

An Overview of the Principles of Jurisprudence Vis-A-Vis Legal Maxim

Mohammad Zaini Yahaya¹, Muhammad Adib Samsudin¹ & Hayatullah Lalulddin¹

¹Shari'ah Department, Universiti Kebangsaan Malaysia, National University of Malaysia, Malaysia

Correspondence: Mohammad Zaini Yahaya, Shari'ah Department, Universiti Kebangsaan Malaysia, National University of Malaysia, Malaysia. E-mail: zaiza@ukm.my

Received: August 20, 2013 Accepted: November 19, 2013 Online Published: December 29, 2013

doi:10.5539/ass.v10n2p157

URL: <http://dx.doi.org/10.5539/ass.v10n2p157>

Abstract

The Principles of Jurisprudence (Usul al-Fiqh) is a well-known science in the field of Shari'ah. Almost all institutions in Malaysia offering Islamic Studies in the field of Shari'ah make The Principles of Jurisprudence as compulsory course that must be taken by each candidate. This is due to the Principles of Jurisprudence dealing with crucial matters such as al-Dalil al-Ijmali (Comprehensive Proof), istinbat (derivation of rulings from nas (text) and debates related to ijihad (the exertion of the utmost effort by a trained jurist). This study using both descriptive and analytical methods concludes that the Science of the Principles of Jurisprudence is extremely important for it equip the researcher with a clearer and deeper understanding of the Arabic speech rather than its linguistic sense and superficial meaning. Hence, the Principles of Jurisprudence is an absolute requirement for proper understanding of the Shari'ah, hence, derivation of rulings.

Keywords: Islamic jurisprudence, law, rulings principles, derivation, purposes of law and method

1. Introduction

In discussing the principles of jurisprudence scholars and writers, normally, begin with discussion of the individual component elements of the term separately, meaning to say principles, *usul* and *fiqh*, only then they attempt defining its collective meaning in a terminological sense. Due to the limit of space, this article will focus on elaboration of the meaning Principles of Jurisprudence on its own as an appellation of specific disciplines of *Shari'ah* related science.

Looking through the classic books one would not be able to find any specific definition for the *usul al-fiqh*. They contained only the meaning of its component elements *usul* and *fiqh* the former with the connotation of principle and the latter with jurisprudence. The reason for not defining the terms collectively as an appellation for specific sciences can probably be due its consideration by the classic scholars not as a separate scientific discipline of Islamic Jurisprudence. Therefore, we are obliged to refer to the books of contemporary or modern scholars in order to define the term *usul al-fiqh* collectively, in other words, to define it in terminological sense. Apparently, they seem not to have relied in their definition on any *turath* (classic) books except when defining the word *usul* (principles) and *al-fiqh* (jurisprudence) individually. Thus, it could be said that the definition of the *usul al-fiqh* in relative sense is the innovation of the contemporary scholars. From the definition of the contemporary scholars two definitions are selected and discussed as follow:

1) Al-Jilani Al-Mariniyy's Definition

Al-Jilani (2004) defines it as *hukm kulliy* (universal ruling) based on which the periphery branches) of *fiqh* (jurisprudence) are constructed and which are expressed in general and concise phrases and independent of any specific situation.

2) Ayman 'Abd Al-Hamid Al-Badarayn's Definition

However, Ayman (2006) defines it as *hukm kulliy* expressed in precise expressions by mean of which one is able to derive rulings from *al-adillah* (evidences) and to undertake reasoning, *istidlal* using certain methods, and to know the required conditions of the *mustafid* (jurist).

2. Commentary on the Definitions

The first definition is not comprehensive, because, some parts of fiqh ruling can be categorised as kulliy

(universal) too, for examples, the principle of al-darar yuzal (harm must be eliminated), contains a lot of furu' al-fiqh (branches of jurisprudence), expressed in general phrases and are not confined to any specific situation, and yet it is not considered as Principles of Jurisprudence.

The second definition is more precise and comprehensive, for it includes all related features of generality and avoids any features contrary to its comprehensiveness by not excluding any relevant subjects in the discussion of Principles of Jurisprudence which comprises of:

- a) *al-Dala'il*
- b) *Istidlal*
- c) *Mujtahid*

These all subjects' matter of the science of Principles of Jurisprudence enjoys the privilege of parallel mention in the definition given in jurists' books. For example, al-Raziyy (1988) defined Principles of Jurisprudence as: Collection of the methods of Jurisprudence in general, legal reasoning and the required conditions of the jurist.

On the other hand, the contents of the definition given by Ayman al-Badarayn include *mawdu'* (subject) and the function of Principles of Jurisprudence. Inclusion of the *mawdu'* or subject matter in the definition is an indication of the scope of the coverage of the science of the Principles of Jurisprudence. It is important for further development of the principles and methods by researchers as far as they are within the boundary demarcated by the science of the Principles of the Jurisprudence. Meanwhile, the inclusion of the function (*wazifah*) in the definition portrays the established goals of the science of the Principles of Jurisprudence. Thus, the second definition is made the focal point of this paper.

3. Relationship between Legal Maxims and the Principles of Jurisprudence

Underscoring the existence of the relationship between the Islamic Legal maxims and the Principles of jurisprudence is not an easy task because the public consider the legal maxims as same as the Principles of Jurisprudence. Even some jurists hold both to be of the same nature. However, the existence of the Principles of Jurisprudence and *al-qawa'id al-fiqhiyyah* (Islamic Legal Maxims) is a contemporary need and requirement. Therefore, it is also required to establish a connection between scholars who know less about the Science of the Principles of Jurisprudence and those who are well versed in it. The existence of the Principles of Jurisprudence and Legal Maxims will make it easier for researchers to know the basic methods of *istinbat*, derivation of law, hence at least, enabling them to have an overview of the basics rules of Islamic Jurisprudence.

