CHAPTER ONE

An Introduction to the Study of *al-Qawāʿid al-Fiqhiyya*

1.1: Major Phases of Islamic Jurisprudence to the 8th / 16th Century

The earliest phase of jurisprudential development in the Islamic context is characterized by a shift in focus from the Qurʾān to the *sunna*[2] of the Prophet Muḥammad[3] as the preeminent source of guidance in legal matters facing the Muslim community. This shift mirrors and anticipates a similar shift in the mental process that the legist (*fuqahāʾ,* s. *faqīh*) employed when reaching his legal determinations: from using his own independent reasoning to referring to the *sunna* of the prophet as the authoritative precedent/source for reaching a legal decision.

In the first century AH, Prophet Muḥammad and his companions were the authoritative lawgivers who made legal determinations to treat cases of law as they arose in society. Authoritative sources of the law were the Qurʾān and pre-Islamic Arab custom which did not challenge the teachings of the

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[2] Ḥallāq, Waʾel. *A History of Islamic Legal Theories*. Cambridge: Cambridge University Press, 1997. The *sunna* of the prophet Muḥammad is an essential foundation and source of wisdom in Islamic legal thought. In his book, Waʾel Hallāq describes the concept as follows: "The term *sunna* means an exemplary mode of conduct and the perfect verb *sanna* has the connotation of 'setting or fashioning a mode of conduct as an example for others to follow." During the first decades of Islam, it became customary to refer to the Prophet's biography and the events in which he was involved as his *sira*. But while the latter term indicates a manner of proceeding or acourse of action concerning a particular matter, the former, *sunna*, describes the manner and course of action *as something established, and thus worthy of being emulated*.". See Waʾel Ḥallāq, *Theories*, 10.

[3] Muḥammad b. ʿAbd Allah (570-632 AD/), prophet and messenger who brought the message of Islam as expounded in the Qurʾān to the people of Arabia.

Qurʾān. The Prophet used, and instructed his companions to use, their own mental faculties, or *ijtihād al-raʾy*, to reach a considered opinion with which to mediate legal disputes according to the Qurʾān and his teachings throughout the nascent Islamic world[4].

After the Prophet's death, his companions and the generation that followed them continued to use *ijtihād al-raʾy,* guided by the teachings of the Qurʾān, the *sunna* of the Prophet, to determine new legal cases. No formal structure or theory had yet emerged to confine legists' *ijtihād* to a certain established and agreed upon process of adjudication. However, by the end of the first century AH, the Prophet's *sunna* had begun to dominate the discourse and the process of eliciting *ḥadīth* out of that living tradition was underway[5].

As emphasis on newly-emerging *ḥadīth* as an essential source from which to draw for legal matters, *ijtihād al-raʾy* and those who practice it, called *ahl al-raʾy*, came to be increasingly criticized whereas arguing cases using *ḥadith* evidence, and those who practiced this, called *ahl al-ḥadīth*, became the new standard[6]. By the time of al-Shāfiʿī, (d. 204/820) *raʾy* had begun to be replaced formally by other more restricted methods for reaching legal determinations such as *qiyās* and *ijmāʿ*. Al-Shāfiʿī's traditionalist

[4] When sending Muʿādh ibn Jabal to Yaman, the Prophet tells him to adjudicate new cases he faced by using Qurʾān as a first source. If he cannot find a precedent there to assist him, he should refer to the sunna of the Prophet. If he still cannot find a precedent there, then he is to use his own reason (ijtahida raʾyuk).

[5] The bulk of this historical discussion comes from Hallaq's *A History*. For the transition from *sunna* to *ḥadīth*, see 15-18.

[6] Ḥallāq places this development in the second half of the second century AD or by 150 AH. ibid, 16.

theories would dominate legal discourse and practice for centuries to come. However, despite al-Shafiʿīs inclinations, this did not negate completely the practice of *ijtihād*; it only altered the form *ijtihād* would take, restricting it within certain parameters for the sake of expediency and consistency across the range of opinions.

The following phase of Islamic Jurisprudence is marked by the domination of traditionalist thought and the acceptance of al-Shāfiʿīs theory as standard. This meant the sanctification of the Qurʾān and *ḥadīth* as the highest sources of law and *qiyās* and *ijmāʿ* as the dominant tools of treating new legal cases. Variations and differences of opinion regarding minor aspects of this theory became the underlying foundations of different schools of law, the most dominant and lasting of which were the Shāfiʿī, Ḥanafī, Mālikī, and Ḥanbalī schools.

Once these guidelines were entrenched, with minor variations across the legal spectrum, the rapid proliferation, collection and recording of legal cases, or *masāʾil fiqhiyya*, became widespread. The legal compendium, or handbook, dominated legal literature and served the purpose of bringing together in one source all the cases of law treated by the major scholars of each school.

Later generations of legists recognized the need to create effective mechanisms to organize and systematize the huge body of *masāʾil*. One such way that they did this was by examining case law to infer, or deduce (*yastaqraʾu*) the underlying principles which bind certain cases and renders

their legal determinations the same. This method of organization developed into the field of *al-qawāᶜid al-fiqhiyya*, or principles of jurisprudence, to which we will devote the rest of this study.

