

DEFINITIVENESS OF PROOF OF *ḤARĀM* AND *HUKM* OF ITS DENIAL IN THE *ḤANAFĪ* SCHOOL

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Abstract

In Islamic law, knowledge of *ḥarām* as a judgement (*ḥukm*) category is as important as determining the deeds that are *ḥarām*. Accordingly, work on *uṣūl al-fiqh* describes the concept of *ḥarām* from several perspectives. Pursuant to some classical *Ḥanafī* work on *uṣūl al-fiqh* and certain modern *uṣūl* studies, the common *Ḥanafī* view is that proof for prohibition must be definitive to determine what is *ḥarām* and its denier is subjected to excommunication (*takfīr*). Nevertheless, based on a general approach in classical *Ḥanafī* work on *uṣūl al-fiqh* and the use of the *ḥarām* concept in *furūʿ* books, it is impossible to accept the foregoing view as the absolute or preferable opinion in the *Ḥanafī* school. This study discusses the correctness of this relation for the foregoing approach to the *Ḥanafī* school through the following claim: According to common *Ḥanafī* view, definitiveness of proof, which signifies prohibition, is not necessary for determining *ḥarām*; it can be equally determined through speculative proof. Thus, it is impossible to declare someone unbeliever unless he / she denies a *ḥarām* with definitive proof.

Key Words : *Ḥanafī* school, *ḥarām*, definitive proof (*dalīl qaṭʿī*), *ḥukm* of denial of *ḥarām*.

Introduction

All religions, ethical and legal systems have prohibitive and mandatory rules pursuant to their normative nature.¹ According to the Qur'ān, prohibition begins with humanity's history.² Tests, which are the purpose of human existence on earth, as well as the characteristics and needs of man, render the presence and legitimacy of prohibition inevitable.

Ḥarām is the most common term used to indicate the prohibited zone in *fiqh*. This area is defined as a *copse of Allāb*³ in a ḥadīth; determination of its boundaries is very important for individual's and society's earthly and heavenly lives. *Faqīh* is responsible for declaring the deeds that are *ḥarām*. In addition, *uṣūl al-fiqh* fulfils the duty of determining the content of *ḥarām* as a *ḥukm* category.

According to lexicon, *ḥarām* means prohibition, prohibited, and banned, and it is the opposite of permissible (*ḥalāl*) and neutral/permitted (*mubāḥ*). In certain cases, it reflects holiness and inviolability, such as in "*ḥarām* months" and "al-Bayt al-ḥarām."⁴ In relevant verses, ḥadīths, and *fiqh* works, terms, such as forbidding (*ḥazr*), proscribed/forbidden (*maḥzūr*), evil (*qabīḥ*), and forbidden efforts (*manbiyy*^m *anbu*), are also used with synonymous or near-synonymous meanings.⁵

¹ For more detailed information, see Vecdi Aral, *Hukuk ve Hukuk Bilimi Üzerine* (Istanbul: Filiz Kitabevi, n.d.), 51-59; Talip Türcan, *İslam Hukuk Biliminde Hukuk Normu* (Ankara: Ankara Okulu Yayınları, 2003), 53-170; Kürşat Demirci, "Haram," in *Türkiye Diyanet Vakfı İslâm Ansiklopedisi (DİA)*, XVI, 97-100; Cengiz Batuk, "Tabu," in *Türkiye Diyanet Vakfı İslâm Ansiklopedisi (DİA)*, XXXIX, 334-335.

² Q 2:35; 7:19-22.

³ Al-Bukhārī, "al-İmān," 39; Muslim, "al-Musāqāt," 107; al-Tirmidhī, "al-Buyūʿ," 1.

⁴ Abū l-Faḍl Muḥammad ibn Mukarram Ibn Manzūr, *Lisān al-ʿArab* (Beirut: Dār Şādir, 1990), s.v. "*ḥrm*"; Muḥammad Murtaḍā al-Ḥusaynī al-Zabīdī, *Tāj al-ʿarūs min jawābir al-Qāmūs*, ed. Muṣṭafā Ḥijāzī (Kuwait: Maṭbaʿat Ḥukūmat al-Kuwayt, 1989), s.v. "*ḥrm*."

⁵ See Seyit Mehmet Uğur, "Fıkıh Usûlünde Haram Kavramı," (master's thesis, Istanbul: Marmara University, 2009), 9-14; Uğur Bekir Dilek, "İslam Hukuk Metodolojisinde Teklifi Hüküm Terimleri (Doğuşu-Gelişmesi-Terimleşmesi)," (PhD diss., Konya: Selçuk University, 2010), 124-136; Recep Çetintaş, *İlk Beş Asır Fıkıh Usulü Literatüründe Teklifi Hüküm Terminolojisi* (Ankara: Fecr Yayınevi, 2015), 202-227.

Scholars of Ḥanafī *uṣūl al-fiqh* define *ḥarām* with a focus on sanctions for the committer and rewards for those who leave *ḥarām*. According to al-Jaṣṣāṣ (d. 370/981), *maḥẓūr*, which he uses as synonymous with *ḥarām*, signifies “what the *mukallaḥ* (the one vested with responsibility) will deserve for punishment upon commitment and reward upon abandoning.”⁶ ‘Alā’ al-Dīn al-Samarqandī (d. 539/1044), defines *ḥarām* as the opposite of *farḍ* (obligatory) and the definitive *wājib* (compulsory), therefore, it is what makes the committer sinful and the commitment to which leads to the threat of punishment.⁷ Al-Lāmishī (d. 5th-6th century AH) uses the same method and quotes two definitions, specifically, the “thing for which one deserves reprimand for committing,” the “thing for which one becomes a sinner because of doing and acquires merit for approaching Allah if it is abandoned.”⁸ According to Ibn al-Sā‘ātī (d. 694/1295), *ḥarām* is something that “the commitment to which, as a deed, causes denunciation that is pursuant to *sharī‘ah*.” The last description, which is more accurate owing to the fact that it put *mubaḥ* that leads to abandonment of *wājib* out of the *ḥarām*⁹, is identical to the definition of *maḥẓūr* by Shāfi‘ī jurist Sayf al-Dīn al-Āmidī (d. 631/1233).¹⁰ Ṣadr al-Sharī‘ah (d. 747/1347) and Mullā al-Fanārī (d. 834/1431) define *ḥarām* as “something for commitment of which a person is punished.”¹¹ In contrast, Mullā Khusraw (d.

⁶ Abū Bakr Aḥmad ibn ‘Alī al-Jaṣṣāṣ al-Rāzī, *al-Fuṣūl fī l-uṣūl*, ed. ‘Ujayl Jāsim al-Nashamī, 2nd ed. (Kuwait: Wizārat al-Awqāf wa-l-Shu‘ūn al-Islāmiyyah, 1985), III, 247.

⁷ Abū Bakr ‘Alā’ al-Dīn Shams al-Nazar Muḥammad ibn Aḥmad al-Samarqandī, *Mizān al-uṣūl fī natā’ij al-uqūl (al-Mukhtaṣar)*, ed. Muḥammad Zakī ‘Abd al-Barr (Cairo: Maktabat Dār al-Turāth, 1997), 43.

⁸ Abū l-Thana’ Maḥmūd ibn Zayd al-Lāmishī, *Kitāb fī uṣūl al-fiqh*, ed. ‘Abd al-Majīd Turkī (Beirut: Dār al-Gharb al-Islāmī, 1995), 61.

⁹ Abū l-‘Abbās Muzaḥḥar al-Dīn Aḥmad ibn ‘Alī ibn Taghlib Ibn al-Sā‘ātī, *Nibāyat al-uṣūl ilā ‘ilm al-uṣūl al-ma‘rūf bi-Badī‘ al-nizām al-jāmi‘ bayna kitāb al-Bazdawī wa-l-Iḥkām*, ed. Ibrāhīm Shams al-Dīn (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2004), 105.

¹⁰ See Abū l-Ḥasan Sayf al-Dīn ‘Alī ibn Muḥammad al-Āmidī, *al-Iḥkām fī uṣūl al-ahkām*, ed. ‘Abd al-Razzāq ‘Afīfī (Riyadh: Dār al-Ṣumay‘ī, 2003), I, 153.

¹¹ Ṣadr al-Sharī‘ah al-Awwal ‘Ubayd Allāh ibn Mas‘ūd al-Maḥbūbī, *al-Tawḍīḥ sharḥ al-Tanqīḥ*, ed. Muḥammad ‘Adnān Darwīsh (along with Sa‘d al-Dīn Mas‘ūd ibn ‘Umar al-Taftāzānī’s *al-Talwīḥ ilā kashf ḥaqā’iq al-Tanqīḥ*; Beirut: Sharikat Dār al-Arqam ibn Abī l-Arqam, 1998), II, 275; Shams al-Dīn Muḥammad ibn Ḥamzah Mullā al-Fanārī, *Fuṣūl al-badā’i‘ fī uṣūl al-sharā’i‘*, ed. Muḥammad Ḥasan

885/1480) does not directly define *ḥarām*. Nevertheless, in the content of his expressions, “*ḥarām* necessitates punishment, whereupon one who commits it will deserve punishment due to such an act” is similar to the foregoing descriptions.¹²

Apparently, sanction, which is an essential element in the abovementioned descriptions, signifies punishment, denunciation, and sinfulness. Another common feature in these descriptions is the relation between the commitment of *ḥarām* and sanction. Şadr al-Sharī‘ah and Mullā al-Fanārī suggest that punishment is an inevitable consequence of committing *ḥarām*. Nevertheless, man is not necessarily punished for committing *ḥarām*, due to a lack of intent or forgiveness from Allāh. For the possibility of engaging in *ḥarām* by mistake, one can oppose the obligatory causal link between sin and *ḥarām* that is described by al-Samarqandī and al-Lāmishī.¹³ While defining *ḥarām*, al-Jaṣṣāṣ uses the term “being worthy of punishment,” Ibn al-Sā‘ātī mentions “causing denunciation,” and Mullā Khusraw discusses “requiring punishment” and “deserving punishment.” Thus, these scholars believe that there is no obligatory relation between sanction and the commitment of *ḥarām* and seek a more accurate definition that can evade foregoing objections. Unlike others, al-Jaṣṣāṣ and al-Lāmishī strikingly refer to “gaining merit when abandoned” in their definitions of *ḥarām*. Whether or not avoiding an act can lead to reward is closely related to the problem of requiring the obligation (*taklīf*); therefore, it is still a controversial topic among jurists.¹⁴ We are content with the present information because the descriptions of *ḥarām* with regard to *ḥukm* are not

Muḥammad Ḥasan Ismā‘īl al-Shāfi‘ī (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2006), I, 244.

¹² Muḥammad ibn Farāmūz (Farāmūz) ibn ‘Alī Mullā Khusraw, *Mir‘āt al-uṣūl sharḥ Mirqāt al-wuṣūl* (Istanbul: Dār al-Ṭibā‘ah al-‘Āmirah, 1309), II, 390, 393-394.

¹³ For this question, see Badr al-Dīn Muḥammad ibn Bahādur ibn ‘Abd Allāh al-Zarkashī, *al-Baḥr al-muḥīṭ fī uṣūl al-fiqh*, ed. ‘Abd al-Qādir ‘Abd Allāh al-‘Ānī and ‘Umar Sulaymān al-Ashqar, 2nd ed. (Kuwait: Wizārat al-Awqāf wa-l-Shu‘ūn al-Islāmiyyah, 1992), I, 256-257.

¹⁴ See Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī, *al-Mustaṣfā min ‘ilm al-uṣūl* (along with Muḥibb Allāh Ibn ‘Abd al-Shakūr al-Bihārī’s *Musallam al-thubūt* and ‘Abd al-‘Alī Muḥammad ibn Nizām al-Dīn al-Anṣārī’s *Fawātiḥ al-raḥamūt bi-sharḥ Musallam al-thubūt fī uṣūl al-fiqh*; Bülāq: al-Maṭba‘ah al-Amīriyyah, 1322), I, 90.

directly associated to the theme of our paper.¹⁵

In addition to sanction, religious ordinances/rules (*al-ahkām al-sharʿiyyah*) can be described as based on the quality of proof that is determined. In fact, when defining and explaining *farḍ* and *wājib*, Ḥanafī jurists account for the definitive or speculative nature of proof. Accordingly, *farḍ* is an act for which commitment is determined via definitive proof (*dalīl qaṭʿī*), while *wājib* is that in which commitment is determined via speculative proof (*dalīl zannī*).¹⁶ Is a similar case in question when defining and explaining *ḥarām* in the Ḥanafī school?

In modern *uṣūl al-fiqh* works and those about *ḥarām*, it is asserted that proof about prohibition has to be definitive for *ḥarām* to be determined in the Ḥanafī school. For example, Khuḍarī Beg (d. 1927) asserts that according to Ḥanafīs, the *ḥukm* is *ḥarām* if the proof, which requires obligatory avoidance of an act, is determined in a definitive manner, and that *ḥukm* will be *makrūb taḥrīmī* (prohibitively disliked/discouraged) when it is determined in a speculative manner.¹⁷ Therefore, Khuḍarī Beg claims that definitiveness of proof is a prerequisite for authenticity (*thubūt*), in other words, its belonging to its origin, for which *ḥarām* can be determined according to Ḥanafīs; similar assertions are common in many modern works on the same problem.¹⁸

¹⁵ For other *ḥarām* descriptions and evaluation with the *ḥukm* of *ḥarām* commitment in focus, see Uğur, “Fıkıh Usûlünde Haram Kavramı,” 19-25.

¹⁶ Abū Zayd ʿUbayd Allāh ibn ʿUmar ibn ʿĪsā al-Dabūsī, *Taqwīm al-adillab fī uṣūl al-fiqh*, ed. Khalīl Muḥyī al-Dīn al-Mays (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2001), 77; Abū l-Ḥasan Abū l-ʿUṣr Fakhr al-Islām ʿAlī ibn Muḥammad al-Bazdawī, *Uṣūl al-Bazdawī*, ed. ʿAbd Allāh Maḥmūd Muḥammad ʿUmar (along with ʿAlāʾ al-Dīn ʿAbd al-ʿAzīz ibn Aḥmad al-Bukhārī’s *Kashf al-asrār ʿan Uṣūl Fakhr al-Islām al-Bazdawī*, Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997), II, 436-438; Abū Bakr Shams al-aʿimmah Muḥammad ibn Abī Sahl al-Sarakhsī, *Uṣūl al-Sarakhsī*, ed. Abū l-Wafāʾ al-Afghānī (Hyderabad, al-Dakkan: Lajnat Iḥyāʾ al-Maʿārif al-Nuʿmāniyyah, n.d. → Beirut: Dār al-Kutub al-ʿIlmiyyah, 1993), I, 110-111; al-Samarqandī, *Mizān al-uṣūl*, 28-29.

¹⁷ Muḥammad Khuḍarī Beg, *Uṣūl al-fiqh*, 6th ed. (Egypt: al-Maktabah al-Tijāriyyah al-Kubrā, 1969), 34, 49-50.

