CHAPTER FOUR

Shāfi‘ī Qawaid Fiqhiyya: ‘al-Ada Muhakkama’
(Fourth/Tenth to Tenth/Sixteenth Century)

4.1: General Background to the Shāfi‘ī madhhab and its Approaches to Adjudication

Muhammad ibn Idrīs al-Shāfi‘ī (d. 204/820)\textsuperscript{257} was one of the most influential theoreticians of Islamic law during his time and remains so to the present day\textsuperscript{258}. As a student, then critic, of the two leading legal minds of his time, namely, Muḥammad al-Shaybānī and Mālik ibn Anas, al-Shāfi‘ī presented a middle path between their thought. He neither accepted Ḥanafī ra‘y completely nor embraced the concept ‘amal ahl al-madīna\textsuperscript{259} as sufficiently rigorous sources of law. According to Al-Shāfi‘ī, each of these approaches introduced too much arbitrariness, or tahakkum, into the comprehension of the law and that neither gave sufficient consideration to the

\textsuperscript{257} Please see above, p. 67, n. 105 for his biographical information.

\textsuperscript{258} During the past decade, a debate has raged in the field of Islamic Studies regarding al-Shāfi‘ī’s true role in the development of usul al-fiqh during the late second/eighth century. One the one hand, he is known as the father of usul al-fiqh on account of his well-known epistle on usūl, the Risāla, which attempted to systematize the sources of and methods for Islamic legal practice. Recently, however, Wael Hallaq has argued quite persuasively that al-Shāfi‘ī was not as influential during his time as later scholars’ writings of him would have us believe. In his “Was al-Shāfi‘ī the Architect of Islamic Law?”, Hallāq argues that the Risāla was not widely accepted as authoritative and did not receive scholarly attention for well over a century after its completion.

\textsuperscript{259} ‘Amal ahl ul-Madīna is the practice of the people of Madīna. Mālikīs consider this to be the living tradition of the Prophet Muhammad, which they inherited directly because he had lived there. Consequently, the Mālikīs consider ‘amal to be one of the main sources of legal knowledge, or proofs, upon which judgments can be made. See “al-Shāfi‘ī” in EI2 (9:181a-185a), especially 182-3.
main sources of law: the Qurʾān and the sunna. As a result, Al-Shāfīʿī’s contribution to legal thought was to define and the sunna and to systematize the use of analogical reasoning.

Although he may not have wanted or intended to do so, al-Shāfīʿī’s innovative thought prompted a following of scholars which would later culminate in the formation of the Shāfīʿī madhhab. Although the seeds of the madhhab were sown during his lifetime, it flourished fully after the fourth/tenth century AH260.

4.2: Background to Shāfīʿī Qawāʾid Fiqhiyya

Although Ḥanafī fuqahāʾ and uṣūliyyūn were the first to articulate the foundations of al-qawāʾid al-fiqhiyya as a distinct field of law, it was the unmatched contributions of Shāfīʿī scholars that would shape and define the direction of al-taqāʾid al-fiqhī, from the as early as the fifth/eleventh to the tenth/sixteenth centuries. Early Shāfīʿ scholars such as al-Qāḍī Ḥusayn al-Marwarrūdhī (d.462/1070)261, al-Juwaynī (d. 478/)262, Muḥammad al-Jājarmī

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260 Al-Muzani (d. 264/877), was one of al-Shāfīʿī’s earliest and most important followers. His Mukhtasar, or abridgement, of al-Risāla became one of the most influential early works of Shāfīʿī law and helped spread his thought throughout the Muslim world. EI2 “al-Shāfīʿī”, (IX:187a).

261 He is also known as al-Marwazī, although al-Marwarrudhī more precisely reflects his place of origin (Marw al-Rudh or the Marw near the river rather than Marw). “Marw al-Rūdḥ” A town on the Murghāb river in medieval Khurasān, five or six stages up river from the city of Marw al-Shāhijān where the river leaves the mountainous region of Gharjistān and enters the steppe lands of what is now the southern part of the Qara Qūm. The name means Marw on the River, or little Marw, served to distinguish it from the larger center of Marw al-Shāhijān. (EI2 6, 617b-618a). See also, Kahālā, Muḥājim (1957), 4:45.

262 See Nadwī, al-Qawāʾid, 141-144 and also Saflo’s Al-Juwaynī’s Thought and Methodology: with a translation and commentary on Lumaʿ ul-adilla.
and al-Nawawī (613/1216-17) authored works on Shāfi’ī principles of jurisprudence which were of groundbreaking significance within the madhab.

Later scholars such as al-Zanjānī (d. 656/1258) and ʿIzz al-Dīn ibn Abd ul-Salam (d. 660/1262), whose works we will explore below developed the ideas of their predecessors and presented new perspectives on legal organization and structure of al-qawāʿid al-fiqhiyya.

It was not until the eighth/fourteenth century that the field of qawāʿid embarked upon its ‘golden age’ a period which is dominated by Shāfi’ī

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263 This is Muʿīn al-Dīn Abū Ḥāmid Muhammad b. Ibrāhīm b. Abī Ḥ-ḏ al-Sahlī al-Jājarmī al-Shāfiʿī, a jurist from Nishapūr where he studied and died (613/1216). Among his books are al-Kifāyyā, Ḥdā al-wajīz li Ḥ-Ghazālī, and al-Qawāʿid. His Qawāʿid is one of the earliest works in the field of jurisprudential principles. However, it has not survived although it was an important text to students of fiqh. See Kahgālā, Muʿjam (1957), 7:212.

264 For al-Nawawī，请 see p. 131, n. 288 below.

265 My use of the relational terms ‘early’ or ‘earlier’ and ‘late’ or ‘later’ separates events occurring before and after the beginning of the seventh/thirteenth centuries.

266 This is Abū Ḥ-ḏ Manāfī Muḥammad b. Ḥmad b. Bakhtīār al-Zanjānī al-Shāfiʿī, a jurist, usūlī, Qurʾān commentator, ḫadīth scholar, and linguist. He lived in Baghdād where he was Qāḍī Ḥ-ḏ al-Qudāt but was later removed from the position. He taught at the Nizāmāyya and the Mustansiriyya. He was martyred upon Hulagu’s sack of Baghdād in 656/1258. His most important works are Ṭafsīr al-Qurʾān and Kitāb Takhrij al-fūrūʾ ʿalā l-usūl. Please see Kahgālā, Muʿjam (1957), 12:148-9.

