CHAPTER ONE

An Introduction to the Study of *al-Qawāḍid 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 Qurān to the *sunnah* of the Prophet Muḥammad 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 (*fiqhār*, s. *faqīh*) employed when reaching his legal determinations: from using his own independent reasoning to referring to the *sunnah* 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 Qurān and pre-Islamic Arab custom which did not challenge the teachings of the

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2 Hallāq, Wa'el. *A History of Islamic Legal Theories*. Cambridge: Cambridge University Press, 1997. The *sunnah* of the prophet Muhammad is an essential foundation and source of wisdom in Islamic legal thought. In his book, Wa'el Hallāq describes the concept as follows: “The term *sunnah* means an exemplary mode of conduct and the perfect verb *sunnah* 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 course of action concerning a particular matter, the former, *sunnah*, describes the manner and course of action *as something established, and thus worthy of being emulated.* See Wa'el Hallāq, *Theories*, 10.

3 Muhammad b. ʿAbd Allāh (570-632 AD), prophet and messenger who brought the message of Islam as expounded in the Qurān 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 world⁴.

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 underway⁵.

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 *ḥadīth* evidence, and those who practiced this, called *ahl al-ḥadīth*, became the new standard⁶. By the time of al-Shāfīʿī, (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-Shāfīʿī’s traditionalist

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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 (ijtihāda raʿyuk).

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

⁶ Hallāq 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-Shafī‘īs inclinations, this did not negate completely the practice of *ijtihād*; it only altered the form of *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-Shafī‘īs theory as standard. This meant the sanctification of the Qurān and *ḥadīth* as the highest sources of law and *qiyaṣ* and *imāra* 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 Shafī‘ī, 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 *masā‘il 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 *masā‘il*. One such way that they did this was by examining case law to infer, or deduce (*yastaqra‘u*) the underlying principles which bind certain cases and renders
their legal determinations the same. This method of organization developed into the field of *al-qawā'id al-fiqhiyya*, or principles of jurisprudence, to which we will devote the rest of this study.

1.2: Background on *al-qawā'id al-fiqhiyya*

1.2.1: Lexical Definitions of *al-qawā'id al-fiqhiyya*

In the Arabic language, *qawā'id* (s. *qā'id*) 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 (*qawā'id al-dīn*). *Al-qawā'id* in this sense appears in the Qurʾān 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.”

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’.”

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8 Ibid. This verse in Arabic is as follows: “Qad makara ‘l-ladhīna min qablihim fa-ātā Allahā bunyānuhum min al-qawāʿidi fa kharra ʿalayhimu ‘l-saqīfū min fawqihum wa ātāhumu ‘l-ʿadhabu min ḥaythu la yashʿūrūn.” (Qurʾān: 16:26) in Muhammad Asad’s *The Message of the Qurʾān*. Gibraltar: Dār al-Andalus Limited, 1997, 396-7.

9 Ibid. 27. This verse in Arabic is as follows: “Wa idh yarfa’u Ibrāhimu ‘l-qawāʿida mina ‘l-bayti wa Ismā‘īlu rabbanā ṭaggabal minna innaka anta ‘l-sama‘īl ‘l-ṣālim”. (Qurʾān, 2:127).
In addition to this, the root *qa-‘a-da* also bears the meaning to ‘remain’ or ‘stay’ seated or in one’s place, although it is used in contexts other than sitting\(^\text{10}\). The eleventh month of the lunar Islamic calendar, ‘Dhu ‘I-Qā‘ida’, 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. *Qā‘ida* in this sense was used in the Qur‘ān 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”\(^\text{11}\). However, *qawā‘id* 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-qawā‘id 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 ilayhi 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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\(^{11}\) See Qur‘ān, 24:60.
Similarly, al-qawā'id al-fiqhiyya are the governing legal principles that inform the process of reaching a legally consistent judicial decision. As such, al-qawā'id al-fiqhiyya are most commonly rendered as legal maxims or principles of jurisprudence. They are predominantly valid determinations through which the legist can know the individual legal decisions of similar cases directly. However, neither modern nor medieval scholars of the field have agreed upon one particular definition of al-qawā'id al-fiqhiyya and offer a range of slightly different conceptions of the field.

