QAWĀ'ID AS A GENRE OF LEGAL LITERATURE

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Traditional works devoted to *qawā'id fiqhīyah*, "legal maxims/principles", usually have the term *qawā'id* in their titles, but legal works having this term in their titles do not necessarily deal with "legal principles" (see below). In the later period (8th/13th–10th/15th centuries) a popular name for "true" *qawā'id* works is *al-Ashbāh wa 'l-naẓā'ir*.[1] Related genres are the works on *furūq* ("significant differences of similar cases yielding different legal determinations"), *takhrīj al-furū' 'alā 'l-uṣūl* ("deriving specific cases from general rules"),[2] and *maqāṣid al-Sharī'ah* ("the intentions of the Law"). The last two are predominantly theoretical exercises, but in their contents all of these genres overlap and blend into each other. It is surprising that this whole complex of legal literature with its attendant terms and concepts, which has spawned a not inconsiderable literary output throughout the centuries, has so far found little attention in the Western Islamicist discourse. But then the same was true, until recently, for the whole area of legal thought, *uṣūl al-fiqh*. The reason is presumably to be sought in the fact that, of the two groups of people who studied Islamic law, the philologists and the lawyers, neither was much interested in the indigenous meta-discourse. The philologists were largely positivists with little interest in post-hoc constructions, as they thought, while the lawyers brought their own, Western, meta-discourse with them.

Be that as it may, there is certainly a lacuna here which cries to be filled. This first attempt must needs be survey-like and descriptive,

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[1] Most famously, the works of the Shāfi'īs Ibn al-Wakīl (d. 716/1317), Tāj al-Dīn al-Subkī (d. 771/1370), and al-Suyūṭī (d. 911/1505), as well as that of the Ḥanafī Ibn Nujaym (d. 970/1563). See the A bibliography. These works usually go beyond a mere enumeration of *qawā'id*. E.g., the *Ashbāh* of al-Suyūṭī consists of the following "books": (1) on the Five Legal Principles (see below); (2) on [other] generally valid legal principles (*qawā'id kullīyah*); (3) on disputed legal principles (*qawā'id mukhtalaf fīhā*); (4) ubiquitous legal rulings; (5) similar cases within the same field of the law (*naẓā'ir al-abwāb*); (6) in similar fields; (7) various similar cases.

[2] *Uṣūl* here is close to *qawā'id* in meaning, in the sense of *madhhab*-specific general rules that are often opposed by the rules of a rival *madhhab*.

similar to the earlier paper on *furūq*.[3] Preliminary bibliographies of (a) *qawāʿid* works, (b) some related literature, and (c) contemporary studies in Arabic will be part and parcel of this endeavor; they will be found in the appendix. The lack of Western attention to the *qawāʿid* literature is certainly not mirrored by the contemporary Arabic/Islamic discourse. In recent years many traditional texts have been published for the first time and a number of modern studies have been written, as well. This has definitely been triggered by the interest in revivifying Islamic law in many parts of the Islamic world. This aspect of the present topic will, however, not be taken up here, as it would require interviews and field work, the literature not being very outspoken on this. Suffice it to mention that the *qawāʿid* literature is sometimes said to be helpful in giving [secular] legislators a whiff of the true spirit of Islamic law,[4] and it is also not without importance that the Ottoman (civil-law) codification of Ḥanafī law, the *Mecelle*, starts off with ninety-nine *qawāʿid*:[5] they are felt to be a bridge between *Sharīʿah* and *Qānūn* (or *Fiqh* and *Ḥuqūq*), a bridge that can be crossed from both sides.

Among the modern studies of the *qawāʿid*, those by al-Sadlān, al-Būrnū, al-Nadwī, and al-Bāḥusayn[6] have been used here. The last of these proved especially useful, due to its clear and thoughtful presentation. None of these studies can be called "modern" in the sense that they step out of the tradition and view the existence of this branch of legal literature critically and historically.