267 ʿIzz al-Dīn b. ʿAbd al-Salām b. Abī Ḥ-Qāsim b. al-Ḥasan b. M. b. al-Muhadhdhib al-Sulāmī al-Dimashqī al-Shāfiʿī, known as Ibn ʿAbd al-Salām, was a Shāfiʿī jurist, usūlī and linguist. ʿIzz al-Dīn was born in Dimashq in 577 or 578/1181 where he learned fiqh from Ibn ʿAsākir and later taught and issued fatwās. He is said to have reached the level of ḫithād. He died in al-Qāhirah in 660/1262. Among his best works are al-Qawāʿid al-kuhrā fī usūl al-fiqh, al-Ishāra ilā ʿl-ījāz fī baʿḍ anwār al-ṣajā, and al-Ghāya fī ikhtisār al-Nihāya. See Kahgālā, Muʿjam (1957), 5:249. Please also see below, p. 144, n. 316.

268 See “Early Shāfiʿī Contributions to the Field of al-Qawāʿid Generally and ʿal-ʿĀda Muḥakkama” In Particular”, p. 127 below.
accomplishment and scholarship on the topic\textsuperscript{269}. Shāfī‘ī fuqahā of this period introduced some of the most constructive and enduring organizational structures and methods of discussing the qawā‘id, which served as a foundation for nearly all future exploration of the field, regardless of madhab affiliation.

For this purpose, our discussion of eighth/fourteenth to tenth/sixteenth century Shāfī‘ī contributions to the field will be much longer than in the previous chapter. We will present - to varying degrees of depth - the works of numerous Shafi‘ī fuqahā of the highest esteem who lived during this time and some of whose works represent major turning points in the historical development of the principles of jurisprudence of this time.

Some of these important Shafi‘ī turning points include: Ibn al-Wakil’s use of ‘ashbah wa nazair’ and al-Subki’s division of the qawā‘id into major and minor ones are the two most important developments in the field from its inception to the present.

4.3: Shafi‘ī Positions on Ādā and ‘Urf As a Source of Law in Adjudication

As we have seen in the previous chapter, it is tasking to discern a consistent and broad position on the use of custom as a source of legal evidence. However, the Shafi‘ī case presents one of the most interesting developments in Islamic legal history: al-Shafi‘ī himself changed his fiqh from

\begin{quote}
\textsuperscript{269} On the important developments in the field during the eighth/fourteenth century, see al-Nadwī’s \textit{al-Qawā‘id al-fiqiyya}, 138.
\end{quote}
old, ʿIrāqī teachings to new Egyptian teachings—a change which has often been attributed to the vastly different needs, norms and customs of the people of these two regions.

4.4: Early Shāfīʿī Contributions to the Field of al-Qawāʾid Generally and ‘al-ʿĀda Muḥakkama’ In Particular

Despite the relatively few extant texts on the principles of jurisprudence from the fifth/eleventh to seventh/thirteenth centuries, scholars made great intellectual contributions to that burgeoning field. Like the Ḥanafīs before them, Shāfīʿīs expended considerable efforts to treat this subject laying the foundations for their future domination of al-qawāʾid al-fiqhiyya.

Six early Shāfīʿī scholars were of particular importance in the formation of Shāfīʿī qawāʾid studies during this time. These were al-Qāḍī Ḥusayn al-Marwarrūdhī (d. 426/1070), al-Juwaynī (d. 478/1085), al-Jājarmī (d. 613/1216), al-Nawawī (d. 613/1216-17), al-Zanjānī (d. 656/1258), and ʿIzz al-Dīn ibn ʿAbd al-Salām (d/ 660/1262).270 We will examine these as the structural foundations of Shāfīʿī qawāʾid fiqhiyya in general by focusing our discussion on the qāʿida “al-ʿāda muḥakkama”.

4.4.1: al-Qāḍī Ḥusayn al-Marwarrudhī

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270 The works of two of these scholars, namely al-Qāḍī Ḥusayn and al-Jājarmī have been lost. However, we will mention their contributions to the extent possible while delving more deeply into the works of the other four early Shāfīʿī scholars who pioneered the field of qawāʾid in their madhhab.
Al-Qaḍī Ḥusayn al-Marwarrūdhi, one of the most esteemed Shāfi‘ī scholars of usūl and furū‘ during the fifth/eleventh centuries, encapsulated Shāfi‘ī fiqh into four major principles. Muḥammad al-Jājarmī was likewise an eminent scholar who displayed the highest abilities in various branches of science. His celebrated work, al-Qawārid (of Shāfi‘ī jurisprudence), was of immense benefit to students and became a standard class book. Yet despite its importance and popularity as a school text, it has not survived. Although the works of both scholars are referred to with deep respect and homage by later Shāfi‘ī scholars of qawārid, little is in fact know of the contents of these works or the methods they used to treat their subject matter.

4.4.2: Imām al-Ḥaramayn al-Juwaynī

Imām al-Ḥaramayn al-Juwaynī, who stands out as one of the most brilliant Shāfi‘ī scholars of all time, also took a particular interest in the

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potential role of *qawā'id* to structure the law. *Ghiyāth al-umām fi iltiyāth al-
ẓulam*274 is a singular accomplishment which anticipates and designates a
course of action in the event of two particular lapses in the authoritative
leadership of the Muslim community275. The first discussion assesses the
problems of and offers guidelines for the *ummah*, or community of believers,
in the absence of an Imam (or caliph, the political leader of the wider
community of Muslims)276. The second discussion anticipates the existence of
a time devoid of legal or religious scholars and practitioners277. It is the latter
portion of the text that is of interest to us in the context of *qawā'id fiqhiyya*.

Although *Ghiyāth al-umam* is not at all a *qawā'id* work278, al-Juwaynī
devotes a considerable amount of his thought to them279. Anticipating a time
devoid of transmitters, practitioners, and authorities of the *sharī'a*, the author
astutely highlights the indispensability of clearly understanding the legal

274 Imām al-Haramayn Abī ‘l-Muʾārif al-Juwaynī, *Ghiyāth al-umām fi iltiyāth il-
ẓulam*. Eds. Fu’ād ‘Abd al-Mun‘im and Muṣṭafā Hilmī. (Alexandria: Dar ul-
Da‘wa, 1979). His father was also known for having written a book on *al-Qawā'id al-fiqhiyya*.

