'* shows their dissatisfaction with other lines of textual evidence just like al-Shirbīnī's bringing up “A woman does not lead men in prayer.” shows his dissatisfaction with the suitability of the ḥadīth of Abū Bakrah.

What we see here is the Shāfi'ī school confronting its own rigorous evidentiary standards and not finding any way to match those standards while maintaining the school's established ruling. Moreover, this problem did not result from a gradual, growing dissatisfaction with the evidence. It was around from the school's earliest days with the dissenting views of al-Shāfi'ī's students al-Muzanī and Abū Thawr, as well as of al-Ṭabarī who followed very similar juristic standards. It is clear from al-Juwaynī's admission that the ruling has no discernible rationale and from al-Nawawī's presentation of the question in *al-Majmū'*. Its final manifestation is seen with the commentators of the *Minhāj* in their disagreement on the ḥadīth evidence and their ineffectual appeal to the word *ijmā'*.



C. Women-Only Congregations

Al-Shāfi'ī declares in *al-Umm* that women can lead other women in prayer, both compulsory and voluntary prayers. He cites the practice of the Prophet's wives and describes in detail how the prayer is carried out, highlighting that the only differences between a female imām and a male imām is that a female should preferably stand in the middle of the first row of worshippers and lower her voice for all recitations. He also discusses the complexity caused by the discrepancy in dress code between a free woman and a slave, but deems this problem to be less critical than that of a seated *imām* leading standing worshippers.

Al-Shāfi'ī does not expressly state at this point that it is better for a woman to lead other women in congregational prayer than for them to pray individually, though this can be understood from his relating the statement of Ṣafwān b Sulaym that it is the Sunnah for them to do so. Indeed, the Shāfi'ī school is unique in its emphasis on this

preferentiality, which is not so much in evidence in the Ḥanbalī school which shares in the ruling that women-only congregations are permissible.

Al-Māwardī asserts that al-Shāfi‘ī’s position is that it is preferable for one woman to lead the other women. He stresses this point, repeating it twice, once at the beginning of his discussion and once at the end. Al-Māwardī introduces the ḥadīth of Umm Waraqah to the list of evidence, but nothing else. He also addresses the opposing views of the Mālikī and Ḥanafī schools and others.

Al-Juwaynī cites the same evidence and also explicitly states that “it is good for one of them to lead them in prayer” and that “the congregation as we have described is to be preferred for them”.

Al-Ghazālī does not state expressly that it so preferable for a woman to lead other women in prayer. However, he does state in *al-Wasīṭ*: “The virtue of congregational prayer applies to the woman, regardless of whether she follows a man or a woman in prayer.” The implication, of course, is that there is virtue to be had in a woman leading the other women in prayer that is lost if they each pray on their own. However, there is a subtle but clear change of emphasis here. We see a blurring of the distinction between two distinct issues. The first is whether it is preferable for women to participate in congregational prayer as followers as opposed to their praying individually. The second is whether it is preferable for a woman to lead the other women in prayer in order for them to have the opportunity to offer prayer in congregation when no men are present. There is a degree of overlap between these questions, but they are not the same.

This shift in emphasis is complete with al-Rāfi‘ī. The primary question becomes to what degree women praying in congregation is preferable for them at all, regardless of whether the imām is a man or a woman.³⁰⁹ When he cites the practice of Umm Salamah, ‘Ā’ishah, and Umm Waraqah, it is more in the context of this broader

³⁰⁹ Al-Rāfi‘ī presents this general question as follows: “As for women, praying in congregation is not obligatory for them individually or collectively. It is preferable for them, but al-Rūyānī mentions there are two positions on the question. One is that it is preferable for them just like it is for men, on account of the generality of the textual evidence. The clearer position held by the majority is that it is not as emphatic for them as it is for men, so it is not disliked for them to forego the congregation though it is disliked for men to do so.” al-Rāfi‘ī, *al-Azīz*, 2:142.

question. He also takes the trouble to point out that “a man leading the prayer for them is better than a woman leading them in prayer.” The ruling is still intact that women-only congregations are better than each woman praying by herself, but it must now be teased out from the al-Rāfi‘ī’s words by way of implication. It is no longer directly stated as it has been before. This is a far cry from the forthrightness of al-Māwardī and al-Juwaynī, who presented it almost as a point of distinction for the Shāfi‘ī school.

Al-Nawawī reasserts the fact that it is preferable for women to congregate on their own rather than pray individually. Interestingly, he does so by pulling the more general pronouncements about the preference of congregation back into the context of women-only congregations. He clearly seeks to restore the question to its earlier prominence. However, he also states that a male imām is better than a female one because he is more knowledgeable about prayer and he always recites out loud. Though this ruling favours men, it also serves to bring the question of women imāms back to the fore.

This renewed emphasis on women imāms is not found among the commentators of al-Nawawī’s *Minhāj*. They cite the practice of ‘Ā’ishah and Umm Salamah to assert the validity of women leading other women in prayer. The only time preference is invoked is to state that the woman imām should stand in line with the others rather than stand ahead. Elsewhere they discuss the general question of how preferable it is for women to pray in congregation, upholding the position that “the preference is not as emphatic as it is for men.” In *Nihāyah al-Muḥtāj*, al-Ramlī justifies this by saying that making them pray in congregation would cause them undue hardship because it would require them to go out to the mosques in most cases. These later jurists are clearly conceiving the question as one of women praying in congregation behind men in most cases and not as a question of women imāms. That emphasis is entirely lost in the later works.

D. Summary

The Shāfi‘ī school maintains the prohibition of political and judicial authority on the basis of the ḥadīth of Abū Bakrah, which is taken to divest women of all positions of authority due to their inherent deficiency and intellectual weakness. It also affirms the invalidity of the prayers of men if they follow women in prayer, in spite of not being able to present a satisfactory justification for the ruling within the school’s framework. It affirms the preference of women-only congregations on the basis of the practice of the Prophet’s wives, though with a discernible change in attitude regarding it. What began as a point of distinction for the Shāfi‘ī school in declaring it preferable for a woman to lead other women in prayer becomes a neglected question that is presented only by implication. This shows a subtle but negative tendency in the ruling’s development.

IV. ḤANBALĪ RULINGS & ARGUMENTS

A. Political and Judicial Appointments

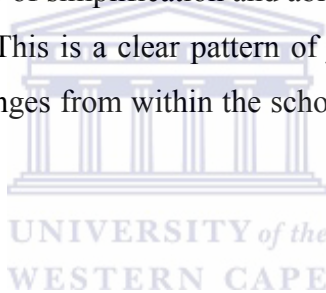
The Ḥanbalī texts are uniform in citing the ḥadīth of Abū Bakrah as the sole textual evidence to directly prohibit women from being judges. Implicitly, this is also their evidence for prohibiting women from being head of state, though this becomes explicit in the final two works where political leadership is finally addressed as a separate issue.

All of the Ḥanbalī works are equally consistent in citing that women are weak of opinion, deficient in intellect, and unsuited to be present in the assemblies of men. The wording of their various pronouncements to this effect vary only slightly, in what is clearly a direct paraphrase of each jurist from his predecessor. Significantly, they all present this as a valid and independent justification for the ruling. They expressly state that the ruling is because of the ḥadīth of Abū Bakrah, and that “it is also because” of this list of reasons. The phrase “it is also because” is consistently cited in all five works. Only the first two works mention a woman’s forgetfulness and propensity to err, invoking verse 282 of *Sūrah al-Baqarah* as proof for this

contention. The absence of this additional reference in the later works might be due to the way the verse can limit the scope of deficiency that can be attributed to women.