¹⁸ For example, see Wahbah al-Zuḥaylī, *Uṣūl al-fiqh al-Islāmī* (Damascus: Dār al-Fikr, 1986), I, 85-86; Muḥammad Abū l-Fatḥ al-Bayānūnī, *al-Ḥukm al-taklīfī fī l-sharīʿah al-Islāmiyyah* (Damascus: Dār al-Qalam, 1988), 197, 204; Zekiyyüddin Şaʿbān [Zakī al-Dīn Shaʿbān], *İslām Hukuk İlminin Esasları (Uṣūlü’l Fıkḥ)*, trans. İbrahim Kâfi Dönmez, 5th ed. (Ankara: Türkiye Diyanet Vakfı Yayınları, 2001),

Ḥanafīs and most scholars agree that an exactitude of proof is necessary for determining *ḥarām*. In other words, the proof must be precise, clear, and binding in such a manner that there is no need for interpretation or explanation. Khuḍarī Beg and those on the same page indicated that proof for Ḥanafīs should also be definitive in authenticity when determining *ḥarām*, and the proof that has definitive authenticity are Qurʾānic verses, multiply transmitted traditions (*al-sunnab al-mutawātirab*), and consensus (*ijmāʿ*). According to several of these scholars, *ḥarām* can also be determined through the well-known ḥadīth (*al-sunnab al-mashbūrab*).¹⁹ Putting aside the debates about the definitiveness of *ijmāʿ*^c and *al-sunnab al-mashbūrab*,²⁰ when definitiveness for both authenticity and significance (*dalālah*) is required to conclude that an act is *ḥarām*,

251-252; Fahrettin Atar, *Fıkıb Usūlü*, 5th ed. (Istanbul: Marmara Üniversitesi İlähiyat Fakültesi Vakfı [İFAV] Yayınları, 2002), 127; ‘Abd al-Karīm Zaydān, *al-Wajiz fī uşūl al-fiqh* (Beirut: Muʾassasat al-Risālah, 2002), 41,46; Aḥmad Maḥmūd al-Shāfiʿ, *Uşūl al-fiqh al-Islāmī* (Beirut: Manshūrāt al-Ḥalab al-İḥuqūqiyah, 2002), 229; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd rev. and enl. ed. (Cambridge, UK: The Islamic Texts Society, 2003), 410, 421; Ferhat Koca, “Haram. Fıkıh,” in *Türkiye Diyanet Vakfı İslām Ansiklopedisi (DİA)*, XVI, 100; Abdullah Kahraman, “İslām’da Helal ve Haramın Yeri ve Fıkıh Usulü Açısından Temellendirilmesi,” *İslām Hukuku Araştırmaları Dergisi* 20 (2012), 51; Muhsin Koçak, Nihat Dalgın, and Osman Şahin, *Fıkıb Usūlü* (Istanbul: Ensar Neşriyat, 2013), 214; Kahraman, *Fıkıb Usūlü*, 3rd ed. (Istanbul: Rağbet Yayınları, 2014), 211.

¹⁹ Khuḍarī Beg, *Uşūl al-fiqh*, 49; al-Zuḥaylī, *Uşūl al-fiqh al-Islāmī*, I, 86; Şaʿbān, *İslām Hukuk İlminin Esasları*, 251.

²⁰ In Ḥanafī *uşūl*, consensus (*ijmāʿ*) is often expressed as definitive proof; nevertheless, it is understood that the definitive or speculative character of consensus varies depending on its form of occurrence, document, related topic, method of its report to posterities, and quality of related *muḥtabid*. For additional information, see al-Bazdawī, *Uşūl*, III, 386; al-Sarakhsī, *Uşūl*, I, 318-319; ‘Alā’ al-Dīn ‘Abd al-‘Azīz ibn Aḥmad al-Bukhārī, *Kashf al-asrār ‘an uşūl Fakbr al-Islām al-Bazdawī*, ed. ‘Abd Allāh Maḥmūd Muḥammad ‘Umar (along with Abū l-‘Umr al-Bazdawī’s *Uşūl al-Bazdawī*, Beirut: Dār al-Kutub al-‘İlmiyyah, 1997), III, 385-386; ‘Adnān Kāmil al-Sarmīnī, *Hujjiyyat al-ijmāʿ* (Jeddah: Dār Nūr al-Maktabāt & Muʾassasat al-Rayyān, 2004), 404-414; İbrahim Kāfi Dönmez, “İcmā,” in *Türkiye Diyanet Vakfı İslām Ansiklopedisi (DİA)*, XXI, 426. About epistemological value of well-known ḥadīth (*al-sunnab al-mashbūrab*), see al-Bazdawī, *Uşūl*, II, 534-536; al-Sarakhsī, *Uşūl*, I, 291-295; ‘Abd al-‘Azīz al-Bukhārī, *Kashf al-asrār*, II, 534-537; Mehmet Ali Yargı, *Meşbur Sünnetin Dindeki Yeri* (Istanbul: Ensar Neşriyat, 2009), 101-140.

one who denies *ḥarām* should consequently be declared an unbeliever. Indeed, some authors, who ascribe this condition to the Ḥanafī school, assert that those who deny *ḥarām* is declared unbelievers under the Ḥanafī school.²¹

Is it possible to accept that the restriction that definitiveness of the authenticity of proof is necessary for determining *ḥarām*, and, accordingly, that the view that one who denies *ḥarām* will be declared as an unbeliever is the general opinion of the Ḥanafī school? Do the approaches in conventional *uṣūl* works and use of the term *ḥarām* in *furūʿ* works support such assertions? In the classical period, were there any Muslim jurists who defended these assertions? This study intends to answer these questions. As such, we analyze relevant approaches in Ḥanafī *uṣūl* works, as well as the use of the term *ḥarām* in *furūʿ* books. Because the topic of this study is *ḥarām* in the Ḥanafī school with regard to its proof and declaration of its denier as an unbeliever; related definitions and problems in *uṣūl* works by kalām scholars are beyond the scope of this paper. Likewise, issues that are related Ḥanafī *uṣūl* works, such as identical or similar *ḥarām* concepts, as well as their relation to the latter, divisions of *ḥarām*, *ḥarām* as an indulgence/concession (*rukḥṣab*), the relation between *ḥarām* and other religious rules/ordinances, its origin, ways of obtaining it, forms of its expression in the Qurʾān and ḥadīths, and objectives and justifications for declaring *ḥarām* are beyond the scope of this study.

I. The Treatment of *Ḥarām* in *Uṣūl* Works

Al-Dabūsī (d. 430/1039), al-Bazdawī (d. 482/1089), and al-Sarakhsī (d. 483/1090) examine *ʿazīmab ḥukms* (initial determined rules) in four categories, specifically, *farḍ*, *wājib*, *sunnab*, and *nāfilab*, while *ḥarām* is not discussed as a *ḥukm* category.²² Evidently, this does not mean that they do not consider *ḥarām* as a religious rule. Because abandoning *ḥarām* is *farḍ* and *farḍ* is the opposite of *ḥarām*, the foregoing jurists evaluate *ḥarām* in the scope of *farḍ* and do not

²¹ Khuḍarī Beg, *Uṣūl al-fiqh*, 49; al-Zuḥaylī, *Uṣūl al-fiqh al-Islāmī*, I, 86; Ṣaʿbān, *Islām Hukuk İlminin Esasları*, 251-252; Maḥmūd al-Shāfiʿī, *Uṣūl al-fiqh al-Islāmī*, 235; Kamali, *Principles of Islamic Jurisprudence*, 421; Kahraman, *Fıkıh Usûlü*, 211.

²² See al-Dabūsī, *Taqwīm al-adıllab*, 77-80; al-Bazdawī, *Uṣūl*, II, 436; al-Sarakhsī, *Uṣūl*, I, 110-116, 117.

separately discuss it in related divisions. Indeed, al-Sarakhsī highlights two aspects of *wājib* in the following definition: “*Wājib* signifies what is compulsory to do; as for problems about *ḥalāl* and *ḥurmah* (being *ḥarām*), it signifies what is compulsory to abandon.”²³ Therefore, in al-Sarakhsī’s division of *ḥukms*, *wājib* includes both what is compulsory to do and abandon. Consequently, according to his division, *farḍ* also includes *ḥarām*. ‘Abd al-‘Azīz al-Bukhārī (d. 730/1330) has a clearer approach to the issue. For him, the *ḥukms* in al-Bazdawī’s classification covers acts in forms of commitment and abandonment. When the proof for the *ḥarām* character of an act is definitive, such as in prohibitions of *maytab* (impure meat) and *khamr* (wine), it is *farḍ* to abandon the act subject to prohibition. When the proof, which expresses prohibition, is not definitive but incorporates doubt – doubt in the examples by ‘Abd al-‘Azīz al-Bukhārī apparently indicates speculative character with regard to authenticity – it is *wājib* to abandon the act.²⁴ Ibn Malak (d. after 821/1418) also indicates that *ḥarām* is included within *farḍ* or *wājib* depending on definitiveness of proof.²⁵ This established relation between *ḥarām* and *farḍ*, as well as the evaluation of *ḥarām* within the scope of *farḍ*, are important for analyzing the problems below. Followers of this approach include jurists, such as al-Akhsikathī (d. 644/1247),²⁶ al-Khabbāzī (d. 691/1293),²⁷ and Ḥāfiẓ al-Dīn al-Nasafī (d. 710/1310).²⁸

²³ Al-Sarakhsī, *Uṣūl*, I, 111.

²⁴ ‘Abd al-‘Azīz al-Bukhārī, *Kashf al-asrār*, II, 436.

²⁵ ‘Izz al-Dīn ‘Abd al-Laṭīf ibn ‘Abd al-‘Azīz Ibn Malak, *Sbarḥ al-Manār* (along with Yahyá ibn Qarājā al-Ruhāwī, *Ḥāshbiyah ‘alā Sbarḥ al-Manār*, ‘Azmīzādah Muṣṭafá ibn Bīr ‘Alī’s *Ḥāshbiyah ‘alā Sbarḥ al-Manār*, and Burhān al-Dīn Muḥammad ibn Ibrāhīm al-Ḥalabī’s *Anwār al-ḥalāk ‘alā Sbarḥ al-Manār li-Ibn Malak*, in *Sbarḥ al-Manār wa-ḥawāshibi min ‘ilm al-uṣūl*; Darsa‘adah: Maṭba‘a-i ‘Uthmāniyyah, 1315), 579-580.

²⁶ See Abū l-Barakāt Ḥāfiẓ al-Dīn ‘Abd Allāh ibn Aḥmad al-Nasafī, *Sbarḥ Ḥāfiẓ al-Dīn al-Nasafī li-kitāb al-Muntakhab fī uṣūl al-madbbab li-Muḥammad ibn Muḥammad ibn ‘Umar al-Akhsikathī*, ed. Salim Ögüt (Istanbul: n.p., 2003), 560.

²⁷ Jalāl al-Dīn Abū Muḥammad ‘Umar ibn Muḥammad ibn ‘Umar al-Khabbāzī, *al-Mughnī fī uṣūl al-fiqh*, ed. Muḥammad Mazhar Baqā (Mecca: Jāmi‘at Umm al-Qurá Markaz al-Baḥth al-‘Ilmī wa-lḥyā’ al-Turāth al-Islāmī, 1403), 83-86.

²⁸ Al-Nasafī, *Kashf al-asrār: Sbarḥ al-muṣannif ‘alā l-Manār* (along with Aḥmad ibn Abī Sa‘īd ibn ‘Abd Allāh [‘Ubayd Allāh] Mullā Jīwan al-Laknawī’s *Nūr al-anwār ‘alā l-Manār*; Beirut: Dār al-Kutub al-‘Ilmiyyah, 1986), I, 448 ff.

However, certain Ḥanafī jurists treat *ḥarām* independently in their *ḥukm* classifications. As far as we can determine, the first of these scholars was al-Jaṣṣāṣ. Al-Jaṣṣāṣ divides voluntary acts of *mukallaḥ* (the legally responsible agent), mentally into three categories: *mubāḥ*, *wājib*, and *maḥẓūr*.²⁹ Elsewhere, he groups acts into four categories in religio-juridical terms, specifically, *wājib*, *maḥẓūr*, *mandūb* (recommended), and *mubāḥ*.³⁰ For him, *maḥẓūr* is “the act upon the commitment of which mukallaḥ will be worthy of punishment and abandonment will be worthy of reward.”³¹ In *uṣūl* work, *maḥẓūr* is occasionally used instead of *ḥarām*, therefore, al-Jaṣṣāṣ must have meant *ḥarām* with *maḥẓūr*. Nevertheless, please remember that al-Jaṣṣāṣ did not mention the foregoing classifications under the title or in the context of religious ordinances/rules.³² For *ḥukm* classifications by ‘Alā’ al-Dīn al-Samarqandī and al-Lāmishī, *ḥarām* is discussed separately. Nevertheless, the contrast between *ḥarām* and *farḍ* remains decisive in *ḥarām* definitions. According to these two jurists, the concepts of *ḥarām*, *muḥarram*, and *nahy* are opposites of *farḍ* and definitive *wājib*, therefore, it is possible to attain the definition of *ḥarām* based on the opposite definitions for *farḍ* and definitive *wājib*. They mention several of the foregoing examples to show how to attain defining *ḥarām* through *farḍ*. In a sense, they ascribe *ḥarām* definitions to chapters about *farḍ* and definitive *wājib*.³³ In addition, al-Samarqandī in particular, emphasizes *farḍ* more than *ḥarām*. Jurists who separately discuss *ḥarām* include Ibn al-Sā‘ātī (d. 694/1295),³⁴ Ṣadr al-Sharī‘ah (d. 747/1347),³⁵ Mullā al-Fanārī (d. 834/1431),³⁶ Ibn al-Humām (d. 861/1457),³⁷ Mullā Khusraw (d. 885/1480),³⁸ Ibn ‘Abd al-Shakūr (d. 1119/1707),³⁹ and Abū Sa‘īd al-Khādimī (d. 1176/1762).⁴⁰

²⁹ Al-Jaṣṣāṣ, *al-Fuṣūl fī l-uṣūl*, III, 247.

³⁰ *Ibid.*, II, 166.

³¹ *Ibid.*, III, 247.

³² The first division by al-Jaṣṣāṣ is under the title of *ḥukm* about things prior to religious declaration/*waḥy*. The second division that is mentioned is related to the fact that ordering something requires abandoning its opposite.

³³ Al-Samarqandī, *Mizān al-uṣūl*, 43; al-Lāmishī, *Kitāb fī uṣūl al-fiqh*, 61.

³⁴ Ibn al-Sā‘ātī, *Nibāyat al-wuṣūl*, 105.

³⁵ Ṣadr al-Sharī‘ah, *al-Tawḍīḥ*, II, 271, 275.

³⁶ Mullā al-Fanārī, *Fuṣūl al-badā‘i*, I, 244.

³⁷ Kamāl al-Dīn Muḥammad ibn ‘Abd al-Wāḥid Ibn al-Humām, *al-Taḥrīr fī uṣūl al-fiqh al-jāmi‘ bayna iṣṭilāḥay al-Ḥanafīyyah wa-l-Shāfi‘īyyah* (along with

II. Definitiveness of Proof for *Ḥarām*

A. Definitiveness of Proof for *Ḥarām* in *Uşûl* Works

As indicated in introduction, many modern studies assert that in the Ḥanafī tradition, the proof, which prohibits an act, must be definitive in authenticity and signification to determine the *ḥarām*.⁴¹ Does this argument accurately reflect the views of the founding imāms of the school and classical Ḥanafī jurists?