275 Al-Juwaynī’s book begins with a comprehensive discussion of the institution of the Imāma
which comprises nearly sixty percent of the text. That discussion is followed by one on the
absence of the imam and another on the absence of transmitters of legal knowledge.

276 See *Ghiyāth*, 224, ‘*al-Qawl fi Khulūww al-zamān ‘an il-a‘immah*’. See also 376 where he
confirms once again his reasons for having written this work and particularly this section. He
says, “*Fā inni lam ufjamī hadhā ‘l-kalām ...*”.

277 See *Ghiyāth*, 284, ‘*Taqdīr inqirād hamlātalu ‘l-sharī'a*’.

278 The author’s father wrote a work entitled *al-Furūq*, which deals more directly with
*qawā'id*. This work has not been published. See al-Zahīlī’s *al-Qawā'id al-fiqhiyya ‘alā al-
madḥhab al-Ḥanāfī wa ‘l-Shāffi‘ī*.

279 See *Ghiyāth*, 284-380, *passim*. Also, see 316 for example, where al-Juwaynī refers to
certain *qawā'id* as ‘*qawā'id kulliyyya*’, a distinction not made by other scholars until al-Subkī.

Proceeding in fiqh order and discussing the most important chapters of fiqh (such as al-ṭahāra and al-ṣalāh), al-Juwaynī presents the implications and applications of as certain qawā‘id, such as al-yaqīn la yazūlu bī ‘l-shakkh\footnote{281}, mā lā yu‘lam fiḥī tahrim yajrī‘alā ḥukm ul-ḥill, and ra‘ al-ḥiṭj wa ‘l-ḥaraj, or the lifting of undue hardship\footnote{282}.

4.4.3: Al-Nawawī’s\footnote{283} al-Ūṣūl wa ‘l-Ḍawābiṭ\footnote{284}

\footnote{281} Although al-Juwaynī does not use this phrasing, the meaning and essence is one. See for example, his Ghiyāth, 317 where he says, “One of the established sharī‘i principles, or al-qawā‘id al-sharī‘iyya (by which he means al-qawā‘id al-fiqhiyya) is the presumption of certainty in the ṭahāra, or ritual purity, of things until a certainty of its impurity is verified.}

\footnote{282} See Ghiyāth, 316-380.}

\footnote{283} This is Abū Zakariyya Yahya b. Sharaf b. Marīy b. Ḥasan b. Ḥusayn b. Muhammad b. Jumʿa b. Ḥīzāmī al-Nawawī. His nisba is to Nawā, a small town in the area of Ḥūrān in Syria. Abū Zakariyya al-Nawawī was born in Muḥarram, 631 ah to a merchant in whose store al-Nawawī worked from the age of 10 years. However, he was not skilled in buying and selling and did not enjoy this work. Instead he spent his time reading Qurān even in place of playing with other children. Al-Zarkashi, another great Shāfī‘ī scholar of the time, recalls seeing kids taunting and nearly forcing him to play with them while he tearfully evaded them. When he reached 19 years of age, his father took him to Damascus to continue his studies where he excelled in all fields. It is reported that he spent six years in intense study where he wasted virtually no time without learning, memorizing, or reading. His character was one of simplicity and zuhd. For example, he is said to have spent those years without ever sleeping in a fully reclined position, neither night nor day. When asked how he rested, he said he would simply lean on his book and take a nap and continue where he was before. Al-Nawawī ate one meal after ‘isha’ prayer and drank once in the early dawn hours of the day. He wrote extensively in fiqh, ḥadīth, and other fields and emerged as one of the Shāfī‘ī
In his very brief epistle on *uṣūl* and *dawābīṭ*, al-Nawāwī seeks only to highlight and comment upon the most essential aspects of legal practice rather than treat exhaustively the field of *al-qawā'id al-fiqhiyya*. Al-Nawāwī’s target audience is the student of Șhāfī’ī law and his overall goal is to provide a handbook of indispensable knowledge, which is reminiscent of other scholars before him.

The five major objectives of *al-Uṣūl wa ʿl-ḍawābīṭ* are clearly put forward at the onset with the goal of keeping students of Șhāfī’ī law from going astray in their learning and practice. These five objectives are to establish unifying principles and various limiters, group similar cases together, provide examples of particular cases which are derived from *uṣūl* or which are based upon them, contain or consolidate many scattered legal determinations, and clarify many conditions of well known *uṣūl*.

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285 See the editor’s comments, *al-Uṣūl*, 6 and al-Nawawī’s statement, 21, in which he says, “These are *qawā'id, dawābīţ*, important *uṣūl*, and required goals that which [are important and very much] needed by the students of Shāfī’ī law- and students of all fields. They are indispensable to fiqh scholars…” 21-22.

286 Namely, al-Karkhī and especially al-Dabūsī. Please see Chapter Three, above.

287 See al-Nawawī, *al-Uṣūl*, 22: “ʼal-maṣāṣid bihā [i.e. al-risāla, or the epistle] bayān al-qawā'id il-jāmī'a wa ʿl-ḍawābīţ il-muḏṭaradāt…”.


The author centers his discussion on nine issues, or masāʾil which highlight his five objectives. These are as follows:

