CHAPTER THREE:

Hanafi *Qawaid Fiqhiyya: 'al-ʿĀda muḥakkama'* (Fourth/Tenth to Tenth/Sixteenth Century)

3.1: Introduction

In this chapter, we will examine the Ḥanafī school's perspective on *ʿāda* through the general principle '*al-ʿāda muḥakkama*', or 'custom is an arbiter' from the earliest *qawāʿid* sources through those of the tenth/sixteenth century.

The primary sources consulted have been al-Dabūsī's *Taʾsīs al-naẓāʾīr*, al-Karkhī's *Risāla fi 'l-uṣūl*, and Ibn Nujaym's *al-Ashbāh wa 'l-naẓāʾir*[82]. We will use al-Dabūsī's text in two ways: first to illustrate a Ḥanafī approach to law making and second, as the earliest known extant source of *al-qawāʿid al-fiqhiyya*. I will argue that this work laid key methodological, structural, and terminological foundations for future inquiries and works in the area of *qawaid fiqhiyya.*

3.2: General Background to Islamic Legal Development

At the heart of the four *madhāhib* (sing. *madhhab*, or legal school of thought) of Sunnī Islām lie essential theories and principles which formulate their approach to Islamic jurisprudence. The Mālikī, Ḥanafī, Shāfiʿī and Ḥanbalī schools share four *uṣūl* (sing. *aṣl,* meaning principle source, or root)

[82] For al-Karkhī, see p. 70, n. 114 below. For al-Dabūsī, see p. 62, n. 98 below. For Ibn Nujaym, see p. 92, n. 160 below.

which together form the basis of Islamic law[83]. These *uṣūl* consist of two sources and two methods from and through which law can be derived[84]. Wael Ḥallāq presents these lucidly as follows:

> The sources *from* which the law can be derived are the Qurʾān and the Sunna, or examples of the Prophet, both of which provide the subject matter of law. The sources *through* which the law may be derived represent either methods of legal reasoning and interpretation or the sanctioning instrument of consensus (*ijmāʿ*). Primacy of place within the hierarchy of all these sources is given to the Qurʾān, followed by the Sunna which, though second in order of importance, provided the greatest bulk of material from which the law was derived. The third is consensus, a sanctioning instrument whereby the creative jurists, the *mujtahids*, representing the community at large, are considered to have reached an agreement, known retrospectively, on a technical legal ruling, thereby rendering it as conclusive and as epistemologically certain as any verse of the Qurʾān and the Sunna of the Prophet. The certitude bestowed upon a case of law renders that case, together with its ruling, a material source on the basis of which a similar legal case may be solved. The *mujtahids*, authorized by divine revelation, are thus capable of transforming a ruling reached through human legal reasoning into a textual source by the very fact of their agreement on its validity. The process of reasoning involved therein, subsumed under the rubric of *qiyās*, represent the fourth source of the law. Alternative methods of reasoning based on considerations of juristic preference (*istiḥsān*) or public welfare and interest (*istiṣlāḥ*) were of limited validity, and were not infrequently the subject of controversy[85].

In essence, each school of law recognizes the Qurʾān and Sunna as the two primary sources of law, utilizes the process of *qiyās*, or analogical reasoning, to reach judgments which are in keeping with the Prophet's traditions, and finally, sanctions the legal conclusions reached by other *mujtahids* through the instrument of consensus, or *ijmāʿ*.

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[83] See J. Schacht, Introduction, 60-61. Also see *Encyclopaedia of Islam*, *New Edition.* 1954- in progress (hereafter abbreviated *EI2*), s.v. "*Uṣūl*," by M. Carter.

[84] Wāʾel Hallaq, *A History of Islamic Legal Theories*, 1.

[85] ibid.

The agreement of the various schools of law on these four principles does not, however, preclude their divergence of opinion on other important theoretical and practical aspects of the judicial process. Throughout the next two chapters, we will take a closer look at the Ḥanafī and Shāfiʿī *madhāhib* and highlight the characteristics that distinguish each *madhhab* in their treatment of *ʿāda* and *ʿurf*, or custom, within the legislative process.