In his work, al-Imām Muḥammad does not describe *ḥarām* or provide definitive or speculative character of its proof. Ḥanafī *uşûl al-fiqh* relates the views of Muḥammad al-Shaybānī as follows: An act, the abandonment of which is demanded in a conclusive and binding manner and with definitive proof, is *ḥarām*. If such demands (*ṭalab*) occur upon not definitive but speculative proof, the act is not called *ḥarām* but is *makrūb taḥrīmī*. Whoever commits *makrūb taḥrīmī* becomes worthy of punishment similar to one who commits *ḥarām*. Therefore, according to al-Shaybānī, *makrūb taḥrīmī* is essentially *ḥarām*. Nevertheless, he refrains from naming this *ḥarām* because it is determined through speculative proof and calls it *makrūb taḥrīmī*.⁴² As is seen, in his distinction between *ḥarām* and *makrūb*

Muḥammad Amīn ibn Maḥmūd Amīr Bādshāh al-Bukhārī's *Taysīr al-Taḥrīr*, Egypt: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī wa-awlāduhū, 1350), II, 134-135.

³⁸ Mullā Khusraw, *Mir'āt al-uşûl*, II, 390, 393-394.

³⁹ Muḥibb Allāh Ibn 'Abd al-Shakūr al-Bihārī, *Musallam al-thubūt* (along with Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī's *al-Mustasfā min 'ilm al-uşûl* and 'Abd al-'Alī Muḥammad ibn Niẓām al-Dīn al-Anṣārī's *Fawātiḥ al-raḥamūt bi-sbarḥ Musallam al-thubūt fī uşûl al-fiqh*; Bülāq: al-Maṭba'ah al-Amīriyyah, 1322), I, 58-59.

⁴⁰ Abū Sa'īd Muḥammad ibn Muṣṭafā ibn 'Uthmān al-Khādimī, *Majāmi' al-ḥaqā'iq min al-uşûl* (Istanbul: Shirkat-i Şahāfiyya-i 'Uthmāniyyah, 1308), 36-37.

⁴¹ Khuḍarī Beg, *Uşûl al-fiqh*, 34, 49-50; al-Zuḥaylī, *Uşûl al-fiqh al-Islāmī*, I, 85-86; al-Bayānūnī, *al-Ḥukm al-taklīfī*, 197, 204; Şa'bān, *İslām Hukuk İlminin Esasları*, 251-252; Atar, *Fıkıh Usûlü*, 127; Zaydān, *al-Wajīz*, 41; Maḥmūd al-Shāfi'ī, *Uşûl al-fiqh al-Islāmī*, 229; Kamali, *Principles of Islamic Jurisprudence*, 410, 421; Koca, "Haram. Fıkıh," 100; Kahraman, "İslam'da Helal ve Haramın Yeri," 51; Koçak, Dalgın, and Şahin, *Fıkıh Usûlü*, 214; Kahraman, *Fıkıh Usûlü*, 211.

⁴² Şadr al-Sharī'ah, *al-Tawdīḥ*, II, 277; Sa'd al-Dīn Mas'ūd ibn 'Umar al-Taftāzānī, *al-Talwīḥ ilā kashf ḥaqā'iq al-Tanqīḥ*, ed. Muḥammad 'Adnān Darwīsh (along with Şadr al-Sharī'ah al-Awwal 'Ubayd Allāh ibn Mas'ūd al-Maḥbūbī's *al-Tawdīḥ sbarḥ al-Tanqīḥ*; Beirut: Sharikat Dār al-Arqam ibn Abi l-Arqam, 1998), II, 277; Mullā al-Fanārī, *Fuṣūl al-badā'iy*, I, 244; Mullā Khusraw, *Mir'āt al-uşûl*, II, 394; al-

tabrīmī, al-Imām Muḥammad takes the power of proof as a benchmark and stipulates definitiveness of proof for determining *ḥarām*. On the other hand, *uṣūl* works by influential Ḥanafī scholars, including al-Dabūsī, al-Bazdawī, al-Sarakhsī, al-Lāmishī, ‘Alā’ al-Dīn al-Samarqandī, al-Akhsikathī, Ibn al-Sā‘ātī, al-Nasafī, Ṣadr al-Sharī‘ah, Mullā al-Fanārī, and Mullā Khusraw, do not comprise an explicit *ḥarām* definition based on the definitiveness of proof. Moreover, the prerequisite of definitive proof is only ascribed to al-Imām Muḥammad and not to Abū Ḥanīfah or Abū Yūsuf.⁴³ Indeed, the fact that there is no explicit quotation from Shaykhayn (i.e., Abū Ḥanīfah and Abū Yūsuf) about the issue may be a clue that suggests that they do not require definitive proof for *ḥarām*.

As stated above, it is not surprising not to see any information on this issue in the work by *uṣūl* scholars who treat *ḥarām* within the scope of *farḍ* and do not mention it as an independent *ḥukm*. Moreover, their analysis of *ḥarām* in the context of *farḍ* can be interpreted in such a manner that they defend the necessity of definitiveness of proof for *ḥarām*. Indeed, the Ḥanafī school agrees that the proof of *farḍ* should be definitive. Nonetheless, most *uṣūl* scholars, who treat *ḥarām* as an independent *ḥukm* category, do not mention the condition of definitive proof in their definitions of *ḥarām*. For example, al-Jaṣṣāṣ defines the concept of *maḥẓūr* as “the act for which the *mukallaḥ* will be worthy of punishment upon commitment and of reward upon abandonment.”⁴⁴ Thus, he does not require definitive proof as a condition. Even though they do define *ḥarām* separately, al-Lāmishī and ‘Alā’ al-Dīn al-Samarqandī consider the contrast between *farḍ* and *ḥarām* as decisive to their *ḥarām* definitions; accordingly, they define *farḍ* as related to the sanctions

Khādimī, *Majāmi‘ al-ḥaqā’iq*, 37. For examples about use of terms *ḥarām* and *makrūb* in the works by al-Imām Muḥammad, see Mehmet Boynukalın, muqaddimah to *al-Aṣl*, by Abū ‘Abd Allāh Muḥammad ibn al-Ḥasan al-Shaybānī, ed. Mehmet Boynukalın (Beirut: Dār Ibn Ḥazm, 2012), I, 262-267.

⁴³ Ṣadr al-Sharī‘ah, *al-Tawḍīḥ*, II, 271, 275-277; Mullā al-Fanārī, *Fuṣūl al-badā’i‘*, I, 244; Mullā Khusraw, *Mir’āt al-uṣūl*, II, 394; al-Khādimī, *Majāmi‘ al-ḥaqā’iq*, 37. Likewise, Ottoman *uṣūl al-fiqh* works do not ascribe the condition of definitive proof to entire Ḥanafī school. See Büyük Ḥaydar Efendī, *Uṣūl-i Fiqh Dersleri* (Istanbul: al-Maktabat al-Maḥmūdiyyah, n.d.), 426-427; Meḥmed Seyyid, *Uṣūl-i Fiqh: Madkhal* (Istanbul: Maṭba‘a-i ‘Āmirah, 1333), 77-79; Maḥmūd As‘ad al-Saydīshahrī, *Talkhīṣ-i Uṣūl-i Fiqh* (Izmir: Maṭba‘a-i Nikūlāyidī, 1313), 443.

⁴⁴ Al-Jaṣṣāṣ, *al-Fuṣūl fī l-uṣūl*, III, 247.

that one who abandons it will face. In addition, they describe *farḍ* in relation to determining proof as “the necessity of which is determined via definitive proof.”⁴⁵ Nevertheless, the two *uṣūl* scholars define *ḥarām* exclusively in consideration of the sanction that the committer will face and never discuss the definitiveness of proof.⁴⁶ Ibn al-Sā‘ātī also does not mention definitive proof in his *ḥarām* definition.⁴⁷ Likewise, Ḥanafī *uṣūl* scholars, such as Ṣadr al-Sharī‘ah, Mullā al-Fanārī, and Mullā Khusraw, define *ḥarām* as related to the sanction that the committer will be subject to, but do not review the necessity of definitiveness of proof. Further, there is a striking difference in *farḍ* and *ḥarām* definitions by these scholars. This difference is so apparent because these scholars assert that an act, the commitment of which is preferred and abandonment of which is prohibited through *definitive proof*, is *farḍ*; while an act, the abandonment of which is preferred over its commitment and the commitment of which is *prohibited*, is *ḥarām*. At this point, *uṣūl* scholars are attentive to their use of words. Unlike *farḍ*, they never discuss the definitiveness of proof for *ḥarām*.⁴⁸ Because each indication in the succinct work is chosen with the utmost diligence, these *uṣūl* scholars apparently do not believe that definitiveness of proof is a condition for *ḥarām*, because they do not mention it in any manner whatsoever, even though they explicitly express the necessity of definitive proof for the authenticity of *farḍ*.

Statements by foregoing scholars about the distinction between *ḥarām* and *makrūh taḥrīmī* appear to support our argument. Indeed, an act, the abandonment of which is preferred over its commitment, and the commitment of which is prohibited, is *ḥarām*, while an act that is not prohibited is *makrūh*.⁴⁹ *Makrūh* is divided in two as *makrūh tanzībī* (prohibitively disliked, but to a lesser degree) and *makrūh taḥrīmī*. According to Abū Ḥanīfah and Abū Yūsuf, *makrūh taḥrīmī* resembles *ḥarām* but is not included in the latter. On the other hand, *makrūh tanzībī* resembles *ḥalāl*. According to two

⁴⁵ Al-Samarqandī, *Mizān al-uṣūl*, 28-29; al-Lāmishī, *Kitāb fī uṣūl al-fiqh*, 57.

⁴⁶ Al-Samarqandī, *Mizān al-uṣūl*, 43; al-Lāmishī, *Kitāb fī uṣūl al-fiqh*, 61.

⁴⁷ Ibn al-Sā‘ātī, *Nibāyat al-wuṣūl*, 105.

⁴⁸ Ṣadr al-Sharī‘ah, *al-Tawḍīḥ*, II, 271, 275; Mullā al-Fanārī, *Fuṣūl al-badā‘i*, I, 241, 244; Mullā Khusraw, *Mir‘āt al-uṣūl*, II, 390, 393; al-Khādīmī, *Majāmi‘ al-ḥaqā‘iq*, 36.

⁴⁹ Ṣadr al-Sharī‘ah, *al-Tawḍīḥ*, II, 271; Mullā al-Fanārī, *Fuṣūl al-badā‘i*, I, 241; Mullā Khusraw, *Mir‘āt al-uṣūl*, II, 390; al-Khādīmī, *Majāmi‘ al-ḥaqā‘iq*, 36.

jurists, *makrūb*, in both aspects, is outside of *ḥarām*. The commitment of *makrūb* is not prohibited, but its abandonment is preferred over commitment. Because there is no prohibition of commitment, a person who commits *makrūb taḥrīmī* or *makrūb tanzībī* does not deserve punishment, but becomes subject to reprimand (‘*itāb*).⁵⁰ Therefore, *makrūb taḥrīmī* is not included in *ḥarām* according to Abū Ḥanīfah and Abū Yūsuf. Unlike al-Imām Muḥammad, the two founding members of the school and their followers believe that whether the act is prohibited or not and whether the committer is worthy of punishment or not are the main criteria for distinguishing between *ḥarām* and *makrūb taḥrīmī*, and do not account for the definitive or speculative character of proof. The main criteria for distinction between *ḥarām* and *makrūb taḥrīmī* by al-Imām Muḥammad is whether the proof is definitive or speculative.

Ibn al-Humām, as well as scholars that he influenced, such as Ibn Amīr Ḥājj (d. 879/1474), Amīr Bādshāh (d. 987/1579), Muḥibb Allāh Ibn ‘Abd al-Shakūr (d. 1119/1707), and Niẓām al-Dīn al-Anṣārī (d. 1225/1810), introduce the prerequisite of definitive proof as the absolute view of the Ḥanafī school and not merely the opinion of al-Imām Muḥammad. Therefore, if the proof about non-fulfilment of an act is definitive in authenticity and significance, the act, of which abandonment is required, is *ḥarām*; if its proof about non-fulfilment is speculative, then such act will be *makrūb taḥrīmī*. *Makrūb taḥrīmī* and *ḥarām* are identical in terms of deserving punishment.⁵¹ Thus, a similar distinction between *farḍ* and *wājib* on the basis of

⁵⁰ Ṣadr al-Sharī‘ah, *al-Tawḍīḥ*, II, 277; al-Taftāzānī, *at-Talwīḥ*, II, 277; Mullā al-Fanārī, *Fuṣūl al-badā‘i‘*, I, 244; Mullā Khusraw, *Mir‘āt al-uṣūl*, II, 394; al-Khādimī, *Majāmi‘ al-ḥaqā‘iq*, 37.

⁵¹ Ibn al-Humām, *al-Taḥrīr*, II, 135; Abū ‘Abd Allāh Shams al-Dīn Muḥammad ibn Muḥammad Ibn Amīr Ḥājj, *al-Taqrīr wa-l-taḥbīr*, ed. ‘Abd Allāh Maḥmūd Muḥammad ‘Umar (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1999), II, 103; Muḥammad Amīn ibn Maḥmūd Amīr Bādshāh al-Bukhārī, *Taysīr al-Taḥrīr* (along with Kamāl al-Dīn Muḥammad ibn ‘Abd al-Wāḥid Ibn al-Humām’s *al-Taḥrīr fī uṣūl al-fiqh*; Egypt: Maṭba‘at Muṣṭafā al-Bābī al-Ḥalabī wa-awlāduhū, 1350), II, 135; Ibn ‘Abd al-Shakūr, *Musallam al-thubūt*, I, 58; ‘Abd al-‘Alī Muḥammad ibn Niẓām al-Dīn al-Anṣārī, *Fawātiḥ al-raḥamūt bi-sharḥ Musallam al-thubūt fī uṣūl al-fiqh* (along with Muḥibb Allāh Ibn ‘Abd al-Shakūr al-Bihārī’s *Musallam al-thubūt* and Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī’s *al-Mustasfā min ‘ilm al-uṣūl*; Būlaq: al-Maṭba‘ah al-Amīriyyah, 1322), I, 58.

definitiveness of proof is equally employed for separating between *ḥarām* and *makrūb taḥrīmī*, and *ḥarām* is accepted as a symmetrical of *farḍ*. Most modern *uṣūl al-fiqh* authors, and specifically Khuḍarī Beg, explain *ḥarām* with regard to the Ḥanafīs, and mention an indication for definitive proof. The difference between these and the above-mentioned author is that the latter introduce the prerequisite of definitiveness of proof, which al-Imām Muḥammad exclusively postulated as a criterion for separating between *ḥarām* and *makrūb taḥrīmī*, as the absolute opinion of the Ḥanafī school. In fact, given the foregoing arguments and perspectives, this is in contrast to the approaches of Abū Ḥanīfah and Abū Yūsuf, as well as their followers and, thus, the majority of *uṣūl al-fiqh* scholars, for *ḥarām* and *makrūb taḥrīmī*. Indeed, it is a separate matter to prefer the view of al-Imām Muḥammad in this issue. Nevertheless, introducing his views as the general opinion of Ḥanafī school does not seem appropriate because such an attitude would indicate that Shaykhayn and their followers completely agreed with al-Imām Muḥammad.