<table>
<thead>
<tr>
<th>Masʿala#</th>
<th>Title in Arabic</th>
<th>Translation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Madhhab ahl al-sunna wa ‘l-jamāʿa fi ‘l-qadar</td>
<td>Predestination According to the Sunnīs</td>
</tr>
<tr>
<td>2</td>
<td>Aqsām ‘uqād al-muʿāmalat min al-luzum wa ‘l-jawāz</td>
<td>Categories Of Transaction Contracts With Regard To Their Validity And Bindingness</td>
</tr>
<tr>
<td>3</td>
<td>Idha in’taqada ‘l-bayʿu lam yattariq ilayhi ‘l-fashku illa bi aḥadi sabratu asbābin (Asbāb al-fashk fī al-buyūʿ)</td>
<td>Once A Sale Has Been Completed It Can Only Be Voided cancelled In One Of Seven Circumstances (Causes For Cancellation Of Sale)</td>
</tr>
<tr>
<td>4</td>
<td>Mā yaqūmu fihi ‘l-watʿu maqāmu ‘l-lafz</td>
<td>Cases In Which Intercourse Takes The Place Of Declarations</td>
</tr>
<tr>
<td>5</td>
<td>Ḥukmu ‘l-ʿaqdi ‘l-fāsidi ḥukmu ‘l-ʿaqdi ‘l-ṣāḥīh fī al-damān</td>
<td>The Legal Status Of An Invalid Contract Is The Same As That Of A Valid Contract In Guarantees</td>
</tr>
<tr>
<td>6</td>
<td>Ḍabṭu jumalān min muqaddarāt al-sharīʿa</td>
<td>Setting Required Amounts/ Limits/ Measurements By Way Of Legally Determined Amounts</td>
</tr>
<tr>
<td>7</td>
<td>Bayānī aqsāmu al-rukhas</td>
<td>Categories Of [Legal] Licence</td>
</tr>
<tr>
<td>8</td>
<td>Rukhaṣu ‘l-safari thamānīn</td>
<td>There Are 8 Established Licenses For Travel</td>
</tr>
<tr>
<td>9</td>
<td>Idhā taʿāraḍa aṣlun wa ḥāhirun aw aṣlaynī…</td>
<td>If An Existing Situation And An Apparent One Are At Odds With Each Other…</td>
</tr>
</tbody>
</table>

Although Al-Uṣūl wa ‘l-ḍawābiṭ is quite incomplete in its treatment of the subject, it is an essential benchmark in the historical development of qawāʿid, ḍawābit, and ashbāh wa-naẓāʾir. al-Uṣūl wa ‘l-ḍawābiṭ reiterates a familiar theme— the problem of students who lack sufficient knowledge of

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290 ibid. “…ḥaṣru nafāʾisa min al-aḥkam al-mutafarrīqāt…”

291 ibid. “…bayān sharīʿl kathīrin min al-uṣūlī ‘l-mashhūrāt…”

292 What is between parentheses is the editor’s abbreviation of al-Nawawī’s section title. I felt it was important to bring out the author’s own words in order to demonstrate that it is, as stated, a ḍābiṭ.
their own school’s furū‘ needed to treat new cases— and seeks to remedy this phenomenon which threatens the legal educational system and the practice of law by qāḍīs and muftīs.

However, what sets it apart from other early texts is that it places the furū‘, not the uṣūl, squarely in the center of the discussion and proposes new ways of grouping and classifying cases, including the limited introduction of technical terms. The first observation reinforces a reality while the second one is a departure from early Ḥanafi scholars whose writings were heavily influenced by qawā‘id uṣūliyya.

The content and structure of the text are new and different from previous writers in a few important ways. First, the text begins on an unconventional note: by stating the Shāfi‘ī dogmatic belief in the theological principles of predestination, or al-qadar. Once this is established, the author presents areas of the law which are a priority to people’s proper

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293 We have seen this as the primary motivation for the works of both al-Karhānī, al-Nasafī, al-Dabūsī and others. It is clear that the reason al-qawā‘id al-fiqhiyya and related fields emerged when they did in the format they did was to tackle this considerable obstacle to the continuation of Islamic legal practice within the context of dominant and well-formed legal schools operating mostly under the rubric of taqlīd.

294 In this text al-Nawāwī uses the term ‘uṣūl’ to refer to qawā‘id and ẓawāḥīḥ in a way that is new and betrays their emergence as new technical terms with set meanings and ranges within a new field of inquiry, namely al-qawā‘id al-fiqhiyya. See al-Uṣūl throughout.

295 See note 298 above with al-Karkhānī and al-Dabūsī.

296 See al-Nawāwī’s al-Uṣūl wa ʿl-ẓawāḥīḥ, 23-25, where the issue is treated in a very simple fashion. He poses the question of whether God accepts and loves a sinner or not? His answer, and that of the Ashʿarite Shāfi‘īs is a resounding ‘no’ citing the Qur’ānic verse, “Lā yarda bi ʿibādihī ʿl-kufr” Surat al-Zumar, v 6. Their theological opponents, the Muʿtazila, would reply in the affirmative. The heart of this debate is the notion that every thing, act, person, or situation acts according to the will of God. Actions are deemed good or evil by God’s attribution of those characteristics to them, not by human reason.
practice of the tenets of the faith and of conducting one’s life in accordance with its teachings\(^{297}\). So for example, three of the nine \(uṣūl\) clarify the differences between various kinds of contracts, their validity, bindingness, and ways of cancellation\(^{298}\). Al-Nawawī is keenly aware of the centrality of all kinds of contracts to peoples’ daily lives and strives to raise the awareness of future qādis’ of the stipulations and conditions which govern these transactions.

The third and fifth \(masā'il\) are example of \(ḍawābiṭ\) which can inform decisions of a qādī within a limited section of law: in these cases, it is the chapters on sale and guarantees. What is interesting is that these two \(masā'il\) are stated in the syntactical form of a legal maxim. It is short, informative, and easy to recall when needed. This is a clear departure from the clumsy difficult \(uṣūl\) presented by al-Karkhī and al-Dabūsi.

Other \(masā'il\) demonstrate how al-Nawawī began to introduce new ways of organizing and structuring various particular cases of law for easier reference and use. These are \(mas'ala\) number two, four, six, seven and eight. The second \(mas'ala\) informs student of the four major kinds of contracts in a structure that is easy to learn and remember. So any kind of contract fits one of the four following categories. It is either: 1. valid for both parties (like

\(^{297}\) Although \(uṣūf\) is not explicitly (and hardly implicitly) mentioned in \(al-Uṣūl\), the subject matter itself appears in some of the cases used.

\(^{298}\) These are mas'alas #2, 3, and 5. See al-Uṣūl, 26-28 and 31-32.
sharika\textsuperscript{299} and wikāla\textsuperscript{300}) 2. binding on both parties (like al-salam and ijāra),
3. valid for one party and binding on the other (like rahn and kitāba) and 4. binding on one but there is a difference of opinion (either valid or binding) on the other, like marriage. Once this legal structure for organizing the various kinds of contract is clear in the mind of the student, he can apply the rule to new kinds of cases to determine which rules are applicable to it.