3.3: Background to the Ḥanafī *Madhhab*

Named after Abū Ḥanīfa al-Nuʿmān b. Thābit (d. 150/767)[86], the Ḥanafī *madhhab* emerged from the rich legal traditions of Kūfan and Baṣran scholars of the first and second centuries A.H. whose thought was anchored in the use of *raʾy*, or considered opinion[87]. Abū Ḥanīfa's most important students and companions were Abū Yūsuf (d. 182/795)[88] and Muḥammad al-

[86] Abū Ḥanīfa, a theologian and religious lawyer from Kūfa, was the eponym of the Ḥanafī madhhab who discussed his opinions with and dictated them to his disciples but left no *fiqh* text of his own. *Encyclopaedia of Islam*, CD-ROM Ed. v.1.1, s.v. "Abū Ḥanīfa," by J. Schacht. Also, see Carl Brockelmann, *Geschichteder arabischen Litteratur (GAL).* Original edition: 2 vols., Weimar: E. Felber, 1898-1902. 3 supplement vols., Leiden: E.J. Brill, 1937-42. Rev. edition of Vols 1-11, Leiden: E. J. Brill, 1943-49; G1, 176-77, S1, 284-87.

[87] Throughout this dissertation, when a century is mentioned without further elaboration, I am referring to the *hijrī* century demarcated by the abbreviation "A.H.", which begins with the year 621 marking the Prophet Muḥammad's migration, or *hijrā* from Macca to Madina. The corresponding Gregorian century is roughly 600 years later. So, the "first century" (*hijrī*) refers to the seventh Gregorian century.

[88] Abu Yūsuf was Abū Ḥanīfa's most brilliant and influential student as well as chief *qāḍī* of the Abbāsid Empire under Hārūn al-Rashīd. His *Kitāb ul-kharāj*, a treatise on taxation, is the oldest extant work of positive law. See R. Stephen Humphreys, *Islamic History: A Framework for Inquiry*, rev. ed., (Princeton: Princeton University Press, 1991), 216. See also, Brockelmann, *GAL*, G1, 177.

Shaybānī (d. 189/805)[89]. These students of Abū Ḥanīfa solidified the school through their voluminous literary production as well as their reasoned opinions[90]. Abū Yūsuf's *Kitāb al-kharāj* along with Muḥammad's *Kitāb al-aṣl*, *al-Jāmiᶜ al-kabīr*, and *al-Jāmiᶜ al-ṣaghīr* became the standard texts of the Ḥanafī school[91].

Through close association with ruling political groups, the Ḥanafī *madhhab* expanded far beyond the central Islamic lands and into the East (Khurasān, Transoxania, and Afghanistan), the Indian subcontinent, Turkish Central Asia and to China. During the Seljuk and Ottoman periods of Turkish rule, Ḥanafism became even more pervasive as it was the official *madhhab* of both empires throughout its domains. Currently, the *madhhab* remains particularly dominant in Turkey, India, Pakistan, the Central Asian Republics and, to a lesser but not insignificant extent, parts of the Middle East.

3.4: Hanafi Approaches to the Process of Adjudication

The Ḥanafi *madhhab* has stood apart from the other three Sunnī *madhāhib* because of its embrace of rationalist (verses traditionalist) approach

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[89] Muḥammad al-Shaybānī was a Ḥanafī jurist of the very highest eminence who attained *fiqh* from Abū Yūsuf and Abū Ḥanifa and many others including, Sufyān al-Thawrī, al-Awzāᶜī, and even Malik b. Anas. He also taught al-Shāfiᶜī. It was Muḥammad who first recorded the *fiqh* of he first Ḥanafīs in his *Kitāb ul-aṣl*. He died in Khurasān in 187/803 or 189/805. *EI2*, CD-ROM Ed. v.1.1, s.v. "*al-Shaybānī*," by E. Chaumont. See also, Brockelman, *GAL*, G1, 178-180.

[90] Since this triad of the highest authorities of the *madhhab* often disagreed with one another, "the uniform character of the doctrine is much less pronounced in the Ḥanafī *madhhab* than in the other schools. See s.v ."*Ḥanafiyya*" in EI2, CD-ROM Ed. v.1.1 by J. Schacht.

[91] ibid, 163a.

to the formulation of legal theory and its ensuing practice[92]. At a time of increasing preponderance of literary texts, most notably *ḥadīths* and *ḥadīth* collections, the legal community became engaged in a debate which pitted a *faqīh's* reliance on reason against his reliance on texts, especially *ḥadīth*. On the one hand, those who argued that jurists must exercise their own independent reason, or *raʾy*, were known as *ahl al-raʾy*[93]. On the other hand, those who purported that the Prophet's example as derived from *ḥadīth* took precedence over human reason as a source for guidance in adjudication were known as *asḥab al-ḥadīth*[94].

The Ḥanafīs were perhaps the staunchest advocates of the use of reason over *ḥadīth*, whose major weakness is the unreliability of transmissions with the exception of the *hadīth mutawātir*[95], which Hanafis accepted as unequivocally authoritative. Abū Ḥanīfa was the first to employ *qiyā*s, or analogy, systematically for which reason the practitioners of his school are known as those who use reason, or *asḥāb al-raʾy*[96]. Conversely, the Shāfiʿīs and the Hanbalis became advocates of *ḥadīth* over reason, preferring to rely

[92] See Hallaq, *Theories*, 15-35.