This is the challenge when we address the problem in the context of *ḥarām* and *makrūb taḥrīmī*. However, the question is also worth analyzing with regard to the Ḥanafī distinction between *farḍ* and *wājib*, the established relation between proof and *ḥukm*, and when certain *uṣūl* scholars evaluate *ḥarām* in the scope of *farḍ*.

The lexical meanings of *farḍ* are “appreciation/measurement,” “to cut,” and “exactitude.” When considering these lexical meanings, Ḥanafīs argue that *farḍ* can be only be determined through definitive proof, such as the Qurʾān, multiply transmitted tradition, and consensus. Consequently, all *farḍ* definitions incorporate a discussion of definitive proof. The lexical meanings of *wājib* are “lesser,” “necessary,” and “required.” It is indicated that *wājib* is determined with proof, such as an isolated ḥadīth/single report (*khabar al-wāḥid*), the authenticity of which is in doubt; accordingly, the definition of *wājib* reflects the speculative nature of proof.⁵² However, most scholars do not accept such distinctions between *farḍ*

⁵² Al-Dabūsī, *Taqwīm al-adillab*, 77; al-Bazdawī, *Uṣūl*, II, 436-438; al-Sarakhsī, *Uṣūl*, I, 110-111; al-Samarqandī, *Mizān al-uṣūl*, 28-29; al-Lāmishī, *Kitāb fī uṣūl al-fiqh*, 56-57; ‘Abd al-‘Azīz al-Bukhārī, *Kashf al-asrār*, II, 436-438; Ṣadr al-Sharī‘ah, *al-Tawḍīḥ*, II, 271-272; Ibn al-Humām, *al-Taḥrīr*, II, 135; Mullā Khusraw, *Mir‘āt al-uṣūl*, II, 390. For detailed information, see al-Bayānūnī, *al-Ḥukm al-taklīfī*, 78-87.

and *wājib*.⁵³ For example, opposing the distinction between *farḍ* and *wājib*, al-Imām al-Shāfi'ī admits that the words *farḍ* and *wājib* essentially have separate lexical meanings. In addition, he states that there is a difference between a *ḥukm* that is determined through definitive proof and one that is determined with speculative proof. Accordingly, the denier of the former will be declared as an unbeliever, while the latter will not. Al-Imām al-Shāfi'ī defends that there should not be a terminological difference between *farḍ* and *wājib*. For him, in the terminology, both words signify acts for which the committer is praised and the abandoner is reprimanded in terms of *sharī'ah*.⁵⁴ According to deprecators of this view, the difference between proof in terms of power and weakness, as well as definitive and speculative character, does not necessitate any essential difference in *ḥukms*, which are determined through this proof. For example, the explicit or implicit, or even powerful or weak character of *wājib*, does not indicate any difference with regard to whether such thing is *wājib*. *Likewise, the definitive or speculative character of proof that determines ḥurmah does not necessitate any difference in such act in terms of being ḥarām or not. Therefore, it is unacceptable to assign farḍ and ḥarām to the definitive and wājib and makrūh taḥrīmī to the speculative.*⁵⁵

⁵³ Several opinions are reported from Aḥmad ibn Ḥanbal on this problem. According to the most precise perspective, he does not differentiate between *farḍ* and *wājib*. Nonetheless, he reportedly calls *farḍ* what is determined through definitive proof and *wājib* what is determined through speculative proof, such as *khbar al-wāḥid* and *qiyās*. In addition, he reportedly names *farḍ* what is determined via Qur'ānic verses and *wājib* what is determined via Sunnah. See Abū I-Wafā' 'Alī ibn 'Aqīl ibn Muḥammad ibn 'Aqīl al-Baghdādī al-Ḥanbalī, *al-Wāḍiḥ fī uṣūl al-fiqh*, ed. 'Abd Allāh ibn 'Abd al-Muḥsin al-Turkī (Beirut: Mu'assasat al-Risālah, 1999), III, 163.

⁵⁴ Al-Taftāzānī, *at-Talwīḥ*, II, 272.

⁵⁵ Al-Āmidī, *al-Iḥkām*, I, 136. Al-Ghazālī insists there is no difference between *farḍ* and *wājib*; however, he does not deny the distinction of *wājib* as definitive and speculative, and says there will be no restriction in terminology as far as meanings are comprehensible. See al-Ghazālī, *al-Mustasfā*, I, 66. Al-Ṭūfī also objects to the relation established by the Ḥanafīs between proof and *ḥukm*; nevertheless, he says the dispute between the Ḥanafīs and most scholars is just about wording, and cites specific examples about the distinction between *farḍ* and *wājib*. See Najm al-Dīn Abū I-Rabī' Sulaymān ibn 'Abd al-Qawī al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah*, ed. 'Abd Allāh ibn 'Abd al-Muḥsin al-Turkī (Beirut: Mu'assasat al-Risālah, 1987), I, 276-277.

Ḥanafīs response to the above objection as follows: First, *farḍ* and *wājib* have different lexical meanings. In addition, there is a clear difference between the two concepts in terms of their respective *ḥukm*. This difference consists of the fact that denial of *farḍ* necessitates unbelief (*kufr*) while the denial of *wājib* does not. In addition, *farḍ* and *wājib* differ from each other in terms of levels of obligation to act as required. In this respect, the obligation of acting with *farḍ* is more powerful than with *wājib*. This is not surprising, because *authenticity of the signified (maḍlūl) depends on the authenticity of proof. When two types of evidence differ in terms of power, the ḥukms that are determined by these proofs will surely differ.*⁵⁶

As shown, most scholar's criticisms against the division of *ḥukm* based on the definitive and speculative features of proof is not specific to the distinction between *farḍ* and *wājib*, the separation is also applicable for *ḥarām* and *makrūb taḥrīmī*. Likewise, we do not necessarily have to limit the relation that is established by the Ḥanafīs between the definitive or speculative character of proof, and the true nature of *ḥukms* that is determined by these proofs, only with *farḍ* and *wājib*. In this respect, it is apparently possible to consider the prerequisite of definitive proof as a common perspective of Ḥanafī madhhab. As indicated above, the treatment of *ḥarām* by certain Ḥanafī *uṣūl* scholars in the scope of *farḍ* strengthens this possibility. Indeed, if *ḥarām* is the opposite of and symmetrical to *farḍ*, the definitiveness of proof should be obligatory for *ḥarām*, just as it is for *farḍ*. However, these two points – in other words, the Ḥanafī approach on the relation between proof and *ḥukm* and their evaluation of *ḥarām* in the scope of *farḍ* – allow us to attain an indirect conclusion that is not direct and compulsory. In any case, the foregoing *ḥarām* definitions express explicit and direct information for the fact that definitive proof is not a prerequisite.

In contrast, treating *ḥarām* in the context of *farḍ* does not necessitate that these two *ḥukm* categories must be identical in every aspect – aside from the fact that the demand of the Lawgiver is affirmative in *farḍ* and negative in *ḥarām*. In other words, two features of *ḥarām* are highlighted for its lexical meaning. One of these traits is that its limits are definite and do not allow a rise or fall;

⁵⁶ Al-Sarakhsī, *Uṣūl*, I, 111-112; ‘Abd al-‘Azīz al-Bukhārī, *Kashf al-asrār*, II, 441; Ṣadr al-Sharī‘ah, *al-Tawḍīḥ*, II, 272.

the other is that it is determined by definitive proof.⁵⁷ It is impossible to claim that the first trait also exists in *ḥarām*. This is because some acts, which are not known beforehand but eventually appear, can be ruled *ḥarām*. Nevertheless, there is no such case that can be in question for *farḍ*. Evidently, one of the two essential characteristics of *farḍ* is not present for *ḥarām*. Likewise, determination through definitive proof, another feature of *farḍ*, may not be applicable for *ḥarām*. Then, again, Ḥanafī jurists occasionally use the term *farḍ* for the demands from the Lawgiver that are not determined with definitive proof. For example, one of the meanings of *farḍ* is “the act in the absence of which the *ḥukm* of legality (*jawāz*) will die out.” This category includes following examples: Performing *masḥ*, which is rubbing one-fourth of the head in ablution, and rinsing the mouth and nostrils in major ablution (*gḥuṣl*) are *farḍ* and prayer of *witr* is *farḍ* according to Abū Ḥanīfah. Therefore, *farḍ* is divided into two categories that are definitive/belief-related and speculative/practical; one who denies practical *farḍ* is not declared as an unbeliever.⁵⁸ Even though *farḍ* here signifies *wājib* and possibly *rukn* (core element) in some cases; this does not change the fact that the term *farḍ* is equally used for demands in which proof is not definitive. This is yet additional evidence that treating *ḥarām* in the scope of *farḍ* does not necessitate definitiveness of the proof for *ḥarām*. Moreover, given this fact about *farḍ*, one can claim the following: “If the term *farḍ* is used for *ḥukm* of certain problems for commitment of which there is no definitive demand by the Lawgiver and if *farḍ*, in this respect, is classified as definitive and speculative, likewise, the *ḥarām* quality may be determined even without definitive demands by the Lawgiver for abandoning such an act; accordingly, similar to *farḍ*, *ḥarām* should also be divided into subgroups, such as definitive/belief-related and speculative/practical.”

⁵⁷ Al-Bazdawī, *Uṣūl*, II, 437; al-Sarakhsī, *Uṣūl*, I, 110.

⁵⁸ Ṣadr al-Sharī‘ah, *al-Tawḍīḥ*, II, 272; al-Taftāzānī, *al-Talwīḥ*, II, 272-273; Mullā Khusraw, *Mir‘āt al-uṣūl*, II, 391; id., *Durar al-ḥukkām fī sharḥ Gḥurar al-ahkām* (Karachi: Mīr Muḥammad Kutubkhānah, n.d.), I, 6, 17, 112; Dāmād ‘Abd al-Rahmān ibn Muḥammad Shaykhīzādah, *Majma‘ al-anbur fī sharḥ Multaqā l-abḥur* (along with Burhān al-Dīn Muḥammad ibn Ibrāhīm al-Ḥalabī’s *Multaqā l-abḥur* and ‘Alā’ al-Dīn Muḥammad ibn ‘Alī ibn Muḥammad al-Ḥaṣkafī’s *al-Durr al-muntaqā fī sharḥ al-Multaqā*; Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, n.d.), I, 11, 21.

Some *uṣūl* work comprises expressions that being *ḥarām* may be determined with speculative proof. According to Ibn Malak, classifying the initial determined rules (*‘azīmah*) by al-Nasafī includes *ḥarām*, *makrūb*, and *mubāḥ*. Ibn Malak states the following about *ḥarām*: “*Ḥarām* is included by *farḍ* or *wājib*, because if the necessity of *ḥarām*, as in the prohibition of wine, is *determined via definitive proof*, it is *farḍ* to abandon it. If the necessity of abandoning *ḥarām* is *determined via speculative proof*, such as the prohibition of chess, it is *wājib* to abandon it.”⁵⁹ Thus, Ibn Malak clearly indicates that *ḥarām* can be determined via speculative proof.⁶⁰

B. Definitiveness of Proof for *Ḥarām* in *Furū‘* Works

After an analysis of definitiveness of proof of *ḥarām* in *uṣūl* works, the use of *ḥarām* should be examined in *furū‘ al-fiqh* works. Thus, we will be able to determine compliance or non-compliance between *uṣūl* and *furū‘* on this issue. However, it is impossible to address all of the problems where the term *ḥarām* is used in *furū‘*

⁵⁹ Ibn Malak, *Sbarḥ al-Manār*, 580. For an explanation of this treat by Ibn Malak, see Yaḥyā ibn Qarājā al-Ruhāwī, *Hāshbiyah ‘alā Sbarḥ al-Manār* (along with ‘Izz al-Dīn ‘Abd al-Laṭīf ibn ‘Abd al-‘Azīz Ibn Malak’s *Sbarḥ al-Manār*, ‘Azmizādah Muṣṭafā ibn Bīr ‘Alī’s *Hāshbiyah ‘alā Sbarḥ al-Manār*, and Burhān al-Dīn Muḥammad ibn Ibrāhīm al-Ḥalabī’s *Anwār al-ḥalāk ‘alā Sbarḥ al-Manār li-Ibn Malak*, in *Sbarḥ al-Manār wa-ḥawāshibi min ‘ilm al-uṣūl*; Darsa‘adah: Maṭba‘a-i ‘Uthmāniyyah, 1315), 580; ‘Azmizādah Muṣṭafā ibn Bīr ‘Alī, *Hāshbiyah ‘alā Sbarḥ al-Manār* (along with ‘Izz al-Dīn ‘Abd al-Laṭīf ibn ‘Abd al-‘Azīz Ibn Malak’s *Sbarḥ al-Manār*, Yaḥyā ibn Qarājā al-Ruhāwī’s *Hāshbiyah ‘alā Sbarḥ al-Manār*, and Burhān al-Dīn Muḥammad ibn Ibrāhīm al-Ḥalabī’s *Anwār al-ḥalāk ‘alā Sbarḥ al-Manār li-Ibn Malak*, in *Sbarḥ al-Manār wa-ḥawāshibi min ‘ilm al-uṣūl*; Darsa‘adah: Maṭba‘a-i ‘Uthmāniyyah, 1315), 580.

⁶⁰ Here, Ibn Malak might mean *makrūb taḥrīmī* via *ḥarām*. Nonetheless, his statements about *ḥukm* on chess in the commentary on *Majma‘ al-baḥrayn* rule out this possibility. More precisely, Ibn al-Sā‘atī states that chess is absolutely *ḥarām*. Ibn Malak annotates that chess is *ḥarām* whether it is in the form of gambling or not. See Ibn al-Sā‘atī, *Majma‘ al-baḥrayn wa-multaqā l-nayyirayn fī l-fiqh al-Ḥanafī*, ed. Ilyās Qablān (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2005), 823 and footnote 9. In Ḥanafī school, there are two views that dub chess *makrūb* or *ḥarām*, respectively. See Burhān al-Dīn Abū I-Ḥasan ‘Alī ibn Abī Bakr al-Marghīnānī, *al-Hidāyah sbarḥ Bidāyat al-mubtadī*, ed. Muḥammad ‘Adnān Darwīsh (Beirut: Sharikat Dār al-Arqam ibn Abī I-Arqam, n.d.), IV; 381; Ibn al-Sā‘atī, *Majma‘ al-baḥrayn*, 823; Shaykhizādah, *Majma‘ al-anbur*, II, 553.

works in a single paper. Therefore, we attempt to attain a conclusion by using subjects with examples in which due quality and quantity enable a determination about our problematic in *furū'* works.