Modern scholars of the field define al-qawā'id 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 sharī'ī determinations, from different chapters [of fiqh] in matters which come under its subject area”.

Although al-qawā'id al-fiqhiyya have often been considered universal, Ḥanafis and others qualify this and limit them to being only predominantly

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12 See Wolfhart Heinrichs, “Qawā'id 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-qawā'id 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-Qawā'id, where he defines it as “Ḥukmun aghlabiyyun yata'arrafu minhu‘ala juz‘iyātihi ‘l-fiqhiyya mubāsharatān”.

14 al-Nadwī, al-Qawā'id, 43, “Aslun fiqhiyyun kulliyyun yatadammanu aḥkāman tashrīfiyyatin ‘āmmatin min abwābun muta‘addidatun fit‘l-qadāya allati tadkhulu taḥta mawqūf‘iha”..
valid. If we accept this view, then *al-qawā'id 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-qawā'id al-fiqhiyya*

Although the goals of *al-qawā'id 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-qawā'id al-fiqhiyya* as epitomized by al-Ṣuyūṭī (d. 911/1505). Medieval scholars also differed slightly as to the breadth and scope of *al-qawā'id al-fiqhiyya*; differences which often fell on *madhhab* lines. This range of

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15 See al-Bāḥusayn, *al-Qawā'id*, 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-qawā'id al-fiqhiyya were known by that term, they were referred to as usūl, which were understood to serve a different purpose from usūl al-fiqh, or theory and hermeneutical tools for the creation of Islamic law.  

It is surprising that Islamic legal theoreticians and scholars of law had not defined al-qawā'id al-fiqhiyya until the 8th/14th century. Şadr al-Sharīʿa (d. 747 AH), an eighth century Ḥanafī scholar, defined it as “al-qāḍāyā al-kulliyya”, or “matters of general or universal validity”. However, a more prominent and influential definition of al-qawā'id 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”. By the thirteenth century, al-Ḥamawī (d. 1095/1687),

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16 Few scholars elevated al-qawā'id al-fiqhiyya, as they came to be known later on, to the level of actual usūl.

17 See al-Qawāʾid by al-Bāḥṣayn, 19.

18 ibid. This is ʿUbayd Allah b. Masʿūd b. Muḥammad al-Bukhārī al-Maḥbūbī al-Ḥanafī. His laqab was Şadr al-Sharīʿa al-Asghar, meaning he was among the best Ḥanafī fuqahāʾ, usūliyyān, and philosophers of his time. Furthermore, he was a transmitter and exegete of hadith, a grammarian, a linguist as well as a philosopher. He died in 747 AH. Among his other works was, al-Tawāhid fi ḥall ghawāmid al-tanqīḥ fi usūl al-fiqh, al-Washshāh fi ʿl-maʿrānī wa ʿl-bayān, Sharḥ al-waqiyya fi ʿl-fiqh al-Ḥanafī and Taʿdīl ul-ulūm.

19 See Wolfhart Heinrich’s “Qawāʾid as a Genre of Legal Literature”, 3 where he defines it as “al-amr al-kulli alladhi yanṭabiq ʿalayhi juzʿīyyāt kathira tufḥamu akhāmuha minha wa minhā mā lā yakhtasṣu bi bābin... wa minhā mā lā yakhtasṣ”. 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 *qawāḥid*. This development culminated in our current understanding of *al-qawāḥid al-fiqhiyya*: that they are predominantly valid legal principles, gleaned from a detailed study of the *furāʾ*, through which a jurist can draw the legal determination of similar cases. Yet throughout this period, the function of *al-qawāḥid* remained clear: to give structure and consistency to the way new cases were determined in conformity with the *madhab*.

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

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20 This is roughly how al-Nadwī, one of the foremost scholars of the field, identifies the *qawāḥid*. See al-Nadwī, *al-Qawāḥid*, 43-4, where he defines it as “Hukmun sharʾiyun fi qadiyyatin yata’arrafa minha ahkām mā dakhala taḥṣiha”.