1.2: Background on *al-qawāᶜid al-fiqhiyya*

1.2.1: Lexical Definitions of *al-qawāᶜid al-fiqhiyya*

In the Arabic language, *qawāᶜid* (s. *qāᶜida*) bear several meanings including the foundations or roots of a thing be they literal, such as the foundations of a building, or figurative, such as the foundations of faith (*qawāᶜid al-dīn*)[7]. *Al-qawāᶜid* in this sense appears in the Qurᵓān in several passages, including:

> "Those who lived before them did, too, devise many a blasphemy – whereupon God visited with destruction all that they had ever built, [striking] at its very foundations, so that the roof fell in upon them from above and suffering befell them without their having perceived whence it came[8]."

and,

> "And when Abraham and Ishmael were raising the foundations of the Temple, [they prayed:] 'O our Sustainer! Accept Thou this from us: for, verily, Thou alone art all-hearing, all-knowing'[9]".

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[7] Al-Nadwī, ᶜAlī Aḥmad. *al-Qawāᶜid al-Fiqhiyya*. Dimashq: Dār al-Qalam, 2000, 39.

[8] ibid. This verse in Arabic is as follows: "*Qad makara 'l-ladhīna min qablihim fa-ātā Allahū bunyānuhum min al-qawāᶜidi fa kharra ᶜalayhimu 'l-saqfu min fawqihim wa ātāhumu 'l-ᶜadhābu min ḥaythu la yashᶜurūn*." (Qurᵓān: 16:26) in Muḥammad Asad's *The Message of the Qurᵓān.* Gibralter: Dār al-Andalus Limited, 1997, 396-7.

[9] ibid. 27. This verse in Arabic is as follows: "*Wa idh yarfaᶜu Ibrāhīmu 'l-qawāᶜida mina 'l-bayti wa Ismāᶜīlu rabbanā taqqabbal minna innaka anta 'l-samīᶜu 'l-ᶜalīm*". (Qurᵓān, 2:127).

In addition to this, the root *qa-ʿa-da* also bears the meaning to 'remain' or 'stay' seated or in one's place, although it is used in contexts other than sitting[10]. The eleventh month of the lunar Islamic calendar, 'Dhu 'l-Qāʿida', takes its name from this sense of the term as it was the month in which people remained home and did not travel for trade or other reasons. *Qāʿida* in this sense was used in the Qurʾān in reference to women who do not desire to be married, *"…women advanced in years, who no longer feel any sexual desire, incur no sin if they discard their [outer] garments, provided they do not aim at a showy display of [their] charms*"[11]. However, *qawāʿid* in the sense that we will be using throughout this project more closely resembles principles rather than foundations.

1.2.2: Technical Definitions of *al-qawāʿid al-fiqhiyya*

Given the meaning of 'principles', we know that all areas of study are built upon underlying principles which facilitate and govern the workings of that field. So, in the field of Arabic grammar, an essential principle is that *al-muḍāf ilayhī majrūr*. From this principle we know that every time there is a *muḍāf ilayhī,* it must conform to the principle above and as such, take a *kasra* at the end (*jarr*).

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[10] Al-Bāḥusayn. Yaʿqūb Ibn ʿAbd al-Wahhāb. *al-Qawāʿid al-fiqhiyah: al-mabādiʾ, al-muqawwimāt, al-masādir al-dalīlīyah, al-tatawwur: dirāsah nazarīyah tahlīlīyah taʾṣīlīyah tārīkhīyah.* (al-Riyāḍ: Maktabat al-Rushd, 1998). al-Bāḥusayn renders this in Arabic as *'istiqrār'* and *'thubūt'*. For this discussion, see Ibn Firās in Bāḥusayn, *Qawāʿid*, 14 especially note 2.

[11] See *Qurʾān*, 24:60.

Similarly, a*l-qawāʿid al-fiqhiyya* are the governing legal principles that inform the process of reaching a legally consistent judicial decision. As such, a*l-qawāʿid al-fiqhiyya* are most commonly rendered as legal maxims or principles of jurisprudence[12]. They are predominantly valid determinations through which the legist can know the individual legal decisions of similar cases directly[13]. However, neither modern nor medieval scholars of the field have agreed upon one particular definition of *al-qawāʾid al-fiqhiyya* and offer a range of slightly different conceptions of the field.

Modern scholars of the field define *al-qawāʿid* in one of three ways: as generally valid (*kulliyya*), predominantly valid (*aghlabiyya*), or as a theory, (*naẓariyya*). However, some have taken all of these factors into consideration to offer the following definition, "A generally valid legal principle which encompasses general *sharʿī* determinations, from different chapters [of *fiqh*] in matters which come under its subject area"[14].

Although *al-qawāʿid al-fiqhiyya* have often been considered universal, Ḥanafīs and others qualify this and limit them to being only predominantly

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[12] See Wolfhart Heinrichs, "*Qawāʿid* as a Genre of Legal Literature", 2000 p. 1. This is an unpublished article which surveys the field in general. I thank the author for generously sharing it with me. Also see Joseph Schacht, *An Introduction to Islamic Law*, (Oxford: Clarendon Press, 1964; repr., Oxford: Oxford University Press, 1991), 114, where he defines the term as the 'systematic structure of positive law'. Also see Muḥammad H. Kamālī, *Principles of Islamic Jurisprudence*, (Cambridge: The Islamic Texts Society, 1991), 5, where he defines *al-qawāʿid al-fiqhiyya* as a body of abstract rules which are derived from the detailed study of the *fiqh*; maxims of *fiqh*".