What then are these *qawāʿid fiqhīyah*? J. Schacht in his *Introduction* mentions them in passing and renders them in his glossary as "'rules', the technical principles of positive law, subject of special works".[7] The application of the term "positive law" to the *aḥkām* circulating within the *madhāhib* may be questionable, but the term "principle" is very apt, though what he means by "technical" is unclear.[8] "Legal principles"

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[3] Wolfhart Heinrichs, "Structuring the Law: Remarks on the *Furūq* Literature", in Ian Richard Netton [ed.], *Studies in Honour of Clifford Edmund Bosworth.* Vol. I: *Hunter for the East: Arabic and Semitic Studies* (Leiden: Brill, 2000), 332–344.

[4] Al-Sadlān, *al-Qawāʿid*, 34.

[5] *Al-Majallah*, 25–34, and cf. al-Zarqā', *Sharḥ*.

[6] Al-Sadlān, *al-Qawāʿid*; al-Bāḥusayn, *al-Qawāʿid*; al-Būrnū, *al-Wajīz*; al-Nadwī, *al-Qawāʿid*.

[7] J. Schacht: *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 114, 300. On p. 265 he lists all of three works on *ashbāh wa-naẓā'ir/qawāʿid* (Ibn Nujaym, al-Suyūṭī, and Ibn Rajab), while the bibliography enclosed herewith comprises over thirty titles, not counting commentaries and the like.

[8] If by "technical" he means "hermeneutical", his definition would cover only the *qawāʿid uṣūlīyah* (see below), but the works he cites certainly go beyond them.

would be an acceptable rendition; if the *qawāʿid* are formulated in a terse and snappy way, "legal maxims" might be another suitable translation. The definition of Tāj al-Dīn al-Subkī (d. 771/1370) which is often repeated with slight variations in more recent works runs as follows: "The *qāʿidah* is the generally valid rule with which many particular cases [*juzʾīyāt*] agree, whose legal determinations can be understood from it [i.e., the *qāʿidah*]".[9] This seems like a straightforward definition of a legal principle and it is clearly for this reason that it has found favor with modern authors. But there is the unsettling fact that many *qawāʿid* are said to be only predominantly, rather than generally, valid and, as a result, are couched not in the form of a terse adage, but in that of a double question. Some modern authors do not recognize these as real *qawāʿid*, as a consequence of which the bulk of famous works such as the Ḥanbalī Ibn Rajab's (d. 795/1393) *Taqrīr al-qawāʿid wa-taḥrīr al-fawāʾid* and the Mālikī al-Wansharīsī's (d. 914/1508) *Īḍāḥ al-masālik ilā qawāʿid al-Imām Mālik* would fall by the wayside.[10] But though this may be a good move systematically, it does not help us understand this wider notion of *qawāʿid* historically. There are also voices who proffer the opposite view, i.e., that a *qāʿidah* in the field of legal studies is always only predominantly valid—whereas *qāʿidah* in other fields, such as grammar and *uṣūl al-fiqh*, is defined as "generally valid". Thus Shihāb al-Dīn al-Ḥamawī (d. 1098/1687), in his commentary on Ibn Nujaym says: "*qāʿidah*, among legal scholars, is a predominantly, not a generally, valid determination (*ḥukm*) that applies to most of its specific cases (*juzʾīyāt*) so that their legal determinations will be known from it". The Mālikī ʿAbd al-Bāqī al-Zurqānī (d. 1099/1688)[11] says that MOST *qawāʿid al-fiqh* are predominantly valid (*aghlabu qawāʿidi ʾl-fiqhi aghlabīyah*) and, indeed, in al-Wansharīsī's work the distribution is 17 *kullī* to 101 *aghlabī*. The idea of *aghlabīyah* probably came about through the experience of irrefutable exceptions to the rule (*istithnāʾāt*). Take, e.g., the legal principle *lā yunsabu ilā sākitin qawl*, "no opinion is attributed to the

[9] Tāj al-Dīn al-Subkī, *al-Ashbāh*, i, 11.

