Legal Principles (*Qawā‘id*) in Legal Practice: An Analysis of *Fatwās* during the Age of *Taqlīd*

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The age of taqlīd, which began around the twelfth century, has been characterized by modern scholars of Islamic law as being rigid and having uncreative legal practices. However, despite the passive name of “taqlīd” (imitation), this age produced new methodologies and notions for creative legal interpretation. Although the “qawā‘id” (legal principles, sg. qā‘ida) represent these new notions, its specific function in legal practice has never been fully examined. In this paper, I will examine five fatwās (legal opinions) in which the qawā‘id are applied so as to clarify how they work in legal decisions.

Not only these fatwās illustrate how Muslim jurists use the qawā‘id as a vehicle for legal change, but also they interpret the law with restraint and never abuse it. When Muslim jurists can not find a reasonable solution under the normal rules, they sometimes make a decision according to the qawā‘id such as “attaining benefit (maslaha),” “averting harm” and “blocking means.” In these cases, Muslim jurists consciously exercise discretion which is legitimated by the qawā‘id and constituted a part of Islamic law in the age of taqlīd. Moreover, as the qawā‘id reflect the goals and purposes of Islamic law (maqāṣid al-sharī‘a), they work as an instrument for securing them in legal practice.

The qawā‘id and the conventional uṣūl al-fiqh (Islamic legal theory), which is rich with a distinctive methodology dominated by the literalist tradition, have different approaches to interpretation, but they function harmoniously in practice. It is up to the Muslim jurist to decide how they are used together in an integrated way in a concrete case. Islamic law has been developed in the age of taqlīd to accommodate the diversity of reality so as not to lose its relevance to the practice.

Keywords: legal principles, qawā‘id, legal practice, fatwā, benefit

I. Introduction

A Jurist is the highest level of intellectual in Muslim society and their primary function is to apply Islamic law (sharī‘a) to the concrete world of human affairs. Islamic law is God’s law, that is to say, God is only the lawgiver, and in the first instance, it means rules (aḥkām) derived from revelation which consists of Scripture (the Qur’ān) and the Prophet Muḥammad’s Tradition (Sunna). The legitimacy of a rule comes from its affiliation to revelation, and there is no room for doubt about the perfection of Islamic law (Bearman et al. (eds.) 2005, 5).

While Muslim jurists believe God’s law should govern all cases without any exceptions, Western scholars have doubts about such attitude because in their eyes, Islamic law is too idealistic to apply to practical cases of Muslims. Since the nineteenth century, Western scholars...
of Islam have argued that Muslim jurists have made judgmental decisions according to ethical, political, personal or utilitarian considerations, rather than legal rules. Islamic law is not a law in a strict sense for them but a system of religious norms or sacred law that is characterized as irrational (Hurgronje 1957, 256-63; Weber 1925, xlviii-xlix and lv; Johansen 1999, 42 ff.). They changed their view during the last quarter of the twentieth century and increasingly became aware of the wide range of applications of Islamic law, from ritual law and criminal law to a broad array of contracts. This was because they increasingly took note of expert legal opinions (fatāwā or fatwās) during this time (Masud et al. (eds.) 1996).

However, there are still many questions about the application of Islamic law. One of the reasons is that Western scholarship has, until recently, alleged that Islamic law did not experience any noticeable development after the formative period (about AD 900). On this point, some scholars, such as W. Hallaq, advocate the theory that Islamic law underwent changes at different points in its history, especially through fatwās. He alleges that if the fatwā of a mufīṭ, a specialist in the law who is qualified to issue fatwās, came to be regarded as correct by subsequent scholars it would be incorporated into the legal manuals (furūʿ) of the school to which he belonged. In other words, the doctrinal development of Islamic law after the formative period owes much to fatwās (Hallaq 1994).¹

The image of Islamic law as being idealistic and rigid is shaped, not only by some Western scholars, but by many laymen as well. Some might also think that Islamic law is originally rigid and changes in response to reality-based requests. However, this is a misunderstanding brought on by overlooking the true picture of Islamic law.

First of all, not all Islamic legal rules are derived from revelation through simple process of interpretation of its texts, and Muslim jurists are quite certain of this throughout the history. For example, the jurist cum philosopher Ibn Rushd the Grandson (d. 595/1198) clearly says in his book Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid that most rules he argues about are “the rules which have a textual basis in revelation or are closely related to it” (Ibn Rushd al-Ḥafīd 1997, Vol. 1, 1). This implies the presence of rules derived from non-revelatory sources or which are not closely related to revelation. Indeed, the Qurʾān is the prime source of law, but the Qurʾān is not a legal document in the sense that legal material occupies a small portion of the bulk of its text. As there are only about three hundred and fifty legal verses in the Qurʾān (Kamali 1989, 219),² it is up to Muslim scholars to search through the less precise statements of the text in order to explicate God’s law and turn it into a system amenable to every day legal concerns (Johnston 2004, 240).

Secondly, in Islamic legal theory, the fact that the vast majority of rules found in legal manuals have no direct root of revelation does not conflict with the premise that the legitimacy of rules comes from its affiliation to revelation. Especially Mālikī (one of the four major schools of Islamic law) jurists like Ibn Rushd are so aware of this that they seldom cite the phrase attributed to their eponym Mālik b. Anas (d. 179/795) as follows: “Istiḥsān is nine-tenths of ʿilm (legal

¹ I do not agree with Hallaq because the examples he held up are rare and the legal manuals undergo very little change after formative period. I think the development of Islamic law in the later period owes a great deal to theoretical and methodological development rather than doctrinal one.