Although this work does not discuss ‘urf or ʿada to any significant extent\textsuperscript{301}, the seventh and eighth masāʾil discuss certain aspects of legal license and leniency, or al-rukhāṣ, which would emerge later as one of the five major principles: al-mashaqqat al-tajlib al-taysīr\textsuperscript{302}. The seventh mas'ala establishes clearly the categories of legal leniency while the eighth talks specifically about the license permitted to one who is traveling. It is clear from his focus on such worldly, practical, and very pressing issues that al-Nawawī worked to insure the functional practice of law in the hands of well-informed students. His contribution to the field of qawārīd is significant and although it is not explicit, his work takes people’s practice, or custom, as the touchstone for the discussion.

\textsuperscript{299} Limited partnership.

\textsuperscript{300} Proxy

\textsuperscript{301} There is one reference to customary practice in the eighth mas'ala regarding the minimum distance required to qualify as travel, upon which certain legal licenses apply. He states any opinions but settles on 48 Hashemite miles, which is customarily understood to mean 46 since the first and last mile are not usually counted. See al-Uṣūl, 42.

\textsuperscript{302} See al-Nawawī, al-Uṣūl, 37-44.
4.4.4: Al-Zanjani’s *Takhrīj al-furūʿ ʿalā al-uṣūl*: Part One

Al-Imām Abu ‘l Manāfīʿ Shahāb al-Dīn Maḥmūd ibn ʿAbī ʿl-Maḥdī ʿl-Zanjānī was born in 573 AH in Zanjān, a town on the border of Azerbaijan. Zanjān was a large town in the heart of the mountain region near the river of Qazvīn. He led a life of knowledge and contributed to many fields of Islamic and Arabic studies. He was appointed professor at the Nizāmiyya school, followed by the Mustansiriyya School and then became qāḍī ‘l-quḍāḥ of Baghdad. He was martyred in 656 during the sack of Baghdad at the sword of the Tatars. It is presumed that the vast majority of his works perished, as did an overwhelming number of treasures during this time. But biographical entries of him attest to his knowledge and erudition in such fields as *lughah*, ‘ilm al-khilaf, *uṣūl*, and *tafsīr*.

The impetus which prompted al-Zanjānī to write this book was a concern about the ability of legal practitioners to issue *ḥukm* on new cases in a manner consistent with the foundations of their own *mahdhab* doctrine as opposed to the doctrines of other schools. Al-Zanjānī, like al-Dabūsī before him, was concerned that legal scholars had become distant from the founding principles of their *mahdhab* as well as the *uṣūlī* points of contention and contrast between them which helped to solidify the differences between, say, the Shafiʿī and the Ḥanafī *madhhab*.

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304 Muḥjam al-Buldān by Yāqūt al-Hamawī, 3, p. 152. Al-Zanjānī was one of the leading Shafiʿī scholars of his time. Also, please see p. 127, n. 265 above for more information about the author.
Al-Zanjānī begins by clarifying the relationship between *usūl* and *furūʿ*. The *adilla* from which laws are derived are known as *usūl al-fiṣḥ*. He continues:

“It is well known that *furūʿ* are built upon *usūl*. Therefore, one who does not comprehend the methods of derivation nor is aware of the relationship between the *furūʿ* and their *adilla*, which are the *usūl*, that person will not be capable of going further in the field nor will he be able to perform *tafrīʿ* (or deriving *furūʿ* cases from *usūl*) by any means.

Therefore he envisions the task of this book to be a contribution to the field in a very new and much needed way. In a very real sense al-Zanjānī hopes to create a 'guide book' to provide a step-by-step progression through the often daunting task of reaching the most appropriate legal solution to a conflict or question while remaining legally on target within the framework of *madhhab* argumentation and historical decisions.

Al-Zanjānī argues that no other scholar to his day had undertaken a similar work, rendering *Kitāb takhrīj al-furūʿ ʿala ʿl-usūl* a new contribution to the field of *fiṣḥ*. Consequently, and as a matter of sound scholarship, he takes great pains to establish his methodology. First, the author begins with the *usūlī* matter (*al-masʿala ʿl-usūliyya*) to which the *furūʿ* are traced back within each *qaʿida*. Then, within that context, he mentions the *usuli* argument (*ḥujjā*) from different points of view. Then he traces back, or attributes the *furūʿ* that originate from it back to it.

According to al-Zanjānī, three kinds of legal writing are clearly interacting with each other and are negotiating their role vis-a-vis each other. These are *usūl al-fiṣḥ*, *furūʿ al-fiṣḥ* and *al-qawāʿid al-fiṣḥiyya*. Al-Zanjānī's
goal is to establish clearly once and for all the relationship between these and how one is a necessary part of, or prerequisite for reaching the other but only in a particular order. Al-Zanjānī begins with the presupposition that at least within the Shāfi‘ī and Ḥanafī madhāhib, furū‘ are grouped together under the rubric of a unifying qā‘ida only if each far‘ can be traced back to a common usūlī ħujja. This is, then, a refresher course in the defining usūl of these two schools as a point of departure for understanding key differences in formulation of judgements within each school as well as between them.

The second, equally important goal of the book is to mitigate conflict between the Shāfi‘ī and Ḥanafī madhāhib by returning to the aṣl fiqhī, or hermeneutical principle, upon which conflict was based.

It is difficult to categorize Kitāb takhrīj al-furū‘ ʿala ’l-usūl squarely within the genre of either usūl or furū‘ or even qawā‘id. However, this problem of which category a work belongs in embodies one of the most important changes facing legal scholars of the seventh to eleventh centuries AH. It is at this time that new subfields of legal inquiry and thought were beginning to emerge which corresponded to the changing legal situation, which I would argue becomes dominated by a regime of organization specialization and categorization of the existing case law and the attempted formulation of usūl, or qawā‘id. It is precisely these new realms which were being explored and elaborated through works such as this. For this reason, categorization of these early works is difficult, it at all possible…Their task
was in fact to take these subjects as a whole and locate the differences between them as well as they ways in which they overlap.

Al-Zanjānī’s methodology was to include not only ḍawābīṭ in matters of uṣūl, but also legal and linguistic principles, or qawāʿid fiqhiyya wā qawāʿid al-ʿarabiyya. It is interesting to note that al-Zanjānī sometimes supported opinions which were NOT the most widely accepted within the madhhab. Also, despite being Shāfiʿī, he only upholds or defends the Shāfiʿī position in a few uṣūl matters. Furthermore, when conveying the Ḥanafī position on a few matters, al-Zanjānī selects a viewpoint other than the dominant one, which, in his estimation, is a more accurate representation of the madhhab’s position than the dominant view.