Ibn Qudāmah is the only jurist to identify being male, along with being adult, sane, and female, as the four constituents of complete legal capacity. The others simply present these qualities among a longer list of qualifying conditions for the judicial post, without differentiating between those that pertain to legal capacity and those that pertain to physical attributes. Ibn Qudāmah is also the only jurist to mention the contrary opinions of al-Ṭabarī and Abū Ḥanīfah. The only jurist to introduce a new line of evidence into the discussion is al-Zarkashī, citing the ḥadīth “The judges are three... a man” to argue that judgeship is limited to males. The extreme weakness of this argument is probably the reason why it is not seen again.

The tendency over time is one of simplification and abridgement, while the ruling and arguments remain the same. This is a clear pattern of juristic inertia where the legal ruling faces no serious challenges from within the school of thought nor from outside of it.



B. *Leading Men in Prayer*

1. *Women Leading Men in Compulsory Prayers*

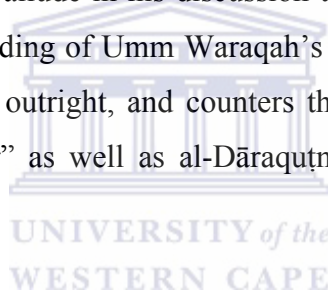
All of the Ḥanbalī jurists rely on the ḥadīth “A woman does not lead men in prayer” as their sole textual evidence. All but al-Zarkashī invoke the *qiyās* on insane men due to their inability to give the call to prayer. The rationale behind this *qiyās* can be discerned from Ibn Qudāmah’s discussion about the call to prayer. However, he gives other arguments later in *al-Mughnī* that show his own dissatisfaction with this kind of reasoning. The repetition of this *qiyās* in the later works without the corresponding rationale shows the Ḥanbalī propensity to repeat the arguments of their earlier scholars almost verbatim. As mentioned before, the reason why al-Zarkashī does not mention this *qiyās* may have less to do with his recognition of the argument’s weakness than with his greater openness to the older view of women leading men in voluntary prayers. Asserting this *qiyās* would mean committing himself to the view

that women cannot lead men in any prayer, regardless of whether it is compulsory or voluntary.

2. Women Leading Men in Sunnah Prayers

The Ḥanbalī school is unique among the four canonical Sunnī schools in that a significant number of its early scholars permit a woman to lead men in some or all voluntary prayers. This prevalence changed over time. Due to the lateness of the Ḥanbalī school in developing encyclopaedic legal works, we do not have a dynamic history for most of this change. Instead, we have to rely on references from later Ḥanbalī scholars who have more or less already dismissed this opinion as weak and discuss the matter in hindsight.

Ibn Qudāmah cites that “some” Ḥanbalī scholars permitted a woman to lead the Tarāwīḥ prayer and does not allude in his discussion to any other voluntary prayers. He then cites the general wording of Umm Waraqah’s ḥadīth of as their evidence for it. He rejects this possibility outright, and counters this with the ḥadīth “A woman does not lead men in prayer” as well as al-Dāraqṭnī’s variant narration of Umm Waraqah’s ḥadīth.



The presence of a prayer caller gives him a strong argument to support his contention that Umm Waraqah’s ḥadīth must refer to compulsory prayers. He also argues that the conditions some earlier Ḥanbalī jurists set for a woman leading men – like her standing in the back or limiting it to the Tarāwīḥ prayer – are not supported by the ḥadīth and are contrary to established rulings. However, his purpose in doing so is to rule out the ḥadīth’s applicability for a congregation including men and to insist upon adopting al-Dāraqṭnī’s variant narration, which he describes as an “extra clause.” He appeals to the the impossibility of accepting her leading men in compulsory prayers, and argues that this is the inevitable consequence of understanding that she was leading men in any prayers.

Finally, his own reasoning comes back to haunt him, since the presence of an appointed prayer caller in Umm Waraqah’s ḥadīth does not correspond to a women-only congregation, but indicates she was leading a general one. He then resorts to the argument that the ruling for leading men might have been uniquely for her and for no

other woman thereafter. The strangeness of this argument has already been discussed, and none of the later Ḥanbalī scholars in the surveyed texts bring it up.

It is important to note that Ibn Qudāmah does not argue his case on the basis of considering Umm Warāqah's ḥadīth to be weak. He accepts the ḥadīth and attempts to explain it in different ways. This is how the ḥadīth is approached by the other Ḥanbalī jurists in the survey.

Al-Zarkashī asserts that the ruling of permissibility for women to lead men in at least the Tarāwīh prayer, and from the back of the congregation, was the position of the “generality of the close associates” of Aḥmad b. Ḥanbal, acknowledging that there were two narrations from him, one permitting it and the other prohibiting it. He also admits that some Ḥanbalī scholars permit a woman to lead men in all voluntary prayers. He also cites a variant position that she leads only apparently through her recitation while a man leads in actuality. He does not present counter-arguments or take sides in the matter, but leaves all of the opinions standing. Al-Zarkashī provides a lot of history on the ruling. He identifies al-Mārūdhī as the associate of Aḥmad who narrated the permissibility which was adopted by the majority of Ḥanbalī scholars early on, and he identifies Abū Mūsā as the one who narrated the opinion of prohibition. He identifies Abū al-Khaṭṭāb and Abū Muḥammad as the earlier scholars who favoured prohibition.

Ibn Muflīḥ reasserts Ibn Qudāmah's view that a woman should not lead men in any voluntary prayers, stating that that the prayers of any man who does so would be invalid. He then elaborates on the other views and the manner of a woman leading men in prayer on the basis that someone chooses to adopt that view.

By the time of al-Bahūtī, the debate is over. He asserts that the school of thought has settled upon the view that women cannot lead men in any prayer, though admitting that most of the early Ḥanbalī scholars thought otherwise. Al-Ruḥaybānī, in the final surveyed work, does not even refer to the disagreement on the subject. He says that the prohibition for women leading men “is categorically the case for compulsory and voluntary prayers.”

The later Ḥanbalī rejection of women leading men in Tārāwīḥ prayers is a complete reversal of the prevailing view followed by the majority of Aḥmad b. Ḥanbal's own associates and early Ḥanbalī scholars. It shows that the prevailing ruling of the school of thought could change completely, as long as there was a narration from Aḥmad to support the alternative ruling. It also shows a tendency over the course of time to narrow, rather than expand, the domain allowed to women when more than one possibility was available. Even in the surveyed texts, despite their lateness, the overall trajectory is one of narrowing the possibility of women leading men. Al-Zarkashī leave the matter wide open, despite ibn Qudāmah disavoursing women leading men. Ibn Mufliḥ rejects the idea but still makes concessions for those who wish to follow it. Al-Bahūtī at least mentions that disagreement once existed on the matter. Al-Ruḥaybānī does not do so, but simply asserts that the prohibition includes voluntary prayers.

3. 20th Century Changes

The Ḥanbalī scholars in the survey do not rely on the ḥadīth of Abū Bakrah to prohibit women from leading men in prayer, though they cite this ḥadīth frequently to prohibit them from political and judicial leadership. This seems to be the case for all classical Ḥanbalī legal works. I am unaware of any Ḥanbalī legal scholar before the twentieth century who cites the ḥadīth of Abū Bakrah as proof that a man's prayer under a woman's leadership is invalid. Indeed the concept of authority (*wilāyah*) does not even come up in their discussions about prayer leadership.

It seems that Ḥanbalī scholars have universally rejected the particular analogous reasoning that is required to use the ḥadīth as evidence in prayer which necessitates recognizing prayer leadership to be a position of authority akin to that of political authority. Ibn al-Qayyim, in *I'lām al-Muwaqqi'īn*, clearly excludes the question of prayer leadership from what the ḥadīth indicates. He writes, while defending the position that women can lead other women in prayer:³¹⁰

These traditions [supporting a woman leading women in prayer] are being [wrongly] rejected due to an ambiguous reading of the Prophet's statement: "A

³¹⁰ Ibn al-Qayyim, *I'lām al-Muwaqqi'īn*, 2:488.

people who grant a woman authority to rule them will not succeed.” This refers only to the highest authority and leadership, and to judicial appointments. As for narrating [ḥadīth], giving testimony, issuing legal verdicts, and leading prayers, these matters do not enter into its [meaning]. It is strange that those who go against this Sunnah permit a woman to serve as a judge and preside over the affairs of the Muslims.³¹¹ So how can they be successful when she is ruling over them, but her sisters among the women cannot be successful if she leads them in prayer?