² The whole Qurʾān has six thousand two hundred and thirty six verses.
Istiḥsān, an Arabic technical term for preference, is an Islamic legal doctrine closer to the western legal concept of equity (Kamali 2005). One of its oldest definitions by Mālikī jurist says: “The concept of istiḥsān which Mālikī scholars employ means to accept stronger evidence of the two (Bājī 1995, Vol. 2, 639)” While there are many definitions and discussions about istiḥsān, it generally functions as an apparatus for justifying the centrality of empirical analysis to their analysis of revelatory text (Shāṭibī n.d. a, Vol. 4, 148-149; Fadel 2002, 176). Mālikī jurists don’t hesitate to count istiḥsān as one of the authentic sources of Islamic law next to two textual sources (the Qur’ān and Sunna), the Consensus of the Muslim community (ijmāʿ) and legal analogy (qiyyās) (Abū Zahra 2002, 224; Jayyidī 1987, 65). In addition, local customs that do not contradict these textual sources are also counted among the sources of the law, and new ideas or new “ways of doing things” are presumptively acceptable by default, unless a clear prohibition for them can be found in the textual sources of the law.3

These considerations indicate that Islamic law as God’s law is neither idealistic nor rigid but is flexible and open to change essentially. Indeed, as the system of Islamic law is based on a finite text (i.e., the Qur’ān and Sunna), the law might thus be applied to a case, but the result might be less than satisfactory and unreasonable in the eyes of both the jurists and parties involved. However, Islamic law developed some notions and methodologies to tackle the problem and find a desirable solution to a particular case not in an arbitrary way, but in a legitimate way. Especially in the age of taqlīd, which began roughly in the twelfth century and means “imitation,” Muslim jurists refrained from ijtihād, which means interpretation of scripture directly with no intermediate authorities standing between the sources and the individual jurist (Jackson 1996a, 167). However, while they refrained from ijtihād, they looked for new ways to make creative legal interpretations within the framework of taqlīd.4

This paper examines one of these new notions called qawāʿid (sg. qāʿida) fiqhīyya, “legal principles/maxims” and its application in some fatwās. The qawāʿid are a kind of indigenous meta-discourse; related genres include furūq (distinctions and differences between similar themes), takhrīj al-furūʿ ‘alā al-uṣūl (a process of linking practical legal decisions to governing legal sources), and maqāṣid al-sharīʿa (the purpose of Islamic law). In recent decades, both Muslim and Western scholars of Islamic law have taken interest in these genres, which overlap in their content and blend into each other because many traditional texts have been edited and published for the first time and numerous works, especially in the Arabic language, on the subject have been available.5 This has been triggered by the interest in reviving Islamic law in the Islamic world today and the qawāʿid is said to be helpful in giving secular legislators a whiff of the true spirit of Islamic law (Heinrichs 2002, 365-366).

My thesis is that the qawāʿid provide the required framework to address the problem

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3 This presumptive lawfulness is known as the principle of istiṣḥāb.
4 Ijtihād dominated the formative period and taqlīd gained the upper hand from about the sixth/twelfth century on. S. Jackson stresses that these were only dominant tendencies and neither ijtihād nor taqlīd represented mutually exclusive linear moments in the history of Islamic law. Jackson 1996a, 172-173.
5 As to the qawāʿid in general, see Heinrichs 2002.
6 For example, Hasan 2000; Raysūnī 2003; Qaraḍāwī 2006; Qaṭṭāsh 2006.
of applying legal rules based on the limited material foundation on everyday life in an ever-changing environment. In the age of taqlīd, Muslim jurists exercised discretion legitimately according to the qawā‘id when they did not find a reasonable solution under existing legal rules in their legal manuals. The qawā‘id theory to be discussed here mainly is found in the writings of a Mālikī jurist Shihāb al-Dīn Ahmad b. İdrīs al-Qarāfī (d. 684/1285) and, the fatwās to be analyzed here are found in the Kitāb al-Mi‘yār of Abū al-‘Abbās Aḥmad al-Wansharīsī (d. 914/1508), who is also a Mālikī jurist.

Al-Mi‘yār is regarded as the single most important collection of Mālikī fatwās, which al-Wansharīsī began to compile in 1485 and continued to make additions, corrections, and revisions until his death in 1508. Whereas other Mālikī fatwās collections contain the relatively limited fatwās of individual muftīs living in a particular time and place, al-Mi‘yār contains approximately six thousand fatwās issued by hundreds of muftīs who lived between 1000 and 1496 in the major cities of North Africa.7 While many historians have used al-Mi‘yār as a source for social, economic, and religious history,8 I would rely on it to illustrate the function of the qawā‘id in practical legal thought. Although they are now a common notion to modern Western scholars on Islam, how they function in legal practice has not been fully discussed. I will provide five case examples to show how the qawā‘id had regulated practical legal determinations on everyday legal questions.

This paper is presented in two parts; one part is devoted to al-Qarāfī’s qawā‘id theory and its relationship with the age of taqlīd while the other will focus on its application in fatwās.

II. Al-Qarāfī’s Qawā‘id Fiqhiyya and Its Relevance to Taqlīd
Al-Qarāfī is a Mālikī jurist who lived in Cairo during the turbulent age of the thirteenth century in which the Mamlūks took power after the Ayyubid dynasty, the Mongols replaced the ‘Abbāsid dynasty in a quest for world domination, and Muslim rulers fought against the crusaders. Al-Qarāfī, who was famous for his theory on the qawā‘id, enjoyed the reputation of a great jurist already during his lifetime partly because he never held any official post apart from teaching.9

The theory proposed by him ‘Qawā‘id fiqhiyya’ might be translated as “legal principles” or “legal maxims” and are regarded as a genre of legal literature that began to arise around the thirteenth century. The most repeated definition of it, which is presented by Shāfi‘ī (one of the four Sunnī legal schools) jurist Tāj al-Dīn al-Subkī (d. 771/1370), is as follows: “The qā‘ida is the generally valid rule with which many particular cases agree, whose legal determinations can be understood from it [i.e., the qā‘ida]” (Subkī 1991, Vol. 1, 11). However, as W. Heinrichs mentions, the notion of qawā‘id is so wide that the definition is not always suitable for all qawā‘id. For example, many qawā‘id are said to be only predominantly, rather than generally, valid (Heinrichs 2002, 375). The qawā‘id are basically a reiteration of either the Qur‘ān or Sunna and sometimes can be arrived directly from the words of the leading jurists of the school or by induction from rules of fiqh. They are to bring out the assumed inherent logic of the teaching of the school or sometimes express the general object of Islamic law (Heinrichs 2002, 369).

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7 As to al-Wansharīsī and al-Mi‘yār, see Powers 2002, 4-9.
8 For example, Brunschvig 1940-47; Idris 1961; Kably 1986; Powers 2002.
9 For an account of al-Qarāfī’s period, his life and education see Jackson 1996b, 1-19 and 33-68.
Jurists always need specific rules relevant to the subject when they make judgments or issue an opinion. Therefore, they sometimes utilize the *qawā'id* as broad guidelines in finding a solution to problems or persuasive evidence or standards against which a ruling for a concrete case can be measured and tested for its validity (Jackson 1996b, 92).