[93] See EI2, I, 691b.

[94] See EI2, I, 691 a.

[95] *Ḥadīth mutawātir* is a widely transmitted report where the number of transmitters in each generation was large enough to dispel any suspicion of fabrication or complicity. Please see, N.J. Coulson, *A History of Islamic Law*. (Edinburgh: The University Press, 1964), 64.

[96] See s.v. "*Kiyās*", EI2, CD-ROM Ed. v.1.1/

on the Prophet's alleged example through *ḥadīths* of varying degrees of authenticity[97]. These two schools accepted *qiyās* only as a last resort[98]

By the fourth/tenth century, a new branch of legal writing, that of *ikhtilāf*, or legal divergence of approach or opinion, had begun to appear which delineated the critical differences between the *madhāhib*. Although *ikhtilāf* works' primary goal was to highlight how one *madhhab* differed from another in points of theoretical applications of the law, an equally important accomplishment of this field was to articulate the fundamental sources, principles, and methods of adjudication within their own *madhhab*.

To illustrate the Ḥanafī approach to the process of adjudication during this period, I will examine an early Ḥanafī *ikhtilāf* work, al- al-Dabūsī's [99] (d. 430/1039) *Taʾsīs al-naẓar*.

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[97] For a further discussion of *ahl al-raʾy* verses *ahl al-ḥadīth* in the field of legal thought during the 3rd and 4th centuries, see Ḥallāq, *Theories,* 15-35.

[98] See s.v. "*Kiyās*", EI2, CD-ROM Ed. v.1.1.

[99] He is Abū Zayd ʿUbayd Allāh b. ʿUmar b. ʿĪsā al-Dabūsī, one of the most highly esteemed of the major Ḥanafī scholars (*min ajall kibār al-fuqahāʾ al-Ḥanafiyya*), as was evidenced by his inclusion among the seven *qudāt* of the Ḥanafī *madhhab*. Al-Dabūsī was especially well known (*yuḍrabu bihī 'l-mathal*) in the areas of *naẓar* (speculative theology) and *istikhrāj al-ḥujaj* (extrapolation of arguments) and became the *shaykh* of Bukhāra and Samarqand and their environs (*intahat ilayhi mashyakhat Bukhāra wa Samarqand wā mā walāhuma*). He acquired *fiqh* from Abū Jaʿfar al-Ustrūshanī, who had learned from Abū Bakr Muḥammad b. al-Faḍl, whose own teachers had taken their knowledge directly from Muḥammad (hence, Abū Ḥanīfa) only three generations of scholars earlier. Al-Dabūsī's most notable student was Abū 'l-Naḍr Aḥmad b. ʿAbd al-Raḥmān al-Rayfadmūnī who was the first to establish and present the field of *ikhtilāf* to the rest of the scholarly community. Abū Zayd wrote many important books including *Kitab al-Asrār*, *Taqwīm al-Adilla*, *al-Amad al-Aqsa*, *Naẓm al-Fatāwī, Khazānat al-Hudā*, and *Taʾsīs al-naẓar*. He died in Bukhāra in the 430 at the age of 62. The *kunya*, "al-Dabūsī" is a reference to Dabusiyya, a village located between Bukhāra and Samarqand. See, Aʿmāl al-Akhyār. Abū Zayd ʿUbayd Allāh b. ʿUmar al-Dabūsī, *Taʾsīs al-Naẓar* [plus al-Karkī: *al-Uṣūl*] (Cairo: Maṭbaʿat al-Imām, n.d.). See also, Brockelmann, *GAL*, G1, 176 and S1, 296.

Abū Zayd al-Dabūsī's *Taʾsīs al-naẓar* demonstrates that within the early Ḥanafī legal tradition, there was no single process of adjudication that dominated. Instead, several major early scholars embraced equally valid and reasoned approaches that, in turn, yielded several different processes of adjudication, all of which were squarely within the Ḥanafī tradition. Below, we will examine al-Dabūsī's motivation for writing *Taʾsīs* as well as the text itself, focusing on its structure and content.

Al-Dabūsī clearly establishes his purpose in writing *Tasīs al-naẓar,* which was to help upcoming students of *uṣūl* and *fiqh* sort through the myriad of opinions and methods embraced by authoritative scholars of the Ḥanafī *madhhab* as well as those of the other *madhāhib*[100]. Once students of *fiqh* came to understand the underlying basis for differences of juristic opinion between the scholars, they would become more proficient at legal debates and refutations[101]. Furthermore, they would be more solidly rooted in their own schools *furūʿ*.