[13] See al-Nadwī's *al-Qawāʿid,* where he defines it as *"Ḥukmun aghlabiyyun yataʿarrafu minhu ʿala juzʾiyyātihī 'l-fiqhiyya mubāsharatan*".

[14] *al-*Nadwī, *al-Qawāʿid*, 43, "*Aṣlun fiqhiyyun kulliyyun yataḍammanu aḥkāman tashrīʿiyyatin ʿāmmatin min abwābun mutaʿaddidatun fi 'l-qaḍāya allatī tadkhulu taḥta mawḍūʿiha*"..

valid[15]. If we accept this view, then *al-qawāʿid al-fiqhiyya*, or principles of jurisprudence, become quite different from principles of other fields such as Arabic Grammar or Physics, which do not generally accommodate exceptions.

However, the purposes of Grammar and Physics are likewise quite different from those of adjudication: principles of adjudication aim to create overall consistency –not complete perfection—in the way people resolve their disputes based on precedence, and school affiliation. As a result, an occasional case which is resolved inconsistently with the principle of adjudication does not destroy the validity of the principle: instead it demonstrates judges' responsiveness to any mitigating circumstances which necessitate bending the principle. Principles of adjudication help create a loose framework to encompass the individual cases that come under it: it does not seek to make that framework airtight.

1.2.3: Historical Development of the Definition of *al-qawāʿid al-fiqhiyya*

Although the goals of *al-qawāʿid al-fiqhiyya* were known from early on, the creation of a 'system' to bring about those goals consistently was being worked out for centuries. This 'system' is the fully developed field of *al-qawāʿid al-fiqhiyya* as epitomized by al-Ṣuyūṭī (d. 911/1505). Medieval scholars also differed slightly as to the breadth and scope of *al-qawāʿid al-fiqhiyya*; differences which often fell on *madhhab* lines. This range of

[15] See al-Bāḥusayn, *al-Qawāʿid*, 41.

difference becomes clearer upon examination of the historical development of this field from its earliest instance in the fifth century AH to the present.

Before *al-qawāʿīd al-fiqhiyya* were known by that term, they were referred to as *uṣūl*, which were understood to serve a different purpose from *uṣūl al-fiqh*, or theory and hermeneutical tools for the creation of Islamic law[16].

It is surprising that Islamic legal theoreticians and scholars of law had not defined *al-qawāʿid al-fiqhiyya* until the 8th/14th century[17]. Ṣadr al-Sharīʿa (d. 747 AH), an eighth century Ḥanafī scholar, defined it as "al-qaḍāyā al-kulliyya", or "matters of general or universal validity"[18]. However, a more prominent and influential definition of *al-qawāʿid al-fiqhiyya* in the eighth century, and for many centuries to come was that of Tāj al-Dīn al-Subkī (d. 771/1370), who says of the *qāʿida* that it is, "the generally valid rule with which many particular cases agree whose legal determinations can be understood from it"[19]. By the thirteenth century, al-Ḥamawī (d. 1095/1687),

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[16] Few scholars elevated *al-qawāʿid al-fiqhiyya*, as they came to be known later on, to the level of actual *uṣūl*.

[17] See *al-Qawāʿid* by al-Bāḥusayn, 19.

[18] ibid. This is ʿUbayd Allah b. Masʿūd b. Muḥammad al-Bukhārī al-Maḥbūbī al-Ḥanafī. His *laqab* was Ṣadr al-Sharīʿa al-Asghar, meaning he was among the best Ḥanafī *fuqahāʾ, uṣūliyyūn*, and philosophers of his time. Furthermore, he was a transmitter and exegete of *ḥadīth*, a grammarian, a linguist as well as a philosopher. He died in 747 AH. Among his other works was, *al-Tawḍīh fī ḥall ghawāmid al-tanqīḥ fī ʾuṣūl al-fiqh, al-Washshāḥ fi'l-maʿānī wa 'l-bayān, Sharḥ al-waqāya fi 'l-fiqh al-Ḥanafī* and *Taʿdīl ul-ʿulūm.*

[19] See Wolfhart Heinrich's "*Qawāʿid* as a Genre of Legal Literature", 3 where he defines it as "*al-amr al-kulli alladhi yanṭabiq ʿalayhi juzʾiyyāt kathīra tufhamu aḥkāmuha minha wa minhā mā lā yakhtaṣṣu bi bābin… wa minhā mā lā yakhtaṣṣ"*. See al-Subkī, Tāj al-Dīn ʿAbd al-

one of the most well known commentators on Ibn Nujāym's *Ashbāh wa Naẓāʾir*, had defined it as, "a predominantly, not universally, valid principle [*ḥukm*] which is applied to most of its particular cases in order to discern its legal determination from it".

We can see that between the third and eleventh century, scholars continually developed the scope and organizational structure of the *qawāʿ*id. This development culminated in our current understanding of *al-qawāʿid al-fiqhiyya*: that they are predominantly valid legal principles, gleaned from a detailed study of the *furūʿ*, through which a jurist can draw the legal determination of similar cases[20]. Yet throughout this period, the function of *al-qawāʿid* remained clear: to give structure and consistency to the way new cases were determined in conformity with the *madhhab*.