As the notion of *qawā'id* is used in a broad sense, the number of them differs as to the author. One of the oldest *qawā'id* work is Hanafī jurist Abū al-Ḥasan al-Karkhī (d. 340/952)’s *Al-Risāla fī al-uṣūl allatī ‘alay-hā madār furū‘ al-Ḥanafiyya* (Karkhī n.d.), which counts thirty seven *qawā'id* and al-Qarāfī’s *Kitāb al-Furūq* which counts five hundred and forty eight *qawā'id* and two hundred and seventy four *furūq* (Qarāfī 1998, Vol. 1, 11). Shāfi‘i jurist ‘Izz al-Dīn b. ‘Abd al-Salām (d. 660/1262), who was al-Qarāfī’s teacher, reduced the whole of the Islamic law to only one *qā'ida* as “*i’tibār al-maṣāliḥ wa dar’ al-mafāsid*” (attaining benefit and averting harm) (‘Izz al-Dīn b. ‘Abd al-Salām 1999, Vol. 1, 11).

The last *qā'ida* of al-Qarāfī’s teacher is the most general and important one, and it is also true to the one in the works of al-Qarāfī because he regards *maṣlaḥa* (pl. *maṣāliḥ*), which literally means benefit or something good, as the embodiment of the purpose of Islamic law (*maqāṣid al-sharī’a*). Since at least the eleventh century, Muslim jurists led by Abū Ḥāmid al-Ghazālī (d. 505/1111) have thought of the *maṣlaḥa* as the purpose of law and use this concept as a vehicle for legal change. As I discuss later, al-Qarāfī mentions that the reason why God sent the Apostles is to attain *maṣlaḥa* for people and he develops his *qawā'id* theory under this major premise.

There are also normative legal maxims (*al-qawā'id al-fiqhiyya al-aṣliyya*) that are generally acknowledged by all Sunnī legal schools as applying to Islamic law entirely. Especially the following five *qawā'id* are called “major principles” or “five principles:”


These *qawā'id* derive their basic massage from the Qur’ān and Sunna. For example, “harm should be eliminated” is derived from the Qur’ānic verses that state: “God intends for you ease and He does not intend to put you in hardship” (2:185), “God does not intend to inflict hardship on you” (5:6), and also the famous hadīth, “No harm may be inflicted or reciprocated in Islam” (*lā ḍarara wa lā dirāra fi al-Islām*). The collaboration between the Qur’ān and Sunna in Islamic law that is seen in the formation of the *qawā'id* is recognized by Ibn Ḥazm as follows: “Every

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10 Mālik 2001, 531. As to this hadīth, see Kahera & Benmmira 1998.
single chapter of fiqh finds its origin in the Qur’ān, which is then explained and elaborated by the *Sunna*” (Abū Zahra 1958, 80).

However, one may ask where are the *qawā'id* situated in the system of Islamic law which is divided into two fields called the *uṣūl* (“roots” of legal methodology and jurisprudence) and the *furū’* (“branches” of substantive legal rules).

Al-Qarāfī considers the *qawā'id* as belonging to the *uṣūl* division of law. According to him, Islamic law is constituted from the *uṣūl* and the *furū’*, and the *uṣūl*, on which the *furū’* are derived, are constituted from *uṣūl al-fiqh* (the science of Islamic legal theory or theoretical jurisprudence) and *qawā'id kulliyya fiqhiyya* (general legal principles) (Qarāfī 1998, Vol. 1, 5-6). At the beginning of his law compendium *al-Dhakhīra*, he emphasizes that offering an introduction on *uṣūl al-fiqh* and the *qawā'id* at the outset of a book of jurisprudence (*fiqh*) is essential since any jurisprudence that is not based on the *qawā'id* is nothing (Qarāfī 1994, Vol. 1, 55).

He also says that the *qawā'id* encompasses the innermost secrets of Islamic law but *uṣūl al-fiqh* never mentions them in spite of its importance (Qarāfī 1998, Vol. 1, 6). Muslim jurists, he emphasizes, should acquaint themselves with the *qawā'id* because the number of legal rules are too large to memorize in their short lives, and they are too inconsistent with each other to solve problems in the real world (*dunyā*). Knowing the *qawā'id*, he says, enables a jurist to respond to unprecedented questions in an appropriate way without having to memorize scores of individual rules and without having to refer back to scripture for specific proof texts (Qarāfī 1998, Vol. 1, 7).

By al-Qarāfī, the *qawā'id* are positioned as indispensable tools for *muqallid*, who is the practitioner of *taqlīd*, that is, to follow the opinions of others or of an established school of law. As to *mujtahid*, who is the practitioner of *ijtihād*, *uṣūl al-fiqh* is enough for him to craft legal opinions. Al-Qarāfī says that both *muqallid* and *mujtahid* are interpreters, but the former interprets substantive legal rules and the latter interprets revelation, while the *qawā'id* reveal the latter’s methodology to the former so as to be flexible, creative and authorized interpreters as the latter (Qarāfī 1998, Vol. 2, 189-197; Qarāfī 1995, 42, 97).

As pointed out above, the Qurʾān contains only a few specific rulings on such matters as inheritance, marriage and penalties. The Qurʾān calls itself by such alternative names as *hudā* (guidance) and *dhikr* (remembrance), and it provides general guidelines on almost every major topic of Islamic law (Kamali 1989, 219-220). This is expressed in the observations by Abū Isḥāq al-Shāṭibī (d. 790/1388) that “Experience shows that every ‘ālim (intellectual) who has resorted to the Qurʾān in search of a solution to a problem has found in it some guidance to assist him on the subject (Shāṭibī n.d. a, Vol. 3, 219).” However, while a *mujtahid* is said to be able to derive rules even from the parables and historical passages of the Qurʾān, this is not the case for a *muqallid* (Shawkānī 1937, 250). For example, the Qurʾān declares that “God intends for you ease and He does not intent to put you through hardship” (2:185), “God never intended to make religion a means of inflicting hardship” (22:78), and this is confirmed in other passages, such as “God never intends to impose hardship on you” (5:6) and “God intends to make things easy for you” (4:28). The *mujtahids* had relied on these verses in support of the many concessions that are granted to the sick and the disabled, especially in the sphere of religious duties (Qarāfī 1998, Vol. 1, 215-229; Shāṭibī n.d. a, Vol. 3, 16). The purport of them is in turn reflected in the *qā’ida*,
“hardship brings about facilitation,” which is one of the “five principles.” A muqallid might be able to reflect the purport of the Qur’ān in his practical legal thinking through the qā’ida in an appropriate manner.