However, legal Maxims are more advanced than the Principles of Jurisprudence in terms of written works and discussion by the scholars. It is probable that a contemporary scholar could memorize dozens or even hundreds of Legal Maxim but if he is asked about the Principles of Jurisprudence he could hardly remember but a few such as al-amr li al-wujub (the command gives rise to an obligation), al-nahy li al-tahrim (forbidding gives rise to a prohibition) and al-asl fi al-ashya' al-ibahah (permissibility is the original state of things). Majority of the scholars know books like al-Ashbah wa al-Naza'ir (Similarities and Resemblances) or Qawa'id al-Ahkam (The Methods of the Rulings) while, having no idea about the book like Takhrij al-Furu' 'ala al-Usul (Deriving Branches from the Origin) and also al-Tamhid fi Takhrij al-Furu' 'ala al-Usul (Introduction to the "Deriving Branches from the Original Source"). This is the picture of the poor fate of the Principles of Jurisprudence in comparison to the well-known Legal Maxims.

Consequently, due to the existence of the wide gap between the two in terms of their reputation Ayman 'Abd al-Hamid al-Badarayn in his Ph.D thesis, *Nazariyyat al-Ta'qid al-Usuliyy*, attempted to close the gap by highlighting the importance of the Principles of Jurisprudence and re-evaluating its foundations, history, and discussing its proposed topics. His thesis can be regarded as an important reference in the science of the Principles of Jurisprudence at the present time. His precise and concise discussion of the characteristics and conditions of Principles of Jurisprudence can be elaborated as follow:

- 1) The objective of the Principles of Jurisprudence is to ensure that the *ijtihad* (the exertion of the utmost effort by a trained jurist) move on the right direction, while the objective of the legal maxims is to control and guide the function and operation of the Principles of Jurisprudence itself.
- 2) *Mawdu'* (subject) of the Principles of Jurisprudence is al-dalil al-ijmali (general proof) while the subject of the legal maxim is the science of the Principles of Jurisprudence itself (al-Badarayn, 2006).
- 3) The Principles of Jurisprudence provide a general picture of the ruling (*hukm*) its *dalil* (evidence) and its nature. (Al-Badarayn, 2006). For example, in discussing *mafhum al-mukhalafah* (divergent meaning), it focuses on explaining the essence of *mafhum al-mukhalafah*, and its relevant argumentation and views offered by the

scholars, whereas, in the legal maxim the main concern is the identification of legal status of an act or thing. For example, to say, *mafhum al-mukhalafah hujjah*, is accepted as a proof.

4) Using simple and concise expression. This characteristic is not the sole property of the science of Principles of Jurisprudence. Other disciplines too share this characteristic, as their principles also are formulated in simple expressions. (al-Badarayn, 2006) because, their expression in long sentences can be detrimental to the survival of the principle, for, simplicity of its expression facilitate its understanding, memorization hence, application.

These are some of the differences between the Principles of Jurisprudence and the Legal Maxims. In spite of their difference they cannot be separated from each other as in the same manner as Principles of Jurisprudence cannot be separated from the Jurisprudence al-Fiqh. However, due to the difference of subject matter and form they cannot be treated as one. This is asserted by Ayman al-Badarayn, however, he is not denying the previous view. Speaking objectively, what he did is acceptable and not contrary with some previous scholars who have written about the Principles of Jurisprudence partially in their work like al-Zinjaniyy in *Takhrij al-Furu' 'ala al-Usul* (Deriving Specific Cases From General Rules), al-Tilmisaniyy in *Miftah al-Wusul fi Bina' al-Furu' 'ala al-Usul* (The Key of Achievement in Developing The Branche based on the Origins) and al-Asnawi in *al-Tamhid fi Takhrij al-Furu' 'ala al-Usul* (Introduction To The “Deriving Specific Cases From General Rules”). Their writing method is identical with that of *Qaedah al-Fiqh* (Legal Maxim). They made *Qaedah Usul al-Fiqh* (Rule of Principles of Jurisprudence) as a discipline of its own, easy to understand, easy to remember and apply. It is presumed that the existence of *Qaedah Usul al-Fiqh* as a separate scientific discipline will give new impetus to the development of *Usul al-Fiqh* (Principles of Jurisprudence) by facilitating its better understanding and comprehension. On the other hand, assuming it as a form of innovation in *Usul al-Fiqh* it necessitates its being addressed by those involved in *Usul al-Fiqh* particularly and in *Shari'ah* generally. The presence of this knowledge will prove helpful in learning process as it will facilitate teaching in a more effective way. But to combine both in a single subject is not appropriate because *Qaedah Usul al-Fiqh* is just a complement to *Usul al-Fiqh*.