This is a powerfully stated rejection of using this ḥadīth as evidence for anything regarding prayer leadership. Ibn al-Qayyim sees it as referring specifically to political authority, and he extends its meaning to judicial appointments. He does not extend it by way of analogy to any other position of responsibility or leadership.

This is in marked contrast with the Ḥanbalī legal scholarship of the twentieth century, particularly in Saudi Arabia, where there has been an explosion of recent commentaries on classical Ḥanbalī legal treatises. These commentaries are typified by an originality of thinking with respect to evidence as well as with an occasional willingness to depart from the established rulings of the Ḥanbalī school. Otherwise, they are fully within the classical Ḥanbalī tradition. A good example is the commentary on *Zād al-Mustaqni*³¹² by al-Bulayhī entitled *al-Salsabīl*. Regarding a woman leading men in prayer, he writes:³¹³

[A man’s prayer] is invalid [following] behind a woman. This is the position of the three, due to the general meaning of the Prophet’s statement: “A people who grant a woman authority to rule them will not succeed.” Its [authenticity] is agreed upon [by al-Bukhārī and Muslim] from the ḥadīth of Abū Bakrah. The Prophet also said: “Send them to the back whence God has sent them to the back.”

³¹¹ He is referring to the Ḥanafī ruling against women leading women in prayer and their ruling on the validity of a woman serving as a judge.

³¹² *Zād al-Mustaqni* is a short legal treatise by al-Ḥajjāwī (d. 968), the author of *al-Iqnā*.

³¹³ Ṣāliḥ b. Ibrāhīm al-Bulayhī, *al-Salsabīl fī Maʿrifah al-Dalīl*. (Riyadh: Maktabah al-Maʿārif, 1986), 1:184.

We can note here that two ḥadīth are used in an unprecedented manner. The ḥadīth “A people who grant a woman authority to rule them will not succeed” is presented as if it by virtue of its general wording – and not by way of analogy – prohibits women from all forms of leadership, including prayer, and moreover to invalidate the prayers of the men who follow them in prayer. Secondly, the ḥadīth “Send them to the back whence God has sent them to the back.” is used as proof to invalidate the prayers of men following a female imām, which is not the case in earlier Ḥanbalī works. This ḥadīth is often quoted by classical Ḥanbalī scholars in their legal works, but only as proof for where a woman should preferably stand in relation to men during congregational prayer, not as proof that her leadership of men invalidates their prayers.

Another good example is the commentary on *Zād al-Mustaqni‘* by al-‘Uthaymīn entitled *al-Sharḥ al-Mumti‘*.³¹⁴

[A man’s] prayer is invalid [following] behind a woman. The proof for this is what is related from the Prophet that he said: “A woman does not lead a man in prayer.” This ḥadīth is weak. However, it is supported by the Prophet’s statement: “A people who grant a woman authority to rule them will not succeed.” The congregation grants their affair to the imām, so it is not valid for a woman to be the imām for them.

Al-‘Uthaymīn tells us the reason for the unprecedented use of this ḥadīth by acknowledging that the primary ḥadīth text the Ḥanbalī school relies upon is too weak to stand as evidence, and therefore other evidence is needed to maintain the school’s position. Al-‘Uthaymīn argues here that his interpretation of Abū Bakrah’s ḥadīth supports and strengthens the directly worded ḥadīth in *Sunan Ibn Mājah* to the point of making it valid as evidence. In another unprecedented move, he also cites as evidence: “The best rows for women are the last rows.”³¹⁵ This ḥadīth was cited in the

³¹⁴ Muḥammad b. Ṣāliḥ al-‘Uthaymīn, *al-Sharḥ al-Mumti‘ ‘alā Zād al-Mustaqni‘*, ed. Sulaymān b. ‘Abd Allah b. Ḥamūd Abā al-Khayl and Khālid b. ‘Alī b. Muḥammad al-Mushayqih. (Riyādh: Mu’assasah Āsām, 1995), 4:312-313.

³¹⁵ al-‘Uthaymīn, *al-Sharḥ al-Mumti‘*, 4:313. He argues: “This is evidence showing that she has no place at the front, and the imām is not anywhere else but in the front. If we were to say that her leading men in prayer is valid, the situation would be reversed and she would be put ahead of the men. This is not supported by the Sharī‘ah.” The subjectivity of this argument is interesting. He takes evidence

classical Ḥanbalī legal literature, but only for determining the preferential rows for women, not as proof that their leading men in prayer is invalid.

An even more recent Saudi Ḥanbalī *fatwā* from ‘Abd Allah b. Ḥumayd is worthy of interest in this regard:³¹⁶

It is impermissible for a woman to lead men in prayer, because the Prophet said: “Send them to the back whence God has sent them to the back.” Moreover, prayer leadership in the mosque is authority, and only men are qualified to be in authority. “A people who grant a woman authority to rule them will not succeed,” as the Prophet said.

However, there is an exception in the Ḥanbalī school, though it is a weak opinion, that a woman can lead prayer in *Tarāwīḥ* if she is a proficient reciter and the men are illiterate. She stands behind them and leads them. However, there is no evidence for this.

In brief: It is impermissible for a woman to lead men in prayer. Yes, she may lead other women like herself – there is no objection to her leading women due to the report of Umm Waraqah – or some of her close relatives (*maḥārim*). As for [her leading] unrelated men or [holding a position of] public authority like her being *imām* of the mosque, this is impermissible.

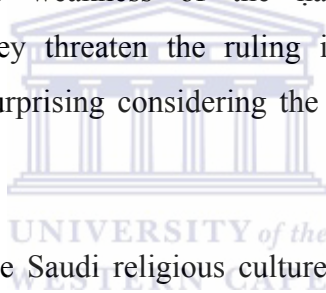
Here, the case is made for prohibiting a woman from leading prayer primarily because it is a position of public authority (*wilāyah āmah*). Following this line of reasoning, he permits a woman to lead her close male relatives in prayer, since it does not entail her aspiring to any position of public authority.

stating what is best in virtue for a woman in the ranks of prayer and summarily concludes the invalidity of her leading prayers on the basis that she would not be in the row that is best for her. This is indicative of the high levels of subjectivity in interpreting textual evidence exhibited by many post-*taqlīd* Islamic jurists.

³¹⁶ ‘Abd Allah b. Ḥumayd, “al-Mar’ah Ta’umm al-Nisā’ Lā al-Rijāl” in *Fatāwā al-Mar’ah al-Muslimah*, ed. ‘Abd al-Maqṣūd, Abū Muḥammad Ashraf. (Riyadh: Maktabah Aḍwā’al-Salaf, 1996), 1: 319

What we see in all of these cases a complete rethinking of the evidence for invalidating a woman's leadership of men in prayer, while essentially preserving the ruling that her leadership is invalid. It introduces the notion of prayer leadership being akin to political authority, a comparison that Ibn al-Qayyim, for one, explicitly and clearly rejected.