Despite the passive name of “taqlīd” (imitation), it has no passive meaning in al-Qarāfī’s argument as has been alleged by Western scholars for decades.\(^{11}\) For him, muqallid is not a mere blind follower of authorities but a creative interpreter of them. Although there is a well-known controversy among Western scholars (especially between the late J. Schacht and W. Hallaq)\(^ {12}\) over ījtihād and taqlīd, the fact that both sides in this debate share the same negative view of taqlīd may be overlooked. B. Weiss notes earlier that taqlīd “entailed a choice, not of rules from a range of variant rules, but of an authority (i.e. a mujtahīd) among a number of equally acceptable authorities” (Weiss 1984, 97). Inspired by his indication, S. Jackson suggests that if one accepts the idea that it is essentially not substance but authority that validates legal interpretations (Posner 1990, 79-84), one’s assessment of taqlīd would shift fundamentally, as one confronted the probability that its establishment had little to do with any real or perceived inability to affect novel interpretations (Jackson 1996a, 171-172).

According to S. Jackson, al-Qarāfī’s theory is evidence of the maturity of Islamic legal approaches in the age of taqlīd (Jackson 1996b). The legal sources (uṣūl) direct an answer to a practical legal question and existing legal rules (furū’) may require explanations with reference to existing uṣūl in a given school of law by an able jurist who can explain how these furū’ and uṣūl belong to a consistent legal framework. If existing uṣūl do not sufficiently explain the existing furū’ or the legal views held by jurists, jurists are to be involved in what the legal historian Alan Watson refers to as “legal scaffolding” (Watson 1977, 95). At this stage, rather than abandon existing furū’ in favor of new interpretations of the sources, jurists seek needed adjustment through new division, exceptions, distinction, prerequisites and expanding or restricting the scope of existing furū’.

Naturally, the uṣūl itself must be developed to fit the demands of the furū’ at the demand. It is true that theoretical legal reasoning must maintain a structure of legal thought that preserves the integrity of the legal system in which it functions. However, it is also true that the structure of theory must accommodate the variety and diversity of reality; otherwise the theory loses its relevance to the practice (Ahmad 2006, xviii). The significantly developed form of Islamic legal science produced the qawā’id, which has been evolved to expand and adapt to the established authoritative legal doctrines in changing circumstances.

### III. Analysis of Fatwās

In this chapter, five fatwās from al-Mi’yār are examined so as to explain the function of the qawā’id in practical legal thought. They are the examples in which the legal decision based on the qawā’id replaces the legal rules that are applied normally to such cases by uṣūl procedure. However, this dose not mean that the qawā’id always overwhelms the legal rules in fatwās because most fatwās in al-Mi’yār apply the legal rules (Iiyama 2009). It means that legal change

\(^{11}\) For example, see Watt 1962, 73-74; Schacht 1964, 71; Coulson 1964, 80; Makdisi 1981, 199.

\(^{12}\) As to the controversy, see Hallaq 1984.
might be achieved through applying the qawā'id in fatwās, but the extent and numbers are limited. Generally speaking, it is true that the qawā'id bestow legitimacy to new rulings, but it is still unclear how and under what circumstances they operate. The following five fatwās’ functions are supposed by specific examples.

1. Child Custody after Death of Parents
As children are one of the major focuses in Islamic family law like other legal systems, there are many rules relating to child custody in each school of Islamic law. In this section, a fatwā on this subject will be analyzed. We can observe that a qā'ida should replace normal rules and function as a guideline for making decision in the following fatwā:

**The Question.** Abū ‘Abd Allāh Muḥammad al-Ḥaffār (d. 811/1408) was asked about a man who died and left two daughters who were in the custody (ḥaḍāna) of their grandmother, who are the mother of their mother. Their grandmother began to refuse paying costs of maintaining them and alleged their father’s sister should pay for their food and clothes because their father appointed her as the executors (waṣī) for them. If they remain in the custody of their grandmother, there should be a loss of their property because of covering the costs. So may it be judged that their aunt can have their custody for their benefit (maṣlaḥa)?

**The Answer.** As to the question, their aunt has no duty to have their custody. However, the custody should be changed from their grandmother to their aunt for the preservation of their property because that is the greatest benefit (maṣlaḥa) for them. The question of child custody is not a question of duty but of priority. As al-Lakhmī (d. 478/1085) notes, affection and sympathy are regarded as highly important in child custody cases, so if the people preferred as the custodial go against the ward’s benefit, they should lose their right. In this question, their aunt is preferred to have their custody because she is appointed as their executor. Therefore, she should have the guardianship for them (Wansharīsī 1981-83, Vol. 4, 21-22).

The muftī answers that their aunt should have their custody not because of the legal rules normally applied to the case but, presumably, because of the qā‘ida of preserving the ward’s benefit. The qā‘ida leads him in the direction that places a higher value on preserving their benefit rather than applying the normal rules in a textbook way. Generally speaking in Islamic law, the mother has child custody, and in her absence the mother’s mother has custody. A large number of related complex rules in the Mālikī school of law set up the maternal priorities of those who have child custody in the absence of the superior custodial (Tusūlī 1991, Vol. 1, 758-761). Therefore, if the muftī followed these rules, the two daughters should remain in the custody of their grandmother. However, he thought this was inappropriate because it would not be in their

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13 All fatwās presented in this paper were not word-for-word translations but translations of main points. Because each fatwā is too long to translate word for word in this given space, and also my purpose in this paper is not a lengthy explanation of its details.
best interest. What enables him to issue the *fatwā* is the *qāʿida* which gives utmost priority to the benefit of the child.

Al-Qarāfī explains the *qāʿida* about child custody as follows: “The main purport of guardianship is to preserve ward’s benefit (*maṣlaḥa*) and as to child custody, those who have affection and warmth should have it, thus the women is preferred” (Qarāfī 1998, Vol. 3, 361-362). According to this, the aunt who was appointed as the two girls’ guardian can have custody because she should be the most appropriate person in both preserving their estate and treating them with affection.