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Wahhāb b. ʿAlī b. ʿAbd al-Kāfī. *al-Ashbāh wa ʿl-naẓāʾir*. Eds. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad ʿAwād. (Bayrāt: Dār al-Kutub al-ʾIlmiyya, 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 *dāḥīt*, 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 *dāḥīt* is a principle which is applicable only to cases within one particular *fiqh* chapter.
1.3: Objectives of *al-Qawā'id al-fiqhiyya*

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

The original and most meaningful *Sitz im Leben* of the *qawā'id* is the *madhab*-internal discussion leading to the finding of a legal determination for an as yet un-encountered “event”. The *madhab* 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 (*ahkām*) of individual cases (*furū'ī*). Knowledge of these general rules allowed the jurisprudent to wield *madhab*-internal *ijtihād*, to be a *mujtahid al-fatwā*.\(^\text{21}\)

So, the function of the *qawā'id* was to assist the *muftī*, or jurisconsult, or the *faqīh* in formulating the *ḥukm* of a new case while remaining consistent with the method of the *madhab*. This is further confirmed in the earliest extent works dedicated specifically to compiling the *qawā'id*. The earliest scholars to do so were al-Karkhī (d. 340/951) and al-Dabūsī (d. 430/1039).\(^\text{22}\)

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\(^{21}\) See Heinrichs, “*Qawā'id as a Genre of Legal Literature*”, 12.

\(^{22}\) Both works were published in the same volume. Al-Dabūsī, Abū Zayd ʿUbayd Allah b. ʿUmar. *Taʾṣīs al-nazar* [plus al-Karkhī: *al-Uṣūl*], (Cairo: Maṭbā‘at al-Imām n.d.). For biographical information on both of these fuqahā‘, please see Chapter Three.
Al-Dabūsī’s editor writes in his introduction,

wa ʿammā ʿl-qawāʾid wa ʿl-ḍawābīṭ fa ḥīnāma kathurat al-furūʿ wa ʿl-fatawā bi khathrātu ʿl-waqāʾiḥ wa ʿl-nawāzīl tawassāʾū fī waḍqīha ʿalā hadyin min salafihim tādīrū fī abwābin mmukhtalīfā min al-fīqī ṭaḏbuṭ kathrat al-furūʿ wa ταιμαʿuha ḵe qālibīn muttaṣīq li-ṣiyānaṭīha min al-ḍayāʾ wa ʿl-taṣḥattūt. 23

Translation:

As for al-qawāʾid and al-ḍawābīṭ, when the furūʿ 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 (ṭaḏbuṭ) the number of furūʿ and collect them in one relevant rubric to protect them (furūʿ) from perdition and dispersion.

It becomes clear from this statement that the qawāʾid 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-qawāʾid 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 furūʿ 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-qawāʾid al-fiqhiyya is meaningful is the madhhab and the intellectual beneficiary of its

23 See al-Nadwī’s, al-Qawāʾid al-fiqhiyya, p. 135.
creation is primarily the mutjahid fi ‘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-qawāʾid al-fiṣḥiyya strove, in a sense, to
answer some of the most pressing questions that faced the jurist of the 4\textsuperscript{th}/5\textsuperscript{th}
century AH, including:

1. Exactly what makes a Ḥanafī a Ḥanafī (and a Ḥanafī hukm, 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-fiṣḥiyya, by deducing the
principles that inform them for use by future generations of jurists. Al-
qawāʾid al-fiṣḥiyya 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 masā’il. 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 madhab’s ‘official’ view on any given matter without pitting authoritative opinions of the madhab’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 qādi to call up the appropriate cases of precedence to use as a reference in treating a new related case.

The establishment of al-qawā'id, 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 madhab as the primary source of legitimate authority, or legal precedence. They helped address a concrete problem: how to keep one’s madhab views consistently present in the aḥkām of generations of fuqahā who were becoming further and further removed from the intellectual context of the founders of their school of law.

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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 Taʾṣīs al-Nazar, al-Dabūsī (d. 430/1039) states that his students had grown confused and uncertain of the position of the Ḥanafi madhab 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 madhab regarding the masā’il of fiqh as well as to highlight the differences between them and those of al-Shāfī’ī and other leading legal theorists and scholars of the time. See al-Dabūsī’s Taʾṣīs, 3.
Both early (pre-third/ninth century) and later (post-fourth/tenth century) generations of fuqahā' 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. āṣl, or legal theory) using unlimited independent reasoning called ijtihād muṭlaq, fuqahā’ 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, fuqahā’ 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 Wālī 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-qawā’id 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. Hallaq, 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 qawāʾid 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-qawāʾid al-fiqhiyya helped keep a Ḥanafi jurist and his aḥkām as Ḥanafi as possible.