The need for this change in thinking derives from the current religious culture in Saudi Arabia, which places a high value upon reliance upon authentic ḥadīth and exhibits a distaste for blind following (*taqlīd*). This has introduced some instability into the state of affairs and poses a challenge to legal inertia. In this case, the Ḥanbalī scholars have opted for an evidentiary basis requiring a high level of interpretative reasoning and an implicit *qiyās* of an act of worship on a question of public policy, both of which are highly incompatible with Ḥanbalī thinking. On the other hand, by acknowledging the extreme weakness of the ḥadīth Ḥanbalī scholars have traditionally relied upon, they threaten the ruling itself. This is an unwelcome consequence, which is not surprising considering the current position of women in Saudi society.



What is surprising is how the Saudi religious culture, by demanding evidence and eschewing blind following, has produced a *fatwā* from one of its mainstream scholars which would allow a woman to lead close (*mahram*) male relatives in prayer, even in compulsory prayers. This *fatwā* might be seen as a return to earlier Ḥanbalī attitudes about women leading men in voluntary prayers, but it is quite different. In one way, it is more restricted than what had once been the school's most prevalent opinion, that a woman can lead all men in some prayers. In another way, it is less restricted, since it is inclusive of both compulsory and voluntary prayers. This new ruling simply prohibits cases where women will be seen by non-relatives, which is frowned upon in Saudi society, and her being a public imām because that would be a position of public authority. However, even with these objections, once the validity of the prayer of a close male relative following a woman in a compulsory prayer is acknowledged, it becomes difficult to maintain the stance that the prayer of a non-relative male is invalid. This is an interesting case of instability in the law challenging the school's legal inertia, a case which is unfolding at the present time. It is too early to determine

how this matter will be resolved, but the response of other Ḥanbalī scholars indicates that it will probably not lead to the adoption of Ḥumayd's more liberal opinion.

C. *Women-Only Congregations*

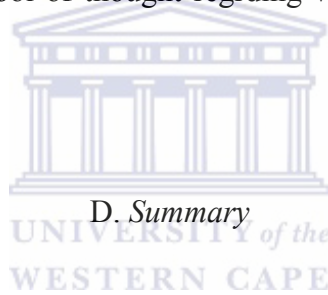
The Ḥanbalī texts are uniform in the position that it is permissible for a woman to lead other women in congregational prayer and that she should stand in their midst when doing so. Ibn Qudāmah is the only jurist who presents the opinions of other schools of thought, which is his general approach in *al-Mughnī* when discussing major legal issues. Otherwise, the Ḥanbalī texts differ only slightly. There is some variation in the presentation of evidence. There is also some differences regarding whether or not the woman imām can stand ahead of the first row, and whether or not women-only congregations are preferable to each woman praying on her own.

With respect to the presentation of evidence, Ibn Qudāmah mentions that it was the opinion of 'Ā'ishah and Umm Salamah that women can lead other women in prayer, without citing their practice. He relies instead on the ḥadīth of Umm Waraqah as his chief piece of evidence. He is unique in presenting the analogy that women resemble men in leading prayer since prayer is equally incumbent upon them both. He does this to refute the Mālikī stance that women-only congregations are impermissible. This is significant, because it weakens his own earlier argument against women leading men in prayer, where he compares women to insane men in their both being unable to make the call to prayer. Here, he dismisses the call to prayer issue as being irrelevant to the question at hand. Ibn Qudāmah is non-committal as to whether it is valid for the woman imam to stand ahead, citing the Ḥanbalī school's two divergent opinions without giving preference to either. He also presents the school's two opinions on whether women-only congregations are preferable or merely allowed, and seems to slightly favour the ruling of preferability in his introduction to the topic.

Al-Zarkashi relies upon the practice of 'Ā'ishah and Umm Salamah as proof for the validity of women-only congregations, and cites their practice to clearly assert a ruling of preferability, though he also mentions there are two opinions related from Aḥmad on the matter. He does not discuss whether the woman imām can stand ahead.

Ibn Muflīḥ also cites the practice of ‘Ā’ishah and Umm Salamah and favours the ruling that women-only congregations are preferable. He asserts the validity of the woman imām standing ahead, though he accepts the possibility of the opposing opinion that her standing ahead it is invalid. He is unique in discussion the question of whether the lone follower should pray to the right of the imām or behind her.

We see a change in attitude with al-Bahūtī. He merely states that it is “valid” for a woman to lead other women in prayers, and returns to citing the ḥadīth of Umm Waraqah, particularly the alternative narration of al-Bayhaqī that restricts Umm Waraqah’s practice to women. Al-Ruḥaybānī also limits the question to the “validity” of women-only congregations. This indicates a shift in attitude about the preferability of such congregations, possibly tending towards the alternate view on the matter that they are merely permissible. To the extent that this is true, it would be another negative tendency in the school of thought regarding women leading prayer, albeit a subtle one.



The Ḥanbalī texts are the most uniform in presenting evidence and arguments, and the verbatim replication of passages is not uncommon. There is no significant variation in rulings or the presentation of evidence in the surveyed works. The most severe example of the replication of evidence is the uniform citation of the *qiyās* of women on insane men to disallow the practice of women leading men in prayer, since the underlying rationale Ibn Qudāmah gives for this complex analogy is absent from the later works, though the *qiyās* is consistently mentioned by them all, nonetheless.

In spite of the near-uniformity of presentation, a few trajectories are in evidence. The most significant is the change in the Ḥanbali position on women leading men in voluntary prayers. In the early school, the predominant position had been that it was permissible, with disagreement between the jurists relating to the scope of this permissibility. There was a complete reversal later on, and this change had nearly run its course by the time of Ibn Qudāmah who comes out strongly against the practice. Nevertheless, a negative tendency still unfolds within the surveyed works themselves,

with only the final works completely ruling out the possibility. A more mild negative trajectory can be seen in the question of whether it is preferable for a woman to lead other women in congregation, rather than each woman praying on her own. The earlier jurists lean towards preferrability, with the later one's merely declaring the practice to be valid.

A twentieth-century challenge to the evidentiary basis for prohibiting women from leading men in prayer, though outside the time-period of the survey, sheds light on the dynamics of Ḥanbalī legal reasoning. They adopt the ḥadīth of Abū Bakrah in a radical departure from their traditional attitude against using this ḥadīth for matters of worship. However, they are willing to resort to this strategy rather than challenge their school's ruling against women leading men in prayer. Though 'Abd Allah b. Ḥumayd points out that the shift in evidence has implications for allowing a limited scope for women to lead men, it is unlikely that his view will be adopted. If it is, it would mark the first-ever positive trend in a ruling pertaining to women's leadership in the history of "classical" Islamic Law, though it is still too early to tell if this will be the case.



UNIVERSITY of the
WESTERN CAPE

V. ḤĀNAFĪ RULINGS & ARGUMENTS

A. *Political and Judicial Appointments*

1. *Judicial Appointments*

The Ḥanafī school of law is unique in permitting women to serve as judges in cases not involving capital punishments. The crux of their argument is that a woman's legal capacity to give testimony demonstrates her legal capacity to serve as a judge. Consequently, since she cannot give testimony in capital crimes, she cannot preside as a judge in those matters. Al-Zayla'ī uses this justification to counter the argument of non-Ḥanafī jurists that a woman's deficiency in intellect disqualifies her from being a judge. He specifically implicates al-Shāfi'ī in framing his refutation: "We say: She is qualified for the legal agency by which she is qualified to give testimony. Consequently, she [is qualified] to be a judge, just like a man." Here, al-Zayla'ī asserts that wherever a woman is allowed to preside over a case, her eligibility for

judgeship is exactly the same as that of a man. This remains the Ḥanafī ruling until the time of the revisionist scholar Ibn al-Humām.

Ibn al-Humām begins his discussion by confirming the Ḥanafī position. He then commences to discuss the opposing view of the other three schools of thought, citing the ḥadīth of Abū Bakrah as their evidence. This is the first time this ḥadīth is mentioned in the surveyed Ḥanafī works.³¹⁷ He points out that al-Marghīnānī's does not address this ḥadīth, almost as if he is accusing him of evading the issue. Ibn al-Humām then goes on to concede to his opponents that men are better than women and that women are deficient in intellect, and that as a consequence people will not be successful if they grant women authority to rule them. Most importantly, he concedes its relevance to judicial authority, declaring that the men whom the ḥadīth addresses are not permitted to appoint a woman as a judge.