We have an assumption that it was almost impossible for the *muftī* to reach the decision in the *fatwā* if he evaluated the appropriateness and integrity of all normal rules related to this case, in which many members of maternal family were listed as the custodial. However, he has many options other than the normal rules in choosing authorities and principles just as other *muftīs* did in the age of *taqlīd*. It is up to him. He is not a blind follower of authorities at all but uses the system of Islamic law set up by authorities as a tool for reaching what he regards as a just and equitable decision.

In general, the *qawā'id* are employed when upon investigation a case displays contradictory indicants resulting in contradictory rulings. The *qawā'id* then serves to find the “correct” ruling, that is, the ruling that secures the purposes of Islamic law (*maqāṣid al-sharī'a*) as we shall see later. In the present case, the *muftī* chose the *qāʿida* not only because it guided him to what he wanted, but because the consequence secured the purpose of Islamic law. As discussed in my previous paper, al-Qarāfī’s *qawā'id* theory paved the way for goal-oriented interpretation in Islamic law (Iiyama 2003). One of the features of his theory is the emphasis on the purpose and consequence of acts more than the means. It is represented by the *qāʿida* of “blocking means” (*sadd al-dharāʾi‘*), which means “Whenever an act that itself is free from harm is a means to harm, we prohibit it” (Qarāfī 1973, 448). Presumably, this *qāʿida* would have also assisted the *muftī* to avert the normal rules and give the girls’ aunt their custody.

The fact that the *qawā'id* do not always directly reverberate the textual sources of law potentially raises the question of their legal validity. But as to the *qāʿida* applied here, which has been induced from many opinions of authorities, the *muftī* mentions the opinion of al-Lakhmī, one of the dependable authorities in the Mālikī school, to vouch for its validity. The decision that he crafted in the *fatwā* may not have been doctrinally pure, but it was legitimated by an Islamic legal system that offers Muslim jurists an alternative when a fair solution under normal rules is not found.

2. Entering Mosque with One’s Sandals on

Friday prayer (*ṣalāt al-jum'ā*) in Islam is a communal prayer in which participation is a duty for all adult males. Consequently, manners for communal prayer are very important for Muslims and are one of the major subjects of legal argument. The *fatwā* discussed in this section deals with a problem about manners for prayers, and it is also observed that a *qāʿida* plays a decisive role in the commentary held by al-Wansharīsī.

(d. 806/1404) was asked about entering mosque with one’s sandals on. Is this act hated (makrūh) even if there are no impurities on them?

**The Answer.** If the fact that there are no impurities on the sandals is confirmed, entering mosque with them is not hated. However, there is a conflict of views in the Companions (ṣaḥāba) and the Followers (tābi‘ūn) about the act. Some of them might say that the act is liked or permitted, but others might say it is hated (Wansharīsī 1981-83, Vol. 1, 21).

Although the answer to the question is “the act is not hated,” al-Wansharīsī offers commentary on this issue as follows:

> It is certainly true that the Prophet Muḥammad had prayed with his sandals on. However, we have to recognize that the situation around us differs from one person to another. Then I think we should not pray with our sandals on, especially in Friday prayer at Friday mosque, for the act might cause greater harm (mafsada). In the year 705 (1305-06 AD), when a Bedouin man from Ifrīqiyya entered a Friday mosque in Tunis with his sandals on, the people restrained him about to teeter over the edge but he did not take them off. On the assumption that it was serious, the people attacked him and finally killed him (Wansharīsī 1981-83, Vol. 1, 21-22).

Al-Wansharīsī advises against entering mosque with one’s sandals on even if there are no rules or authorities that prohibit the act clearly, for it may cause greater harm. He should support the position that if the application of the normal rules in a concrete situation would entail more harm than benefit, then they can be altered or rather set aside. This is the qā‘ida based on the following idea.

Al-Qarāfī claims that every rule contains both harm (mafsada) and benefit (maṣlaḥa) as the Qur‘ān 2:219 states that drinking wine and gambling are prohibited in spite of the fact that they contain some benefits for human beings because the benefit is smaller than the ensuing harm. Therefore, although eating carrion is normally prohibited, if this leads to greater harm such as death by starvation, the prohibitive ruling is set aside and it becomes permissible to eat carrion (Qarāfī 1973, 87).

The qā‘ida of “blocking means” might also be the premise of al-Wansharīsī’s opinion. As normal rules are usually concerned only with conformity to technical details, it is an individual jurist who takes into consideration the consequence of its application in a given case and judges the validity of it. This kind of thought can be developed under the general qā‘ida of maṣlaḥa or the ultimate purpose of God’s law.

As al-Wansharīsī stresses the difference of the situation, he may also give considerable thought about the qāʻida of “custom is the basis of judgment.” This is partly based on a statement of the Companion, ‘Abd Allāh Mas'ūd, that “What the Muslims deem to be good is good in the eyes of God.” On custom, al-Qarāfī discusses as follows:
For all what in Islamic law conform to the customs, the judgment about a case should change when the custom around it changes. This does not mean the new exercise of *ijtihād* for *muqallid* but is itself the *qāʿida* that the intellectuals (‘ulamā’) exercised *ijtihād* to find and they all agreed on, then we just have to follow the *qāʿida* in accordance with them (Qarāfī 1995, 218-219).

Here we can understand not only the gist of *qāʿida* of custom but also the reason why *muqallid* can rely on the *qawāʿid* in legal decisions. Al-Wansharīsī was a *muqallid*, but he could express his original legal opinion on the case without exercising *ijtihād* partly because of the *qawāʿid* that authorize setting aside normal rules in specific situation and exercising discretion in view of the circumstances.

He states at the beginning of *al-Miʿyār* that the object of its compilation is for the general benefit of future generations (Wansharīsī 1981-83, Vol. 1, 1). Therefore, it is natural that when he comments on this case, he should be conscious of it being a useful precedent for them. Why I presume that al-Wansharīsī relies on the *qawāʿid*, despite the absence of him referring to them explicitly, is because he never writes down arbitrary opinion that nobody understands and agrees to. Even if it may not have been doctrinally pure, as long as jurists share an awareness of the *qawāʿid*, their decision should be neither seen as arbitrary nor unprincipled.

Although the jurists craft *fatwās* according to the *qawāʿid* to a greater or lesser extent, they seldom mention them partly because they can understand them by reading between the lines, but sometimes they refer to them explicitly. In the next section, we will examine such a *fatwā*.