However, just as important as what *al-qawāʿid al-fiqhiyya* were is the function that they performed. We shall now turn to the question of why the *qawāʿid* developed the way they did and what their various practical functions were within the wider scope of the process of adjudication.

Wahhāb b. ʿAlī b. ʿAbd al-Kāfī. *al-Ashbāh wa 'l-naẓāʾir.* Eds. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad ʿAwaḍ. (Bayrūt: Dār al-Kutub al-ʿIlmiyya, 2001/1422, (2 vols). It is interesting to note that by the mid- to late-eighth century, and specifically with al-Subkī's definitions, a distinction is explicitly established between a *qāʿida* and a *ḍābiṭ,* where a *qāʿida* is a generally valid principle or rule which is applicable to cases across a wide spectrum of chapters of *fiqh* but a *ḍābiṭ* is a principle which is applicable only to cases within one particular *fiqhī* chapter.

[20] This is roughly how al-Nadwī, one of the foremost scholars of the field, identifies the *qawāʿid*. See al-Nadwī, *al-Qawāʿid*, 43-4, where he defines it as "*Hukmun sharʿiyyun fī qaḍiyyatin yataʿarrafa minha aḥkām mā dakhala taḥtiha"*.

1.3: Objectives of *al-Qawāʿid al-fiqhiyya*

Although the evolution of the terminology associated with *al-qawāʿid* seems unclear and inconsistent, their function was not. *Qawāʿid* were a means of organizing, structuring, and preserving the ever-expanding body of *furūʿ*, or cases of positive law, within one's *madhhab*. In his important introduction to the study of *qawāʿid,* Professor W. Heinrichs says:

> The original and most meaningful *Sitz im Leben* of the *qawāʿid* is the *madhhab*-internal discussion leading to the finding of a legal determination for an as yet un-encountered "event". The *madhhab* developed a set of general rules to cover individual cases that fit the definition set up in the general rule. The general rules were either already explicitly set up by the eponymous founder of the school and his disciples (or ascribed to him/them). Or they were found by induction from established legal determinations (*aḥkām*) of individual cases (*furūʿ*). Knowledge of these general rules allowed the jurisprudent to wield *madhhab*-internal *ijtihād*, to be a *mujtahid al-fatwā*[21].

So, the function of the *qawāʿid* was to assist the *mufti,* or jurisconsult, or the *faqīh* in formulating the *ḥukm* of a new case while remaining consistent with the method of the *madhhab*. This is further confirmed in the earliest extent works dedicated specifically to compiling the *qawāʿid*. The earliest scholars to do so were al-Karkhī (d. 340/951) and al-Dabūsī (d. 430/1039)[22].

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[21] See Heinrichs, "*Qawāʿid* as a Genre of Legal Literature", 12.

[22] Both works were published in the same volume. Al-Dabūsī, Abū Zayd ʿUbayd Allah b. ʿUmar. *Taʾsīs al-naẓar* [plus al-Karkhī: *al-Uṣūl*], (Cairo: Maṭbaʿat al-Imām n.d.). For biographical information on both of these fuqahāʿ, please see Chapter Three.

Al-Dabūsī's editor writes in his introduction,

> *wa ʾammā 'l-qawāᶜid wa 'l-ḍawābiṭ fa ḥīnama kathurat al-furūᶜ wa 'l-fatawā bi khathratu 'l-waqāʾiᶜ wa 'l-nawāzil tawassaᶜū fī waḍᶜiha ᶜalā hadyin min salafihim tadūru fī abwābin mmukhtalifa min al-fiqh taḍbut kathrat al-furūᶜ wa tajmaᶜuha fī qālibin muttaṣiq li-ṣiyānatiha min al-ḍayāᶜ wa 'l-tashattut*.[23]
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> Translation:
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> As for *al-qawāᶜid* and *al-ḍawābit*, when the *furūᶜ* and *fatwas* increased with the number of cases and legal events, scholars expanded in recording them with the guidance of their predecessors.. They revolved around different chapters of fiqh to contain (*taḍbuṭ*) the number of *furūᶜ* and collect them in one relevant rubric to protect them (*furūᶜ)* from perdition and dispersion.

It becomes clear from this statement that the *qawāᶜid* were both didactic tools as well as guides to procuring a determination formed within the *madhhab* and emanating from its intellectual foundations. Unless this was done, there was a perception among scholars that the cases of law and the rational for their determinations would be lost on new generations of scholars.

Furthermore, the function of *al-qawāᶜid al-fiqhiyya* is intrinsically connected to the refinement, fortification and establishment of the *madhhab* as the consistent and enduring institution of Islamic adjudication whose *uṣūl* and *furūᶜ* reflect a unified and coherent set of principles to which the *aḥkām* of all future normative cases must conform to remain within the acceptable parameters of the *madhhab*. Therefore, the legal context in which *al-qawāᶜid al-fiqhiyya* is meaningful is the *madhhab* and the intellectual beneficiary of its

[23] See al-Nadwī's, *al-Qawāᶜid al-fiqhiyya*, p. 135.

creation is primarily the *mujtahid fī 'l-madhhab*, or the jurist who may practice independent reasoning within the guidelines, principles, and views of the major scholars of his *madhhab*.