Ibn al-Humām does not go so far to say the other schools were right all along. Instead, he argues that deficiency is relative and that some individual women can be more competent than some men. This means that if a woman happens to be appointed as a judge and she judges correctly, her judgement will be legal and binding. He presents this as a rhetorical question: "Why should her correct judgement be nullified?"

Ibn al-Humām presents his explanation as if he is clarifying what the Ḥanafī position was all along. In reality, he is overturning their position, making what was once a substantial disagreement between the Ḥanafī school and the others something purely hypothetical: *What if a woman is appointed as a judge, even though it should not happen?* His revision may very well reflect the reality on the street, where women were never appointed judges. It definitely conforms with society's attitudes about women at the time. Nevertheless, it is not what the earlier Ḥanafī jurists were saying.

There is a sense that Ibn al-Humām is responding to the discourse of the scholars of the other schools of law, as if to cover up for something embarrassing in his own school. It is as if he is saying: *We have never really disagreed with you that women*

³¹⁷ In a broader survey of over thirty Ḥanafī legal texts, I have not found this ḥadīth cited with reference to a woman being a judge before it was introduced by Ibn al-Humām. Afterwards, it continues to appear.

should not be judges. You do not get the subtlety of our argument. We are just saying that her ruling does not have to be overturned in the unlikely event that a woman is made a judge.

Ibn al-Humām's revised ruling is adopted by the later Ḥanafī works, and Abū Bakrah's ḥadīth also becomes a regular feature in their discussions.

2. Political Appointments

The question of political leadership is first brought up in the surveyed texts by al-Bābirtī as an incidental point to a discussion focusing on women's intellectual capacity and their competence to give testimony as witnesses. He is followed in this, almost verbatim, by al-'Aynī and Ibn Nujaym, the latter of whom identifies al-Bābirtī as the original source of this argument and presents it as a direct quotation from him.

Al-Bābirtī's argument employs a quasi-Aristotelian distinction between the passive and active intellects to categorise the human mind. He then identifies the woman's place of mental competence, claiming that a woman is fully capable of forming thoughts on the basis of "self-evident knowledge through the sensory perception of particular things" but is deficient in even basic abstract reasoning. He then argued that this was Prophet Muḥammad's intention when he said that women are deficient in intellect. As a further clarification of his argument's implications, al-Bābirtī says this is why women cannot be political leaders.

This argument provides a very negative depiction of women's intellectual ability, and it predates Ibn al-Humām's about-face on women being judges due to their intellectual deficiency. It indicates a negative trend towards women's competence in the Ḥanafī school which could very well have influenced Ibn al-Humām's conclusions, though he does not bring up that particular argument in his work.

The surveyed works do not address this question of political leadership directly until very late. It is first brought up as a direct topic by Ibn Nujaym in *al-Baḥr al-Rā'iq*. Surprisingly, he states that it is valid for a woman to be head of state (*sulṭānah*). Even more surprising is his argument for it. He does not bring up any textual or theoretical evidence. Instead, he cites history, mentioning the reign of Shajarah al-Durr in Egypt.

This is not a legal argument. He accepts it simply because it happened. This reveals a lot about the possible thought processes in operation behind the legal rulings across the four schools of thought. It shows how social reality could be translated into codified law. Certainly, we have seen where a number of jurists cite the absence of women leaders, judges, and imāms as proof that women should not assume these roles. Here is an ruling based on one occurrence – very late in Islamic history – that concludes the opposite. Shajarah al-Durr died in 655AH/1257 CE, and marked the rise of the Mamluk dynasty in Egypt. This is too late to be precedent-setting in Islamic Law. At the same time, since Ibn Nujaym died in 970 AH/1563 CE under Ottoman rule, her reign is too early for Ibn Nujaym to have been political motivated to assert its validity.

Ibn Nujaym is one of the jurists who quotes al-Bābirtī's argument about women's intellect and how her inability to grasp abstract thinking disqualifies her from being head of state. It is easy to reconcile Ibn Nujaym's position here with his quoting al-Bābartī, since the question of her being head of state is part of al-Bābirtī's much larger argument that Ibn Nujaym is quoting in full, and he does not have to agree with all of its conclusions, especially those that are mentioned only incidentally.

On the other hand, Ibn Nujaym's position does need to be reconciled with his own stance on a woman being a judge. He comes after Ibn al-Humām, so he adopts the ruling that it is sinful to appoint a woman as a judge. Since he does so on the strength of the ḥadīth of Abū Bakrah, it is inconceivable that he would apply this ruling to a judge and not to the head of state. We are forced to conclude that Ibn Nujaym upholds the validity of her appointment and the legitimacy of her reign, but that she should not be the one granted such authority if there is a choice to be made.

All the same, it is significant that Ibn Nujaym discusses the question of a woman assuming political power in conjunction with her being a judge. He draws our attention to how the unique Ḥanafī position on a woman's capacity to exercise authority left the question of political leadership wide open, and that this had been the case for a very long time. If we consider that, for most of the school's history, appointing a woman as a judge was not regarded as sinful or objectionable in any way, we can appreciate just how open the question really was. Ibn al-Nujaym

regarded her political leadership as valid, implying that this had been the true implication of the school's teachings all along.

Ibn Nujaym is not followed in this opinion by later Ḥanafī jurists. Ibn ‘Ābidīn makes being male an explicit condition for possessing supreme political authority. He argues that women should stay at home and keep themselves hidden, and then mentions the ḥadīth of Abū Bakrah. If Ibn ‘Ābidīn intends this for the Caliph and not for a lesser head of state, he is silent on the matter, though the mention of Qurayshī lineage makes this a possibility. Moreover, since he lists being male after the condition of being free and before that of being sane, it is ambiguous whether this condition is to be waived in the event a woman is appointed head of state, as is the case with the appointment of a child.

B. *Leading Men in Prayer*

Ḥanafī scholars are agreed that it is impermissible for a woman to lead men in prayer, and the prayers of the men who follow her are invalid. Al-Sarakhsī relies solely on the statement: “Send them to the back whence God has sent them to the back.” Though al-Sarakhsī does not elaborate on it, it is clear that sending them forward to lead the prayer violates the command given in the text, which he claims to be a ḥadīth from the Prophet.

Al-Kāsānī mentions “Send them to the back” to demonstrate that a woman coming in line with a man or standing directly ahead of him nullifies his prayer, but he does not cite this text as being direct evidence for prohibiting a woman from leading prayer. Instead, he uniquely asserts that “the woman does not have the legal capacity to lead men in prayer.” He does not elaborate on why this is the case, but states that the consequence of her lack of legal capacity is that “her prayer is nonexistent with respect to the man.”

Al-Marghīnānī asserts the ruling on the basis of “Send them to the back” since making her imām would require the prohibited act of sending her forward. He also

addresses the objection to using an individual-narrator ḥadīth to establish a *farḍ* obligation by claiming that it is a well-known ḥadīth.

Al-Zayla‘ī asserts the prohibition of a woman leading men in prayer on the basis of the text “Send them to the back”. He explicitly states that the reason his prayer is nullified is his obligation to send her to the back. He also addresses the status of the narration as being an individual-narrator ḥadīth, and likewise claims that it is a well-known ḥadīth and therefore strong enough to establish the ruling. He further tries to assert that there is *ijmā‘* on the issue.

Al-Bābirtī follows him in the interpretation of the ḥadīth as well as the assertion of *ijmā‘*. He also suggests the ḥadīth of Anas and his grandmother as textual evidence for a woman negating a man’s prayer by coming in line with him, but does not elaborate on how it does so.