3. *Wuḍūʿ* and Tayammum

Muslims must be in a state of spiritual purification (ṭahāra) before all acts of worship, such as daily prayers and touching the script of the *Qurʾān*. To purify themselves is called *wuḍūʿ* and is usually done with water in a specific manner. In particular circumstances, such as the absence of available water, purification can be done with clean soil and is called *tayammum*. However, in the following *fatwā*, *tayammum* is permitted despite the presence of water.

**The Question.** Muhammad b. Marzūq (d. 842/1439) was asked about the *fatwā* of Ibn ‘Arafa (d. 803/1401) which suggests that if a person in *junub* (ritually impure condition due to sexual intercourse or semen discharge) can find water for purification only in a mosque, he should not use the water but perform *tayammum* before daily prayer.

**The Answer.** The *fatwā* is good. Because Mālik said that a person in *junub* must not enter mosque for if he performs *wuḍūʿ* there, that should cause harm to others. And also, we have already learned that averting harms (mafāṣid) has priority over attaining benefits (maṣāliḥ). So he should not use the water as Ibn ‘Arafa says (Wansharīsī 1981-83, Vol. 1, 50).

“*Averting harm has priority over attaining benefit*” is a well-known *qāʿida* that many jurists including al-Qarāfī mention in books of the *qawāʿid* (Qarāfī 1998, Vol. 3, 193; Subkī 1991, Vol.
In this case, harm means to cause harm to others and benefit means that the person performs wuḍū’ and is purified.

There are some circumstances in which tayammum is permitted despite the presence of water. Ibn Rushd explains that many jurists agree that the sick should perform tayammum legally if there is a fear of the condition worsening or death resulting from coldness, but there is disagreement on other circumstances (Ibn Rushd al-Ḥafīd 1997, Vol. 1, 83). Some jurists say Mālik permitted the person who was not sick performed tayammum for fearing the late for the prayer, and others say Mālik obligated him to perform wuḍū’ and pray afterwards (Ibn ‘Abd al-Barr 2003, 72-73).

Despite many disagreements on the rule, the man in question who is not sick is permitted to perform tayammum according to Mālik’s opinion and the qā’ida. Mālik is the eponymous founder of the Mālikī school, and generally, his opinion is a strong argument in fatwās of the Mālikī school. But as his opinion is not enough for answering the question about the validity of tayammum, the qā’ida makes up for it.

Wuḍū’ brings benefit to the person who performs it in normal situations, but Ibn Marzūq thinks that it brings more harm than individual benefit in this situation. As mentioned before, Mālikī jurists like al-Qarāfī claim that every ruling contains both benefit and harm, and an act that leads to benefit in normal situations is permissible (this is the normal rule), but if following the normal rule would entail more harm than benefit, then it should be disregarded. Ibn Marzūq might also be based on this qā’ida when he agrees with Ibn ‘Arafa.

Jurists have to weigh the benefits against the harm in many cases and sometimes the harm against another harm. As to wuḍū’ and tayammum, Ibn Marzūq also issues the following fatwā.

In certain situations, performing tayammum and pray is permitted in the existence of water. If we force the sick who can’t touch water to perform wuḍū’ in the presence of water, he should pray without purification. To pray without purification in the existence of soil is religious harm and to perform tayammum in the existence of water is physical harm. In this situation, we have to avert religious harm preferentially according to the order of five necessities (ḍarūriyyāt khamsa) (Wansharīsī 1981-83, Vol. 1, 31-32).

“Five necessities” is the notion advocated originally by al-Ghazālī who argues that maṣlaḥa is “the ultimate purpose of Islamic law (maqṣūd al-shar’),” and more concretely, that the intention is to preserve for humankind the five necessities of their well-being, namely their religion, life, reason, offspring and property. He believes each one should take priority in order and what protects them is a maṣlaḥa, while what fails to do so is a mafsada (Ghazālī 1997, Vol. 1, 216-217). His concept is sublimed in Al-Qarāfī’s book as a qā’ida (Qarāfī 1973, 391), which can be applied easily in fatwās. Applying it, Ibn Marzūq thinks that religious harm takes priority over physical harm, thus the sick can perform tayammum even if there is water.

Ibn Marzūq used the qawā’id as a tool for reaching what he regarded as a reasonable conclusion because he thought it was as authoritative alternative to referring back to many rules.

14 As to the example of the application, see Wansharīsī 1981-83, Vol. 1, 107-109.
Many fatwās in al-Miʿyār, including these fatwās of Ibn Marzūq, show that Mālikī jurists share the recognition that the qawāʿid are legitimate supplementary legal sources originating from the eponymous founder of the school, his disciples or other jurists of authority. In the next chapter, I present a relatively old fatwā and a newer one about unjust witnesses in order to clarify some details regarding the interrelationship between established rules or opinions of authoritative figures and the qawāʿid.

4. Unjust Witness

In Islamic law, the witness (shāhid) is often required to prove the truthfulness of a certain communal affairs such as contracts or crimes. Two male Muslims are required as witnesses in most of the cases, and jurists agree that witnesses should be just (ʿādil), free adult Muslim (Ibn Rushd al-Hafīd 1997, Vol. 2, 677). However, the following fatwā shows that these conditions are eased in particular situations.

The Question. Ibn Abī Zayd al-Qayrawānī (d. 386/996) was asked about the testimony of the Khawārij people. Is it permitted for them to be witness to give testimony for themselves or for Sunnī people?

The Answer. Mālik and his followers are of the opinion that the testimony of the Khawārij people is not permitted at all while other jurists permit it in the case of necessity (ḍarūra) because in some areas all residents are the Khawārij, but in other areas only most residents are. Mālik also held the view that if the judge did not know the people in the troop that came from the distance, he should regard them as just and permit them to be a witness. Mālik also ordered the judge of Madīna to permit the testimony of an evil people because one of them had died and they needed the witnesses for inheriting his property. Mālik also ordered the judge of Madīna to permit the testimony of an evil people because one of them had died and they needed the witnesses for inheriting his property. Mālik said that this was a necessary case. According to that, I have issued the fatwā that gives special dispensation (rukhṣa) to the judge of Jerba, where most residences are the Khawārij. Although they call just Sunnī people as a witness for them in accord with the custom, the numbers of Sunnī people are so small compared to the numbers of the Khawārij people that they need more witnesses for their trials. This is the case of necessity as Mālik said (Wansharīsī 1981-83, Vol. 10, 191-192).