[10] See al-Sadlān, *Qawāʿid*, 29. Note also that among the *qawāʿid* discussed in his book there is only ONE that is *khilāfīyah*, i.e., in the form of a double question (see pp. 10 and 67). Al-Bāḥusayn, *Qawāʿid*, 174, offers the view that double-question *qawāʿid* are really TWO (contradictory) *qāʿidahs*. Cf. also al-Nadwī's discussion of *kullī-aghlabī*, *Qawāʿid*, 43–45.

[11] *Apud* Muḥammad ʿAlī b. Ḥusayn b. Ibrāhīm al-Makkī al-Mālikī [d. 1367/1948], *Tahdhīb al-furūq bi-ḥāshiyat al-furūq*, i, 36 (quoted after al-Bāḥusayn, *Qawāʿid*, 45–46). ʿAbd al-Bāqī is the father of Muḥammad al-Zurqānī (d. 1122/1710), the well-known commentator of the *Muwaṭṭaʾ*.

silent person", and, as an exception to it, the *sukūt al-bikr ʿinda ʾstiʾmārihā*, "the silence of the virgin when she is consulted [concerning her marriage]", which silence is to be taken as assent. But, say others like al-Shāṭibī (d. 790/1388), exceptions do not invalidate a general rule, because the stray particulars do not form a second general rule in opposition to the first.[12] They thus remain exceptions that prove the rule. *Wa-fīhi naẓar*, as medieval commentators would say, because conflicting *qawāʿid* do seem to exist, and al-Nadwī posits them in the case of double-question *qawāʿid* (*pace* al-Shāṭibī, whom he does not mention).[13] This would need further investigation.

So much for the attempts at definition of the *qawāʿid fiqhīyah*. As a note one might add that the majority of sources make a distinction between *qawāʿid*, which are principles applicable to many areas of the law, and *ḍawābiṭ* (sg. *ḍābiṭ*), which are principles pertaining to one specific field. Examples of the latter would be "every bird [or: flying animal] is licit to eat" (*kullu ṭāʾirin mubāḥu ʾl-akl*) and "every act of worship is [valid] through a [declaration of] intention" (*kullu ʿibādatin bi-nīyah*).[14]

How then was the position and importance of the *qawāʿid fiqhīyah* viewed by the various authors who dealt with them?

According to a shocking statement by Ibn Nujaym the *qawāʿid* are the REAL *uṣūl al-fiqh*.[15] His commentator, Shihāb al-Dīn al-Ḥamawī, is not amused and says: I.e., LIKE the *uṣūl al-fiqh*, because they are NOT *uṣūl al-fiqh*, let alone that they are the REAL *uṣūl al-fiqh*.[16] Ibn Nujaym continues: Through them the legal scholar rises up to the level of independent judgement (*ijtihād*), if only in being a jurisconsult (*wa-law fī ʾl-fatwā*). Here the commentator adds: The *mujtahid al-fatwā* is the one who can extract the legal determinations for new cases (*ḥawādith*), which the *imām* (i.e., Abū Ḥanīfa) and his disciples have not explicitly dealt with, from their *qawāʿid* and *uṣūl*.[17] This makes it patently clear that the *qawāʿid* are typical of each *madhhab*, although some may be shared by several *madhāhib*. It also suggests that the *qawāʿid* are something that the eponymous *imāms* of the legal schools

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[12] *Al-Muwāfaqāt*, ed. Abū ʿUbayda Mashhūr b. Ḥasan Āl Salmān, 6 vols (Khubar: Dār Ibn ʿAffān 1417/1997), ii, 83–84.
[13] *Al-Qawāʿid*, 43–45.
[14] Al-Maqqarī *apud* al-Bāḥusayn, 40.
[15] *Al-Ashbāh*, 15: *wa-hiya uṣūlu ʾl-fiqhi fī ʾl-ḥaqīqah.*
[16] *Ghamz*, 16.
[17] *Uṣūl* is the earlier—and, of course, more ambiguous—term for *qawāʿid*. See below.