4. Relationship between the Rule of the Principles of Jurisprudence and the Legal Maxim

The difference between *Qaedah Usul al-Fiqh* and *Qaedah al-Fiqh* has been described by al-Qarafi (1998) in his book *al-Furuq (Legal Differences)*, as he says:

Verily, the *Shari'ah* brought by Prophet Muhammad PBUH contains *usul* (principles) and *furu'* (branches). The *usul* has two parts. One of them called *Usul al-Fiqh*. Normally it is just principles that usually emerge from Arabic letters and utterances and the change that happen to them such *nasakh* (abrogation), *tarjih* (preference), and similar things pertaining their implication such as *al-Amr li al-Wujub* (Command Gives Rise to Obligation), *al-Nahy li al-Tahrim* (Forbiddeng Gives Rise to Prohibition), and also the connotation of particular expression and general meaning and so on. It also include principles that emerge based on the signification of the Arabic wordings and letters like *qiyas* (analogical deduction) as a *hujah* (proof), *khbar ahad* (singular narration) and *mujtahid's* (jurist) attitude. Second part: *Qaedah al-Fiqh* containing *kulliyat* (universals) which include greatest, numerous, numbers of cases from varying fields and are much beneficial and contains the wisdom of Islam. Each principle contains uncounted number of *furu'*, branches, of jurisprudence. No mention of wisdom behind ruling is made at all in *Usul al-Fiqh* even though inference is randomly provided in a generalized manner but not specifically and in detail.

From al-Qarafi statements mentioned above it is clear that he made some comparison between *Qaedah Usul al-Fiqh* and *Qaedah al-Fiqh*. This book as the main *turath* sources discusses the difference between *Qaedah Usul al-Fiqh* and *Qaedah al-Fiqh*. Other classic writings too discusses the difference between legal maxim and method of principles of jurisprudence, however, they elaborated on five or six basic differences which is hardly sufficient for providing a clear picture of their differences. However, Ayman 'Abd al-Hamid al-Badarayn by enumerating 14 differences between legal maxim and the method the principle of jurisprudence was able to provide a clear picture of the differences that exist between them pertaining the following aspects:

1) Aspects of *Qat'iyyah* (Certainty) and *Zanniyyah* (Speculation)

Most of the rules of *Qaedah Usul al-Fiqh* are *qat'iyy* (certain) implies certainty due to their being based on the evidence that are *qat'I al-dalalah* (definitive in meaning) while, most of *Qawaed al-Fiqh* are speculative in nature and their implications are speculative, for they are open to certain exception (al-Badarayn, 2006).

2) Aspect of Numbers

Qawaed al-Fiqh, as al- Qarafi (1998) holds, are numerous. This is so because they are established through research on various *furu'* from different areas of Islamic jurisprudence and which are united under one rule.

There is a large number of *qawaed al-fiqh* which are contained in both types of books, classic and modern. Al-Burnu, for example, discussed 4192 legal maxims in *Mawsu'ah al-Qawa'id al-Fiqhiyyah (The Encyclopaedia of Legal Maxims)* (al-Badarayn, 2006). Whereas, the case is different with the *Qaeda Usul al-Fiqh* for they are not developed in the light of reference to the *furu'* of Islamic jurisprudence except among the early scholars like Hanafi.

3) Aspect of Consensus and Contradiction

Qaedah Usul al-Fiqh generally, is not prone to any contradiction, whereas, *Qaedah al-Fiqh* often faces certain contradiction in various areas of Islamic jurisprudence. This presents a stark difference between the method of the principles of jurisprudence and that of legal maxim (al-Badarayn, 2006).

4) Aspect of Subject

Subject matter of *Qaedah Usul al-Fiqh* is *Usul al-Fiqh* while subject matter of *Qaedah al-Fiqh* is *furu'* of jurisprudence that can be brought under one unified ruling based on their similarities (al-Burnu, 1997).

5) Aspect of Relation with Arabic Language, *Akidah* (Faith) and *Mantiq* (Logic)

We cannot distinguish the *Qaeda Usul al-Fiqh* from the principles of Arabic Language, principle of *Akidah* (faith) and principle of *Mantiq* (Logic) if its principles are derived from these sources. (Al-Badarayn, 2006). For example:

أقل الجمع ثلاثة

Meaning: Minimum of *Jama'* (plural) is three.

This principle constitute a *Qaedah of Usul al-Fiqh* and at the same time it is a principle of Arabic Language.

6) Aspect of Scientific Advantage Based on *Furu'*

Qaedah Usul al-Fiqh is used more often. For, every single juristic rule must have connection with *Qaedah Usul al-Fiqh* either in respect of *istinbat* or *ta'arud* (contradiction) or *tarjih* (preference). Thus, every *ijtihad* must undergo the successful test of compliance with the *Qaedah Usul al-Fiqh*. Unlike this, *Qaedah al-Fiqh* is not subject to this requirement due to multiplicity of its *furu'*, which cannot be included within the scope of its application. Nevertheless, many *furu'* (branches) do not require *Qaedah al-Fiqh* for attaining their relevant rulings (al-Badarayn, 2006).

7) Aspect of Motive

Although both, the rule of the principles of Islamic jurisprudence and legal maxim have the same common goal of operationalization of *ijtihad* and its control but in respect of their specific objectives and motives they differ from each other. *Qaedah Usul al-Fiqh* controls *ijtihad* in terms of generalized evidence of how to conduct *istinbat* and the conditions of *mujtahid*. Thus, *Qaedah Usul al-Fiqh* provides methods of interpretation of *nas* (text), conditions for the use of evidence not based on *nas* (text). On the contrary, *Qaedah al-Fiqh* is concerned mainly with the provision of rulings to the *furu'* that come under its scope and implication (al-Badarayn, 2006).