The editor discusses the only other book which preceded Takhrīj and which aspired to do a similar task. This is Dabusi’s Taṣīs al-naẓar with which we are familiar from the previous chapter. These two works are compared and the differences between them highlighted. The most noteworthy points of convergence between these two works are that each aspires to link furūʿ back to the uṣūl from which they were derived. However, they do this in different ways. Finally, the editor notes that after al-Zanjānī’s book, writing on this topic followed one of two methodological

305 See al-Zanjānī, Takhrīj, 20 for editor’s comments.
306 Al-Zanjānī, Takhrīj, These are enumerated on p. 21.
307 ibid. 21.
308 ibid., 21-24.
approaches. The first was organizing "furūʿ" in terms of legal maxims as was the case in works of qawāʿid fiqhiyya, ashbāh wa-nazāʿīr, and furūq beginning with Ibn ʿAbd al-Salām (d. 660) and ending with Maḥmūd Ḥāmzā, muftī of Damascus (d. 1305). The second approach was to elaborate upon matters of ādā al-uṣūl only such as Asnāwī (d.772) in his Tamhid through al-Timurtāshī (d.1004) in his al-Wuṣūl ilā qawāʿid al-uṣūl309.

Al-Zanjānī’s Takhrij al-furūʿ ‘alā al-uṣūl: al-ʿāda muḥakkama

Al- Zanjānī’s Takhrij is loosely structured according to the chapters of fiqh, beginning with al-tahāra310 and ending with al-sayr311. Within each chapter, the author only treats certain issues, or masāʿil, in which Ḥanafis and Shāfiʿis are divided along uṣālī lines. In this way, al-Zanjānī demonstrates how the uṣālī difference, or khilāf, between the two schools dictates different aḥkām in all cases which are derived from that aṣl.

Customary practice is discussed several matters throughout the text. However, we will examine one issue in particular from the legal chapter on ghaṣb, or usurpation, in which al-Zanjānī gives us his legal perspective on ʿurf in tashrīʿ312. In this matter, it is al-Shāfiʿī’s opinion that the use of a thing is

309 ibid., 24-25.
310 This is usually the first chapter of any fiqh work and focuses on matters pertaining to ritual purity. See al-Zanjānī, Takhrij, 47.
311 See al-Zanjānī, Takhrij, 305.
312 See al-Zanjānī, Takhrij, 198-201
equivalent to the components which are essential to it and which are constructed with that particular purpose in mind. The example given is that of a house:

Whose ceilings are meant to protect against heat and cold, whose walls protect its occupants against theft or usurpation from without, and whose land protects it from plunging downwards.\textsuperscript{313}

Al-Zanjānī explains that each part has a form, shape or purpose which differentiates it from others and which is used to derive a set purpose from it. Each of these, say the walls, or ceilings of a house, come and go as does any property or asset which was meant to be of service to people. Therefore, use of the term ‘\textit{māl}’ on these [individually] is more proper than on the whole, or the house. Abū Ḥanīfā held the opposite view, which was that the existence of the usufruct was itself the property or value (\textit{māl}) based on the component parts. Al-Zanjānī refutes the Ḥanafī position by rendering it based on definitions and debate, or \textit{al-haqāiq wa ʿl-nazar}, which is not what legal decisions are based upon. He says:

That is accepted if we take definitions and reason into [legal] consideration. However, legal determinations are not based upon definitions and logical reasoning. Instead they are based on customary beliefs. The thing which no longer exists, or \textit{al-maʿdūm}, which they [Ḥanafis] refer to is customarily and legally understood as property. Furthermore, the customary and legal determinations are predominant in legal cases.\textsuperscript{314}

\begin{flushright}
\textsuperscript{313} ibid, 198.
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He goes on to explain that custom dictates that whoever can prove possession of and residence within a dwelling is deriving its usufruct. As a result, the Shāffic legal determination is that the usufruct of the usurped thing is to be compensated (or guaranteed) by the usurper upon its depletion. The Ḥanafī position in that legal matter is that it is not to be compensated and the usurper does not owe anything for as long as he is usurping it\textsuperscript{315}.

The significance of this work for the historical development of āda as a principle within all schools is noteworthy. This text demonstrates that at this point in Shāffic legal thought, custom and divine law, or shar\textsuperscript{e}, are made equivalent to each other, at least in this case\textsuperscript{316}. Later, a subordinate principle would emerge from this and other discussions, which is that what is known by ṣurf is as what is known by shar\textsuperscript{e}, or al-ma\textsuperscript{r}ūfūn ka ḥarṣūtu shar\textsuperscript{e}n.

4.4.5: ‘Izz al-Dīn ibn ‘Abd al-Salām’s\textsuperscript{317} Qawārid al-ḥākām fī maṣāliḥ al-ānām\textsuperscript{318}

\textsuperscript{315} al-Zanjānī, Takhrij, 199.

\textsuperscript{316} ibid, “wa ḥukm al-shar\textsuperscript{e} i wa ḥarṣūtu ghālibun fī ḥarṣūtu ‘l-ahkām”.

\textsuperscript{317} He is ‘Izz al-Dīn b. ‘Abd al-Salām b. Abī ‘l-Qāsim b. al-Ḥusayn al-Sulami whose laqab was Sulṭān al-Ṣalāmān. ‘Izz al-Dīn was an esteemed scholar of the Shāffic madhhab. He was born in Damascus on 577 and visited Baghdād in 599, where he remained for one month. Upon his return to Damascus he was appointed as khaṭīb and professor in al-Ghazali’s corner, and later khaṭīb of the Umayyad mosque. After criticizing the ruler for a political move and then neglecting to mention him in ritual supplications, ‘Izz al-Dīn was imprisoned then moved to Egypt where he was appointed khaṭīb of Masjid Amr, or al-masjid al-‘atīq. He later settled as professor at the Ṣāliḥiyya school where he remained until his death in 660. See Abū Bakr b. Hidāyat Allah al-Ḥusayni (d. 1014 ah), Ṭabaqāt al-Shāfficīyya. Ed. Adel Nuwayhad. (Beirut: Dār al-Āfāq al-Jadīda, 3\textsuperscript{rd} ed., 1982/1402), 222-223. See also, Ṭāj al-Dīn al-Subkā. Ṭabaqāt
Throughout our discussion of the early Shafi'i contributions to the field, we have seen nearly as many approaches and structures as we have seen scholars. The case of ʿIzz al-Dīn Ibn ʿAbd al-Salām and his *Qawāʾid al-Aḥkām fī Maṣāliḥ al-Ānām* is no exception. This was a significant Shafiʿi work on *qawāʾid fiqhiyya* during the early seventh century due to several factors.