implicitly, or even explicitly, used in order to arrive at their *aḥkām*. Some works devoted to the *qawāʿid*, such as the *Īḍāḥ al-masālik* of al-Wansharīsī, have the name of the *madhhab* or its founder in their titles, indicating in this way the intellectual universe to which the *qawāʿid* apply. They are to bring out the assumed inherent logic of the teaching of the schools; if the imams have not been explicit about their principles, the *qawāʿid* can only be arrived at by induction from their *furūʿ* decisions (*qawāʿid istiqrāʾīyah*). Then, as a next step, they can be used to arrive at *aḥkām* for hitherto unknown *ḥawādith*. In al-Bāḥusayn's opinion it was Ibn al-Wakīl (d. 716/1317) who first did his own *istiqrāʾ* of the major sources of the Shāfiʿī *madhhab*, while Abū ʿAbd Allāh al-Maqqarī (d. 758/1357) did the same for the Mālikī school.[18] It should be noted, however, that this was the time of the great resurgence of interest in *qawāʿid*, and that this consciously inductive effort was preceded, and accompanied, by a "living" school tradition that found expression, e.g., in the earlier Ḥanafī works on legal principles (here called *uṣūl*) by al-Karkhī and others (see below).

Alongside the *madhhab*-specific legal principles, however, there are also *qawāʿid* which are said to be acknowledged by all schools. This applies in particular to the the five so-called "Major Principles" (*al-qawāʿid al-kubrā*), also called the "Five Principles" (*al-qawāʿid al-khams*). Modern authors like to focus on them, and al-Sadlān's book is specifically devoted to them, but they can also be traced in the medieval literature. First here is a list of them, according to the wording in al-Sadlān:

(1) *al-umūru bi-maqāṣidihā*: "Things [acts] are what they are through the intentions that bring them about".
(2) *al-ḍararu yuzāl*: "Harm shall be removed".
(3) *al-ʿādatu muḥakkamah*: "Custom is made the arbiter".
(4) *al-mashaqqatu tajlubu ʾl-taysīr*: "Hardship brings about facilitation".
(5) *al-yaqīnu lā yazūlu bi ʾl-shakk*: "Certainty is not erased (superseded) by doubt/uncertainty".[19]

Similar lists can be found in Ibn Nujaym's and al-Suyūṭī's *al-Ashbāh wa ʾl-naẓāʾir*, both of whom refer back to Tāj al-Dīn al-Subkī's work with the same title. There are small changes in the wording and,

[18] *Qawāʿid*, 324 and 328.
[19] Al-Sadlān, 9. The maxims are very terse and there is little explanation of their wording.

strangely, radical changes in the sequence of these *qawāʿid*.[20] The latter probably means that the later authors did not simply copy the earlier ones. One other relatively early version that differs in the wording of the maxims can be found in the work of the Imāmī al-Shahīd al-Awwal (d. 782/1380), where it occurs in an inconspicuous place in the middle of the book. A list of the *madārik al-aḥkām*, to wit *Kitāb, Sunna, ijmāʿ*, and *dalīl al-ʿaql* is followed by the statement: "There are five principles deduceable from them, to which all legal determinations can be traced back and by which they can be provided with a *ratio legis*".[21]

Al-Suyūṭī gives some anecdotal indications about the genesis of the Five Principles which partly overlap with a similar story included by Ibn Nujaym.[22] The story says that the Ḥanafī scholar Abū Ṭāhir al-Dabbās[23] collected the underlying rules of the school/method of Abū Ḥanīfah into seventeen principles to which the whole *madhhab* could be reduced. The Shāfiʿī scholar Abū Saʿd[24] al-Harawī heard