8) Aspect of Existence

Theoretically, *Qaedah Usul al-Fiqh* emerged earlier than *Qaedah al-Fiqh* whereas; *Qaedah al-Fiqh* emerged after the accumulation of numerous juristic *furu'*. *Usul al-Fiqh* functions as a mean of *istinbat*. Therefore, it is logical to presume its existence prior to the existence of the *furu'*. This is because of the impossibility of *ijtihad* hence, the existence of the corpus of the juristic law without the existence of the *Qaedah Usul al-Fiqh* (al-Badarayn, 2006).

9) Aspect of Authority and Strength

Generally, the authority of *Qaedah Usul al-Fiqh* is accepted with certainty due to its definitive implication. On the other hand, *Qaedah al-Fiqh* lacks such implication for; its acceptance is not unanimously agreed upon between scholars. Nevertheless, some scholars regard *Qaedah al-Fiqh* as a supportive evidence of *ijtihad* only. This is so in the case of those who fulfill all the conditions and are fully aware of all cases that can be exempted. However, those admitting *Qaedah al-Fiqh* as authority in *ijtihad* do not allow it in all cases but only in certain cases (al-Zarqa, 1988).

10) Aspect of Foundation

Mostly, the basis of *Qaedah of Usul al-Fiqh* can be traced to the semantic rules and regulations of Arabic Language especially in respect of interaction with *nusus* (texts) as al-Qarafiyy (1998) has stated. On the contrary, *Qaedah al-Fiqh*, legal maxim is constructed through the process of induction of the existing *furu'* of

jurisprudence (al-Badarayn, 2006).

11) Aspect of the Authority of *Maqasid al-Shari'ah* (Objectives of Islamic Law)

Ayman 'Abd al-Hamid al-Badarayn rejects the view which assert the impossibility of understanding of the wisdom of Islamic law through *Qaedah Usul al-Fiqh's*. He politely rejects this view by saying that there are some *Qaedah Usul al-Fiqh's* that have *Maqasid al-Shari'ah* in sight. For instance, *qiyas* (analogical deduction), has it in sight especially in relation to the discussion of *al-'Illah al-Mu'aththirah* (Effective Cause), *al-Masalih al-Mursalah* (Unrestricted Interest), *Sadd al-Dhara'i* (Blocking the Means), *al-Istishab* (Presumption of Continuity), *al-Istihsan* (Juristic Preference/Equity) and others methods have the *Maqasid al-Shari'ah* in insight during their operationalization (al-Badarayn, 2006).

Evidently, from our point of view, the difference of opinions pertaining this issue is due to the question of whether *Maqasid al-Shari'ah* is part of *Usul al-Fiqh* or as a separate discipline in its own right? For those who consider it as a part of *Usul al-Fiqh*, there is no issue here. But for those who consider *Maqasid al-Shari'ah* as a separate scientific discipline, *Usul al-Fiqh* does not discuss *Maqasid al-Shari'ah*. Therefore, the arguments presented by Ayman 'Abd al-Hamid al-Badarayn could not shake their stand for, all the examples given above could not clearly reveal the *Maqasid al-Shari'ah* unless in very difficult way. In fact, what Ayman al-Badarayn presented is what Ibn 'Ashur has stated in his book, *Maqasid al-Shari'ah al-Islamiyyah* (Ibn Ashur, 2001):

On the other hand, there is some underlying secret in some issues of *Usul al-Fiqh* in various chapters which are not investigated property and are abandoned -during research- in the book of *Usul al-Fiqh*. Discovery of these secretes or underlying meanings are of such a nature that the authors would not easily comprehend unless they are endowed with a strong sense of patience and endurance. Due to this reason these secret meanings which are more appropriate to be classified as *al-Maqasid* are considered unimportant and are not given a proper attention. Those issues comprises debate pertaining *al-Munasabah* (Appropriateness), *al-Ikhalah* (Appearance of Goodness) in *Masalik al-'Illah* (methods of the discovery of the cause), *al-Masalih al-Mursalah*, *al-Tawatur* (Recurrence), and etc.

Apparently, some researchers with no inclination of separating *Usul al-Fiqh* from *Maqasid al-Shari'ah* have obviously made some efforts to integrate *Usul al-Fiqh* and *Maqasid al-Shari'ah*. Some even indulged themselves with polemics revolving around debates pertaining *Maqasid al-Shari'ah* in various scientific books including *Usul al-Fiqh* written by scholars in 4thHejira. Some of the books are *al-'Ilal* (the Causes) or *Ithbat al-'Ilal* (Substantiation of the Causes") by Abu 'Abd Allah Muhammad bin 'Ali al-Tirmidhiyy (al-Hakim) who died in 320Hejira, *Mahasin al-Shari'ah* (The Virtues of the Shari'ah) by Abu Bakr al-Qaffal al-Shashiyy who died in 364 Hijrah, book of *al-'Ilam bi Manaqib al-Islam* (An Exposition of the Virtues of Islam) by Abu al-Hasan al-'Amiriyy and of course *al-Burhan fi Usul al-Fiqh* (the Authority in the Principles of Jurisprudence) by Abu al-Ma'ali Imam al-Haramayn al-Juwayniyy who died in 478Hijrah. Even Imam al-Haramayn is the first who divide *al-Masalih al-Mursalah* into three categories; *al-Daruriyyat* (Essentials), *al-Hajiyyat* (Necessaries) and *al-Tahsiniyyat* (Embellishments) under chapter *Taqasim al-'Ilal wa al- Usul* (Divisions of Cause and Principles) in the book of *al-Qiyas* (The Analogical Method of Derivation) from *al-Burhan fi Usul al-Fiqh* (Book of Demonstration on Jurisprudence) (al-Juwainiyy, 1997).