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[100] al-Dabūsī, *Taʾsīs*, 2. The author envisions his work as a handbook for his students of *fiqh* (*al-mutafaqqiha*) to aid them in some matters with which they are struggling. These matters are: 1. Memorization of the disputed matters (*masāʾil al-khilāf*), 2. Knowledge of the means by which to derive them (*taʿaṣṣur ṭuruq istinbāṭuha*), 3. Limited ability to analyze the truth of its sources (*iṭṭilāʿ ʿalā ḥaq*), and 4. Mistakes in the attribution of opinions during debate.

[101] It is in fact these 'bases', which al-Dabūsī called the *aṣl*, or principle, which would later become known as the *qāʿida*, or legal principle. So at this time, the third decade of the fifth century, the term *qāʿida* in the sense we have described had not yet become established in the field. Instead, *aṣ*l was the more dominant term, which was familiar to the scholars from the study of *uṣūl al-fiqh*. However, it is my conviction that the term *qāʿida* became more widely used in order to avoid confusion between the *uṣūl al-fiqh* and the principles governing *furūʿ al-fiqh*.

Turning to the text of *Taʾsīs*, we find that both its structure and content are clear and that the text is meant to be a didactic tool–a kind of handbook for the student of *fiqh*. Structurally, it is organized accessibly into eight categories, six of which encapsulate *madhhab*-internal difference of opinion and two of which highlight the major external differences between the Ḥanafī on the one hand and the Mālikī and Shāfiʿī *madhāhib* on the other.

As for its content, again the text attempts to clarify *madhhab*-internal *ikhtilāf* and explain its origins as well as point out *ihktilāf* outside the *madhhab* in the face of its most challenging rival schools —the Mālikī and Shāfiʿī schools. What is most significant for our purposes is that al-Dabūsī uses the underlying legal principles, or *qawāʿid*, of each scholar upon which he anchored his legal position[102]. Let us examine the text in more detail below.

As for the text's contents, al-Dabūsī presents the six most important 'alliances of opinion' among the leading Ḥanafī scholars as a means of comprehending *madhhab*-internal *ikhtilāf*. These alliances are outlined as follows:

1. Abū Ḥanīfa – VS – Abū Yūsuf and Muḥammad
2. Abū Ḥanīfa and Abū Yūsuf – VS – Muḥammad
3. Abū Ḥanīfa and Muḥammad – VS – Abū Yūsuf
4. Abū Yūsuf – VS – Muḥammad

[102] Al-Dabūsī calls these underlying legal principles "*uṣūl*". However, from their content it is clear that they are in fact legal maxims or principles. By the end of the following century, the use of *aṣl* was eventually replaced with the term *qāʿida*.

5. The three ʿulamāʾ (Abū Ḥanīfa, Abū Yūsuf and Muḥammad) – VS – Zufar[103]
6. The Ḥanafī *madhhab* – VS – Ibn Abī Laylā[104]

Furthermore, al-Dabūsī illustrates the differences between Ḥanafī legal thought and that of the Mālikīs and Shāfiʿīs. Hence two sections are devoted to inter-*madhhab ikhtilāf* and are as follows:

1.The Ḥanafīs –VS – Mālik[105]
2.The Ḥanafīs –VS – al-Shāfiʿī[106]

[103] This is Zufar b. al-Hudhayl b. Qays al-ʿAnbarī (110-158/728-775) who was an important Ḥanafī *faqīh* originally from Isfahān. Zufar lived in Baṣra where he was appointed its chief judge and where he remained until his death. He is one of the ten Ḥanafī scholars who helped establish the ten major texts of the *madhhab*. Furthermore, he was one of the traditionalists and used to say, "We do not use *raʾy* as long as there is an *athar* and if an *athar* became known, we abandon *raʾy*". See al-Ziriklī, *al-Aʿlām,* 3: 45.

[104] Muḥammad b. ʿĀbd al-Raḥmān Ibn Abī Laylā Yasār (some say Dawūd) b. Bilāl al-Ansārī al-Kūfī (74-147/ 693-765). Ibn Abī Laylā was a *qāḍī* and *faqīh* who was of *aṣḥābal-raʾy* and was charged with adjudication (*qaḍāʾ and ḥukm*) of Kūfa for over thirty years (through Umayyad and ʿAbbasid rule). EI2 (III:687a).