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[20] Tāj al-Dīn al-Subkī, *Ashbāh*, has: *al-yaqīnu lā yurfaʿu bi ʾl-shakk* (p. 13), *al-ḍararu yuzāl* (p. 41), *al-mashaqqatu tajlubu ʾl-taysīr* (p. 48), *al-rujūʿu ilā ʾl-ʿādah* (different wording that can be understood either nominally or as a sentence: "The fall-back (is) on custom") (p. 50), *al-umūru bi-maqāṣidihā* (p. 54). Al-Suyūṭī, *Ashbāh*, has (using abbreviated forms): (1) *umūr* (p. 38), (2) *yaqīn* (p. 118), (3) *mashaqqah* (p. 160), *ḍarar* (p. 173), *ʿādah* (p. 182; the latter is numbered *al-qāʿidah al-sādisah*, but this is a mistake, occasioned by an immediately preceding series of five sub-*qawāʿid* of the *ḍarar*-principle). Ibn Nujaym, *Ashbāh*, has an additional *qāʿidah* in first place: (1) *lā thawāba illā bi ʾl-nīyah*, "no reward unless [action is accompanied] by intention", (2) *umūr*, (3) *yaqīn*, (4) *mashaqqah*, (5) *ḍarar*, (6) *ʿādah* (pp. 6–8).

[21] *Qawāʿid*, 74. The five principles here are: (1) *tabaʿīyatu ʾl-ʿamali li ʾl-nīyah*, "the dependence of the action on the intention" (a nominal phrase, not the usual *qāʿidah* format), p. 74; (2) *al-mashaqqatu mūjibatun li ʾl-yusr*, "Hardship necessitates ease", p. 123; (3) *qāʿidatu ʾl-yaqīni wa-hiya ʾl-bināʾu ʿalā ʾl-aṣli aʿnī ʾstiṣḥāba mā sabaq* (again, a nominal expression, and a clumsy one at that!), "the principle of certainty, i.e., reliance on the established determination, I mean presumption of continuity of what existed before", p. 132; (4) *al-ḍararu ʾl-manfīy* (nominal!), "prohibited damage", p. 141; (5) *al-ʿādah* (nominal!), "custom", p. 147.

[22] Al-Suyūṭī, *Ashbāh*, 35–36; Ibn Nujaym, *Ashbāh*, 15–16.

[23] Muḥammad b. Muḥammad b. Sufyān Abū Ṭāhir al-Dabbās al-Qāḍī, a contemporary of al-Karkhī (d. 340/952) and al-Ṭaḥāwī (d. 321/933), see his entry in Ibn Abi ʾl-Wafāʾ al-Qurashī, *al-Jawāhir al-muḍīyah fī ṭabaqāt al-Ḥanafīyah*, ed. ʿAbd al-Fattāḥ Muḥammad al-Ḥulw, 5 vols., 2nd ed. (Cairo: Hajar li ʾl-Ṭibāʿah, 1413/1993), iii, 323–24. His role in formulating the *qawāʿid* of the Ḥanafī school is not mentioned in the entry. He does not seem to have been much of an author (*GAS* i, 428, lists his redaction of *al-Jāmiʿ al-ṣaghīr* of al-Shaybānī); he is said to have been "stingy" with this knowledge, which ties in well with our story.

[24] In the two texts he appears as "Abū Saʿīd", corrected by the ed. of al-Suyūṭī. Abū Saʿd Muḥammad b. Aḥmad b. Abī Yūsuf al-Harawī, disciple of al-ʿAbbādī, died 518/1124 according to Ibn Qāḍī Shuhbah, *Ṭabaqāt al-fuqahāʾ al-Shāfiʿīyah*, ed.

about this and traveled to al-Dabbās. The latter was blind and used to repeat his seventeen principles every night in his 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 time he never recited his *qawāʿid* again in the mosque. Al-Harawī returned to his disciples and recited them (which must mean the seven principles which he had heard) to them.

This somewhat farcical story leaves one wondering about the motivations of the protagonists, as Shihāb al-Dīn al-Ḥamawī, Ibn Nujaym's commentator, is quick to remark, though strangely he reprimands only his fellow-Ḥanafī for (a) mistreating a scholar and (b) hogging his knowledge. There is no doubt that Abū Saʿd al-Harawī behaved rather strangely, as well. All of this in turn leads one to doubt the historicity of the event, quite apart from the fact that al-Dabbās and Abū Saʿd al-Harawī are not contemporaries. The story allows for several interpretations, one of which might be that it is used by later Ḥanafīs to state the case that the Ḥanafīs started this type of intellectual pursuit, while the Shāfiʿīs, who later became so outstanding in this field, just stole it from them. Ibn Nujaym states as one of the reasons for writing his book on *al-Ashbāh wa ʾl-naẓāʾir* that the Ḥanafīs had been very good in writing *mutūn* and *shurūḥ* and *fatāwā*, but had not produced anything comparable to Tāj al-Dīn al-Subkī al-Shāfiʿī's *al-Ashbāh wa ʾl-naẓāʾir*, which gap he was intent to stop.[25]