12) Aspects of Generalization and Consistence

The rule of *Usul al-Fiqh* is more consistent in comparison to *Qaedah al-Fiqh* for, the later has many exceptions due to which it has been identified with the character of *aghlabiyyah* (general) (al-Zuhaili, 2006). This led some scholars to take initiative in producing books covering all examples that could be exempted from *Qaedah al-Fiqh* such as *al-Munaqadat fi al-Hasr wa al-Istithna'* (Contradiction on The Cramming and The Exclusion) by Ahmad bin al-Husayn al-Fannakiyy and *al-Istighna' fi al-Farq wa al-Istithna'* (Dispensing on The Different and The Exclusion) by Badr al-Din Muhammad al-Bakriyy al-Shafi'iyy (al-Bahisin, 1998).

13) Aspects of *Usul* and *Furu'*

Knowledge of *Qaedah Usul al-Fiqh* is a necessary condition of *ijtihad* through which the existence of juristic *furu'* is realised), on the other hand, *Qaedah al-Fiqh* is constructed based on the juristic *furu'*. Therefore, *Qaedah Usul al-Fiqh* is the origin of the juristic *furu'* (al-Badarayn, 2006).

14) Aspect of the Method of Construction of Juristic *Furu'*

The rule of *Usul al-Fiqh* is something which is strictly followed by *mujtahid* in the process of *istinbat*. On the other hand, *Qaedah al-Fiqh* is a collection of various cases under one ruling due to their similarity and resemblance (al-Badarayn, 2006).

Although there are many differences between the rule of *Usul al-Fiqh* and *Qaedah al-Fiqh* they also have some principles in common. This partnership can be seen from different aspects. If we were to consider it from the aspect of its generality and its being as an evidence through which *istinbat*, derivation of ruling is facilitated then it resemble to *Qaedah Usul al-Fiqh*. However, considering it from the aspect of its being as a specific evidence establishing a legal obligation for *mukallaf* (subject of law) it resemble to *Qaedah al-Fiqh* (al-Burnu, 19970). For example, *Sadd al-Dhara'i* (Blocking the Means) if we consider it from the aspect of its generality as a general evidence for the derivation of ruling, which is "the proof of establishing the prohibition of something is also the proof of the prohibition of what lead to the establishment of the prohibited thing.", then it is considered as *Qaedah al-Fiqh*. Instead, if consider it from the aspect of its being a specific ruling imposed on the subject of the law than we can conclude that "everything *mubah* (permissible) if lead into illegal it is forbidden" then in this sense it is considered as *Qaedah al-Fiqh*.

5. Main Reference of the Rule of Usul Al-Fiqh

Generally, all books of *Usul al-Fiqh* regardless of their being in the form of *matan* (the text) or *sharh mukhtasar* (abridgement) or *hashiyah* (marginal notes) constitute the essential references for *Rule of Usul al-Fiqh*. However, some of these books having their own style have discussed subjects pertaining to *Usul al-Fiqh* more elaborately in the form of principles than others.

5.1 Turath Books

Turath books constitute the primary sources for the study of *Usul al-Fiqh*. Some of these books involve directly in the discussion of *Qaedah al-Fiqh* such as:

- i. *Al-Qawa'id wa al-Fawa'id al-Usuliyyah wa Ma Yata'allaq biha min al-Ahkam al-Far'iyyah* (Principles and Advantages of Principles of Jurisprudence and Their Related Juristic Rulings) by 'Ali bin Muhammad bin 'Abbas bin Shayban al-Ba'liyy or well-known as Ibn al-Lahham al-Hanbaliyy.
- ii. *Al-Wusul ila Qawa'id al-Usul* (Comprehension of the Principles of Fundamentals) by Muhammad bin Abdullah bin Ahmad al-Tamartashiyy al-Ghazziyy al-Hanafiyy.

Among the classic juristic books that discuss directly *Qaedah Usul al-Fiqh* including their juristic application and are classified as *takhrij al-furu' 'ala al-usul* (Exposition of the Peripheries from the Roots) based on *Qaeda Usul al-Fiqh* for example:

- a) *Takhrij al-Furu' 'ala al-Usul* (Exposition of the Peripheries Based on The Principles) by Mahmud bin Ahmad bin Mahmud al-Zinjaniyy al-Shafi'iyy.
- b) *Miftah al-Wusul fi Bina' al-Furu' 'ala al-Usul* (The Key of Arriving at the Construction of Branchs Based on Roots) by Muhammad bin Ahmad bin Yahya bin 'Ali al-Tilmisaniyy al-Malikiyy.
- c) *Al-Tamhid fi Takhrij al-Furu' 'ala al-Usul* (Introduction to Derivation of Specific Cases From General Rules) by 'Abd al-Rahim bin al-Hasan al-Asnawiyy.