For Sunnī Mālikī jurists, the Khawārij people are heretical and not just. Ibn Abī Zayd permits these unjust people to be a witness in the case of necessity based on Mālik’s second opinion. Islamic law stipulates that witnesses should be just according to the Qur’ānic verse that states: “Bring to witness two just men from among you and establish the testimony of God” (65:2). However, this textual source of law is sometimes set aside on the basis of extra-textual source

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15 The Khawārij (sg. Khārijī), whose doctrine is different from that of Sunnī, is a sect of Islam, which appeared in the mid-seventh century, in the context of conflict for power between the fourth Caliph ʿAlī and the founder of the Umayyad dynasty Muʿāwiya. Some Berber tribes in North Africa adopted the doctrine and sometimes staged rebellions against Arab domination, sometimes came under their control. See Abun-Nasr 1987, 37-49.
of law named “necessity.” More than two hundred years after Ibn Abī Zayd’s death, al-Qarāfī explains the intent of his fatwā as follows:

The reason why witnesses must be just is because preserving life and property is necessary. If there is no just person in an area, the condition should be deleted because removal of difficulty from life is benefit (maṣlaḥa). This is the necessity that influenced the special dispensation (rukhṣa) which Ibn Abī Zayd gave, who said that testimony of unjust people was accepted in the case of necessity (Qarāfī 1973, 391).

As stated previously, maṣlaḥa is the ultimate purpose of Islamic law (maqāṣid al-sharīʿa) in the theory of al-Qarāfī. We can understand from this quotation that he sees Islamic law as goal-oriented nature and understands the rule originated from the Qur’ān in light of the broader objective of Islamic law. He places greater emphasis on the overall reading of the Scripture rather than each single word and treats Islamic law as an integrated whole system. On the one hand, his qawāʿid theory presents jurists with a framework to secure the purpose of Islamic law in legal practice, while on the other, it presents us with a dynamic outlook on Islamic law which is lacking in uṣūl al-fiqh. This may be the reason why he describes the qawāʿid as encompassing the innermost secrets of Islamic law (Qarāfī 1998, Vol. 1, 6).

For al-Qarāfī, the fatwā of Ibn Abī Zayd is one of the sources that illustrates the qāʿida of “necessity justifies that which is prohibited,” especially in the case of unjust witnesses. His fatwā is generalized in al-Qarāfī’s explanation and furthermore quoted by Al-Wansharīsī’s fatwā as follows:

Al-Qarāfī said as follows: Ibn Abī Zayd said that if there are only unjust people in an area, they have to call the most righteous and most not unrighteous person as witness so as to prevent the loss of benefit (maṣāliḥ) in trial or other things. I think nobody disagrees about the issue, for legal requirement (taklīf) differs according to area (Wansharīsī 1981-83, Vol. 10, 145).

In this quotation, an unjust witness is justified by the qāʿida of “preventing the loss of benefit.” Necessity (ḍarūra) is closely related to benefit (maṣlaḥa) in al-Qarāfī’s argument. He explains that the reason why God sent the Apostles is to attain benefit for people (Qarāfī 1973, 446-447). The benefit intended here is to preserve “five necessities:” religion, life, offspring, reason and property (Qarāfī 1973, 391). Attaining benefit is the most general qāʿida through his qawāʿid theory like his master Ibn ʿAbd al-Salām, and he incorporates many fatwās of his predecessors into his theory.

This series of discussion about unjust witnesses shows that these jurists give the assessment of the outcome of legal acts or the purposes priority over the means. Al-Qarāfī states that when the jurists take legal judgment, they must take into account with purposes (maqāṣid), which are ways leading to benefit or harm in themselves, and means (dharīʿa), which are ways leading to

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16 This notion clearly comes from al-Ghazālī.
them. He continues that as means constitute a lower rank than purposes, means receive the same legal ruling (prohibited or permitted) as the purposes they serve. He insists that in the same way as it is obligatory to block means to a prohibited purpose, it is obligatory to make them legally permissible when they serve an obligatory purpose. Therefore, a prohibited means may not be prohibited when it leads to attaining benefit (Qarāfī 1973, 449; Qarāfī 1998, Vol. 2, 61; Qarāfī 1994, Vol. 1, 153-154).

This qā'ida sometimes gives preference to considerations of purposes and benefit over established authoritative evidence from the Qur'ān and Sunna as this issue shows. Al-Qarāfī may recognize that the qā'ida causes controversy and defends himself in saying as follows:

No jurist exists who had not acted against many indicants (adilla) from God’s book and the Sunna of his prophet, upon him be bless and peace, but he had done so due to countervailing factors prevailing over them (Qarāfī 1973, 449).

He also says that Mālik disregarded the time-limit of three days for the right to rescind a sale (bay‘ al-khiyār), which is established in a ḥadīth, because he gave preference to a factor prevailed in his view, namely the practice (‘amal) of Medinese people (Qarāfī 1973, 449-450). For al-Qarāfī, setting aside textual evidence under certain circumstances traces back to Mālik and is widespread.

In association with the issue of unjust witnesses, another discussion about the concept of just arises. Al-Wansharīsī argues as follows:

Later jurists say that justice (‘adāla) should be evaluated by people in each era even if they differ in the criteria of it because as the justice of the Companions is not equal to the justice of the Followers, the justice of the Followers is not equal to the justice of the people after them, and the same is true as to our era. If we make a comparison between the just in the era of the Companion or the Followers and the just in our era, the latter never overrides the former in piety and chastity. Thus we have to allow the just in each era, otherwise we lose guardian, who must be the just, and that has a disadvantage for us. For this reason, if there is not the just at all in an era, the person who is not the just but near to the just should be regarded as the just in the era so as to avoiding general harms (mafāsid ‘āmma) (Wansharīsī 1981-83, Vol. 10, 204).

On the assumption that the jurists do not agree on the criteria of the just, al-Wansharīsī values the universal need for guardian more than establishing the strict criteria of the just for avoiding harms. This is also the fatwā in adherence with the qā’ida of “attaining benefit and avoiding harm.”

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17 Al-Qarāfī argues that whereas most Muslims in the patristic period of early Islam were just, today most Muslims are not just. See Qarāfī 1998, Vol. 4, 189.
5. Leasing with the Rent Unset

Mālikī jurists generally agree that the rent must be determined at the time of the lease contract for the whole period of lease (Ibn Rushd al-Ḥafīd 1997, Vol. 2, 347). The following quotation is a case in which the fatwā erases this condition in the condition of necessity according to the qāʿida of benefit (maṣlaḥa).