To put it another way, *al-qawāʿid al-fiqhiyya* strove, in a sense, to answer some of the most pressing questions that faced the jurist of the 4th/5th century AH, including:

1. Exactly what makes a Ḥanafī a Ḥanafī (and a Ḥanafī *ḥukm*, Ḥanafī)?
2. What distinguishes his *furūʿ* and their *ahkām* from a Shāfiʿī's, for instance?
3. How can one remain firmly committed to the most authoritative opinions of one's own intellectual tradition and produce law that embodies its spirit?

Just as scholars of the second/eighth century AH were faced with a daunting task: to create a viable legal system from the revealed sources that was based on certain *uṣūl,* or foundations of the law*,* this later generation of scholars faced a similarly daunting task: to systematically organize the fruit of earlier scholars' labor, i.e. *aḥkam al-masāʾil al-fiqhiyya*, by deducing the principles that inform them for use by future generations of jurists. *Al-qawāʿid al-fiqhiyya* would play a critical role in answering some of these questions.

During the post-formative period of Islamic legal development, *fiqh* had seen the emergence of numerous massive collections of normative law which, by the fourth and fifth centuries AH had made it difficult for new

students of *fiqh* to identify and absorb their school's position on *masāʾil*[24]. In fact, the overwhelming numbers of cases had legal determinations nearly as varied as the jurists who gave them. The situation-while extremely fluid and offering a wide range of legitimate legal viewpoints- made it difficult to pin down a *madhhab's* 'official' view on any given matter without pitting authoritative opinions of the *madhhab's* biggest scholars against each other. Organizing cases according to the principles under which they fit and which dictate its legal determination would make it easier for a *qādī* to call up the appropriate cases of precedence to use as a reference in treating a new related case.

The establishment of al-*qawāʿid*, hence, was a very practical and necessary step in the expansion of the body of *fiqh* in an organized and systematic fashion which confirmed one's *madhhab* as the primary source of legitimate authority, or legal precedence. They helped address a concrete problem: how to keep one's *madhhab* views consistently present in the *aḥkām* of generations of *fuqahāʾ* who were becoming further and further removed from the intellectual context of the founders of their school of law[25].

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[24] See our discussion of the Major Phases of Islamic Jurisprudence to the 8th/16th Centuries, above.

[25] In his introduction to *Taʾsīs al-Naẓar*, al-Dabūsī (d. 430/1039) states that his students had grown confused and uncertain of the position of the Ḥanafī *madhhab* with regard to key issues and problems, due to the differences of opinion between Abū Ḥanīfa (d. 150/767) and his two primary disciples, Abū Yūsuf (d. 182/798) and Muḥammad al-Shaybānī (d. 189/805). Al-Dabūsī's primary purpose in producing his work was to clarify the position of the *madhhab* regarding the *masāʾil* of *fiqh* as well as to highlight the differences between them and those of al-Shāfiʿī and other leading legal theorists and scholars of the time. See al-Dabūsi's *Taʾsīs*, 3.

Both early (pre-third/ninth century) and later (post-fourth/tenth century) generations of *fuqahāʾ* and *uṣūliyyīn* treated legal cases and formulated theory using some form of *ijtihād*. Whereas the early generations of legal thinkers (culminating in the eponyms of the four *madhāhib*) formulated the essential *uṣūl al-fiqh* (s. *aṣl*, or legal theory) using unlimited independent reasoning called *ijtihād muṭlaq*, *fuqahāʾ* of the fourth century onward treated their own set of legal challenges using a more limited form of independent reasoning known as *ijtihād al-madhhab*[26].

Once the four major Sunni *madhāhib* (*s. madhhab*, or school of law) were established, *fuqahāʾ* turned their efforts primarily to solidifying the methods, structures, and approaches of their *madhhab* with regard to legal theory and adjudication techniques[27]. They did this through a process of *ijtihād fi'l-madhhab*[28]. Their goal was to present a clear, systematic system of theory and adjudication, which accurately reflected the foundations (theological, hermeneutical, and intellectual) upon which their eponym based his *madhhab*.

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[26] Although most scholars agree that such a solidification of the *madhāhib* took place, they do not agree about *when* it occurred. The theories range from Schacht's dating, which suggests the middle of the third century A.H. (See Schacht's *Introduction*, 70) to that of Shāh Walī Allah who contends it was not until the fifth century. It is most likely that this process took place over a long period of time, with the recording of *al-qawāʿid* being a significant part of that process.

[27] The problem of the lack of legal texts from the third to the fifth centuries A.H. has been attested to by many scholars including W. Ḥallaq, *A History*, 36. However, later historical sources describe the intellectual scene at the time and retrospectively assess its main phases.

[28] This is *ijtihād* performed within the accepted precedence of the individual school of law.

Determining the *qawāʿid* of the creators of the *madhhab,* including those explicitly stated by the founders of the *madhhab* or those implicitly known through a process of extrapolation, was essential to the jurist as he presented his own arguments for or against certain legal positions. In this way, knowledge of *al-qawāʿid al-fiqhiyya* helped keep a Ḥanafī jurist and his *aḥkām* as Ḥanafī as possible.

1.4: *al-Qawāʿid al-fiqhiyya* at Work: The Conceptual and The Practical

1.4.1: The Conceptual: Sanctioning Agents for Their Use

All schools of law accord *al-qawāʿid al-fiqhiyya* an important position in their *fiqh* as a system of organization and structuring of the law but not as a legal evidence upon which to base legal determinations[29]. Yet, despite their importance, they <u>are not</u> considered a *dalīl*, or evidence, upon which to base legal determinations unless [the *qāʿida*] was originally derived from a *dalīl* of the Qurʾān, *sunna* or another such source.