5.2 Modern Books

Some of the modern books discuss *Qaedah Usul al-Fiqh* in particular way. This sort of books can be classified into two types:

- i. *General books of Qaedah Usul al-Fiqh such as:*

- a) *Athar al-Ikhtilaf fi al-Qawa'id al-Usuliyyah fi Ikhtilaf al-Fuqaha'* (The Effect of Difference in The Principles of Jurisprudence on Difference of Jurists Opinions), Ph.D Thesis by Mustafa Sa'id al-Khinn.
- b) *Al-Qawa'id al-Usuliyyah al-Muta'alliqah bi Fiqh al-Mu'amalat: Dirasah Usuliyyah Fiqhiyyah Muqaranah*, (Juristic Principles Pertaining Transactional Jurisprudence) A Juristic Comparative Study), Ph.D Thesis by Dusuqi Yusuf Dusuqi.
- c) *Al-Qawa'id al-Mushtarakah Bayn Usul al-Fiqh wa al-Qawa'id al-Fiqhiyyah* (The Shared Principles Between Principles of Jurisprudence and Legal Maxims), Ph.D Thesis by Sulayman bin Salim Allah Raja' al-Rahiliyy.
- d) *Nazariyyat al-Taq'id al-Usuliyy* (The Theories Juristic Engagementof), Ph.D Thesis by Ayman 'Abd al-Hamid al-Badarayn.

- ii. *Scriptures pertaining the study of Qaedah Usul al-Fiqh in particular books such as*

- a) *Al-Qawa'id al-Fiqhiyyah wa Tatbiqatuha al-Fiqhiyyah 'ind Ibn Qudamah fi Kitabih al-Mughni* (The Rules of the Principles of Jurisprudence and its Juristic Application according to Ibn Qudamah in his book The Sufficient), Ph.D Thesis by al-Jilali al-Mariniyy.

b) Al-Qawa'id al-Usuliyah 'inda al-Imam al-Shatibiyy min Khilal Kitabih al-Muwafaqat (The Rules of the Principle of Jurisprudence According to al-Imam al-Syatibiyy in his Book Agreements on the First Principles of Islamic Law), Master Thesis by al-Jilali al-Mariniyy.

c) al-Qawa'id al-Muta'alliqah bi al-Qiyas wa al-tatbiq 'Alayha min Kitab Fath al-Bari li Ibn Hajar (The Rules Pertaining Analogy and Their Application in The Book of "The Creator's Conquest") by Ibn Hajar, Thesis by Sa'di 'Ali al-Haddad.

6. Application of the Rule of Principles of Jurisprudence

As noted earlier, every *ijtihad* must go through *Qaedah Usul al-Fiqh*. However, this is not the case with the *fiqh* (jurisprudence) due to its goals being specifically confined to the statement of the laws and their sources briefly. The application of the *Qaedah Usul al-Fiqh*, can easily be observed in books classified as *Takhrij al-Furu' 'ala al-Usul* (Deriving Specific Cases from General Rules). And other related books. To present the examples, we will divide the discussion into two sections in respect of derivation of law from al-Quran and *al-Sunnah* (Prophetic Tradition).

6.1 Examples of the Application of the Rule of the Principles of Jurisprudence for the Derivation of the Ruling from Al-Quran

Allah says in al-Quran:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا قُمْتُمْ إِلَى الصَّلَاةِ فَاغْسِلُوا وُجُوهَكُمْ وَأَيْدِيَكُمْ إِلَى الْمَرَافِقِ وَامْسَحُوا بِرُءُوسِكُمْ وَأَرْجُلَكُمْ إِلَى الْكَعْبَيْنِ وَإِنْ كُنْتُمْ جُنُبًا فَاطَّهَّرُوا وَإِنْ كُنْتُمْ مَرْضَىٰ أَوْ عَلَىٰ سَفَرٍ أَوْ جَاءَ أَحَدٌ مِنْكُم مِّنَ الْغَائِطِ أَوْ لَامَسْتُمُ النِّسَاءَ فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا صَعِيدًا طَيِّبًا فَامْسَحُوا بِرُءُوسِكُمْ وَأَيْدِيكُمْ مِنْهُ

Meaning: O ye who believe! When ye prepare for prayer, wash your faces, and your hands (and arms) to the elbows; Rub your heads (with water); and (wash) your feet to the ankles. If ye are in a state of ceremonial impurity, bathe your whole body. But if ye are ill, or on a journey, or one of you cometh from offices of nature, or ye have been in contact with women, and ye find no water, then take for yourselves clean sand or earth, and rub therewith your faces and hands.

Among the Rules of the Principles of Jurisprudence through which the verse can be understood is:

i. حرف الواو للترتيب

Meaning: The letter (و) connotes sequence or order.

In the above verse pertaining the act of ablution the letter (و) is used as a conjunction. 'ataf (coupling) letter. Thus, based on the rule of *Usul al-Fiqh*, we understand that the act of ablution as described in the verse is washing face, both hands till elbows, touching one's head and washing feet up to ankles must be done in *tartib* in sequence and order) (al-Zinjani, 1987).

ii. إذا دار اللفظ بين الحقيقة والمجاز جاز أن يكون كلاهما مراداً

Meaning: when a word revolves around metaphorical and real meanings both can be presumed to be the desired meaning.

In the verse above, expression (أو لامستم النساء) has two meanings, *al-Haqiqi* (real meaning) and *Majazi* (metaphoric meaning). The real meaning is to touch and the metaphorical meaning is to have intercourse. According to the principle, this verse gives the meaning that a person touching a woman to whom he can legally marry will nullify his ablution because it, Real meaning) is one of the two desired meanings, which is held by scholars of Shafi'i sect, but Hanafi scholars chose the metaphorical meaning in this situation based on the consideration of other arguments. (Al-Zinjani, 1987).

iii. مطلق الأمر يقتضي التكرار

Meaning: Absolute command requires repetition.

Based on this rule, Shafi'i scholars understood the *amr* (command) of ablution for prayer to be requiring repetitiveness. In other word, a person cannot do *tayammum* (ablution performed with sand instead of water) to perform obligatory prayers except during praying time. This is because the meaning of *amr* (command) requires repetition (al-Zinjani, 1987).