**The Question.** Abū al-Qāsim b. Sarrāj (d. 848/1444) was asked about the rental for the lease contract of a ship. They said that no one in al-Andalus determines the rental at the time of its lease contract because of the series of requisitions by the people of fleet. They rent a ship from the owner and go to sea, then a fleet requisitions a part of the grain, oil, camels and mules taken up in the ship. After this, they take one half or a third of the rest and give the remaining to the owner as rental. This kind of lease contract should be forbidden because of legal uncertainty, that is, the rental is not determined at the time of lease contract. There have been food shortage in al-Andalus, and the people rely on imported food from across the sea. It is clear that this kind of lease, which the people of al-Andalus want, is necessary in this situation.

**The Answer.** If the situation is as described above, to determine the rental as one half or two thirds of the rest is permitted because this kind of lease is necessary. Because Mālik took into account the benefit (maṣlaḥa) when he crafted a legal decision if the benefit was generally needed like this case. Ahmad b. Ḥanbal and the group of intellectuals in the earlier generation permitted a lease contract on condition that profit and loss are divided between lessor and lessee. Although controversy exists regarding the adoption of a doctrine of another school, in some cases, it must be allowed in theory as in this case, which the principle (aṣl) of Mālik relating to the benefit supports (Wansharīsī 1981-83, Vol. 8, 224).

The people explain why the rent is not determined at the time of lease contract with knowledge of its illegality and want the muftī to give a stamp of approval. Ibn Sarrāj permits it because the people’s benefit, that is, to buy food abroad and bring it to the Andalusī people, should be lost if it is prohibited. The needed benefit like this sometimes sets aside the original rule and functions as a decisive factor in legal opinions especially of Mālikī school partly because this qāʿida of maṣlaḥa is regarded to be originated from Mālik himself (Ibn Rushd al-Ḥafīd 1997, Vol. 1, 399).18

Some might assume that the jurists abuse the notion of maṣlaḥa so as to invent a plausible legal decision. If this is true, then the jurists should not refer to a settled body of rules and doctrinal consistency in Islamic law would be lost completely. However, in reality this is not the case. As my analysis on al-Miʿyār here shows, most fatwās in al-Miʿyār reflect the application of the established rules and the fatwā in which normal rules are set aside based on the qāʿida of

18 Al-Shāṭibī gives many examples of Mālik’s judgment in which he uses maṣlaḥa as a decisive legal source. For example, see Shāṭibī n.d. a, Vol. 2, 12, Vol. 3, 16; Shāṭibī n.d. b, Vol. 2, 357-358, 361, 362-364.
maṣlaḥa are few (Iiyama 2009). Al-Qarāfī says that “God, the Almighty, has sent messengers, peace be upon them, only to attain the benefit (maṣlaḥa) of the servants. So wherever the jurists find a benefit highly probable there should be the objective of the law (Qarāfī 1973, 446).” Thus we must understand that Muslim jurists apply existing rules to most cases because they believe that the benefit intended by God can be attained by this application.

Therefore we have to realize that it is the jurist who identifies the benefit and lay Muslims have no right for that as the following fatwā shows:

**The Question.** Ibn Rushd al-Jadd (d. 520/1126) was asked about the man who said “We never need supplication (duʿā) to God because it never changes the fate (qaḍāʾ wa qadar).” Is he forgiven or not?

**The Answer.** He is a liar and traitor. This foolish and crazy man does not know that God has arranged the benefits (maṣāliḥ) in this world and the next. He may have passed through the strain of hunger, thirst or lack of medicine in sickness, but his supplications have never brought him benefits in the past because it is his fate that God has decided. However, this does not mean that supplication is a total nothing. Rational Muslims never say anything like that. He is fool enough to ignore revelation and challenge God (Wansharīsī 1981-83, Vol. 12, 322).

Ibn Rushd al-Jadd might mean that the man in question has to understand that his severe experiences should be the afflictions sent to him by God for his benefit. The benefits God has intended are not always the benefits in lay Muslims’ eyes. It is only Muslim jurists who identify the “true” benefits in a concrete case and incorporate them into judgments and legal opinions because God sent the Apostles for attaining maṣlaḥa, and Muslim jurists are their representatives (Qarāfī 1973, 446-447).

**IV. Conclusion**

The fatwās examined in this paper show the fact that Muslim jurists derive their substance from a broader perspective of reading the meaning of the law through the qawāʿid. My analysis of these fatwās above also shows dominantly goal-oriented nature of them. The jurists of these fatwās try to achieve the purposes of Islamic law, that is maṣlaḥa (attaining benefit) in each case rather than apply normal rules to the case mechanically. So my provisional conclusion in this paper is that noncritical approach to the understanding of Islamic law is the feature of conventional uṣūl al-fiqh, while the qawāʿid are primarily concerned with the ends and objective of Islamic law.

However, as mentioned earlier, this kind of interpretation is not dominant in Islamic legal practice in the age of taqlīd. Besides this, few texts of Islamic legal theory relying mainly on uṣūl al-fiqh devote a chapter to maṣlaḥa and the qawāʿid. It is mainly because the qawāʿid, which are a kind of indigenous meta-discourse developed in the age of taqlīd, try the opposite approach of uṣūl al-fiqh in the way of legal interpretation.

On the other hand, as far as the fatwās in al-Miʿyār are concerned, Muslim jurists seem to craft fatwās at their discretion based on the qawāʿid within reasonable bounds. Jurists in the age
of taqlīd familiarized themselves with the qawā'id as well as uṣūl al-fiqh, but they never abused them as a vehicle for legal change. They consider not only the texts of Islamic law but also its goals so as to achieve the higher objective of the law, that is, “Attaining benefit.” In many cases, they think that the benefit is to be attained through the application of normal rule. And in some cases, as the five fatwās in this paper shows, they prefer to use the qawā'id. It is not possible to clarify the standards of this kind of decision naively; it is up to Muslim jurist to decide based on a vast idea of what is socially acceptable or appropriate according to this profundity. It is certain that God is the only lawgiver in Islam. However, we must not forget that not only do Muslim jurists explicate God’s law and turn it into a visible and usable system, but they also determine how texts and goals are harmonized and how selections are used to produce a decision within the framework of Islamic law.

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