At first glance, this fact seems to undercut the importance of *al-qawāʿid.* However, this ignores the stated objectives of *al-qawāʿid al-fiqhiyya* namely, making the law more accessible, structuring it in a systematic way, keeping the *madhhab's fatwas* and *aḥkam* consistent with the school's

[29] Some *qawāʿid* are exceptions to this rule. This arises when the *qāʿida* at hand was originally derived from a *dalīl*, or evidence, of the Qurʾān, *sunna*, or another such certain sources. See al-Bāḥusayn, *al-Qawāʿid al-Fiqhiyya*, 273, where he says, "*al-qawāʿid al-fiqhiyya lā taṣlūḥ an takuna dalīlan yustanad ilayhī fī istinbāṭu 'l-aḥkām al-sharʿiyya illa idha kāna aṣluha mustanidan ilā dalīlun min al-kitābin aw sunnatin aw ghayrihima*".

teaching, protecting the *furūᶜ* from chaotic scatter and perdition over the long term. In performing that much needed function, *al-qawāᶜid* have played their role and have earned their position of pride within the Islamic legal system.

Certain *qawāᶜid fiqhiyya,* however, can be used as evidence in legal cases since they found their first formulation in either *Qurᵓān*, *ḥadīth*, or the statement of an esteemed legal authority. These *qawāᶜid* were adopted as is by the scholars of *al-qawāᶜid* and were used as strong evidence in their own right but also expounded a rule which many other cases followed. These include the five major *qawāᶜid*, or al-qawāᶜid al-kubra: al-yaqīn lā yazūlu bi ‘l-shakk, al-ḍarar yuzāl, al-ᶜāda muḥakkama, la-ḍarar wa lā- dirār, and al-umūr bi maqāṣidihā.

Some modern scholars have traced the roots of *al-qawāᶜid al-fiqhiyya* to the *Qurᵓān*, claiming that the *Qurᵓān* itself established the first legal principles upon which the rest of the *sharīᶜā* was later established[30]. In fact, *al-Nadwī* posits that later scholars were, in fact, following the lead of the *Qurᵓān*, which summarized the determinations of a range of legal matters under one rule or principle:

> *Wa liᶜalla al-ᵓamr alladhī shajjaᶜa ‘l-aqdamīn min al-fuqahāᵓ ᶜala istinbāṭ hadhihī ‘l-qawāᶜid ᶜinda taᶜdīl al-aḥkām wa tajaddud al-ḥawādith mā raᵓuhu min baᶜḍ ‘l-ayāt al-qurᵓāniyya al-karīma wa ‘l-aḥādīth al-nabawiyya al-sharīfa allati jamaᶜat wa aḥāṭat bi-kathirin min al-aḥkām fi baᶜḍi kalimāt. Fa innahum ᶜan ṭarīqi marānihim ? wa muᶜāyashatuhum maᶜa ‘l-kitāba wa-‘l sunna tawaṣṣalu ila natījatin*

[30] ᶜAlī al-Nadwī makes this argument in, *al-Qawāᶜid*, 271.

ḥatmiyyatin wa hiya anna taqʿīdu amrun muhimmun yatafāda bihi 'l-tabaddur bayna 'l-furūʿ ʿinda takathurihim. [31]

Translation:

Perhaps the situation which encouraged early scholars to extract these *qawāʿid* while clarifying determinations and [treating] new cases is what they observed in some of the verses of the revered *Qurʾān* and the esteemed Prophetic ḥadīth which [themselves] collected and contained many determinations in only a few words. So, by way of their useage and expertise with the book [i.e. the Qurʾān] and the sunna they reached a definite conclusion which was that collecting the *qawāʿid* was an important element by way of which [one can reach] quickly the appropriate case where there are many [legal possibilities that might come to mind].

Yet, in this regard, al-Nadwī produces only one verse (al-Aʿrāf, 199), which is not in itself convincing enough to argue his point[32]. The verse commands the prophet Muḥammad to 'hold to forgiveness, command what is right, but turn away from the ignorant'[33].

That the *Qurʾān* establishes certain solid principles on which to base one's actions cannot be denied, however. The Lawgiver enjoined people to hold on to certain principles such as the equality of all people, protection of the weak, and the centrality of intention in all actions, to be used as the basis for our way of life as well as how we mediate our disputes.

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[31] ibid.

[32] See al-Nadwī, *al-Qawāʿid*, 271-2. Here, al-Nadwī seems to sense the uncertainty of this verse and thus reminds the reader that this opinion belonged also to al-Qurṭubī in his *Jamiʿ li aḥkām al-qurʿān*, a manuscript of which he saw in Cairo. See 272, especially, note 1.

[33] ʿAbdalla Yūsuf ʿAlī's *The Holy Qurʿān: English Translation of the Meanings and Commentary*, 464. In his discussion, ʿAli is clear that this verse falls in the wider context of the few verses before and after this one. This section of al-Aʿrāf is a personal note of encouragement and guidance to the Prophet Muḥammad as he brings his message to people. So, rather than be strictly legal in bent, it is more evangelical.