6.2 Application of the Rule of the Principles of Jurisprudence in Derivation of the Ruling from Al-Sunnah (Prophetic Tradition)

Al-Tirmidhiyy narrated from al-Walid ibn Muslim from Mu'awiya ibn Yahya al-Sadafiyy from al-Zuhriyy from Abu Hurayrah from the Prophet Muhammad words:

لا يؤذن إلا متوضئ

Meaning: a person without ablution cannot conduct the call for prayer.

The application of this rule can be viewed from two aspects.

Firstly: From the Aspect of the Strength of the *Hadith*

Considering the chain of the narration of the *hadith* there are narrators who have been dropped from the chain of the narrators of the *hadith*. (Al-Qattan, 1987, p. 1090) It is clear from the fact that al-Zuhriyy, as one of the narrators in the chain did not narrate *hadith* (prophetic tradition) from Abu Hurairah, therefore based on rule the *Usul al-Fiqh* the *hadith* with missing connection in the chain of its narration is not considered as an evidence for the establishment of a ruling.

لا تقوم الحجة بالحديث المنقطع

Meaning: A narration with a missing connection in its chain of narrator is not a sufficient proof.

Thus, this *hadith* cannot be used as evidence to say that *azan* (call to prayer) without ablution is not acceptable.

Secondly: From the Aspect of its Derived Ruling

The proponents of this *hadith* claimed that even though this *hadith* is expressed in the form of *ayat khabariyyah* (enunciative) statement, its intent is constructive *insha'iyyah* hence, implies prohibition. It is a rule of *Usul al-Fiqh* that:

النهي للتحريم

Meaning: Prohibition give rise to forbidding.

Therefore, this rule implies that to perform the call for prayer without ablution is prohibited and this prohibition includes all types of *azans*, such as *azan* for five times prayer, *azan* of Friday prayer *azan* of traveller etc. based on the rule of the, generality of the implication of the indefinite noun in the context of negation.

النفي تعم النكرة في سياق

The opponents of this *hadith* argued based on a *hadith sahih* (authentic tradition) in which it is mentioned that al-Muhajir bin Qunfudh met the Prophet Muhammad who was urinating. Al-Muhajir gave *salam* (greeting), but he did not answer until he performing *wudhuk* (ablution). Then he said as narrated by Abu Dawud:

إني كرهت أن أذكر الله إلا على طهر أو قال على طهارة

Meaning: I don't like to praise of Allah unless I am free from *hadath* (excrement).

They state that the practice of the prophet is *sunnah* and it is expressed as an explicit cause which is *zikrullah*, remembrance of Allah. It is the rule of the Principles of Jurisprudence, that the cause covers all its related cases.

العلة تعم معلولها

From this rule of the Principles of Jurisprudence it can be concluded that, in all forms of *zikrullah* (remembrance of Allah) it is *mandub* (recommended) to have ablution including *azan*.

Apart from the application of rule of *Usul al-Fiqh* in al-Quran and al-Sunnah (Prophetic Tradition), it can be applied also in all subject of the Science of the *Usul al-Fiqh*. Thus, the examples mentioned are meant to provide a brief description of the forms of the application of rule of the Principles of Jurisprudence, in derivation of ruling from al-Quran and al-Sunnah.

7. Conclusion

The significance of the rules of *Science of Usul al-Fiqh (Principles of Jurisprudence)* is crystal clear from the forgoing discussion. However, despite its significance, it lacks adequate attention unlike *Qaedah al-Fiqh*. This can be attributed to its being as branch of knowledge in its own right, having its own function and ability of self-propelled development, which is not known to many researchers. Theoretically, the *Science of the Principles of Jurisprudence* is as much needed branch of Science as the Science of Legal Maxims. Therefore, concerted efforts should be made to expose the rules of the *Science of the Principle of Jurisprudence* and compile then in specific book in the form of collection of the *Rules of the Science of the Principles of Jurisprudence*. Well organized and continuous effort in this direction will bear fruit and lead to the production of books of the *Rules of the Principles of Jurisprudence* in the same form as that of the books pertaining Legal Maxims with their related cases and application. To achieve this three steps are needed to be taken which comprises, rewriting of all the existing rules of the *Principles of Jurisprudence* in a separate book, hence coordinating and organizing them in the light of the difference of scholars. Then reconstructing them in the concise and precise phrases, hence, establishing the relationship between these rules and their application as mentioned in the classic books of the *Principles of Jurisprudence*. Hopefully this suggestion will attract the attention of the researchers especially in the field of the *Principles of Jurisprudence*, hence instigating further research in this respect