[105] Note that al-Dabūsī presents Ḥanafī views in opposition to the views of Mālik and al-Shāfiʿī, without considering *madhhab*-internal *ikhtilāf* within those *madhāhib*, which he was keen to highlight in his own *madhhab*. This is Mālik b. Anas b. Mālik b. Abī ʿAmir b. ʿAmr b. al-Ḥārith al-Aṣbaḥī al-Madanī, Abū ʿAbd Allah, founder of the Mālikī school, which is based on the practices of the people of Madīna. He was born in Madīna in 93/712 and kept a distance from rulers and kings. Ḥārūn al-Rashīd sent to him to come teach him but Mālik's reply was that knowledge must be sought. Al-Rashīd then came to Mālik's house, where he learned *ḥadīth* from him. Mālik died in Madīna in 179/795. His writings were a ḥadīth collection, al-Muwaṭṭaʾ and a letter to al-Rashīd. His school remains one of the four most widely followed schools in the Sunnī world, located mostly in North Africa. See Kaḥḥālā, *Muʿjam*, 3:9.

[106] This is Muḥammad b. Idrīs b. ʿAbbās b. ʿUthmān b. Shāfiʿ al-Qurashī, Abū ʿAbd Allāh al-Shāfiʿī, founder of the Shāfiʿī school, one of the four major schools of Islamic law. He was born in Ghazzā in Palestine 150/767 but moved to Macca and Madina at the age of two. He learned from Sufyān b. ʿUyaynā, Mālīk b. Anas, among others. He lived in Baghdād for two years where he wrote what would come to be known as his 'old' *fiqh*. He returned to Macca in 199 AH then after a brief time in Baghdād, moved to Egypt where he composed his 'new' *fiqh* where he remained until his death in 204/819. Among his many works are *al-Musnad fī 'l-ḥadīth, al-Risāla fi'l-fiqh, al-Umm.* Please see Kaḥḥālā, *Muʿjam,* 3:116-117.

The author's method is to divide each section into two segments: the first outlines the alliances of opinions and the second lists the *uṣūl*, or *qawāʿid* employed by those scholars to explain the source of the divergence of opinion between them and how that *ikhtilāf*, in turn, yields different *ahkām*, or juridical rulings, between scholars of the same *madhhab*.

To bring this abstract discussion into concrete form, I will analyze the first of these eight categories, one which highlights the *ikhtilāf* between Abū Ḥanīfa and his two main disciples, Abū Yūsuf and Muḥammad. I've selected this category because it reveals the core reasons for the most significant legal *ikhtilāf* within the Ḥanafī *madhhab*, which will elucidate the broad Ḥanafī approach to the process of adjudication in its nuance and complexity.

There are twenty-two *uṣūl* upon which Abū Ḥanīfa and his two disciples do not see eye to eye. We will examine one of these which relates to *dhimmīs* (sing. *dhimmī*, or non-Muslim residing within Muslim territories) and their treatment within an Islamic legal and political system[107].

With regard to the legal position of *dhimmīs*, Abū Ḥanīfa holds the legal principle that, "Whatever *dhimmīs* take to be their beliefs, they are to be left to follow them"[108]. However, Abū Yūsuf and Muḥammad hold the opposite legal principle in their dealings with *dhimmīs*: they argue that *dhimmīs* are <u>not</u> to be left to follow their beliefs, at least in matters of legal

[107] See "Dhimmī", EI2 (ii:227 a)

[108] Al-Dabūsī, *Taʾsīs*, 13.

consequence, and should be held to the same legal norms Muslims are bound to in their legal system[109]. Each of the five cases involves marriage between *dhimmīs* and in each of them Abū Ḥanīfa is accommodating and his disciples are restrictive[110]. On the one hand, Abū Ḥanīfa is facing a socio-political reality—that *dhimmīs* living in lands newly overtaken by Muslims continue to live as they were before—which necessitates accommodation, tolerance, and religious freedom—all of which embody the letter and spirit of the *Qurʾān*. On the other hand, Abū Yūsuf and Muḥammad, also reflecting their slightly different socio-political reality—one in which the Muslims were more established and whose legal system had developed more fully through the flourishing of *ḥadīth*—adjudicated legal disputes with less sympathy for non-Muslim legal norms and more in conformity with the dominant Muslim one.

[109] ibid, 13.