In *furū'* works, specifically at the beginning of the chapter on *karābiyyah* (being *makrūb*), the concept of *makrūb* is addressed and provides information about *ḥarām* and *makrūb taḥrīmī* that is similar to that in *uṣūl* works.⁶¹ According to these works, the position of *makrūb taḥrīmī* in the face of *ḥarām* is similar to that of *wājib* with respect to *farḍ*; some work ascribes this positioning exclusively to al-Imām Muḥammad.⁶² Several other works prefer the views of Abū Ḥanīfah and Abū Yūsuf over al-Imām Muḥammad about whether *makrūb taḥrīmī* is *ḥarām* or is close to *ḥarām*.⁶³ Pursuant to such information in *furū'* works, al-Imām Muḥammad is apparently the only scholar to require definitive proof for *ḥarām*. Nevertheless, some approaches accept this requirement as the madhhab's general view. For example, the foregoing position is introduced as an absolute Ḥanafī view in some sources.⁶⁴ In addition, some works define *ḥarām* as "something the commitment of which is prohibited via definitive proof," which clearly indicates a prerequisite for definitive proof. Thereupon, something, the commitment of which is

⁶¹ For some examples, see 'Alā' al-Dīn Abū Bakr ibn Mas'ūd al-Kāsānī, *Badā'i' al-ṣanā'i' fī tartīb al-sbarā'i'* (Cairo: al-Maṭba'ah al-Jamāliyyah, 1910 → 2nd ed., Beirut: Dār al-Kutub al-'Ilmiyyah, 1986), V, 118. Also see al-Marghīnānī, *al-Hidāyah*, IV, 360; Muḥammad Amīn ibn 'Umar ibn 'Abd al-'Azīz Ibn 'Ābidīn, *Ḥāshiyat Radd al-muḥtār 'alā l-Durr al-mukbtār sbarḥ Tanwīr al-absār fī fiqh madbbab al-Imām Abī Ḥanīfah al-Nu'mān*, 2nd ed. (along with 'Alā' al-Dīn Muḥammad ibn 'Alī ibn Muḥammad al-Ḥaṣkafī's, *al-Durr al-mukbtār sbarḥ Tanwīr al-absār*; Beirut: Dār al-Fikr, 1992), VI, 337-338.

⁶² Shams al-Dīn Muḥammad ibn Ḥusām al-Dīn al-Khurāsānī al-Quhistānī, *Jāmi' al-rumūz* (Qazan: n.p., 1299), II, 165; Zayn al-Dīn ibn Ibrāhīm ibn Muḥammad Ibn Nuḥaym al-Miṣrī, *al-Baḥr al-rā'iḳ sbarḥ Kanz al-daqa'iḳ*, 2nd ed. (Beirut: Dar al-Kitāb al-Islāmī, n.d.), VIII, 205.

⁶³ For works that adopts the view of Shaykhayn, see al-Quhistānī, *Jāmi' al-rumūz*, II, 165. Also see Shaykhīzādah, *Majma' al-anbur*, II, 523; 'Alā' al-Dīn Muḥammad ibn 'Alī ibn Muḥammad al-Ḥaṣkafī, *al-Durr al-mukbtār sbarḥ Tanwīr al-absār*, 2nd ed. (along with Muḥammad Amīn ibn 'Umar ibn 'Abd al-'Azīz Ibn 'Ābidīn's *Ḥāshiyat Radd al-muḥtār 'alā l-Durr al-mukbtār sbarḥ Tanwīr al-absār fī fiqh madbbab al-Imām Abī Ḥanīfah al-Nu'mān*; Beirut: Dār al-Fikr, 1992), VI, 337.

⁶⁴ Mullā Khusraw, *Durar*, I, 310; Shaykhīzādah, *Majma' al-anbur*, II, 523; Ibn 'Ābidīn, *Radd al-muḥtār*, VI, 337.

prohibited by speculative proof, is *makrūb taḥrīmī*.⁶⁵ These data all reveal an ambiguity about whether the prerequisite for definitive proof is the madhhab's common view or whether it only belongs to al-Imām Muḥammad. We will first analyze examples in which definitive proof is required for the *ḥukm* of *ḥarām* and then those where the term *ḥarām* is used without definitive proof to examine whether there is an equivalent for this fact in *far'ī* (secondary) issues and to investigate the solidity of the prerequisite for definitive proof.

1. Certain Examples on Necessity of Definitive Proof for Authenticity of *Ḥarām*

According to a narrative by al-Ḥasan ibn Ziyād (d. 204/819), horsemeat is *ḥarām* for Abū Ḥanīfah.⁶⁶ However, *zābir al-riwāyah*⁶⁷ reads that horsemeat is *makrūb* according to Abū Ḥanīfah, but not according to Imāmāyn (i.e., al-Imām Muḥammad and Abū Yūsuf).⁶⁸ According to al-Kāsānī (d. 587/1191), Abū Ḥanīfah used the term *makrūb* instead of *ḥarām* to refer to horsemeat, due to the presence of controversial ḥadīths and disputes among the former scholars.⁶⁹ Again, in a chapter about the *ḥarām* parts of the meat of *ḥalāl* animals, al-Kāsānī provides valuable information on Abū Ḥanīfah's approach to the definitiveness of proof for *ḥarām*. Al-Kāsānī indicates that it is *ḥarām* to consume flowing blood, genitals, testicles, bladders, and the gall of edible animals. He also cites that Abū Ḥanīfah said "Blood is *ḥarām*. For me, eating others is *makrūb*,"

⁶⁵ Shaykhizādah, *Majma' al-anbur*, II, 523; al-Ḥaṣḥafī, *al-Durr al-muntaqā fī sharḥ al-Multaqā* (along with Dāmād 'Abd al-Raḥmān ibn Muḥammad Shaykhizādah's *Majma' al-anbur fī sharḥ Multaqā l-abḥur* and Burhān al-Dīn Muḥammad ibn Ibrāhīm al-Ḥalabī's *Multaqā l-abḥur*; Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), II, 523; Ibn 'Ābidīn, *Radd al-muḥtār*, VI, 337.

⁶⁶ Al-Kāsānī, *Badā'i*, V, 39.

⁶⁷ The *zābir al-riwāyah* (authoritative transmission), is the name for the five books of Abū Ḥanīfah's direct disciple, Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189/805). Al-Shaybānī's *al-Aṣl* (or *al-Mabsūṭ*), *al-Jāmi' al-ṣagḥīr*, *al-Jāmi' al-kabīr*, *al-Siyar al-kabīr*, and *al-Ziyādāt* are called *zābir al-riwāyah*, for being authoritative and reliable as to transmitting and collecting the most authoritative doctrines of Abū Ḥanīfah, Abū Yūsuf, and al-Shaybānī, the founding figures of the Ḥanafī school, or the fundamental doctrines of the formative period of the School.

⁶⁸ Abū 'Abd Allāh Muḥammad ibn al-Ḥasan al-Shaybānī, *al-Jāmi' al-ṣagḥīr* (Karachi: Idārat al-Qur'ān wa-l-'Ulūm al-Islāmiyyah, 1990), 475-476.

⁶⁹ Al-Kāsānī, *Badā'i*, V, 39.

using the term “absolute *ḥarām*” for flowing blood but *makrūb* for the rest.⁷⁰ Al-Kāsānī explains the attitude of Abū Ḥanīfah below: Absolute *ḥarām* signifies those, the *ḥarām* quality of which is determined through definitive proof. Flowing blood is in this category. As a matter of fact, a Qur’ānic verse⁷¹ clearly indicates that flowing blood is *ḥarām*. This verse is unequivocal (*mufassar*).⁷² In addition, there is a general consensus (*ijmā’*) on the *ḥurmah* of flowing blood. However, this is not the case for others. Their *ḥurmah* is determined through new legal opinions (*ijtibād*), the emergence of a lexically equivocal verse – “(The Messenger) ... makes lawful for them the good things and prohibits for them the evil”⁷³ – and relevant ḥadīths. Accordingly, Abū Ḥanīfah calls flowing blood *ḥarām*, while the others are *makrūb*.⁷⁴ Consistent with al-Kāsānī’s explanation, *ḥarām* can only be determined through definitive proof according to Abū Ḥanīfah, similar to al-Imām Muḥammad. Indeed, the foregoing explanation and inference for al-Kāsānī is most likely accurate. Nevertheless, this report cannot conclusively prove that Abū Ḥanīfah required definitive proof for *ḥarām*. The attitude of Abū Ḥanīfah can be due to the verse⁷⁵ that makes a point of proper using the wordings *ḥalāl* and *ḥarām*. Consequently, this calls an inference that is most likely true by al-Kāsānī is into question. Like al-Imām Muḥammad, al-Kāsānī also embraces the prerequisite of definitiveness of proof for *ḥarām*; this approach has evidently influenced his inference. In contrast, when providing this information, al-Kāsānī clearly uses the term *ḥarām* about *ḥukm* for eating organs that Abū Ḥanīfah classified as *makrūb*. This use is not only in contrast to the prerequisite for definitive proof that he ascribes to Abū Ḥanīfah and al-Imām Muḥammad but also to his own opinion on the issue.⁷⁶ Additionally,

⁷⁰ Al-Kāsānī, *Badā’i’*, V, 61. Also see Abū Muḥammad Fakhr al-Dīn ‘Uthmān ibn ‘Alī ibn Miḥjan al-Zayla‘ī, *Tabyīn al-ḥaqā’iq sharḥ Kanz al-daqa’iq* (Būlāq: al-Maṭba‘at al-Kubrā l-Amīriyyah, 1313), VI, 226; Shaykhīzādah, *Majma‘ al-anbur*, II, 744; Ibn ‘Ābidīn, *Radd al-muḥtār*, VI, 749.

⁷¹ Q 6:145.

⁷² *Mufassar* refers to a word whose meaning is absolutely clear so there is no need to explain it further. It is the counterpart of *mujmal*, which denotes a word or text that is inherently unclear and provides no indication as to its precise meaning.

⁷³ Q 7:157.

⁷⁴ Al-Kāsānī, *Badā’i’*, V, 61.

⁷⁵ Q 16:116.

⁷⁶ Al-Kāsānī, *Badā’i’*, V, 37, 47.

the report that was related by al-Kāsānī through Abū Ḥanīfah is not present in Ḥanafī *furūʿ* works prior to al-Kāsānī.

Two following *ḥukms* for the same problem reflect two different approaches in the school: According to Asad ibn ʿUmar, “a person who vows not to ‘eat *ḥarām*’ does not break his oath upon eating the meat from apes, dogs or crows if he does not literally express these animals in his oath. Indeed, absolute *ḥarām* is what is prohibited by definitive proof. There is no definitive proof for prohibiting eating the meat from the mentioned animals, as these issues are subject to *ijtibād*. However, according to al-Ḥasan ibn Ziyād, all of these are *ḥarām*, even when the proof is not definitive.⁷⁷

Ḥanafī jurists occasionally provide the definitiveness of proof as a clear condition for *ḥarām*. Al-Kāsānī indicates that things, the *ḥurmah* of which are determined via definitive proof, are called *ḥarām*. In contrast, things for which the *ḥurmah* is subject to *ijtibād*, and those for which there is no definitive proof, which is subject to dispute, are *makrūb*.⁷⁸ To our knowledge, al-Kāsānī is the first ever Ḥanafī jurist to accept the prerequisite of definitive proof as the common opinion in the Ḥanafī school. Ibn al-Humām, in accord with the *uṣūl* approach, requires definitiveness of proof that expresses the prohibition for which *ḥurmah* can be determined, and considers *ḥarām* as counterpart of *farḍ*.⁷⁹ Ibn Nujaym states that Abū Ḥanīfah and Imāmāyn did not use the term *ḥarām* in case there is no definitive proof.⁸⁰ Ibn Nujaym also states that it is *ḥarām* to ride on the sacrifice of hady unless it is a necessity. However, he believes that this act should not be *ḥarām*, but should be *makrūb taḥrīmī*, because the proof for the problem is not definitive.⁸¹ For Ibn ʿĀbidīn, when both authenticity and significance of proof is definitive, the *ḥukm* will be *farḍ* or *ḥarām*; while it will be *makrūb taḥrīmī* or *wājib* when either authenticity or significance are definitive and the other is speculative.⁸² Such views indicate that the definitiveness of

⁷⁷ Al-Kāsānī, *Badāʿiʿ*, III, 57.

⁷⁸ *Ibid.*, V, 37, 47.

⁷⁹ Ibn al-Humām, *Sharḥ fatḥ al-qadīr ʿalā l-Hidāyah sharḥ Bidāyat al-mubtadī*, ed. ʿAbd al-Razzāq Ghālib al-Mahdī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2003), I, 234. For the chapters where Ibn al-Humām’s statements in this work are quoted, see Ibn Nujaym, *al-Baḥr al-rāʾiq*, I, 262; Ibn ʿĀbidīn, *Radd al-muḥtār*, I, 370.

⁸⁰ Ibn Nujaym, *al-Baḥr al-rāʾiq*, I, 363.

⁸¹ *Ibid.*, III, 78; also see *ibid.*, I, 99.

⁸² Ibn ʿĀbidīn, *Radd al-muḥtār*, I, 95.

proof is a necessity for the authenticity of *ḥarām* in the eyes of the mentioned jurists. Nevertheless, Ibn Nujaym and Ibn ‘Ābidīn are apparently followers of Ibn al-Humām in this respect. Accordingly, they quote *al-Taḥrīr* by Ibn al-Humām and its exegesis *al-Taqrīr*, while addressing this problem in their *uṣūl* works.⁸³ Ibn al-Humām is the first ever *uṣūl* scholar to introduce the condition of definitive proof as the absolute view of the school and not merely al-Imām Muḥammad’s perspective. Therefore, expressions by later Ḥanafī jurists, who are based on the views of Ibn al-Humām, are not sufficient for proving that the condition of definitive proof is the absolute opinion of the Ḥanafī school.

Ḥanafī jurists explain *ḥukm* for certain problems with the wording “*ḥarām*,” but prefer expressions, such as “not *ḥalāl*,” “not permissible (*jā’iz*)” or “*makrūb*” for others. In this context, one can propose the following objection: “Jurists used *ḥarām* for problems with definitive proof and other terms for problems without it; therefore, definitive proof is a prerequisite for *ḥarām*.” However, we believe that using these expressions is not a consequence of requiring the condition for definitive proof; rather, it is a necessity arising from the verse, “*And do not say about what your tongues assert of untruth, ‘This is lawful (ḥalāl) and this is unlawful (ḥarām),’ to invent falsehood about Allah. Indeed, those who invent falsehood about Allah will not succeed.*”⁸⁴ Accordingly, the use of the same style in relevant work by other schools that do not require definitive proof for *ḥarām* indicates this fact.⁸⁵

It is also a well-known fact that Ḥanafī jurists do apply the term *ḥarām* to questions where there is definitive proof for prohibition. Nevertheless, this does not necessarily indicate that *ḥarām* is exclusively used for problems that have definitive proof and,

⁸³ See Ibn Nujaym, *Fatḥ al-Ghaffār bi-sbarḥ al-Manār al-ma’rūf bi-Mishkāt al-anwār fī uṣūl al-Manār* (along with glosses by ‘Abd al-Raḥmān al-Baḥrāwī al-Ḥanafī al-Miṣrī; Beirut: Dār al-Kutub al-‘Ilmiyyah, 2001), 251; Ibn ‘Ābidīn, *Sbarḥ Sbarḥ al-Manār li-l-‘Allāmah al-Shāmī fī uṣūl al-ḥukm al-musammā Nasamāt al-ashbār*, ed. Fahīm Ashraf Nūr, 3rd ed. (Karachi: Idārat al-Qur’ān wa-l-‘Ulūm al-Islāmiyyah, 1418), 164.