First of all, Ibn ʿAbd al-Salām is the first scholar to present a minimalist approach to the discussion of *qawāʾid al-fiqh*. In this book, he argues that all of Islamic law emanates from one central concept: bringing about benefit and preventing harm. With that as his point of departure, his book demonstrates how all acts of worship, or *ʿibādāt*, and all transactions, or *muʿāmalāt* can be conceptualized and categorized within the framework of bringing about good and preventing harm. Ibn ʿAbd al-Salām discusses a wide range of legal matters including sale, divorce, and various punishment highlighting where there is the most benefit to people and how to avoid harm. As a result of this work, we see that Ibn ʿAbd al-Salām considers *mašlaḥa*, or the benefit and wellbeing of the people, to be the highest goal, or *maqṣad*, that the *sharīʿa* aspires to achieve and, as such, the only legal maxim needed to

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319 These are “*jalb al-mašāliḥ*” and “*darʾ al-mafāsid*”. See Ibn ʿAbd al-Salām, *Qawāʾid al-aḥkām*, 7 and passim.
structure the law. In fact this would emerge as one of the five universal maxims of Islamic law, known as *al-mashaqqa tajlubu ʿl-taysîr*, or hardship brings about ease.

The second way in which Ibn ʿAbd al-Salām makes his mark in the history of *al-qawāʾid al-fiqhiyya* is that his is the first work to carry the technical term “*qawāʾid*” in its title, a turning point in the field’s development in its own right. The work is organized in terms of *fuṣūl, qawāʾid* and *fawâʾid*. There is very little attention to the *uṣūl* upon which *furūʾ* are built except the *aṣl* of *maṣlaḥa*. There is very little reference to al-Shāfiʿī or other eponyms and their rational for judging the way they did. Instead, the author is himself putting forth these arguments without feeling the need to attribute them to a more authoritative figure within the schools hierarchy of authority. This represents a shift to a new form of legal thinking: from relying upon the eponyms to couch and bolster one’s arguments to becoming empowered and emboldened to perform *ijtihād* within the existing legal reality: i.e. the *madhhab*. So, Ibn ʿAbd al-Salām helps us visualize the legal space between *ijtihād muṭlaq* and *taqlīd*—that is *al-ijtihād fi ʿl-madhhab*. Later scholars would refer back to Ibn ʿAbd al-Salām as a crucial turning point in the formulation of *al-qawāʾid al-fiqhiyya*.

Third, *Qawāʾid al-aḥkām fi maṣāliḥ al-ānām* is the first book of *qawāʾid* which discusses ʿ*urf* extensively and begins to treat it as a principle which governs adjudication in many important ways. In this work, Ibn ʿAbd
al-Salām establishes for the first time, a somewhat systematic approach to ‘urf which within one century would be adopted as the standard, elaborated upon and completed, then become formulated as one of the five major principles of Islamic law—al ʿāda muḥaṅkama.

Throughout his book, ʿIzz al-Dīn ibn ʿAbd al-Salām naturally discusses people’s customary practice and the role it plays in adjudication in a new, systematic and well-structured method. In his work which centers on maṣlaḥa, or the best interest of the people, ‘urf factors prominently because it often entails bringing about benefit and warding off harm. The author identifies three primary ways in which ‘urf and the legal adjudication come together and affect the legal outcome. These are treated within three topics, or fuṣūl, under which he enumerate and groups as many examples from furūʿ as possible. These topics are:

1. Rendering people’s situation and customs in the position of explicit statements in the matters of limiting the general and specifying the unqualified,

2. Understanding statements or words according to the probable implications of customary practices should the need arise, and

3. Actions are presumed to be based on the most commonly understood practice of the people.

321 See Ibn ʿAbd al-Salām, Qawāʾid al-akhbām, especially 79-80, and 83-93 but also throughout the text.

322 See Qawāʾid al-akhbām, 280: “Faṣlūn fi tanzīli dalālat al-šādāt wa qarāʿin al-aḥwāl manzīlatu ẓariḥ al-aqwāl fi takḥiṣ al-ṣumūmi wa taqyīd al-muṭlaq…” For his complete discussion of this topic, please see 280-287.

323 ibid, 287: “Faṣlūn fi ḥamli ‘l-alfāz ʿala ẓunūnin mustaḏādatin min al-ʿādāt li-maṣīṣi ‘l-ḥajātī ila dhālik…” For his complete discussion of this topic please see 287-292.

In the first faṣl, Ibn ʿAbd al-Salām argues that people’s customary practice is legally equivalent to an explicit legal stipulation or statement. This is significant because, as we have seen, it places people’s established customs and habits on the same level of legal certainty as explicit legal statement or stipulation.

This statement amounts to the establishment of a legal maxim which is applicable to many individual kinds of cases. Ibn ʿAbd al-Salām lists and discusses twenty-three areas of furūʿ to demonstrate the ways in which the qāʿida has been applied in Shāfiʿi law. These fall along two main themes, which are that the legal weight of ʿurf is equivalent to that of the law, or al-sharṭ, and that 2. what is known by ʿurf is the same as what is known through a legal stipulation, or sharṭ. I will illustrate these themes through a few examples that Ibn ʿAbd al-Salām records.

First, Shāfiʿi law places certain customarily established limitations on unlimited agency such that an agent must buy and sell for only the fair market value, using local currency. Also, permission in marriage is technically

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325 See Ibn ʿAbd al-Salām, Qawāʾid al-ʿakbām, 280.

326 ibid, 280-287. For a more complete list of these 23 types of cases, please see appendix 2 (“Ibn ʿAbd al-Salām: Cases Where ʿUrf is Equivalent to Explicit Statement”).

327 ibid, 281, and passim.