Al-Suyūṭī then continues by saying that Abū Saʿd al-Harawī related that, when al-Qāḍī al-Ḥusayn al-Marwarrūdhī al-Shāfiʿī[26] (d. 462/1069) heard about this story, he reduced the whole Shāfiʿite *madhhab* to

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ʿAlī Muḥammad ʿUmar, 2 vols (Cairo: Maktabat al-Thaqāfah al-Dīnīyah, n.d.), i, 278 (who quotes ʿAbd al-Ghaffār al-Fārisī via al-Asnawī), and, following him, *GAL S* i, 669 and Kaḥḥālah ix, 30. Tāj al-Dīn al-Subkī, *Ṭabaqāt al-Shāfiʿīyah al-kubrā*, ed. Muṣṭafā ʿAbd al-Qādir Aḥmad ʿAṭā, 6 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 1420/1999), iii, 297, says only: "around 500". If al-Dabbās is supposed to be part of the story, a gross anachronism is involved.

[25] *Ashbāh*, 15.

[26] *GAL* i, 387; *S* i, 669. Since his lifetime overlaps with that of Abū Saʿd al-Harawī, it is Abū Ṭāhir al-Dabbās who does not fit the timeframe of the story. Al-Dabūsī (d. 430/1039), a Ḥanafī with a similar name, might be intended, but the chronological problems, though less flagrant, would still be there. On al-Qāḍī al-Ḥusayn see Tāj al-Dīn al-Subkī, *Ṭabaqāt* (see n. 34), iii, 30–36.

four principles, namely the already mentioned five principles minus *al-umūr bi-maqāṣidihā*, which was added by some later, anonymous, authority, for the sake of balance: *buniya 'l-Islāmu ʿalā khams, wa 'l-fiqhu ʿalā khams*.

The connection that al-Suyūṭī establishes between the story of al-Dabbās and al-Qāḍī al-Ḥusayn by means of Abū Saʿd al-Harawī looks rather contrived, and as a matter of fact, Tāj al-Dīn al-Subkī introduces al-Qāḍī al-Ḥusayn and his four *qawāʿid* without any allusion to the al-Dabbās story.[27]

The urge to reduce the *qawāʿid* underlying a *madhhab* to the lowest number possible meets with some disdain on the part of al-Subkī who says that this cannot be done without much contorsion and artificiality. In this context he quotes the *Qawāʿid al-aḥkām fī maṣāliḥ al-anām* of ʿIzz al-Dīn Ibn ʿAbd al-Salām (d. 660/1262) who, al-Subkī alleges, reduced the whole of the Law to ONE principle, to wit *jalb al-maṣāliḥ wa-dar' al-mafāsid*.[28]

Finally, in this rudimentary typology of *qawāʿid*, mention should be made of the *qawāʿid uṣūlīyah*. These are "hermeneutic principles" that cast the interpretive work of the legal scholar into rules that are easy to handle and to remember.[29] The term, and possibly the notion, are rather late (ninth century Hijra). They are sometimes mixed in with the *qawāʿid fiqhīyah* but more conscientious authors, and certainly modern ones, try to keep them apart. At this point we should also ask ourselves what the relationship between *qawāʿid fiqhīyah* and *uṣūl al-fiqh* might be. Al-Qarāfī, at the beginning of his *furūq* work, says that there are two kinds of *uṣūl*: *uṣūl al-fiqh* and *al-qawāʿid al-fiqhīyah al-kullīyah*.[30] He thus puts them on an equal footing; as a result we have a triad of *uṣūl—qawāʿid—furūʿ*. We shall come back to this at the end of the article.