In the *sunna*, however, there is much more substantial material to make his point: that the early scholars learned *taqʿīd* from the *Qurʾān* and *sunna*[34]. Three essential *qawāʿid* illustrate this: 1. *al-bayyina li 'l-muddaʿī wa 'l-yamīnu li man yunkir*, 2. *al-kharāj bi'l-ḍamān* and 3. *lā ḍarar wa lā ḍirār.* All of these are general principles which are not only applicable to the particular case from which they emerged, but also to any other case whose legal subject matter is the same[35].

So, while there is little disagreement among the scholars about the significance and important function of *al-qawāʿid*, there is equally little confusion about the limits of that function: they are a tool that organizes the law; they are not, for the most part, independent sources of evidence upon which to build a case and issue a determination. However, there is no harm in using a *qāʿida* as a supplemental proof, in addition to other sound and indisputable sources of evidence.

1.4.2: The Practical: Categories of *al-Qawāʿid al-fiqhiyya*, Conditions, and Restrictions

Tāj al-Din al-Subkī (d. 771/1370) was the first Islamic legal scholar to classify the body of *qawāʿid* into several categories including 1. major universally accepted *qawāʿid* which are the foundation of *tashrīʿ* across

[34] In fact al-Nadwī devotes two sections of his study to *aḥadīth* whose verbatim text have become known as *qawāʿid* or whose essence has been captured by later scholars into a *qāʿida*. See *al-Qawāʿid*, 276-320, Chapter 2, sections one and two.

[35] See al-Nadwī, *al-Qawāʿid*, 274.

madhhab lines and 2. minor *qawāʿid*, or ones which are *madhhab*-specific[36]. There are other distinctions on the basis of which the *qawāʿid* have been categorized further but we will focus on the major and minor ones at this point.

By the eighth/fourteenth century, *fuqahāʾ* had begun to distinguish certain central *qawāʿid*, which applicable to cases in nearly every chapter of *fiqh* from others that were more limited in scope. Al-Subkī states these central *qawāʿid* as follows:

1. *al-yaqīnu lā yurfaʿu bi-'l-shakk*, or certainty cannot be superceded by doubt.
2. *al-ḍararu yuzāl*, or, harm should be removed
3. *al-mashaqqatu tajlubu 'l-taysīr*, or, hardship brings about facilitation
4. *al-rujūʿu ilā 'l-ʿāda,* or, the fall-back is on custom
5. *al-umūru bi maqāṣidihā*, or, acts are what they are through the intentions that bring them about[37]

The above five maxims, referred to in modern studies as *al-qawāʿid al-kubra*, are said to be acknowledged by all schools of law[38]. Most post-eighth/fourteenth century works of *qawāʿid* begin with a discussion of these. Often it is argued that these are the foundation of all *qawāʿid* and that all other *qawʿāʿid* can be subsumed under one of the major ones. Some scholars, such as Ibn ʿAbd al-Salām in his *Qawāʿid al-ahkām fī maṣaliḥ al-ānām*, have gone to great lengths to limit the number of *qawāʿid*. He in fact attempts to justify

[36] See my discussion of al-Subkī's *al-Ashbāh wa 'l-naẓāʾir*, Chapter Four, below.

[37] I have used translations presented by Professor W. Heinrichs in his "Qawāʿid", 6-7.

[38] ibid, 6.

placing all known *qawāʿid* under one principle *maqṣad* or *qāʿida*: "warding off harm has the priority over bringing about benefits"[39].

Although these *qawāʿid kubra* are agreed upon by all four schools of *sunnī* law, this does not mean that they were used and applied in the same way across the *madhāhib*. I will present a closer examination of one of these principles, namely *al-ʿāda muḥakkama,* or 'custom is the [legal] fall-back in determining cases', to show the extent to which this supposed agreement remained in the application of these principles to making the law. This study will demonstrate that the tidy structure and universality of the five major *qawāʿid*, especially, *al-ʿāda muḥakkama*, masks the very untidy reality of the wide variation between cases adjudicated within the same *madhhab* and using the same principle.

In other words, despite the best efforts of legal scholars to create an orderly and functional package out of the Islamic legal system, their efforts fall short and reveal that the *furūʿ* cases were neither neat nor always conformed to principles, even major ones. This reality does not, in my view, betray a flawed system that is inherently inconsistent, but instead, one in which a jurist's reason and legal skill thrive to understand people's needs and creatively put forward legally legitimate means of meeting them.

But the vast majority of *qawāʿid* do not fall under the category of *al-qawāʿid al-kubra*, and instead are *madhhab*-specific. Their purpose is to bring out the assumed inherent logic of the teachings of the schools[40].

[39] ibid, 6-7.

1.4.3: Scope of Validity of *al-Qawāʿid al-fiqhiyya*

One further point regarding the practical application of *al- qawāʿid* in the formation of law is the scope of validity of the *qāʿida*: is the maxim in question generally valid and therefore applicable to *every* appropriate case? Is it only predominantly valid and, therefore, has exceptions where it is *not* applicable? If that is the case, what is the wider implication of this problem to the field of *qawāʿid*?

The debate has raged from the fifth century onward about precisely this question. However, if we re-examine the original purpose and function of the *qawāʿid* as stated by their earliest compilers, we see that this dichotomy is largely tangential and immaterial. As we have stated above, the purpose of the *qawāʿid* was to organize the large body of *furūʿ* and systematize them in accordance with the method of the *madhhab* founders.