1.4: al-Qawāʾid 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-qawāʾid 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. Yet, despite their importance, they are not considered a dalil, or evidence, upon which to base legal determinations unless [the qāʾida] was originally derived from a dalil of the Qurʾān, sunna or another such source.

At first glance, this fact seems to undercut the importance of al-qawāʾid. However, this ignores the stated objectives of al-qawāʾid 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

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29 Some qawāʾid are exceptions to this rule. This arises when the qāʾida at hand was originally derived from a dalil, or evidence, of the Qurʾān, sunna, or another such certain sources. See al-Bāḥusayn, al-Qawāʾid al-Fiqhiyya, 273, where he says, “al-qawāʾid al-fiqhiyya là taṣlīḥ an takuna dalīlān yusterād ilayhi fī istinbāṭu ‘l-aḥkām al-sharʿiyya illa idha kāna asluha mustanidan ilā dalīlān min al-kitābin aw sunnatin aw ghayrihima”.

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

Certain qawāʾid fiqhüyya, however, can be used as evidence in legal
cases since they found their first formulation in either Qurʾān, ḥadīth, or the
statement of an esteemed legal authority. These qawāʾid were adopted as is
by the scholars of al-qawāʾid 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 qawāʾid, or al-qawāʾid al-kubra: al-yaqīn lā yazūlu bi
ʿl-shakk, al-ḍarar yuzāl, al-ṣāda muḫakkama, ʿl-ḍarar wa lā- dirār, and al-umūr
bi maqāṣidihā.

Some modern scholars have traced the roots of al-qawāʾid al-fiqhüyya
to the Qurʾān, claiming that the Qurʾān itself established the first legal
principles upon which the rest of the sharīʿa was later established30. In fact,
al-Nadwī posits that later scholars were, in fact, following the lead of the
Qurʾān, which summarized the determinations of a range of legal matters
under one rule or principle:

Wa līʿalla al-ʿamr alladhī shajjaʾa ʿl-aqḍamīn min al-fuqahāʾ ʿala
istinbāṭ hadhiḥī ʿl-qawāʾid ʿinda taʿdīl al-ʾahkām wa tajaddud al-
ḥawādith mā raʾuḥu min baʿd ʿl-ayāt al-qurʾānīyya al-karīma wa ʿl-
ʾahādīth al-nabawiyya al-shariʿa allati jamāʿat wa aḥṣat bi-kathīrin
min al-ʾahkām fī baʿdī kalimāt. Fa inna hum ʿan tarīqi marānīhim ʾ wa
muʿāyashatuhum maʿa ʿl-kitāba wa-ʿl sunna tawāṣṣalu ila nāṭījatin

30 ʿAlī al-Nadwī makes this argument in, al-Qawāʾid, 271.
 hadmiyyatin wa hiya anna taq’idu amrun muhimmun yataf’ada bihi ‘l-tabaddur bayna ‘l-furū’ ‘inda takathurihim.  

Translation:

Perhaps the situation which encouraged early scholars to extract these qawā‘id while clarifying determinations and [treating] new cases is what they observed in some of the verses of the revered Qurʾān and the esteemed Prophetic hadith which [themselves] collected and contained many determinations in only a few words. So, by way of their usage and expertise with the book [i.e. the Qurʾān] and the sunna they reached a definite conclusion which was that collecting the qawā‘id 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-A‘rāf, 199), which is not in itself convincing enough to argue his point32. 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.

31 ibid.

32 See al-Nadwī, al-Qawā‘id, 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-Qurtubī in his Jamī’ li aḥkām al-qur’ān, a manuscript of which he saw in Cairo. See 272, especially, note 1.