[110] The five cases are as follows. **First**, if a *dhimmī* man and woman marry during her *ʿidda*, or waiting period (see EI2, [III, 1016b], Abū Ḥanīfa's *ḥukm* is to leave them whereas Abū Yūsuf and Muḥammad hold that they should be separated. **Second**, if a *dhimmī* man marries his relative who is unlawful to him, Abū Ḥanīfa allows them to remain married whereas Abū Yūsuf and Muḥammad would separate them. **Third**, is the case of a Majūsī, or Magian, man who marries an *ama*, or slave girl, and consummates the marriage then later becomes Muslim. If someone then accuses him of *zinā*, or fornication, Abū Ḥanīfa argues that *al-qādhif*, or the accuser of fornication, is to be given the *ḥadd*, or Qurʾānically prescribed punishment for *qadhf*. However, Abū Yūsuf and Muḥammad would not punish the *qādhif*. **Fourth**, if a Majūsī man marries a relative unlawful to him, Abū Ḥanīfa requires him to pay *nafaqa*, or maintenance, to her but his two students do not. **Finally**, if he marries a *dhimmī* woman for whom there is no *mahr*, Abū Ḥanīfa rules that the contract is valid and that he owes her no *mahr*, even if they were to convert to Islam. Abū Yūsuf and Shaybānī argue that she is owed *mahr al-mithl*, or equivalent dowry, upon their conversion and he must pay her *mutʿa* in the event that he divorces her before the marriage is consummated. See al-Dabūsī, *Taʾsīs*, 13-14.

3.5: Summary

It is challenging at best and at worst impossible to discern a Ḥanafī approach to the process of adjudication in this early stage of legal development. Two critical conclusions emerge from the above discussion. First, that throughout the fourth and fifth centuries AH, the *madhhab* tolerated and even flourished upon the *ikhtilāf* of its major scholars. Thus, permitting *madhhab*-internal flexibility and maneuverability rendered the *madhhab* more accommodating and acceptable to a wider range of legal minds and perspectives. Second, the criteria which made a *madhhab* internally coherent had not yet emerged but was beginning to be negotiated. This would take place through the later process of *al-taqʿīd al-fiqhī*, or the establishment of legal principles, which is the subject of the following discussion.

3.6: Background to Hanafi *Qawāʿid*

In Islamic law, the concept of *al-taqʿīd al-fiqhī*, or the deduction and establishment of legal principles which inform adjudication, existed in the minds and works of *fuqahāʿ* and *ʿulamāʾ* from the earliest days of *tashrīʿ*, or adjudication[111]. Yet by as early as the third/ninth century, *al-qawāʿid al-*

[111] The Prophet Muḥammad, Islam's first *faqīh* and *qāḍī*, established several of these principles which were meant to guide other legists in reaching a legal decision in conformity with the spirit and letter of Islamic teachings. One such *ḥadīth* which became among the most essential foundations of the Islamic legal system was, "*Lā ḍarara wā lā ḍirāra fi 'l-Islām*", or "In Islām, there is no injury or malicious damage".

fiqhiyya was beginning to emerge as a distinct *ʿilm*, or field of legal inquiry, albeit in rudimentary fashion.

It is widely conceded that Ḥanafī scholars preceded scholars of other *madhāhib* in discussing and expounding upon *al-qawāʿid al-fiqhiyya*. They excelled in this field earlier than scholars of other *madhāhib* because of the preponderance of *ikhtilāf* among the three major authorities of their own school, which, itself, led to the proliferation of *furūʿ* within the Ḥanafī *madhhab*[112]. These various strains had become difficult for students of the *madhhab* to keep clear and taxed *quḍāt* and *fuqahāʾ* in their work[113]. Hence the need was acutely felt to organize and synthesize the main principles of the *madhhab* in an easy to access and use format—*al-qawāʿid al-fiqhiyya.*

A farcical yet frequently repeated story claims that the birth of the field of *al-qawāʿid al-fiqhiyya* was as follows:

> The Ḥanafī scholar, Abū Ṭāhir al-Dabbās[114] collected the underlying rules of the school (*madhhab*) of Abū Ḥanīfa into seventeen principles

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[112] See ʿAlī Aḥmad al-Nadwīi, *al-Qawāʿid al-Fiqhiyya: mafhūmuhā, nashʾatuhā, taṭawwuruhā, dirāsatu muʿallafātihā, adillatuhā, muhimmatuhā, taṭbīqātuhā.Dimashq*: Dār al-Qalam, 1420/2000, p. 94-99, where he argues that Abū Yūsuf and Muḥammad's works contain many *qawāʿid* and *ḍawābiṭ* throughout them. However, as we shall see, it was not until the work of al-Karkhī that the topic was treated in its own right.

[113] See p 6-9 above for a discussion of al-Dabūsī's *Taʾsīs al-naẓar*.