When we turn now to the literature on the *qawāʿid* as a genre, we have, first of all, to note the sad, but also intriguing, fact that the term *qawāʿid* is often used in a rather loose way, so that legal works having this term in their titles may understand them in astonishingly different ways. What is somewhat disheartening is the fact that some modern scholars writing in Arabic seem to be hypnotized

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[27] *Ashbāh*, i, 12.
[28] On this see Heinrichs, "Structuring the Law" (see n. 3), 338, and n. 24.
[29] But who would be their addressee? Uṣūlīs, qāḍīs, muftīs?
[30] *Al-Furūq*, 4 vols. (Cairo: ʿĪsā al-Bābī al-Ḥalabī 1344/[1925–26]), i, 2.

by the term and do not point out the obvious differences. Just one example of this may suffice. The editor of the Ḥanbalī Yūsuf Ibn ʿAbd al-Hādī's (d. 909/1503) short work with the title *Kitāb al-Qawāʿid al-kullīyah wa 'l-ḍawābiṭ al-fiqhīyah*[31] has a paragraph in his introduction, in which he speaks about the Ḥanbalī contribution to *qawāʿid* literature. He mentions six names: al-Ṭūfī (d. 716/1316), Ibn Taymīyah (d. 728/1328), Ibn Qāḍī 'l-Jabal (d. 771/1370), Ibn Rajab (d. 795/1393), Ibn al-Laḥḥām (d. 803/1401), and, of course, Ibn ʿAbd al-Hādī himself). Al-Ṭūfī's two *qawāʿid* works have not survived,[32] and from the citations and quotations of these two works that al-Ṭūfī has included in his *Sharḥ Mukhtaṣar al-Rawḍa*,[33] the impression emerges that they were probably more comprehensive than mere collections of legal principles. Ibn Qāḍī 'l-Jabal's book, which exists in ms. in the Ẓāhirīyah Library, is said by al-Bāḥusayn to be a *fiqh* work, in which the *qawāʿid* are interspersed unsystematically.[34] Ibn Taymīyah's *al-Qawāʿid al-nūrānīyah al-fiqhīyah* is more of a regular *fiqh* book, Ibn al-Laḥḥām's *al-Qawāʿid wa 'l-fawāʾid al-uṣūlīyah* is heavily biased towards the *qawāʿid uṣūlīyah* (not *fiqhīyah*), and strangely Ibn ʿAbd al-Hādī's own little book is an exercise in legal classifications and disjunctions that has little to do with legal maxims or principles. As a result, only Ibn Rajab's work remains as a true *qawāʿid* book (but not for those who believe only in *qawāʿid kullīyah*!).

From here we should go further and eliminate some other books with "misleading" titles as well. These may be found in the second part of the bibliography following this paper. Al-Bāḥusayn has indeed noted that the *fuqahāʾ* are less than consistent in their applications of the term *qawāʿid*: Apart from legal maxims they may denote the restricted principle (*ḍābiṭ*), definition (*taʿrīf*), divisions and classifications (*taqsīmāt*), and titles of legal topics (*ʿanāwīn al-masāʾil al-fiqhīyah*).[35] Even books dealing with *qawāʿid* in a narrow sense not infrequently have admixtures of the other types mentioned. Still, as far as genres of legal literature are concerned, all of this amounts to two kinds: one

[31] Ed. Jāsim b. Sulaymān al-Fuhayd al-Dawsarī. Beirut: Dār al-Bashāʾir al-Islamīyah, 1415/1994.

[32] Although al-Būrnū, *Wajīz*, 28 (no. 4), says that his *al-Qawāʿid al-kubrā* exists in ms., without giving details. Al-Bāḥusayn in his very recent *Qawāʿid*, 326, discusses al-Ṭūfī's two *qawāʿid* works, but only from testimonia and citations.

[33] Ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī, 3 vols (Beirut: Muʾassasat al-Risālah, 1407/1987–1409/1989), iii, 824 (entries in the *Fihris al-kutub*).