33 ʿAbdalla Yūsuf ʿAli’s The Holy Qurʾān: 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-A‘rāf 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 *taqīd* from the *Qurʾān* and *sunna*\(^{34}\). Three essential *qawāʾid* illustrate this: 1. *al-bayyina li ‘l-muddaṣī wa ‘l-yaminu li man yunkir*, 2. *al-kharāj bi’l-ḏamān* and 3. *lā ḏurar wa lā ḏirār*. 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-qawāʾid*, 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 *qāʾida* as a supplemental proof, in addition to other sound and indisputable sources of evidence.

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

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

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\(^{34}\) In fact al-Nadwī devotes two sections of his study to *ahadīth* whose verbatim text have become known as *qawāʾid* or whose essence has been captured by later scholars into a *qāʾida*. See *al-Qawāʾid*, 276-320, Chapter 2, sections one and two.

\(^{35}\) See al-Nadwī, *al-Qawāʾid*, 274.
madhhab lines and 2. minor qawā‘id, or ones which are madhhab-specific\(^{36}\). There are other distinctions on the basis of which the qawā‘id have been
categorized further but we will focus on the major and minor ones at this
point.

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

1. al-yaqīnū lā yurfa‘ū bi-‘l-shakk, or certainty cannot be superceded by
doubt.
2. al-dararu yuzāl, or, harm should be removed
3. al-mashaqqatu tajlubu ‘l-taysīr, or, hardship brings about facilitation
4. al-rujū‘u īlā ‘l-‘āda, or, the fall-back is on custom
5. al-umūrū 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-qawā‘id al-
kubra, are said to be acknowledged by all schools of law\(^{38}\). Most post-
eighth/fourteenth century works of qawā‘id begin with a discussion of these.
Often it is argued that these are the foundation of all qawā‘id and that all other
qawā‘id can be subsumed under one of the major ones. Some scholars, such
as Ibn ʿAbd al-Salām in his Qawā‘id al-akhām fī maṣāliḥ al-ānām, have gone
to great lengths to limit the number of qawā‘id. He in fact attempts to justify

\(^{36}\) See my discussion of al-Subkī’s al-Ashbāh wa ‘l-naẓārīr, Chapter Four, below.

\(^{37}\) I have used translations presented by Professor W. Heinrichs in his “Qawā‘id”, 6-7.

\(^{38}\) ibid, 6.
placing all known qawā’id under one principle maqṣad or qā’ida: “warding off harm has the priority over bringing about benefits”\(^{39}\).

Although these qawā’id 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-ṣāda 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 qawā’id, especially, al-ṣāda 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 qawā’id do not fall under the category of al-qawā’id 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-Qawā'id al-fiqhiyya*

One further point regarding the practical application of *al-qawā'id* in the formation of law is the scope of validity of the *qā'id*: 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 *qawā'id*?

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 *qawā'id* 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 *qawā'id* was to organize the large body of *furū'ī* and systematize them in accordance with the method of the *madhhab* founders.

Viewed in this way, *al-qawā'id* 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 *qawā'id* for a different purpose: to systematize. So, even if there *were* exceptions, that poses little problem for the earliest scholars because 1. the *qawā'id* did not aim to be completely encompassing but to outline the overall structural organization of *furū'ī* and in that way help judges remain

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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-qawāʾid 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-qawāʾid al-fiqhiyya in the following terms: usul al-fiqh is to to fiqh what al-qawāʾid are to furūʿ. Both usul al-fiqh and al-qawāʾid came chronologically after fiqh and furūʿ. Usul al-fiqh and al-qawāʾid 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. Usul al-fiqh and al-qawāʾid 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 usul al-fiqh came about
first, then all law was expounded according to that system. Just as it would be misleading to assume that al-qawā‘id al-fiqhīyya existed early on and all cases of law were determined with them in mind. In fact, usūl al-fiqh and al-qawā‘id al-fiqhīyya 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-naẓā‘īr, and al-qawā‘id al-fiqhīyya with the goal of creating means of organizing the overwhelming body of furū‘ 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 sheer volume of cases and the different
determinations on one case within each madhab.

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 *istiqraʾ*. 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 ʿl-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 *taqlid* 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 *taqlid*, or
operating within the accepted parameters of precedence, is essential.

Thinking of *taqlid* 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-qawā'id al-fiqhīyya* 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 Shāfīʿī qawā'id fiqhiyya from this period to learn how Islamic law developed.
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