Al-‘Aynī follows him in the interpretation of “Send them to the back.” He says: “Since the command was given to send her back, it is not permissible to send her forward. Therefore it is impermissible to follow her in prayer.” He also cites the claim of *ijmā‘* without going so far as to endorse it, but he identifies the source of the claim as al-Zāhidī’s *al-Mujtabā*. Though he calls the text “Send them to the back” into question as a prophetic ḥadīth, he does not challenge it very strongly. He also addresses its status as an individual-narrator ḥadīth and argues that it is acceptable for establishing binding obligations, because it clarifies the ambiguity in verse 228 of *Sūrah al-Baqarah*.

Ibn al-Humām follows al-Zayla‘ī’s example in asserting *ijmā‘*. This is crucial for him, since he dismisses the text “Send them to the back” as spurious. Because this *ijmā‘* is not valid, Ibn al-Humām leaves the prohibition of a woman leading prayer with nothing more than the flimsy justification of the ḥadīth of Anas and his grandmother, which is argued primarily to provide evidence that a woman coming in line with a man nullifies his prayer. He seems to recognise the weakness in the argument, admitting that it is only possible evidence.

Ibn Nujaym returns to relying solely on “Send them to the back”. He acknowledges that Ibn al-Humām denies it is a ḥadīth, but he does not even bother to dismiss the allegation. He continues to accept the text as a ḥadīth and argues that it is acceptable for establishing binding obligations in spite of being an individual-narrator report, because it clarifies the meaning of a verse in the Qur’ān. Ibn al-Nujaym seems to realise the weakness of the situation, because he also feels the need to mention al-Zāhidī’s dubious claim of *ijmā’*, though he does not go so far as to endorse it.

When we arrive at Ibn ‘Ābidīn, we find a technical discussion of what constitutes a man, a woman, and a boy and no discussion of the evidence that prohibits a woman from leading men in prayer. It is implicit, however, that “Send them to the back” is what he is relying upon.

The ruling remains constant. What we see unfolding over time, however, is a growing sense of the precarious textual basis upon which the ruling is justified. “Send them to the back” is first challenged as an individual-narrator ḥadīth and then exposed not to be a ḥadīth at all. However, it is not a simple matter for the Ḥanafī jurists to switch their textual evidence for why a woman cannot lead men in prayer, because they need this particular text to establish their argument by *istihsān* for their particular ruling regarding a woman coming in line with a man in prayer. For the argument by *istihsān* to work, the two rulings must be linked together, and need to be anchored by “Send them to the back.” This is what compels some later Ḥanafī scholars to assert an unlikely – and what could be described as desperate – claim of *ijmā’* in the face of the well-established disagreement that exists on women’s prayer leadership. This is also why those who rely on *ijmā’* have to develop an elaborate inductive argument to establish that sending the women to the back is the only possible effective cause for the ruling. In this way, they seek to preserve the meaning of the text without having to rely on the text itself.

C. Women-Only Congregations

Al-Sarakhsī argues that women-only congregations as practiced by ‘Ā’ishah were abrogated because of the temptation they can pose for men. However, he

acknowledges it is nevertheless permissible for women to hold these congregations and even for the imām to stand ahead of the congregation, though it is better if they pray individually, and if they pray together, for their imām to stand in the ranks of the women, like the case for naked men. He asserts that it is preferable for women to pray individually, but he does not claim that their congregating is disliked.

Al-Kāsānī says also compares the performance of women praying together to the prayer of naked men in congregation. He states that women are suited to lead women-only congregations and that these prayers are permissible, but mentions in the same breath that these congregations are disliked. He also adds that the practice of women-only congregations was only at the beginning of Islam, establishing an early period for the abrogation.

With al-Marghīnānī, mention of permissibility is dropped and the woman's congregation is simply declared disliked. The reason he gives is that "unavoidably a prohibited act must be perpetrated" by her standing in the middle of the row of worshippers.

Al-Zaylā'ī presents the argument in far greater detail. He makes mention of the ḥadīth that a woman's prayer in her private chamber is better for her, and he also adds the argument that the congregation leads inevitable to "one of two forbidden things": either the imām stands in the middle of the row which is the wrong place for the imām, or she stands ahead which is disliked for women. He asserts that congregational prayer is not prescribed at all for naked men, so comparing women to them leads to the same consequence.

Al-Bābirtī provides a more detailed discussion wherein he brings up counter-arguments to the prevailing Ḥanafī position. This indicates that the question had become one of serious discussion within Ḥanafī circles. The length of his exposition indicates how much attention Ḥanafī scholars were giving to this matter at the time. This trend continues with al-ʿAynī and Ibn al-Humām, in what are the lengthiest passages in the survey. This was clearly a protracted and serious discussion within the Ḥanafī juristic community.

Al-Bābirtī is intent on defending the established Ḥanafī ruling that women’s congregations are disliked, and he mentions the objections only to answer them. The first objection he addresses is that it is historically impossible for ‘Ā’ishah’s practice to have been at the beginning of Islam due to her young age at the time of the Prophet’s death. He answers this by saying that when al-Marghinānī’s says “the beginning of Islam” he means the time before the ruling was abrogated, “since this is the beginning with respect to what comes after it.” Al-Bābirtī is implying that the abrogation could have taken place at any time, and that she could have led prayers for a short time before it happened.

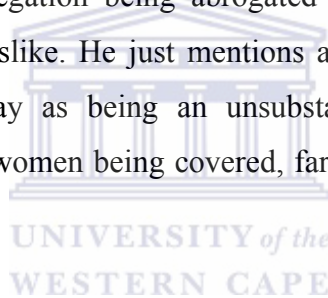
Al-Bābirtī then addresses the theoretical problem of how a ruling can be abrogated and permissible at the same time. He answers that the permissibility is retained in the new ruling of being disliked after the old ruling of being Sunnah had been abrogated. He also attempts to assert this default permissibility by way of *ijmā’*. He embeds this permissibility within the ruling of dislike in order to rescue it from being abrogated, which means that the dislike in question is “disliked as disdainful” (*makrūh tanzīhan*), not “disliked as prohibited” (*makrūh taḥrīman*).

He also addresses the problem of increased exposure being what necessitates the female imām standing in the women’s midst. This exposure, it had been argued, does not exist for women who are covered from head to toe and praying among themselves. Al-Bābirtī replies that this covering on the part of women is a rare situation and that, in any case, the legal rationale is not needed to demonstrate the effective cause, because the ḥadīth of ‘Ā’ishah is sufficient to establish the practice. None of al-Bābartī’s counter-argument are particularly strong.

Al-‘Aynī challenges all of these counter-arguments and comes out strongly in favour of women-only congregations. He does not bring much that is new to the table. He is more intent on pointing out the weakness in al-Bābirtī’s counter-arguments to the original objections. There is a strong sense of exasperation in his tone. He is basically saying that the problems that have been identified are valid and have not been adequately answered for well over a century, so Ḥanafī scholars are obliged to reconsider their ruling.

For instance, the objection that ‘Ā’ishah’s practice could not have been at the beginning of Islam is nothing new. It had been raised by al-Sarūjī a century and a half before al-‘Aynī’s time and nearly a century before al-Bābirtī. Al-‘Aynī simply reiterates al-Sarūjī’s argument and then tersely dismisses al-Bābirtī’s counter-argument as “far-fetched”. His own contribution is to go further than al-Sarūjī and reject the possibility of abrogation altogether. Though he does not elaborate, his emphasis appears to be on ‘Ā’isha’s young age. This provides a very small window for her to be old enough to feasibly serve as an imām for women and then to have it abrogated, especially since no evidence exists to substantiate that abrogation ever occurred. Ibn al-Humam later points out that calling ‘Ā’isha’s age into doubt would change the dynamics of the argument.