⁸⁴ Q 16:116.

⁸⁵ For related examples, see Abū ‘Abd Allāh Shams al-Dīn Muḥammad ibn Abī Bakr Ibn Qayyim al-Jawziyyah, *I‘lām al-muwaqqi‘in ‘an Rabb al-‘ālamīn*, ed. Abū ‘Ubaydah Mashhūr ibn Ḥasan (Riyadh: Dār Ibn al-Jawzī, 1423), II, 73 ff.; Çetintaş, *İlk Beş Asır Fıkıh Usûlü Literatüründe Teklîfî Hüküm Terminolojisi*, 216-227.

consequently, this is necessary for the authenticity of *ḥarām*. Likewise, terms, such as *makrūb* or not *ḥalāl*/not permissible, are employed for most problems without definitive proof when the *ḥukm* is subject to dispute. However, this does not indicate that *ḥarām* is never used for such problems. The following examples will clarify this aspect.

2. Examples that Show that Definitive Proof is not Necessary for the Authenticity of *Ḥarām*

Furūʿ al-fiqh works use the term *ḥarām* when stating the *ḥukm* for certain problems, despite the lack of definitive proof.⁸⁶ For example, it is *ḥarām* to deliberately invalidate an ongoing prayer without an excuse.⁸⁷ The significance of the verse "... and do not invalidate your deeds,"⁸⁸ which was quoted for justifying this *ḥukm*,⁸⁹ is not definitive for the *ḥukm*.

According to several Ḥanafī sources, it is *ḥarām* to add hair extensions.⁹⁰ The ḥadīth, "May Allah curse the one who adds hair extensions ...,"⁹¹ is cited as evidence for this *ḥukm* and has a definitive significance in terms of sense; nevertheless, its authenticity is not definitive. Several essential texts clearly declare that it is *ḥarām* to listen to musical instruments/merriment (*malābī*).⁹² Proof, as reported by al-Marghīnānī in this issue, is a *farʿī ḥukm* in the school. Apparently, the authenticity of the ḥadīth, "It is sin to listen to musical

⁸⁶ Please note that the examples under this title comprise questions where *ḥukm* is declared through the word *ḥarām* and its derivatives; accordingly, the questions where *ḥukm* includes expressions such as "not *ḥalāl*" or "not *jāʿiz*" are not included.

⁸⁷ Mullā Khusraw, *Durar*, I, 121; Shaykhīzādah, *Majmaʿ al-anbur*, I, 140.

⁸⁸ Q 47:33.

⁸⁹ See Mullā Khusraw, *Durar*, I, 121.

⁹⁰ Abū l-Faḍl ʿAbd Allāh ibn Maḥmūd al-Mawṣilī, *al-Ikbtiyār li-taʿlīl al-Mukbtār*, ed. Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd, 2nd ed. (Istanbul: al-Maktabat al-Ḥanafīyah, 1953), IV, 231.

⁹¹ Al-Bukhārī, "al-Libās," 83; Muslim, "al-Libās," 115, 119.

⁹² Al-Marghīnānī, *al-Hidāyah*, IV, 362; al-Mawṣilī, *al-Ikbtiyār*, IV, 233; Burhān al-Dīn Muḥammad ibn Ibrāhīm al-Ḥalabī, *Multaqā l-abḥur* (along with Dāmād ʿAbd al-Raḥmān ibn Muḥammad Shaykhīzādah's *Majmaʿ al-anbur fī sbarḥ Multaqā l-abḥur* and ʿAlāʾ al-Dīn Muḥammad ibn ʿAlī ibn Muḥammad al-Ḥaṣkafī's *al-Durr al-muntaqā fī sbarḥ al-Multaqā*; Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d.), II, 554.

instruments, rebellion (*fisq*) to be in a place where instrument is played, and disbelief (*kufī*) to enjoy it,” reported by al-Mawṣilī (d. 683/1284), is not definitive.⁹³

According to al-Marghīnānī, wearing a ring made of stone, iron or brass is *ḥarām*.⁹⁴ Justifying this *ḥukm*, he quotes al-Imām Muḥammad’s perspective such that, “(Men) do not wear rings other than silver,”⁹⁵ and asserts that there is an explicit proof (*naṣṣ*) about the *ḥurmah* of wearing stone, iron or brass rings. His other evidence is the Prophet’s reproaching of a person who was wearing a brass ring: “Why do I detect the stench of idols on you?” And of another person wearing an iron ring: “Why do I see you wearing the jewellery of the people of Hell?”⁹⁶ Expression by al-Imām Muḥammad clearly does not bear the quality of *shar‘ī* proof. The significance of the ḥadīth on *ḥukm* is definitive; nevertheless, its authenticity is not.

In some Ḥanafī sources, all games and entertainment, which are seen as *labw* and include backgammon, chess, and others, except for three, are declared *ḥarām*.⁹⁷ *Ḥarām* rulings⁹⁸ on games that have no gambling element, such as chess, are based on the ḥadīth, “All plays are *ḥarām* except three: a person plays with his wife, breaking (training) one’s horse, and archery”⁹⁹ provides additional evidence that Ḥanafī jurists do not necessarily require definitiveness of proof to

⁹³ Hereby ḥadīth, which is not included in the essential ḥadīth books, is not authentic according to Ibn Qayyim. See Ibn Qayyim al-Jawziyyah, *Igbāṭhat al-labfān min maṣāyid al-shayṭān*, ed. Muḥammad Sayyid Kīlānī (Cairo: Maktabat Dār al-Turāth, 1961), I, 245.

⁹⁴ Al-Marghīnānī, *al-Hidāyah*, IV, 364. Also see al-Nasafī, *Kanz al-daqa’iq (fi l-fiqh al-Ḥanafī)*, ed. Sā’id Bakdāsh (Beirut: Dār al-Bashā’ir al-Islāmiyyah & Medina: Dār al-Sirāj, 2011), 607.

⁹⁵ Al-Shaybānī, *al-Jāmi‘ al-ṣagbīr*, 477.

⁹⁶ Al-Tirmidhī, “al-Libās,” 43; Abū Dāwūd, “Khātam,” 4.

⁹⁷ Al-Ḥalabī, *Multaqā l-abḥur*, II, 553. For only chess, see Ibn al-Sā‘atī, *Majma‘ al-baḥrayn*, 823. Pursuant to his adoption of the prerequisite for definitive proof for *ḥarām*, al-Kāsānī indicates that backgammon and chess are *makrūb*; however, he later says that they are included under gambling or amusement (*labw*), and claims that these are *ḥarām*. See al-Kāsānī, *Badā’i‘*, V, 127.

⁹⁸ Al-Kāsānī, *Badā’i‘*, V, 127; Shaykhizādah, *Majma‘ al-anbur*, II, 553; al-Ḥaṣkafī, *al-Durr al-muntaqā*, II, 553.

⁹⁹ The sources in which ḥadīth is quoted use the term *bāṭil* instead of *ḥarām*. See al-Tirmidhī, “Faḍā’il al-jihād,” 11; Abū Dāwūd, “al-Jihād,” 24; Aḥmad ibn Ḥanbal, *al-Musnad*, XXVIII, 533, 573.

pass the judgment for *ḥarām*. Indeed, it is very difficult to claim definitiveness for both the authenticity and the significance of the foregoing ḥadīth.

Based on the verse, “(the Messenger) ... forbids them what is evil (*al-khabāʾiṭh*),”¹⁰⁰ al-Mawṣilī asserts that it is *ḥarām* to eat the meat of animals that do not have flowing blood, such as flies, scorpions, and snakes, except for the locust.¹⁰¹ The significance of the verse, which is referred to as proof of this *ḥukm*, is speculative. Indeed, “evil” is not well-defined and is relative depending on time, ground, and persons. Then again, there are views on the *ḥurmah* of *banj* (herbs that have narcotic effects) and horse milk.¹⁰² However, there is no definitive proof in this respect; besides, their *ḥukm* is controversial, even within the school.¹⁰³

According to Abū Ḥanīfah, when a hound eats the prey that it catches, the prey, which was previously caught, also became *ḥarām*. For Imāmayn, only the prey eaten by the hound is *ḥarām*. Animals that were previously taken by the hound are not *ḥarām*.¹⁰⁴ To justify the former argument, scholars refer to the following ḥadīth: “If the hound has eaten some of the prey it obtained, do not consume that prey, because the hound caught it for itself.”¹⁰⁵ However, the ḥadīth includes no direct *ḥukm* related to previously hunted animals. Therefore, this ḥadīth has no direct significance with regard to the disputed problem. In addition, we can claim that the authenticity of ḥadīth is not definitive. The verse, “... Lawful unto you are (all) things good and pure: and what ye have taught your trained hunting animals (to catch) in the manner directed to you by Allah: eat what they catch for you...,”¹⁰⁶ employed to justify this argument, does not precisely signify the *ḥurmah* of these preys. In fact, it is not clear whether the hound has eaten previous preys. Given the nature of the

¹⁰⁰ Q 7:157.

¹⁰¹ Al-Mawṣilī, *al-Ikbtiyār*, V, 19.

¹⁰² Abū Muḥammad Badr al-Dīn Maḥmūd ibn Aḥmad al-ʿAynī, *al-Bināyah fī sharḥ al-Hidāyah*, 2nd ed. (Beirut: Dār al-Fikr, 1990), XI, 427-428.

¹⁰³ Ibid., *al-Bināyah*, XI, 427-428.

¹⁰⁴ Abū l-Ḥusayn Aḥmad ibn Abī Bakr Muḥammad ibn Aḥmad al-Qudūrī, *al-Mawsūʿah al-fiqhiyyah al-muqāranah: al-Tajrīd*, eds. Muḥammad Aḥmad Sirāj and ʿAlī Jumʿah Muḥammad (Cairo: Dār al-Salām, 2004), XII, 6279.

¹⁰⁵ Al-Bukhārī, “al-Dhabāʾiḥ wa-l-ṣayd,” 10; Muslim, “al-Ṣayd wa-l-dhabāʾiḥ,” 2, 3; al-Tirmidhī, “al-Ṣayd,” 6.

¹⁰⁶ Q 5:4.

issue and his position in the madhhab, it is striking that al-Qudūrī (d. 428/1037), who reports this view, uses the term *ḥarām* to express the opinions of the founding jurists of the Ḥanafī school with regard to an issue for which there is no definite argument and that is controversial within the school.

There is no harm in the wages (*rizq*) of a judge; nevertheless, if *qāḍī* demands wages as a prerequisite, saying that “I will carry out judgment in exchange for a certain amount of wage,” results in a wage that is *ḥarām*. However, there is no definitive injunction in this regard. Hereby, *ḥukm* is attained when the activity of a judgment is a type of worship and when it is *ḥarām* to be paid for worshipping.¹⁰⁷

Some Ḥanafī *fiqh* works absolutely use the term *ḥarām* for beverages made of date and grape juice, such as *sakar*, *ṭilāʿ*, *munaṣṣaf*, *faḍīkh*, *mutballath*, *naqīʿ al-zabīb*, and *naqīʿ al-thamar*,¹⁰⁸ which are not included under the category of *khamr*. Therefore, *ḥurmah* of *khamr* (wine) is definitive, while others are speculative/subject to *ijtibād* and less than that of wine; accordingly, one who denies the *ḥurmah* of beverages that are other than wine will not be declared as an unbeliever.¹⁰⁹ Pursuant to the Ḥanafī approach, the *ḥurmah* of these beverages, which are not included in the context of wine, are based on non-definitive evidence, such as a single report (*khbar al-wāḥid*) and words of Companions (*qawl al-ṣaḥābī*). A single report, which was mentioned by al-Kāsānī, is the ḥadīth that states that wine is exclusively made of date and grape.¹¹⁰ Words of Companions that are related to the question are actually views of ʿAbd Allāh ibn Masʿūd and ʿAbd Allāh ibn ʿAbbās, who

¹⁰⁷ Al-Marghīnānī, *al-Hidāyah*, IV, 383; al-ʿAynī, *al-Bināyah*, XI, 311.

¹⁰⁸ Recipes for these beverages are provided as follows: *Sakar* is a fresh date juice that rises and becomes intoxicating. It is also known as *naqīʿ al-thamar*. *Ṭilāʿ* is grape juice that is boiled until two thirds vaporise. It is also named *mutballath*. *Munaṣṣaf* is fresh grape juice of which half is eliminated through boiling and becomes intoxicating. *Faḍīkh* is an intoxicating beverage that is obtained by immersing cut dry dates in water. *Naqīʿ al-zabīb* is the dry grape juice that automatically rises and becomes intoxicating.

¹⁰⁹ Al-Kāsānī, *Badāʿiʿ*, V, 115; al-Marghīnānī, *al-Hidāyah*, IV, 393, 397-398; al-Nasafī, *Kanz al-daqaʿiq*, 619; al-Ḥalabī, *Multaqā l-abḥur*, II, 568-570; Shaykhizādah, *Majmaʿ al-anbur*, II, 568-570.

¹¹⁰ Muslim, “al-Ashribah,” 13, 14; al-Tirmidhī, “al-Ashribah,” 8; Abū Dāwūd, “al-Ashribah,” 4.

declared *sakar* and *naqīʿ al-zabīb* as *ḥarām*.¹¹¹ As shown, intoxicating beverages, except for wine, are clearly declared as *ḥarām* on the one hand, but there is reportedly no definitive proof for their *ḥurmah* on the other hand. In addition, the indication that the denier of *ḥurmah* for these beverages will not be declared as an unbeliever can be accepted as evidence for the lack of definitive proof for their *ḥarām* quality. As this example shows, Ḥanafī jurists may occasionally pass judgment for *ḥarām* on issues that do not have definitive proof.

Foregoing examples from Ḥanafī *fiqh* works demonstrate that the term *ḥarām* was used for some issues without definitive proof. If we are to accept the indication of definitive proof in the *ḥarām* descriptions that are ascribed to the Ḥanafī school, how can we reconcile these descriptions with their foregoing use in the *furūʿ* works? There are two possibilities in question. First, these jurists are mistaken and naively behave on the issue by using the term *ḥarām* without definitive proof. However, due to the relevant divine warning,¹¹² jurists have shown great care and timidity in using the word *ḥarām* since the earliest time periods and prefer expressions, such as “not *ḥalāl*,” “not permissible,” *makrūb* or *mamnūʿ* rather than *ḥarām*. The mentioned Ḥanafī jurists’ style in their related works clearly reflects this diligence. Strikingly, most of these jurists are authors of essential texts that are highly influential in the Ḥanafī school. Moreover, it is not correct to assert that all of these jurists, who have lived in different places and across time periods, were incorrect in their foregoing usage. After all, other Ḥanafī jurists have never criticized their usage of the term.

Second, we claim that the word *ḥarām* in the foregoing usages signifies *makrūb*, because other sources prefer the term *makrūb* for several of the issues that are dubbed *ḥarām* above.¹¹³ This argument,

¹¹¹ Al-Kāsānī, *Badāʿiʿ*, V, 114.

¹¹² Q 7:32; 16:116.