Viewed in this way, *al-qawāʿid* are a timeless tool. That they are generally or partially valid is secondary. This issue did not exist in early discussions of the scholars because it was irrelevant: they compiled and organized the *qawāʿid* for a different purpose: to systematize. So, even if there *were* exceptions, that poses little problem for the earliest scholars because 1. the *qawāʿid* did not aim to be completely encompassing but to outline the overall structural organization of *furūʿ* and in that way help judges remain

[40] W. Heinrichs, "Qawāʿid", 6.

consistently within their *madhhab* and 2. that there was an exception to the rule did not negate the rule, but in some instances proved it.

An example from English spelling may clarify this: how to spell the word "receive". There is a predominantly valid maxim which says that when there is double vowel cluster of 'ie' or 'ei' and one is not sure how to spell the word, the rule is: 'i' before 'e'*except* after 'c'. So at once we recall the rule which helps us to spell the word in question correctly, but at the same time, the exception associated with the rule is also presented in the same context and helps to confirm our correct spelling of the word in question.

This concept of *al-qawāʿid* as a tool is supported by the later development of *al-ashbāh wa 'l-nazāʾir*, which proceeds to do more of the same: organize, systematize, and categorize cases in a predictable, solid manner.

It is helpful to consider the relative position of usul al-fiqh, furūʿ, fiqh, and al-qawāʿid al-fiqhiyya in the following terms: *uṣūl al-fiqh* is to to *fiqh* what *al-qawāʿid* are to *furūʿ*. Both *uṣūl al-fiqh* and *al-qawāʿid* came chronologically after *fiqh* and *furūʿ*. Uṣūl al-fiqh and al-qawāʿid were both developed and elaborated retrospectively to give a sense of order to the legal system that had emerged and create a theoretical framework to encompass it. Uṣūl al-fiqh and al-qawāʿid are methods and foundations (theory) while furūʿ and fiqh are actual cases of law (practice). The relationship between legal theory and practice is complex and there is a certain degree of give and take between them. It would be inaccurate to assume that uṣūl al-fiqh came about

first, then all law was expounded according to that system. Just as it would be misleading to assume that al-qawāʿid al-fiqhiyya existed early on and all cases of law were determined with them in mind. In fact, *uṣūl al-fiqh* and *al-qawāʿid al-fiqhiyya* both emerged in order to ward off a significant harm: chaos and disorder in creating the law. These were each systems and methods of bringing consistency to a system whose major flaw was also its biggest accomplishment. This was the independence of the judiciary and the relative freedom of legal practitioners to reach decisions within a broad range of acceptable *aḥkām*.

1.5: Summary

Despite claims to the contrary, it is clear that Islamic legal scholars continued to develop their legal system to conform to changing times and needs throughout the fourth to tenth century AH. Recognizing that the system of establishing the determinations of legal cases lacked a semblance of organization, structure and *madhhab*-internal consistency, religious scholars set out to correct that reality. They did so by expanding their legal inquiry into new areas of the law such as *al-furūq, al-ashbāh wa 'l-naẓāʾir,* and *al-qawāʿid al-fiqhiyya* with the goal of creating means of organizing the overwhelming body of *furūʿ* in different ways that render them more immediately accessible to jurists.

Jurists of this period wished to place their own rulings squarely within the accepted precedent of their school but had become increasingly removed

from that precedent by the shear volume of cases and the different determinations on one case within each *madhhab*.

For this reason, these scholars meticulously studied the *furūʿ* of their schools to extract from them the underlying principles that guided their most reputable scholars and informed their decisions and legal determinations. This process of thorough study and extraction was known as *istiqrāʾ*. In examining these sources, they found some principles clearly stated in such terms but the vast majority of *qawāʿid* found their birth in the hands of these *ʿulamāʾ* and in their works of *al-qawāʿid al-fiqhiyya*, later known as *al-ashbāh wa ʻl-naẓāʾir*.

Any close examination of this period of Islamic legal thought must discuss the development of *al-qawāʿid al-fiqhiyya* and related fields as this was one of the most significant developments of legal scholars of the time. To discount or detract from this effort on the basis that it takes *taqlīd* as its point of departure would be to ignore what those scholars deemed important and useful areas of inquiry. In fact, the field of law is one in which *taqlīd*, or operating within the accepted parameters of precedence, is essential.

Thinking of *taqlīd* in these terms brings us much closer to the way in which Islamic legal experts viewed their own roles and functions during the fourth to tenth century AH. It was not for them to reinvent the wheel, i.e. to induce a legal system from the revealed sources, but to organize and systematize that structure and infuse into it concepts and mechanisms by which it can remain consistent and responsive to society's ever changing

realities and needs. *Al-qawāʿid al-fiqhiyya* is one area of law that can help us understand this process during this time. In this way, we will understand that throughout all historical phases, Islamic law continued to develop and flourish according to society's needs.

Although we tend to overlook this period as largely one of stagnation and decline, it behoves us to look at it through the eyes of those who lived it and were dedicated to its particular circumstances. For this reason, we will examine the most important works of Ḥanafī and Shāfiʿī qawāʿid fiqhiyya from this period to learn *how* Islamic law developed.

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