[114] Muḥammad b. Muḥammad b. Sufyān Abū Ṭāhir al-Dabbās al-Qāḍī was a contemporary of al-Karkhī (d. 340/952) and al-Ṭaḥawī (d. 321/933) see Brockelmann, I, 181 #7. See *Tabaqat al-Hanafiyya* ed. ʿAbd al-Fattāḥ Muḥammad al-Ḥulw, 5 vols, 2nd ed. 1993, vol 3, 323-24. Although his biographical entry makes no mention of his 'role' in formulating the *qawāʿid* of the *madhhab*, it does mention his stinginess with knowledge. See W. Heinrichs, *"Qawāʿid as a Genre of Legal Literature,"* 2001, an unpublished article the author kindly shared with me as I embarked on this study. It is an excellent overview of the genre that includes a thorough, but incomplete, bibliography of major works in the field. I have used his translation of the Abū Ṭāhir story verbatim above.

> to which the whole *madhhab* could be reduced. The Shāfiʿī scholar, Abū Saʿd al-Harawī heard about this and traveled to al-Dabbās. The latter was blind and used to repeat his seventeen principles every night in the mosque, after the people had left. So, al-Harawī rolled himself in one of the mats there. The people left the mosque and al-Dabbās locked up. He had only recited seven of his principles when al-Harawī was overcome by a coughing fit, which alerted al-Dabbās to his presence. He beat him up and threw him out. After that, he never recited his *qawāʿid* again in the mosque. Al-Harawī returned to his disciples and recited them to them.

Although the particular events of the story are highly improbable, it offers several important points. First, the story notes that the Ḥanafīs initially recognized the need for *qawāʿid* and proceeded to develop them. Furthermore, that they had condensed the whole of their *madhhab* down to just seventeen *qawāʿid* further reflects Ḥanafī skill at structure, organization, and categorization. Also, finally, the story shows that scholars of other *madhahib* recognized the importance of this accomplishment and some of them went to great lengths and behaved in odd ways in order to acquire it for the benefit of their own school.

Suffice it to say that aside from this story, three early Ḥanafī texts mark the genesis of *qawāʿid* as an independent *ʿilm* in Islamic law. These texts are *al-Uṣūl* by al-Karkhī (d. 340/??)[115], *Taʾsīs al-naẓāʾir* by Abū 'l-Layth

[115] Abū 'l-Ḥasan ʿUbayd Allāh b. al-Ḥasan b. Dalāl b. Dalham al-Karkhī of Karkh was one of the leading authorities of the Ḥanafī *madhhab* during the first part of the fourth/tenth centuries [after the time of Qāḍī Abū Ḥāzim and Qāḍī Abū Muʿīd al-Bardaʾī (d. 317/929), who wrote *Masāʾil al-khilāf*, see Brockelmann, S1, p. 293]. In fact, he was considered one of the *mujtahids* who were qualified to solve hard cases (those in which there was no *naṣṣ* in Ḥanafī *uṣūl* or *qawāʿid*). His most important teacher was Abū Saʿid al-Bardaʾī. Al-Karkhī was *knowledgeable in fiqh and ḥadīth* and had many students whose influence reached far and wide. Some of his students of *fiqh* were Abū Bakr al-Rāzī (more well-known as al-Jaṣṣāṣ, d. 370/981), see Brockelmann, G1, p. 204, Abū ʿAbd Allāh al-Damaghānī (d. 478/1085) see Brockelmann, G1, p 460, Abū ʿAlī al-Shāshī (325/937) see Brockelmann, S1, p. 294, Abū

al-Samarqandī (d. 373/983)[116] and *Taʾsīs al-naẓar* by al-Dabūsī (d. 430/1039). But despite their undisputed launching of the field, Ḥanafīs dropped completely from the scene throughout most of the fifth/eleventh centuries through the tenth/sixteenth centuries. After this gap of several centuries, the next important Ḥanafī work of *qawāʿid* was Ibn Nujaym's (d. 970/1563) *al-Ashbāh wa 'l-naẓāʾir*, which was written late in the tenth/sixteenth century. After this great work, the Ḥanafīs reappear only in modern times with the creation of the Ottoman *Majallat al-aḥkām al-ʿadliyya*, whose introductory section consists of ninety-nine of the most important *qawāʿid* in the Ḥanafī *madhhab.*

Below, we'll examine some Ḥanafī text in detail, paying special attention to one particular *qāʿida* around which our further study of the *ʿilm* of *qawāʿid* will be based. This *qāʿida* is '*al-ʿāda muḥakkama*' which translates loosely to mean 'custom is an arbiter'. But first, let us examine the Ḥanafī position on *ʿāda* and *ʿurf* as sources of law in solving difficult cases.