¹¹³ For example, according to some works, it is *ḥarām* to play chess, while it is *makrūb* in others. Al-Marghīnānī, *al-Hidāyah*, IV, 381; al-Mawṣilī, *al-Ikbtiyār*, IV, 230; al-Nasafī, *Kanz al-daqaʿiq*, 614. Al-Marghīnānī says it is *makrūb* to eat meat from domestic donkeys, mules, hyenas, lizards, and insects, while the same is *ḥarām* according to Ibn al-Sāʿatī. See al-Marghīnānī, *al-Hidāyah*, IV, 347; Ibn al-Sāʿatī, *Majmaʿ al-baḥrayn*, 713. Adding hair is *ḥarām* for al-Mawṣilī but *makrūb* for al-Ḥalabī. See al-Mawṣilī, *al-Ikbtiyār*, IV, 231; al-Ḥalabī, *Multaqā l-abḥur*, II, 553.

which is apparently a constrained interpretation, becomes void because the same author uses *makrūh* for one of the successive problems and *ḥarām* for the other.¹¹⁴

For us, it is impossible to reconcile the use of this term with the precondition of definitive proof in the *ḥarām* descriptions that are ascribed to the Ḥanafī school. On the other hand, there is no unconformity between *uṣūl* and *furūʿ*, as it is wrong to ascribe this precondition to the Ḥanafī school as an absolute prerequisite. In contrast, the mentioned uses are a compulsory consequence of the foregoing approach in *uṣūl al-fiqh* works because the Ḥanafī jurists do not require definitiveness of proof for determining *ḥarām* and *ḥarām* can also be determined with speculative proof. In addition, they manifest this approach in *furūʿ*. If we admit that definitive proof is not an indispensable condition for determining *ḥarām*, we can prevent possible objections about incorrect or naive attitudes of the Ḥanafī jurists when using the term *ḥarām* and will not longer need to constrain interpretations of its use or have difficulty when reconciling *uṣūl* and *furūʿ*.

III. *Takfīr* of the Denier of *Ḥarām*

Even though contemporaneous works are more attentive on this issue than previous ones, some sources assert that whoever denies *ḥarām* will be subject to excommunication (*takfīr*) pursuant to Ḥanafī *uṣūl*. These sources introduce excommunication of the denier as the general opinion of the Ḥanafī school.¹¹⁵ The question here is directly related to and a consequence of the problem of the definitiveness of proof for determining *ḥarām*. Specifically, if the Ḥanafī school were to accept that *ḥarām* could be exclusively determined through proof that had a definitive authenticity and significance, the *ḥarām* denier would inevitably have to be

¹¹⁴ For example, having indicated that backgammon and chess are *makrūh*, al-Mawṣilī says that it is *ḥarām* to add hair extensions. Again, he explains it is *ḥarām* to listen to musical instruments, just before stating that it is *makrūh* to add the sign of *ʿasbr* (that indicates every passage of the Qurʾān that consists of ten verses) and punctuations in the text of the Qurʾān. See al-Mawṣilī, *al-Ikbtiyār*, IV, 230-231, 233. For a similar approach, see Ibn al-Sāʿatī, *Majmaʿ al-baḥrayn*, 713, 823; al-Ḥalabī, *Multaqā l-abḥur*, II, 512-513, 553.

¹¹⁵ For example, see al-Zuhaylī, *Uṣūl al-fiqh al-Islāmī*, I, 86; Ṣaʿbān, *Islām Hukuk İlminin Esasları*, 251-252; Maḥmūd al-Shāfiʿī, *Uṣūl al-fiqh al-Islāmī*, 235; Kamali, *Principles of Islamic Jurisprudence*, 421; Kahraman, *Fıkıh Usûlü*, 211.

excommunicated. Indeed, because proof about prohibition is definitive for authenticity, its denial is impossible and because it is also definitive for significance, it would not be subject to interpretation. Therefore, this approach may be attributed to al-Imām Muḥammad, who requires definitive proof for *ḥarām*, as well as to his followers, such as al-Kāsānī and Ibn al-Humām.¹¹⁶ However, it would not be accurate to introduce excommunication for the *ḥarām* denier as the absolute opinion of the Ḥanafī school, because most Ḥanafī jurists do not establish definitiveness of proof as a condition for determining *ḥarām*. Now, we will analyze whether this conclusion, based on the connection between definitiveness of proof for *ḥarām* and *ḥukm* on its denial, is verified by the approach in *uṣūl* and *furūʿ* works.

A. *Hukm* of Denial for *Ḥarām* in *Uṣūl* Works

Expressing *ḥarām* as a distinct *ḥukm* category, al-Samarqandī, al-Lāmishī, Ibn al-Sāʿatī, Ṣadr al-Sharīʿah, Mullā al-Fanārī and Mullā Khusraw clearly indicate that the denial of *farḍ* will necessitate *kufṛ*,¹¹⁷ but do not say anything about excommunication (*takfīr*) for a denier of *ḥarām*.¹¹⁸ Even Ibn al-Humām and Ibn ʿAbd al-Shakūr, who espouse that definitive proof is needed for determining *ḥarām* in the general Ḥanafī view, do not discuss the question of excommunication for *ḥarām* deniers. This fact does not suggest that *ḥarām* deniers will not be excommunicated according to Ibn al-Humām and his followers. Indeed, these scholars do not describe the *ḥukm* of denial

¹¹⁶ Indeed, al-Kāsānī, who adopts the prerequisite of definitive proof for determining *ḥurmah*, uses *makrūb* instead of *ḥarām*, because denial of *ḥarām* will require *kufṛ* pursuant to his approach. Thus, he accounts for the belief-related aspects of the issue while declaring *ḥukm* about problems with speculative proof. See al-Kāsānī, *Badāʿiʿ*, V, 37. Again, al-Kāsānī consistently distinguishes between practical and belief-related and uses the term *makrūb* for practical *ḥarām*. See al-Kāsānī, *Badāʿiʿ*, V, 47.

¹¹⁷ Al-Samarqandī, *Mizān al-uṣūl*, 28-29; al-Lāmishī, *Kitāb fī uṣūl al-fiqh*, 57; Ṣadr al-Sharīʿah, *al-Tawḍīḥ*, II, 271; Mullā al-Fanārī, *Fuṣūl al-badāʿiʿ*, I, 242; Mullā Khusraw, *Mirʾāt al-uṣūl*, II, 391.

¹¹⁸ Al-Samarqandī, *Mizān al-uṣūl*, 43; al-Lāmishī, *Kitāb fī uṣūl al-fiqh*, 61; Ibn al-Sāʿatī, *Nihāyat al-wuṣūl*, 105; Ṣadr al-Sharīʿah, *al-Tawḍīḥ*, II, 275-276; Mullā al-Fanārī, *Fuṣūl al-badāʿiʿ*, I, 244; Mullā Khusraw, *Mirʾāt al-uṣūl*, II, 394; al-Khādīmī, *Majāmiʿ al-ḥaqāʾiq*, 37.

when treating *farḍ*.¹¹⁹ In addition, they implicitly express excommunication for *ḥarām* deniers by accepting the definitiveness of proof of *ḥarām* and introducing this as the general view of the school.

Apparently, Abū Saʿīd al-Khādimī is the only jurist to address this problem in an *uṣūl* work, and provides some valuable information. According to al-Khādimī, *ḥarām* consist of two parts, specifically, *ḥarām* for its own sake (*li-dbātihī*) and *ḥarām* for something else (*li-ghayribī*). Pursuant to deductive analogy (*qiyās*), it would be *kufṛ* to consider any of these parts of *ḥarām* as *ḥalāl*, even though some scholars adopt this approach. It is likely that al-Khādimī means al-Kāsānī, Ibn al-Humām and their followers with “some scholars.” According to al-Khādimī, the common opinion is that a *ḥarām li-dbātihī* denier will be excommunicated, while a *ḥarām li-ghayribī* denier will not. This opinion is justified as follows: A scholar’s denial of *ḥarām* causes excommunication. When a non-scholar denies *ḥarām* that is determined via definitive proof, he will be excommunicated; but he will not be subject to *takfīr* for denying *ḥarām* without definitive proof.¹²⁰ These views, which are reported by al-Khādimī, are important for our topic, although they are accompanied with certain problems.

The justification for the “denial of *ḥarām* being *kufṛ* pursuant to *qiyās*,” as expressed by al-Khādimī, is unclear. The relation of the opposition between *ḥarām* and *farḍ* may be influential in this respect. Then again, for al-Khādimī, the view of absolute excommunication is in contrast to common Ḥanafī opinions. Prohibitions about wine, impure meats, and pork, which are presented as examples of *ḥarām li-dbātihī* in *uṣūl* works,¹²¹ are definitive in both authenticity and significance, with a consensus about their *ḥarām* character. As such, the view “it is *kufṛ* to deny *ḥarām li-dbātihī*,” which was described as common by al-Khādimī, may be accepted as truth. Nevertheless, it appears to be incorrect to absolutely accept the allegation that denying *ḥarām li-ghayribī* does not require *kufṛ*. In fact, the example of *ḥarām li-ghayribī*, in which

¹¹⁹ Ibn al-Humām, *al-Taḥrīr*, II, 134-135; Ibn ʿAbd al-Shakūr, *Musallam al-tḥubūt*, I, 57-58. Ibn Amīr Ḥājj, *al-Taqrīr wa-l-taḥbīr*, II, 103; Amīr Bādshāh, *Taysīr al-Taḥrīr*, II, 134-135; al-Anṣārī, *Fawātiḥ al-raḥamūt*, I, 57-58.

¹²⁰ Al-Khādimī, *Majāmiʿ al-ḥaqāʾiq*, 37.

¹²¹ Ṣadr al-Sharīʿah, *al-Tawḍīḥ*, II, 276; Mullā Khusraw, *Mirʿāt al-uṣūl*, II, 394.

unfair exploitation of other's riches is forbidden, provides definitive proof for both authenticity and significance.¹²² There is no dispute about *ḥurmah* of the unfair exploitation for possessing others. However, there are disputes about whether a person, who deems this act as *ḥalāl*, should be excommunicated.¹²³ Sexual intercourse with a woman on her period is *ḥarām li-ghayribī*; and according to an approach, it is *kufr* to consider this *ḥalāl*.¹²⁴ Therefore, a denier of at least a certain *ḥarām li-ghayribī* is excommunicated. Consequently, we should evaluate such *ḥarāms* separately when examining the power of their respective evidence, rather than categorically claiming that denying *ḥarām li-ghayribī* does not require *kufr*. The view that the “denial of *ḥarām* by scholar is *kufr*,” as reported by al-Khādīmī to explain common opinion, also requires an explanation. Indeed, scholars can deny the *ḥurmah* of a deed based on a legitimate justification or response. Denial based on interpretation (*ta'wīl*) does not necessitate *kufr* insofar as the denied thing is not determined by definitive proof. Therefore, the argument, “denial of *ḥarām* by scholar is *kufr*,” can only be deemed valid for *ḥarāms* that have definitive proof. Aside from all of these controversial issues, one who absolutely denies *ḥarām* cannot be excommunicated pursuant to the approach that was introduced as common opinion by al-Khādīmī.

When considering the information in *uṣūl al-fiqh* works where *ḥarām* is accepted as a separate *ḥukm* category, it is not accurate to exclusively ascribe the view that the denier will be absolutely excommunicated without any distinction between different *ḥarāms* to the Ḥanafī school. This view can be ascribed to al-Imām Muḥammad due to his approach to the question of proof for *ḥarām*; but it cannot be considered the common opinion of the school. For us, *uṣūl* scholars except for al-Khādīmī do not address the problem because they know that *ḥarām* can be determined through definitive or speculative proof. Consequently, they do not impose a general

¹²² Q 2:188; 4:10, 29. For a similar criticism and refusal of this view, see Ramaḍān Efendī ibn Muḥammad al-Ḥanafī, *Hāshiyah 'alā Sharḥ al-'Aqā'id* (Istanbul: Salah Bilici Kitabevi, n.d.), 311.

¹²³ Zayn al-Dīn Khayr al-Dīn ibn Aḥmad al-Ayyūbī al-Ramlī, *al-Fatāwā l-kbayriyyah li-naf' al-bariyyah*, 2nd ed. (Bülāq: al-Maṭba'ah al-Amīriyyah al-Kubrā, 1300), II, 234. Also see Ibn 'Ābidīn, *Radd al-muḥtār*, II, 292.

¹²⁴ Al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Ma'rifah, n.d.), X, 158-159; al-Mawṣilī, *al-Ikhtiyār*, I, 34; Ibn al-Humām, *Fath al-qadīr*, I, 166. Also see Shaykhizādah, *Majma' al-anbur*, I, 53.

ḥukm about its denial; instead, it is more appropriate to examine each *ḥarām* case in light of its determining proof to come to a conclusion.

B. *Ḥukm* on the Denial of *Ḥarām* with regard to *Furūʿ* Examples

In the foregoing chapters about the definitiveness of proof for determining *ḥarām*, we attempted to articulate how the term *ḥarām* is used in Ḥanafī *fiqh* books for many acts that lack definitive proof and are controversial both within a school and between schools. This fact indirectly demonstrates that every *ḥarām* denier cannot be excommunicated. In fact, denying a *ḥukm*, which is determined via speculative proof, does not require *kufṛ*. Otherwise, a jurist, who, in contrast to specific Ḥanafī sources, thinks that playing chess, listening to musical instruments, wearing rings of stone, iron or brass, and eating meat from scorpions and snakes are not *ḥarām*, must be excommunicated. However, it is impossible to accept such excommunication. Therefore, these and similar examples in *furūʿ* works are sufficient to manifest that denying *ḥarām* with definitive proof can constitute a basis for excommunication and not an absolute denial of any *ḥarām*. However, it is important to address a question with clear expression on the problem for better comprehension.

Al-Imām Muḥammad uses *ḥarām* for *ḥukm* about wine and *ḥarām makrūb* for *sakar* and *naqīʿ al-zabīb*.¹²⁵ Thus, he intends to demonstrate that the latter *ḥarām* is determined via speculative and not definitive proof.¹²⁶ Later, this concept evolved into *makrūb taḥrīmī*.¹²⁷ Notwithstanding, al-Kāsānī more or less claims that the consumption of intoxicating beverages, such as *sakar*, *faḍīkh*, and *naqīʿ al-zabīb* is *ḥarām*, even though they are included under the category of *khamr*; but he adds that a person who believes that drinking these is *ḥalāl* cannot be excommunicated. The justification is that these three beverages are determined via non-definitive proof, such as a single report or words of Companions. *Ḥurmah* of *khamr*; on the other hand, is determined by definitive proof.¹²⁸ Likewise, al-Marghīnānī says that “there are four *ḥarām* beverages,” and uses the

¹²⁵ Al-Shaybānī, *al-Jāmiʿ al-ṣagbīr*, 485.

¹²⁶ Al-Kāsānī, *Badāʿiʿ*, V, 118.

¹²⁷ Boynukalın, *Muqaddimah*, 263.