Al-‘Aynī is equally terse in dismissing al-Bābirtī’s complex argument about the Sunnah nature of the congregation being abrogated with the permissibility being subsumed in the ruling of dislike. He just mentions al-Bābirtī’s claim of *ijmā’* and then waives the matter away as being an unsubstantiated claim of abrogation. Likewise, he points out that women being covered, far from being “a rare situation”, is the norm.



One thing al-‘Aynī does argue strongly for is how wrong it is to describe a woman leading prayer within the ranks of women as an innovation or as a prohibited act, since ‘Ā’ishah and Umm Salamah used to do so. He introduces nothing new by mentioning the traditions that establish this practice, since his opponents admit to their practice and cite it themselves. What he does is excoriate them for daring to describe the act as prohibited, disliked, or an innovation.

Al-‘Aynī is followed in a more subdued manner by Ibn al-Humām. For instance, he is willing to concede that there might be inaccuracy as to ‘Ā’ishah’s age and to the leading of Tarāwīḥ prayers, but still considers the claim of abrogation to be far-fetched and without any proof to establish it. The point about Tarāwīḥ is one that al-‘Aynī does not bring up, but Ibn al-Humām’s discussion of it shows that it had already been addressed. If it were allowed to stand, it would show conclusively that women-only congregations had not been abrogated. He likewise shows the fallacy in asserting increased exposure as the legal rationale for the female imām standing in the

women's midst, but concedes it is one of many possible but undeterminable rationales for the ruling. In all these instances, he is engaging with the counter-arguments brought by al-Bābirtī and others. As I have discussed in the first chapter in the section on ḥadīth, it appears that with these concessions, strained as they are, he is employing a rhetorical strategy to illustrate the strongest legitimate arguments his critics can hope to mobilize against women-only congregations. Considering Ibn al-Humām's prominent position among later Ḥanafī jurists, the fact that he does not endorse the ruling that women-only congregations are disliked provides the school with the greatest possibility of overcoming its legal inertia after two hundred and fifty years of prolonged discussion. A return to the idea that praying individually is better for women without their congregating being disliked would seem a viable option.

Instead, with Ibn al-Humām, the debate had run its course. The arguments in support of women-only congregations simply disappear and make no discernible impact on the later works in the survey. The later Ḥanafī jurists go to the opposite extreme and take the strongest possible stance against the women-only congregation that the school can muster, the ruling of disliked as prohibited. This is significant, since these same jurists rely on Ibn al-Humām in discussing other particulars of women-only congregations. Ibn Nujaym and Ibn 'Ābidīn both assert on the strength of Ibn al-Humām that a woman imām commits a sin by standing forward. Ibn 'Ābidīn also cites Ibn al-Humām's discussion on women leading funeral prayers. This is indicative of his status with later Ḥanafī jurists.

Most ironic is how Ibn 'Ābidīn cites Ibn al-Humām to affirm the ruling that women-only congregations are disliked as prohibited, saying: "This is stated explicitly in *Fatḥ [al-Qadīr]*." What Ibn al-Humām does is point out al-Margīnānī's intent, based on the *Hidāyah*'s wording. It is certainly not Ibn al-Humām's own view, which Ibn 'Ābidīn makes no mention of. Nevertheless, Ibn 'Ābidīn finds himself compelled to demonstrate a sense of continuity between the ruling of his time and that of Ibn al-Humām's, and likewise between Ibn al-Humām and al-Marghīnānī, even if that continuity is more apparent than real.

D. Summary

Two rulings were challenged in the Ḥanafī school of law. The first is the ruling that women can be judges just like men, as long as the case is not one of a capital crime or retribution. The other is that it is disliked for women to pray among themselves in congregation. Both of these challenges were championed by Ibn al-Humām, who is a pivotal figure in Ḥanafī Law. The result was that later jurists readily embrace Ibn al-Humām's reform on the question of women judges, which reduces it to hypothetical question, while making it effectively unlawful for all practical purposes. By contrast, they do not even acknowledge the arguments he and al-ʿAynī advance in favour of women-only congregations. Instead, they move to the most extreme possible position they can take against such congregations, that of being disliked as prohibited. There were two potentials for change, one which broadened the scope of women's leadership and one which narrowed it. The change which narrowed that scope was adopted, while the change which broadened that scope was rejected.

It might be argued that the change that narrowed the scope had some face-saving aspects to it. They could still say their ruling on women judges remains intact, even though it is sinful to appoint a woman as a judge. By contrast, saying that women-only congregations are not disliked is a more conspicuous change. However, the permissibility of women-only congregations was invoked in the early Ḥanafī works in the same breath as their being disliked, in what amounted to a contradiction. Moreover, this dislike was not stated in very strong terms, or like in al-Sarakhsī's case, not at all. Indeed, the ultimate trajectory, even without considering the opinions of al-ʿAynī and Ibn al-Humām, is a sharply negative one.

Finally, Ibn Nujaym's statement about women being heads of state shows the potential for the school of law to accommodate this possibility to a limited extent. This potential was not embraced by the school in its final realization, which presents a third negative trajectory towards women's leadership in the school's historical development.

VI. CONCLUSIONS

There is a clearly discernible conservative trend in all four schools of thought with respect to the preservation of the school's legal rulings. There is no doubt that the primary objective of each school's jurists is to preserve and justify their particular school's rulings. Yet, in all four schools of thought, there were some alternatives to the rulings that the school ultimately settled upon.

At times, this took the form of competing opinions expressed by the school's founding jurists. We see this in Mālik's position on women judges as well as his opinion on the validity of women-only congregations. It can be seen in Aḥmad b. Ḥanbal's view on women leading men in voluntary prayers, and the Ḥanbalī perspective on whether women-only congregations are preferable. In the Mālikī case of women judges, the adoption of the negative opinion went unchallenged from the start. By contrast, the alternative opinion on women-only congregations found a champion in al-Rajrājī. In the case of the Ḥanbalī view on women leading men in voluntary prayers, we see the favoured opinion was originally one of permissibility, but this was overturned by the school later on in preference for the alternative negative view. Though this transformation had mostly taken place by the time the major Ḥanbalī legal works were written, it was not yet complete. The negative trajectory which led ultimately to the complete dismissal of the ruling can still be observed within the surveyed works.

At others times, the alternatives were opinions brought later on to challenge the original point of view. This can be seen in al-Muzanī's positive opinion regarding women leading men in prayer, Ibn al-Humām's negative view on women serving as judges, and his and al-'Aynī's positive view on women-only congregations. Moreover, Ibn Nujaym's positive statement about women heads of state might be regarded as a chance to develop a new coherent ruling on a legal matter at a later stage in the school's history. Here again, the outcome was always against women's leadership. In every instance where an alternative presented itself, the result was the adoption of the ruling that provided the narrowest scope for women. There were no exceptions to this trend in any of the four legal schools. This cannot be explained solely by legal inertia. It did not matter whether adopting the more negative ruling

conserved the school's existing position or effected a change in it. The negative ruling always prevailed. In the case of preserving an existing ruling, legal inertia might appear as if it were the only factor involved. Nowhere is this clearer than in the Shāfi'ī position on women leading men in prayer. However, in the case of negative change, legal inertia can at best be said to have had the effect of slowing it down or postponing it, but not of preventing it. Moreover, it cannot explain why the more negative of two opinions expressed by a school's foundational scholar was adopted instead of the more positive one, and it cannot shed any light on how these negative rulings originally came about.