328 Although this is the more rational understanding for unlimited agency, we saw that Abū ʿAbd al-Hāfīṣa, the head of the rationalist school, did not allow custom to limit such an arrangement, whereas both of his companions did. It is true that unconditional means unconditional and words should be understood in terms of their meanings, as he would argue. However, Ibn ʿAbd al-Salām’s central tenet is that harm should be avoided. And applying the letter of the law would prevent benefit and bring about harm. So, if an agent who has unlimited agency
general but is customarily known to meet two conditions, *kafāʿa* and the
equivalent dowry. In contracts of *istiṣnāʿ* (paying a craftsman ahead of
delivery for a good or service: carpenter, barber, porter) and *istiḥār* (hire: for
cooking, construction, renting a beast of burden, etc), it is established that
their pay, the way in which they work, and the length of time it takes them to
deliver the good or service are all known through customary practice. If they
do not deliver the good or service in the customarily understood manner,
quality, in the known timeframe and at the price known as the appropriate
value, then one does not have to pay them a wage.

Another way in which custom is elevated to the level of legal fact, or
higher, is that a legal status is determined not through legal proof, but instead
through the probable meanings of certain actions or statements which have
legal significance according to custom. For example, the customary
practice of delivering a woman to a man in a wedding procession, known as
*izfāf*, indicates that these two people are legally married. The same
principle applies in the case of *muʿātah* and other transations. In all of these
cases custom is indeed the legal determinant (al-*hukm*) which
indicates the *hukm* of these and similar kinds of disputes. Although Ibn ʿAbd
sold X’s car -valued at $9,000- for $100, X would suffer an unacceptable amount of harm.
Therefore custom must limit the unconditional to protect the interests of the people.

Please see Ibn ʿAbd al-Salam, *Qawārid*, 287-292 for examples.

Ibid, 287.

*“Al-bayt bi ʿl-muʿātah*” is simply exchanging a product for its value without offer and
acceptance statements, which are the legal conditions for a valid sale. However, due to the
preponderance of *muʿātah* sales in people’s customary practice, it was deemed legal in order
to avoid undue hardship.
al-Salām does not phrase his argument using those specific words, he does draw the broad strokes which will allow the following generations of scholars to deduce that principle from his work. This is therefore, a critical milestone in the development of the qāʿida al-ṣāda muḥakkama and the first instance of its treatment in a comprehensive and multifaceted way.

Other significant contributions include a discussion of ʿurf sharī or giving known Arabic terms a symbolic meaning according to the spiritual customary meaning they have inherited (such as salāh, zakāh, ḥajj).

Furthermore, al-idhn al-ʿurfī, or permission which is granted according to custom is discussed and examples are enumerated. The author also mentions certain conditions which must be in place before custom can be invoked332, as well as presents cases in which there is a difference of opinion on the use of custom as an arbiter333. These are discussions which did not take place in earlier works of qawāʿid. Qawāʿid al-ahkām fī maṣāliḥ al-ānām was the crucial chapter after which books in the field of qawāʿid al-fiqhīyya came to take new and unique form, content and structure. In many ways, this book represents the true birth of the field.

4.5: Summary of Early Qawāʿid works

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332 That it be tariq, or widespread, common, for instance.

333 See Ibn ʿAbd al-Salām, Qawāʿid al-ahkām, 282.
Within the Shāfī‘ī madhhab, the earliest works of qawā'id fiqhiyya yield several important observations regarding the development of the field up to the middle of the seventh century AH. First, the texts we have examined all shared a considerable concern for preserving the heritage and tradition upon which its case law was established lest it be lost on future generations of students and scholars. Furthermore, we see that the field of al-qawā'id al-fiṣḥiyya emerged in a variety of froms representing explorations of different kinds. From al-Zanjānī’s highly organized and structured work which clarified the roots of law so that all future cases can easily be built upon them to Izz al-Din’s dynamic restructuring of all law under the rubric of just one principle, namely maṣlaḥa, it is clear that fuqahā’ were charting new legal ground. Also, by the end of the seventh century AH, there are only the beginning elements of a solid, consistent technical terms for this field with most discussions using the terms uṣūl, qawā'id and dawābīt. What we can deduce is that the meanings of these terms was clear enough for the scholars to work with. Furthermore, this period presents a vast range in the number of qawā'id that emerge, ranging from one, to nine, to many more. However, overall, they are relatively little and exhaustive in breadth. Regarding the development of ʿurf, it is clear that with each generation of scholars, the range of the discussion of customary practice increased and became more and more comprehensive as the cases which were determined by it became increasingly synthesized under ʿurf as a topic. It would be only a few short decades until
4.6: Later Contributions to the field of al-Qawâ'id (Eighth/Fourteenth to Tenth/Sixteenth Centuries)

4.6.1: The Dawn of al-Ashbâh wa 'l-naza'ir: Ibn al-Wâkîl's Kîtab al-Ashbâh wa 'l-naza'ir

Ibn al-Wâkîl’s al-Ashbâh wa 'l-naza'ir was written in the early eighth century AH and is most noteworthy for bringing together the concepts of al-qawâ'id al-fîqhiyya and al-ashbâh wa 'l-naza'ir for the first time.

Furthermore, it is considered the most influential book of the time in the field to which many future authors referred. Although Al-Ashbâh wa 'l-naza'ir poses several problems, it remains an important part of the historical process which brought about the golden age in al-qawâ'id al-fîqhiyya.

Furthermore, al-Ashbâh wa 'l-naza'ir attempts to present a Shâfi'i ‘theory’ of the use of 'urf but falls short. However, his attempt, which occurs mostly in two particular discussions, is worth examining to reflect on his role.

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334 He is Şadr al-Dîn Muḥammad b. ʿUmar b. Makki b. ʿAbd al-Ṣamad b. ʿAṭiyya, b. Aḥmad b. ʿAṭiyya al-Maṣrī, a Shâfi’î scholar who is known as Ibn al-Marḥal and Ibn al-Wâkîl. He was born in Dâmyat in 665/1267 and grew up in Dimashq, where he acquired knowledge in fiqh, uṣūl, grammar. He also taught there and became the shaykh of Dâr al-Ḥadîth al-Asfrafiyya. He debated Ibn Taṭamiya. He later moved to Ḥalab, then to Miṣr, where he taught at al-Ḥusayn. He died there in 716/1317. He wrote Al-Ashbâh wa 'l-naza'ir and Sharḥ al-ahkâm li ʿAbd al-Ḥaqq. See Kahlâlā, Muqâjam (1957), 11:94-5.

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