¹²⁸ Al-Kāsānī, *Badāʿiʿ*, V, 114-115. Also see al-Zaylaʿī, *Tabyīn al-ḥaqāʾiq*, VI, 44-45.

wording *ḥarām* for three drinks, specifically, ‘*asīr*, *naqī‘ al-tbamar*, and *naqī‘ al-zabīb*, which are made from grapes and dates, in addition to wine. Then, he dubs the second of the three *ḥarām maktūb*, and “absolute *ḥarām*” for the others. Nonetheless, he remarks that the *ḥurmah* of these three beverages is less than wine, because the *ḥurmah* of the latter is determined via definitive proof, while the *ḥurmah* from the others is subject to independent reasoning (*ijtibād*). Consequently, whoever considers wine *ḥalāl* is excommunicated, while anyone accepting the others as *ḥalāl* is not.¹²⁹ Here, *ḥarām* is used for the mentioned beverages, and deniers of their *ḥurmah* are not excommunicated; therefore, *ḥarām* is equally applied for things that are not determined by definitive proof. Deniers of any given *ḥarām* are not excommunicated.

If the denial of *ḥarām* is accepted as absolute *kufṛ*, the excommunication of denier of *ḥarāms*, which are based on well-known Sunnah or *qiyās* as proof, will emerge as a problem when examining the characteristics of this proof. Specifically, despite the presence of adverse views in Ḥanafī *uṣūl*,¹³⁰ denying well-known Sunnah does not require *kufṛ* pursuant to common opinion. Some *uṣūl* scholars even discuss a consensus on this issue.¹³¹ In contrast, Ḥanafī sources comprise several examples of determination of *ḥarām* through well-known Sunnah. For example, pursuant to the ḥadīth, “Rasūl Allāh forbade eating the flesh from all predators that had dogteeth and birds of prey that had claws,”¹³² as the meat from these animals is declared *ḥarām*.¹³³ According to al-Kāsānī, the foregoing

¹²⁹ Al-Marghīnānī, *al-Hidāyah*, IV, 393-398.

¹³⁰ Reportedly, denying well-known Sunnah is *kufṛ* according to some Ḥanafī jurists; nevertheless, this approach is not adopted by Ḥanafī *uṣūl* scholars. See Abū l-Yusr Muḥammad ibn Muḥammad al-Bazdawī, *Ma‘rifat al-ḥujaj al-sbar‘iyyah*, ed. ‘Abd al-Qādir ibn Yāsīn (Beirut: Mu‘assasat al-Risālah, 2000), 121-122; al-Samarqandī, *Mizān al-uṣūl*, 429-430.

¹³¹ Al-Dabūsī, *Taqwīm al-adillab*, 212; al-Bazdawī, *Uṣūl*, II, 535; al-Sarakhsī, *Uṣūl*, I, 292-294; ‘Abd al-‘Azīz al-Bukhārī, *Kashf al-asrār*, II, 534-535. For further information about *ḥukm* on denial of well-known Sunnah, see Yargı, *Meşbur Sünnetin Dindeki Yeri*, 129-133.

¹³² Muslim, “al-Şayd wa-l-dhabā‘ih,” 15, 16; Abū Dāwūd, “al-Aṭ‘imah,” 32; al-Tirmidhī, “al-Şayd,” 9, 11.

¹³³ Declaring *ḥukm* for eating these, some sources employ expressions, such as “not *ḥalāl*,” and “not *jā‘iz*,” while others clearly dub them “*ḥarām*.” For examples of the latter, see al-Samarqandī, *Tuḥfat al-fuqahā’* (Beirut: Dār al-Kutub al-

ḥadīth is a well-known Sunnah.¹³⁴ Some sources state that it is *ḥarām* to eat the meat from a domestic donkey.¹³⁵ Reportedly, the ḥadīth about the prohibition of eating domestic donkeys by the Prophet during the Battle of Khaybar¹³⁶ is also a well-known Sunnah.¹³⁷ In addition, the ḥadīth “a man cannot marry the aunt (mother’s or father’s sister) of his wife”¹³⁸ is reportedly a well-known Sunnah.¹³⁹ Accordingly, the following rule is inferred from this question: “If, the wedding of two women, assuming one of them is man, is not *ḥalāl* when they are relatives; it is then *ḥarām* that a man marries with these two women.”¹⁴⁰ As such, proof of *ḥurmah* for marriage with milk kins, except for the wet-nurse and milk sibling, is the ḥadīth, “whatever is *ḥarām* through lineage is *ḥarām* through milk”¹⁴¹ which is also well-known Sunnah.¹⁴²

Apart from other proofs such as *ijmāʿ* and *qiyās*, the following question can be posed for justification of mentioned *ḥukms*: What is the *ḥukm* for denying a *ḥarām* that is determined through well-known Sunnah? If we adopt the approach about *kufr* of denial in certain recent *uṣūl* works, it is impossible to give a satisfactory

ʿImiyyah, 1984), III, 65; al-Kāsānī, *Badāʿiʿ*, V, 39; Ibn al-Sāʿatī, *Majmaʿ al-baḥrayn*, 713; al-Ḥalabī, *Multaqā l-abḥur*, II, 512.

¹³⁴ Al-Kāsānī, *Badāʿiʿ*, V, 39.

¹³⁵ Ibn al-Sāʿatī, *Majmaʿ al-baḥrayn*, 713; al-Ḥalabī, *Multaqā l-abḥur*, II, 513.

¹³⁶ Al-Bukhārī, “al-Dhabāʿiḥ wa-l-ṣayd,” 28; Muslim, “al-Ṣayd wa-l-dhabāʿiḥ,” 26, 27, 36; Abū Dāwūd, “al-Aṭʿimah,” 34.

¹³⁷ Al-Kāsānī, *Badāʿiʿ*, V, 37.

¹³⁸ Al-Bukhārī, “al-Nikāḥ,” 27; Muslim, “al-Nikāḥ,” 33-40, al-Tirmidhī, “al-Nikāḥ,” 30.

¹³⁹ Declaring the *ḥukm* about this problem, some sources do not apply the term *ḥarām* and say, for example, “a woman cannot marry upon her aunt/her wedding is not *jāʿiz*.” See al-Kāsānī, *Badāʿiʿ*, II, 262; al-Marghīnānī, *al-Hidāyah*, I, 226; al-Mawṣilī, *al-Ikbtiyār*, III, 123. Some sources, however, clearly indicate that it is *ḥarām*. See Ibn al-Sāʿatī, *Majmaʿ al-baḥrayn*, 514.

¹⁴⁰ For some sources that pass judgment on this problem, without using the term *ḥarām*, see Al-Kāsānī, *Badāʿiʿ*, II, 262, al-Marghīnānī, *al-Hidāyah*, I, 226. For some works that employ the term *ḥarām*, see Ṣadr al-Sharīʿah, *Sharḥ al-Wiqāyah* (Amman: Muʿassasat al-Warrāq, 2006), III, 11; Mullā Khusraw, *Durar*, I, 330-331; al-Ḥalabī, *Multaqā l-abḥur*, I, 325.

¹⁴¹ Al-Bukhārī, “al-Nikāḥ,” 20; Muslim, “al-Raḍāʿ,” 1; al-Tirmidhī, “al-Raḍāʿ,” 1.

¹⁴² Al-Kāsānī describes this ḥadīth as *mashbūr*. See al-Kāsānī, *Badāʿiʿ*, IV, 3. For other sources that ground the prohibition on this ḥadīth, see al-Marghīnānī, *al-Hidāyah*, I, 258; al-Mawṣilī, *al-Ikbtiyār*, III, 168; Ibn al-Sāʿatī, *Majmaʿ al-baḥrayn*, 513.

answer to this question. According to this approach, the situation will require *kufır* since the denied *hukm* is *harām*. On the other hand, denial of well-known Sunnah, which is the proof of *hukm*, is not a reason for excommunication. It is impossible to assert that about an issue, denial of proof does not require *kufır*, but that who denies the *hukm*, determined via proof, is to be excommunicated. Such argument includes a clear contradiction.¹⁴³ To evade such contradiction, we should accept that it is *kufır* to deny *harāms*, the authenticity and significance of which are determined through definitive proof; and that the denial of any *harām* does not require *kufır*.

A similar problem occurs with regard to denial of *harām*, the proof of which is *qiyās*. As is known, there are occasional *hukms* on *hurmah* of some acts pursuant to *qiyās*. One of the best known examples is views of jurists about content of prohibition of usury/interest (*ribā*). Most jurists admit *ribā* can be permissible for goods other than the six types indicated in the *hadīth* on *al-ashbyā' al-sittab*,¹⁴⁴ but they argue about the reason for usury.¹⁴⁵ According to *Ḥanafīs*, reason for usury is unity of measure (*kayl*) or scales (*wazn*). Therefore, the exchange of a weighable or measurable commodity, such as rice or iron, with the same kind of goods of different amount or pursuant to date signifies usury and is *harām*. Thereupon, *Ḥanafī* jurists declare all transactions with usury element as *harām*.¹⁴⁶ On the other hand, *qiyās* signifies superior conviction (*ẓann ghālib*).¹⁴⁷

¹⁴³ About validity of a similar situation for *farḍ* determined via well-known Sunnah, see Yargı, *Meşbur Sünnetin Dindeki Yeri*, 139.

¹⁴⁴ Al-Bukhārī, “al-Buyū‘,” 74-81; Muslim, “al-Musāqāt,” 79-84.

¹⁴⁵ Al-Marghīnānī, *al-Hidāyah*, III, 62; al-Mawṣilī, *al-Ikbtiyār*, II, 42.

¹⁴⁶ Al-Marghīnānī, *al-Hidāyah*, III, 61; al-Mawṣilī, *al-Ikbtiyār*, II, 42; Mullā Khusraw, *Durar*, II, 186-187; al-Ḥalabī, *Multaqā l-abbur*, II, 84. *Ḥanafī usūl* scholars give the example of usury while explaining *qiyās*, so as to include the abovementioned issues. See Şadr al-Sharī‘ah, *al-Tawḍīḥ*, II, 127; Ibn Malak, *Sbarḥ al-Manār*, 754-757.

¹⁴⁷ About the previous problem, this fact initially seems like another evidence that *harām* can be determined by speculative proof in *Ḥanafī* school, since *qiyās* signifies speculation and some acts are declared *harām* in *Ḥanafī* school pursuant to *qiyās*. Nevertheless, the following explanation annihilates such possibility: *Qiyās* is not determinant but exhibiting; therefore, the particular *hukm* is determined through not *qiyās* but the proof of original *hukm*. See Şadr al-Sharī‘ah, *al-Tawḍīḥ*, I, 50-51. According to this approach, the proof for *hurmah* of exchange of rice with rice in different quantity is neither *qiyās* nor

Therefore, denial of a *ḥukm*, which is ruled upon *qiyās*, does not require *kufr*. For example, is it possible to excommunicate the *Zāhirīs*, who do not consider *qiyās* as a *sharʿī* proof, the *Shāfiʿīs* or *Mālikīs*, who have different opinions about *ʿillab* despite admitting *qiyās*, on the ground that they do not accept the exchange of one ton of iron with one and a half tons of it signifies usury and is thus *ḥarām*? Since this is impossible, we conclude that denial of certain *ḥarāms* does not require *kufr* according to Ḥanafī school.

Views in *kalām* and *fiqh* books show there is no obligatory relation between denial of *ḥarām* and *kufr*. In this respect, the denied *ḥarām* should be *ḥarām li-dbātihī* and be determined through definitive proof for it can require *kufr*. Thus, who denies *ḥarāms* determined via speculative proof or *ḥarām li-ghayribī* is not excommunicated. According to another approach, without any distinction of *ḥarām li-dbātihī* or *ḥarām li-ghayribī*, it is *kufr* to consider that things ruled *ḥarām* by the religion – such as marriage with close relative, wine, animal carcass (impure meat), pork, and blood – are *ḥalāl*.¹⁴⁸ This view, however, does not necessarily require absolute excommunication of denier of *ḥarām*. Indeed, the examples reveal that all these *ḥarāms* have definitive proof.

Conclusion

For determination of *ḥarām*, proof has to be definitive in terms of both authenticity and significance. This view is unanimously attributed to al-Imām Muḥammad. Apparently, al-Kāsānī is the first ever jurist to introduce this view of al-Imām Muḥammad as general approach of Ḥanafī school. Ibn al-Humām, on the other hand, is the first *uṣūl* scholar to present it as common view of the school in his *uṣūl* work. Ibn Nujaym, Ibn ʿAbd al-Shakūr, and Ibn ʿĀbidīn follow Ibn al-Humām in this respect. A similar approach is observable in most modern *uṣūl al-fiqh* works, particularly those by Khuḍarī Beg, who clearly and precisely ascribes this view to Ḥanafī school.

ʿillab (the underlying reason behind the ruling), but it is the ḥadīth on *al-ashyāʾ al-sittab* and other relevant injunctions.

¹⁴⁸ Ibn Nujaym, *al-Baḥr al-rāʾiq*, I, 207. Also see Mullā Khusraw, *Durar*, I, 324; Shaykhizādah, *Majmaʿ al-anbur*, I, 697; Ibn ʿĀbidīn, *Radd al-muḥtār*, II, 292-293. For further information in *kalām* books, see al-Taftāzānī, *Sharḥ al-Aqāʾid* (Istanbul: Fazilet Neşriyat, n.d.), 190; Ramaḍān Efendī, *Ḥāshiyah ʿalā Sharḥ al-Aqāʾid*, 250, 312-313; Ahmet Saim Kılavuz, *İman Küfür Sınırı – Tekfir Meselesi* (Istanbul: Marifet Yayınları, 1977), 153-156.

Given that *farḍ* and *ḥarām* in Ḥanafī *uṣūl* are two symmetrical *ḥukm* categories and that the motive behind distinction between *farḍ* and *wājib* is present in separation between *ḥarām* and *makrūh taḥrīmī*, it seems a natural consequence of consistency of Ḥanafī *uṣūl* to take into account the power of proof for distinguishing *ḥarām* and *makrūh taḥrīmī* and to claim *ḥarām* can exclusively be determined through definitive proof. Nevertheless, the underlined differences between *ḥarām* and *farḍ*, as well as occasional use of the term *farḍ* despite lack of definitive proof about the demand of the Lawgiver, rules out absolute acceptance of this judgment. In addition, pursuant to Ḥanafī *uṣūl* works, the argument, which claim *ḥarām* can only be determined through definitive proof, is introduced as the point of view of al-Imām Muḥammad and not as the common opinion of Ḥanafī school. According to most Ḥanafī jurists, the main criteria for distinction between *ḥarām* and *makrūh taḥrīmī* is not whether proof is definitive or speculative; instead, the benchmark is whether the act is prohibited or not, and whether the committer is worthy of punishment or not. This approach in *uṣūl* works, as well as use of term *ḥarām* in *furūʿ* works with regard to declaration of *ḥukm* for many issues without definitive proof about prohibition, show it is not accurate to introduce the prerequisite of definitive proof as the general opinion of Ḥanafī school.

The problem of *ḥukm* about denial of *ḥarām* is directly related with the quality of proof through which *ḥarām* is determined. On this matter, in consideration of information in *uṣūl* works and usage in *fiqh* books, it is not true to introduce the necessity for excommunication of denier of *ḥarām*, without any distinction between *ḥarāms*, as the single or preferred opinion of Ḥanafī school. According to both *uṣūl* and *furūʿ* works, *ḥarām* can be determined through definitive or speculative proof depending on the situation; therefore, whoever denies *ḥarāms*, which are determined via proof with definitive authenticity and significance, will be excommunicated, while the rest does not require *kufr*.

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