References

- Al-‘Amidiyy, Al-Din, S., Ali, A. B. A., & Al-Ahkam, A. F. U. (Exactitude in the Sources of Legal Judgments). Beirut: Darul Kutub al-'Ilmiyyah (Publishing House of Scientific Books).
- Al-Badarayn, A. A. A. (2006). Nazariyyat al-Ta'qid al-'Usuliyy. Beirut: Dar Ibn Hazm.
- Al-Bahisin, Y. B. A. A. (1998). Al-Furuq al-Fiqhiyyah wa al-'Usuliyyah. Riyadh: Maktabat al-Rushd.
- Al-Burnu, & Ahmad, M. S. B. (1997). Mawsu'ah al-Qawa'id al-Fiqhiyyah (The Principles of Jurisprudence Encyclopedia). Riyadh: Maktabat al-Tawbah (al-Tawbah's Bookstore).
- Al-Jassas, & Al-Raziyy, A. B. A. (1405 Hijrah). Ahkam al-Quran (Rulings of the Qur'an). Inquisitor: Muhammad al-Sadiq Qamhawiyy. Beirut: Dar Ihya' al-Turath al-'Arabiyyah Publishing House of Arabic Classic Books).
- Al-Jilali, & Al-Mariniyy. (1423 Hijrah/2001 A.D.). Al-Qawa'id al-Fiqhiyyah wa Tatbiqatuhā al-Fiqhiyyah 'ind Ibn Qudamah fi Kitābih al-Mughni (Principles of Jurisprudence and Implementations by Ibn Qudamah in his book "The Sufficient"). Saudi Arabia: Dar Ibn al-Qayyim (Publishing House of Ibn Qayyim).
- Al-Jilali, & Al-Mariniyy. (1425 Hijrah/2004 A.D.). Al-Qawa'id al-'Usuliyyah 'inda al-Imam al-Shatibiyy min Khilal Kitābih al-Muwafaqat (The Juristic Rules by al-Imam al-Syatibiyy based on his book "Agreements On The First Principles of Islamic Law") Saudi Arabia: Dar Ibn al-Qayyim (Publishing House of Ibn al-Qayyim).
- Al-Juwayniyy, & Yusuf, I. A. A. B. A. A. B. (1997). Al-Burhan fi Usul al-Fiqh (Book of Demonstration on Jurisprudence). Inquisitor: 'Abd al-'Azim Mahmud al-Dib. Mansoura: Dar al-Wafa' (Publishing House of Loyalty).
- Al-Qarafiyy, & Idris, S. A. A. B. (1998). Al-Furuq (Legal Differences). Checked and corrected by Khalil al-Mansur. Beirut: Dar al-Kutub al-'Ilmiyyah (Publishing House of Scientific Books).
- Al-Qattan, M. (1987). Mabāhith fi 'Ulum al- Hadith. Cairo: Maktabat Wahbah.
- Al-Rahman, J. A. A. (1990). Ghayat al-Wusul ila Daqa'iq 'Ilm al-'Usul, al-Mabadi' wa al-Muqaddimat. Egypt: Matba'at al-Jabalawiyy.
- Al-Raysuniyy, Ahmad, Al-Maqasidiyy, I. A., & Al-Juwayniyy, A. A. I. A. (Anniversary of Imam al-Haramyn al-Juwayniyy.) (1999, April 6-8). University of Qatar.
- Al-Raziyy, & Umar, F. A. M. I. (1988). Al-Mahsul fi Usul al-Fiqh (The Substance in The Foundations of Jurisprudence). Beirut: Dar al-Kutub al-'Ilmiyyah (Publishing House of Scientific Books).
- Al-San'aniyy, & Al-Yamaniyy, M. B. I. A. (1988). Subul al-Salam sharh Bulugh al-Maram ("Paths of the Peacefulness", commentary on "Attainment of the Objective"). Inquisitor: Muhammad 'Abd al-Qadir Ahmad 'Ata. Beirut: Dar al-Kutub al-'Ilmiyyah (Publishing House of Scientific Books).
- Al-Subkiyy, Al-Kafi, S. A. A. I. A., & Ali, I. A. T. A. A. I. (1404Hejira/1984A.D.). Al-Ibhaj fi Sharh al-Minhaj ("The Gladdening": An Exegesis of "The Road"). Mecca: Dar al-Baz (Publishing House of al-Baz).
- Al-Tirmidhiyy, Isa, A. I. M. B., & Al-Sahih, A. (A Collection of The Prophet's Authentic Traditions) (n. d.). Inquisitor: Muhammad Shakir. Beirut: Dar Ihya' al-Turath al-'Arabiyy (Publishing House of Restoration Arabic Classic).
- Al-Zarqa. (1998). Mustafa Ahmad al-Madkhal al-Fiqhiyy al-'Am. Damascus: Dar al-Qalam.
- Al-Zinjaniyy, & Ahmad, S. A. M. B. (1987). Takhrij al-Furu' 'ala al-'Usul. Inquisitor: Muhammad Adib Salih. Beirut: Mu'assasat al-Risalah.
- Al-Zuhayliyy, & Mustafa, M. (2006). Al-Qwa'id al-Fiqhiyyah wa Tatbiqatuhā fi al-Madhahib al-'Arba'ah. Damascus: Dar al-Fikr.
- Ashur, I., & Al-Tahir, M. (2001). Maqasid al-Shari'ah al-Islamiyyah. Inquisitor: Muhammad al-Tahir al-Misawiyy. Jordan: Dar al-Nafa'is.
- Dawud, A., Al-Ash'ath, S. B., & Dawud, S. A. (Collected by A. Daawood) (n. d.). Inquisitor: Muhammad Muhyi al-Din 'Abd al-Hamid. Beirut: Dar al-Fikr (Publishing House of Thought).
- Fulusi, M. B. M. (2004). Mudarasat al-Mutakallimin wa manhajuhā fi dirasat usul al-fiqh . Arab Saudi. Maktabat al-Rushd. Retrieved from <http://www.mmf-4.com/vb/t2727.html>
- Hajar, I., & Hajar, A. B. A. B. (1989). Fath al-Bari Sharh Sahih al-Bukhariyy. Inquisitor: 'Abd 'Aziz bin Baz. Beirut: Dar al-Kutub al-'Ilmiyyah.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/3.0/>).