Ḥāmid al-Ṭabarī, Abū Qāsim al-Tanūkhī, Abū ʿAbd Allāh al-Jurjānī, Abū Zakariyya al-Ḍarīr al-Baṣrī, and Abū ʿAbd Allāh al-Muʿtazilī. Among his most important legal works are *al-Mukhtaṣar* and *Sharḥ al-jāmiʿ al-kabīr* (and *al-ṣaghīr*). It is important to note that he never accepted the position of *qāḍī* and did not mingle with those who did. See *al-Uṣūl*, 79, where his biography is encapsulated from *Kitab aʿlām al-akhyār* and *Tāj al-tarājum.* Abū Muḥammad ʿAbd al-ʿAzīz b. ʿUthmān al-Faḍlī al-Qāḍī Al-Nasafī al-Asadī (d. 537/1142), of Kūfā provided commentary on *al-Uṣūl* which clarifies it and renders it comprehensible to later generations. He was a jurist and theologian who studied in Bukhārā and served as *qāḍī* in Khuraṣān. See Brockelmann SI, p. 639.

[116] Although this text is lost, there is a consensus that its contents were similar to al-Dabūsī's *Taʾsīs*.

3.7: Ḥanafī Positions Custom As a Source of Law in Adjudication

ʿUrf, or custom, literally means "that which is known…the familiar and customary" as opposed to the "unknown…the unfamiliar and strange."[117] Whereas the majority of *ʿulamāʾ* have defined and used the terms "*ʿurf*" and "*ʿāda*" as largely synonymous, some distinguish the two holding that *ʿāda* means repetition or recurrent practice and can be used with regard to both individuals and groups[118].

Throughout our discussion of custom, our central frame of reference will be the unanimously accepted legal principle *al-ʿāda muḥakkama,* which declares that custom constitutes a valid basis for legal decisions[119].

Although Islamic law discounts *ʿurf* as an official source of law[120], it is generally recognized by scholars across *madhhab* lines to be critical to the Islamic legal process[121]. From the time of the Prophet Muḥammad to the present, the habits and customs of people which did not contravene any teachings of either the *Qurʾān* or the living *sunna* of the Prophet remained

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[117] See Kamālī, *Principles,* 283. See also Chapter 2, below, for a full discussion.

[118] ibid.

[119] Throughout this dissertation, I will use *ʿurf* and *ʿāda* interchangeably except when the context requires one and precludes the other, which I will explicitly mention and discuss.

[120] The four official sources, or *uṣūl*, of Islamic law are limited to the Qurʾān, Sunna, *ijmāʿ* and *qiyās*. In his discussion of *ʿurf* and *ʿāda*, Kamālī suggests a plausible explanation of why custom is not given prominence in *uṣūl al-fiqh*. His argument is as follows: In the Qurʾān, God orders the promotion of *al-maʿrūf*, or that which is good—as determined by divine revelation— (see Sūrat al-Aʿrāf, 7:199). Consequently, He could not have meant the good which reason or custom decrees to be such…only what He enjoins. See his *Principles*, 284.

[121] See J. Schacht, *Introduction*, 62.

intact. Furthermore, customary practice was embraced in situations for which no *Qurʾānic* revelation or Prophetic *sunna* existed.

Throughout their history, Ḥanafī legal scholars, along with their Mālikī counterparts, have been among the most avid proponents of the use of *ʿurf* in a wide range of legal situations. Ḥanafī expanse over avast geographical area with significant differences in peoples, their customs, and their ways of life may have led to this. Let us survey the position of *ʿurf* in the Ḥanafī *madhhab* from its inception to modern times.

ʿUrf was used in three important ways in the Ḥanafī *madhhab*. First, *ʿurf* was used in the formulation of the doctrine of *istiḥsān*[122] to validate departure from a ruling of *qiyās*[123]. Furthermore, custom was employed to qualify the general terms of a *ḥadīth*[124]. Finally, and most significantly, in certain cases[125], some Ḥanafī scholars allowed *ʿurf* to qualify the general provisions of the *naṣṣ*, or explicit text of the *Qurʾān* or *ḥadīth.* In the following section we will examine exactly how the Ḥanafīs utilized custom in their *fiqh*.

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[122] *Istiḥsān* is juristic preference. See Hallaq, *Theories*, 107-111.

[123] See Kamālī, *Principles*, 290.

[124] ibid.

[125] Specifically, this occurs in the case of "special custom", or *al-ʿurf al-khāṣ*. "Special *ʿurf*" is *ʿurf* that is prevalent in a particular locality, profession or trade. Note that the preferred view of Ḥanafī *madhhab* is that "special custom" does not qualify the general provisions of the *naṣṣ*. Kamālī, *Principles*, 290.

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