[34] *Qawāʿid*, 330.

[35] *Qawāʿid*, 100–106.

dealing with *qawāʿid* including *ḍawābiṭ*, and the other with definitions, divisions, and classifications (mostly of a rather elementary character). Obviously, some of the works listed in the first part of the bibliography that have been lost or unavailable may rather belong to the second category and thus should possibly have been included in the B bibliography.

Whatever the somewhat untidy situation may be, the idea of legal principles and of a genre of literature dealing with them is not called into question by it. Their place and function within Islamic legal thought has in part been adumbrated already, and we can perhaps pull the various indications and allusions together by stating the following:

(1) *Madhhab*-internal vs. *madhhab*-transcending principles.
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 unencountered "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*. All this *madhhab*-specificity notwithstanding, a number of *qawāʿid* were discovered that transcended the individual *madhhab* and were recognized by everybody. First and foremost among these are the so-called "Five Principles". Since they cover a large number of sub-*qawāʿid*, it is questionable, whether they were important for the everyday legal work of the *fiqh*. They are more likely to be the outcome of abstract thought about the structure of the law.

(2) Implicit induction vs. explicit induction.
In the early history of the *madhāhib* the legal principles grew out of the school tradition, presumably be a process of implicit induction, from the time of the founders onward. Interestingly, the term for these principles, at least in some circles, is *uṣūl* rather than *qawāʿid*. As a result, the term *aṣl*, pl. *uṣūl*, acquires three meanings: (1) an act that has already been legally determined and now serves as a "model" for similar cases; (2) a legal principle that covers several individual cases; (3) a source of the law. The relationship between

these three usages, which can hardly be unrelated to each other, would be in need of further research. While these school traditions continued, there was a marked resurgence of interest in the concept of *qawāʿid* from the 8th century A.H. onward, which led to a search for further general rules by explicit induction from the great legal handbooks of the schools.[36]

(3) *Qawāʿid kullīyah* vs. *qawāʿid aghlabīyah.*
It strikes the modern observer as distinctly odd that the majority of the *qawāʿid* are not generally valid (the maxim form) but only preponderantly so (the double-question form). Since from a logical and structural point of view generally valid principles are preferable, their counterparts must reflect legal practice. They take necessary exceptions into account. Of course, a rule does not cease to be a rule in the presence of exceptions to the rule. But the logical structure of these principles has been disturbing to classical and modern Arab scholars alike.

(4) Theoretical reduction vs. practical multiplicity.
From the time of the legend about Abū Ṭāhir al-Dabbās onward, there has been an endeavor to reduce the number of principles from which "all" cases could be derived to the lowest number possible, the extreme being the ONE principle that Tāj al-Dīn al-Subkī attributes to ʿIzz al-Dīn Ibn ʿAbd al-Salām. Again, this seems to be a theoretical effort of structuring the law, and more of a game than serious legal work. For practical purposes the lengthy lists of the likes of al-Wansharīsī and Ibn Rajab are indispensable.

(5) The continuum *ḍābiṭ—qāʿidah—maqṣad al-Sharīʿah.*
The master principle of ʿIzz al-Dīn (*jalb al-maṣāliḥ wa-dar' al-mafāsid*, "bringing about beneficial circumstances and warding off harmful ones") is really a statement about a certain goal that the Law is set up to accomplish. As such it belongs to the most general category of principles, the *maqāṣid al-Sharīʿah*, which try to determine God's

[36] It is interesting to note that there are also modern examples of this procedure, such as ʿAlī Aḥmad al-Nadwī, *al-Qawāʿid wa 'l-ḍawābiṭ al-mustakhlaṣa min al-Taḥrīr li 'l-imām Jamāl al-Dīn al-Ḥaṣīrī (546–636 h), sharḥ al-Jāmiʿ al-kabīr li 'l-imām Muḥammad b. al-Ḥasan al-Shaybānī*; see Bibliography C. For this trend in modern *qawāʿid* literature see al-Bāḥusayn, *Qawāʿid*, 406–409.