The negative tendencies that make themselves apparent in the post-formative literature can very well be a reflection of tendencies that existed beforehand. What we do know about the formative period is that the Mālikī and Ḥanafī schools emerged from a conception of the Law that looked heavily at the established practice of the Muslim community. This means that there was considerable scope for the attitudes and tendencies that existed within society to be implicitly imbedded in that practice and then canonised as law. From what we have seen, especially with the Mālikī arguments about women's leadership, assumed general practice is given considerable weight, and not only that which is formally presented as Madinite practice. This is quite visible in the post-formative texts. Even with the Ḥanafī arguments on prayer, it is easy to move from the actual lack of female participation in congregational prayer in society to the development of elaborate legal justifications that effectively exclude them from participation. The Ḥanafī position on women judges is therefore anomalous, since it is clearly a legal stance that cannot be drawn from the practice or attitudes of the society at the time the ruling was formulated. However, social reality ultimately prevailed in changing the ruling to one which would perpetuate the exclusion of women in the judiciary. Once Ibn al-Humām provided a way to overturn the ruling without negating its existence entirely, it was adopted without hesitation.

As for Shāfi'ī and Ḥanbalī Law, which were formally organised from the start on a text-based conception of the law, we would expect some differences. It is no accident that the scholars who allowed women to lead men in prayer and to be judges without restriction all came after al-Shāfi'ī and were affiliated with his school of thought. Likewise, those who at least allowed women to lead men in voluntary prayers came

from the Ḥanbalī school. Their arguments in favour of doing so were not drawn from the practice of their day, but seem to come from strictly textual reasoning, either the existence of a text in favour of the practice or the absence of a text to establish impermissibility. However, the schools themselves did not adopt these rulings, at least in their final formulation, and brought rulings that were no different than the other schools, though framed with different arguments. Moreover, the arguments they brought did not conform very well with the demands of their juristic theory. This lends support to the idea that the cultural momentum that was already underway when these two schools were first developed proved irresistible and dictated what types of rulings could be contemplated and adopted by these two schools of thought. This is reinforced by the works of these schools echoing similar sentiments about women that are found in the works of the other schools, and even the argument from established practice, especially in the Ḥanbalī works.

This is not just the case for the Shāfi‘ī and Ḥanbalī works. For all four schools, the presentation of evidence and arguments reinforce the conclusions drawn from the uniformity of negative trajectories. Negative rulings about women’s leadership seem to represent not only the general attitudes at the time of writing, but of earlier periods as well. It is easy to discern from the arguments presented, even when ḥadīth or examples of *qiyās* are invoked, that they are being understood against a backdrop of common practices and general perceptions about women. Sometimes these are explicitly stated.

The same cannot be said for the more positive rulings suggested regarding women. They seem, by contrast, to rely almost exclusively on academic arguments, either the explicit indications of a ḥadīth text or the rational consequences of following through on a particular line of reasoning. We see the former in al-Rajrājī’s challenge to the Mālikī school regarding a woman leading other women in prayer, as well as in ‘Aynī and Ibn al-Humām’s stance on the matter, and also in the early Ḥanbalī position of women leading men in voluntary prayers. We see it also in the evidence suggested for the positions of al-Tābarī, Abū Thawr, and al-Muzanī for women leading men. We see the latter in the Ḥanafī position permitting women to serve as judges and al-Juwaynī’s assertions regarding the problematic aspects of prohibiting women from leading men in prayer. The historical pattern of these rulings shows that the backdrop

of common practices and general perceptions about women are what ultimately held the greatest sway.

The clearest indication of the true role that common practice and perceptions play in these rulings can be seen in the jurists' behaviour where more formal lines of argument break down, particularly in how they introduce a formally unsustainable appeal to *ijmā'*. This is the case for the Ḥanafī and Shāfi'ī views on women leading men in prayer. This may be more than just a last-ditch effort to salvage the ruling. If it is only that, it is ineffectual, because in all cases it is suggested in the face of established disagreement, a disagreement those who invoke *ijmā'* are often willing to acknowledge. Instead, it appears to be an appeal to what society accepts, to the general and overwhelming attitude people have on the matter. With al-Ramlī, this appeal to *ijmā'* is coupled with declarations of a woman's inferior status and the inherent temptation that she causes for men. Even when *ijmā'* is not invoked, we can see how al-Nawawī, when faced with the absence of other evidence, makes an appeal to "the vast majority of scholars from the earliest and latest generations."

While assumptions about gender remained relatively constant, the rulings themselves were sometimes challenged and even changed. The result was always to uphold or increase restrictions on women's leadership. Though legal inertia can explain the ease by which negative rulings were perpetuated and the slowness in adopting changes, the uniform negativity of these processes indicate that gender attitudes have played a significant role in the development and perpetuation of rulings divesting women of leadership positions. Changes in rulings do not necessarily indicate concurrent changes in social attitudes. Legal inertia can postpone changes in a law long after it had grown intolerable to society at large, especially in the absence of any fear that the law might be put into practice. The lag time between the unacceptability of the law and the law being changed could be substantial. In the case of the Ḥanafī ruling on women judges, it was probably intolerable in practice from the start. There were no indisputable cases of this ever occurring in Ḥanafī-dominated lands, and it is doubtful if anyone would have tolerated a woman judge. However, the law persisted in the legal texts until Ibn al-Humām found a way to bring it in line with practical reality and the position of the other schools, while retaining it on the books in principle. Rather than indicating a change in perspective regarding women's capacity to serve as

judges, the negative trajectory shows the pressure of consistently held attitudes about women ultimately prevailing over legal inertia.



CONCLUSION

Scriptural sources, or adherence to certain hermeneutical and juristic principles in combination with those sources, do not satisfactorily account for the rulings in the post-formative Islamic legal literature prohibiting women's leadership. This applies equally to those principles elaborated in the legal theory works and those which are on display in the legal texts themselves. This means that not only were other determinative factors at work, they were more important.

The legal literature exhibits numerous negative attitudes and beliefs about the nature and status of women and their role in society, showing that gender attitudes played a major part in the development of the laws. These attitudes and perceptions about gender are evident in the legal literature of all four schools of law across the geographical and temporal scope of the survey. Moreover, they appear in various ways: as direct justifications for the rulings, as implicit components of larger arguments, as opinions volunteered independently of legal considerations, and even as concepts upheld where the jurist denies their relevance to the legal point in question. This rules out the possibility that these attitudes and values were merely recruited to defend the legal rulings.

The persistence of these attitudes and values in the legal literature, in the absence of convincing justifications from the scriptural sources and juristic principles, makes them a prime candidate to explain the origins and persistence of the legal rulings. If these values were not a primary factor, why are they so evident in the legal literature? Why do so many cases of analogy depend upon their implicit acceptance? Why is it that even when a jurist does not consider a certain negative idea about women to be the justification for the ruling, the idea is never challenged? It is always conceded as true and then shown to be irrelevant to the ruling. This is best explained by what Sa`diyya Shaikh describes as "specific understandings of gender relationships assumed by dominating discourses in the *fiqh* canon" operating in the development and persistence of the rulings.

By contrast, the variety and changing nature of formal legal arguments both within and among the four schools of thought, even when the rulings themselves remained constant, indicates that defending preferred rulings was a very strong determinative factor in citing evidence and developing arguments, rather than the evidence and formal arguments determining the rulings or accurately representing the reasons behind them.

Finally, the fact that many rulings did change over time, and alternatives were often available in each school of thought to the rulings which were ultimately adopted, shows a limited willingness of the jurists to depart from the past. The ultimate trajectory of these changes, however, was always against women holding leadership positions. This strengthens the conclusion that perceptions about women were a primary factor in determining the rulings, since they proved to be a stronger factor than the desire to preserve the established rulings of the school. These trajectories took a long time to unfold, in spite of negative attitudes towards women being relatively constant throughout the period under study, and this shows a genuine motivation to preserve the school's inherited rulings, but this motivation was not strong enough to keep relatively positive rulings on women's leadership from ultimately being overturned or undermined.