Usul Al-Fiqh

Dr. Muneer Fareed

Overview

Usul 'l-fiqh when translated to mean Islamic theory comprises of multiple disciplines, including linguistics, logic, methodology, epistemology, and theology. As opposed to Fiqh, its related discipline, Usul 'l-Fiqh, some say, is irrelevant to real problems of law; and its role in the formation of Islamic law in the past therefore, is at best, negligible. But Usul is indispensable for unraveling the thought processes of the various Islamic jurists, determining their logic, and their choice of sources. The following material is used to illustrate this process.

Definition:

Fiqh:

1-Practical rules for individual and social conduct.

2-The proofs whereby these rules are prioritized from the most forbidden to the most obligatory. Jurists categorize such rules as: harãm, makruh, mubäh, mustahab, and Fardh.

Usul:

1-The method of determining proofs of Fiqh by classifying the classical sources of Islam.

2- Prioritizing the proofs found in these sources by using language rules, inter-textual commentaries, and the reliable opinions of the first generation Muslims.

Major Areas in Usul Studies:

1. A1-Hukm al-Shar`i: The Rule in terms of Islamic law.
2. A1-Häkim: The Legislator.
3. Al-Mahkum Fihi: The human act itself.
4. Al-Mahkum 'Alaihi: The individual's legal capacity to perform.

A: Al-Hukm Al-Shar`i:

This is also of two types:

- Hukm taklifi: a rule requiring the performance of an act, eg., salat; or the avoidance of an act, eg., consuming pork products.
- Hukm Wad`i: a prerequisite for the performance or the avoidance of the foregoing acts: Water in the case of wudu; death in the case of inheritance; and apostasy in the case of disownment.

Kinds of Hukm TakIifi

Wãjib: also known as fardh. This is an obligatory act whose neglect is blameworthy; eg., fasting in Ramadan. Hanafites distinguish between acts determined by way of definitive evidence which they consider fardh, and acts determined by way of presumptive evidence which they consider wäjib. Thus, the recitation of the Fatiha in every raka`ah of the salat is considered fardh/wajib by the Shafiites but only wajib by the Hanafites. This difference is also important when determining apostasy: fardh denier is kãfir; wãjib denier is not.

Mandub (aka: nafil, mustahab and sunna): an act worthy of reward for performance, but not of punishment for neglect. Sunna however is of 2 kinds: stressed, i.e., acts that the Prophet (s) performed diligently, and non-stressed, i.e., acts he sometimes ignored.

Harãm: that which is forbidden by way of definitive evidence or by way of presumptive evidence. Hanafites call the latter Makrüh tahrimi, and not haram.

Harãm may also be divided into two categories: That which is prohibited in itself (*li dhatihi*) and that which is prohibited for contingent reasons (*li ghairihi)*

- Li Dhatihi: That which causes direct harm to what Imam 'l-Shatibi called life's five essential aspects: the physical; the genealogical, the material, the mental, and the spiritual.
- Li Ghairihi: that which causes indirect harm to the foregoing essential aspects. Thus, marrying two sisters concurrently is *haram li ghairihi* because it causes harm to one's familial relations, and to one's geneology. Acts that fall into this category do not however, invalidate the entire act: eg., praying in stolen clothing.

Makrüh: an act that is disliked but not forbidden. Performing such an act earns rebuke, and avoiding such an act earns commendation.

Mubäh: an act that earns neither wrath nor reward.

Kinds of Hukm Wad'i

Sabab: that which causes the act to be activated, eg., time and the performance of salãt

Shart: a condition upon which an act is contingent. Eg.: wudu is a shart for the performance of salat. But unlike the sabab, the mere presence of the shart does not activate the contingent act. Thus having wudu does not necessitate the performance of salat.

Mãni': a hindrance to the performance of an act. Thus a child is an heir to the parent, except if he caused the death of the parent, in which case he will be denied a share in the estate of his parent.

Al-Hakim

This refers to Allah, who wields sovereignty over the acts of His servants. Scholars differ with regard to the human intellect? Those belonging to the Ahl al-Sunna differ with the Mu'tazilites on what the inerrant determinant of any act is: Revelation alone, or reason independent of revelation? Mu'tazilites say: because an act is intrinsically evil, Allah forbids it; Sunnis say: no act is inherently good or evil, but becomes so through providential decree. Sunnis also say that the Qur'an and the Sunna are the only determinants of good and evil.

Sources of Islamic Law

Islamic law is based on four primary sources: Qur' an, Sunna, Ijma', and Qiyas.

The Qur'ãn

Definition: A collection of revelations received by the Prophet (s) and transmitted thereafter by so many transmitters of good standing as to preclude the possibility of collusion among them. This is known as the process of *tawatur*. Overall, the primary themes of the Qur'an include theology and history. The former includes cosmology, revelation, and eschatology, and the latter, morality, wisdom, and law. Revelation occurred over 23 years, 13 years in Mecca and 10 in Medina, in keeping with the conditions prevalent in these locations.

- Meccan revelation deals with faith and eschatology.
- Medinan revelation deals with social, political and legal reformation.

Sunna

Definition: The prophetic ideal which every Muslim is obliged to emulate in its minutiae. It includes the utterances, the actions, and the tacit approvals and disapprovals of the Prophet(s) after the initiation of the revelatory process. Whilst Sunna is complementary to the Qur'ãn, and a commentary to it, it is also an independent source of the shari` a. Source material for determining the Sunna is found in the Qur'an, and the biography (sira) of the Prophet (s), but its primary source is the collection of material known as hadith.

Hadith

Comprises of two parts: the **sanad,** or the chain of transmitters (ruwat) from the Prophet

(s) to the compilers of authoritative books such as the Sahih collection of Bukhari; and the **matn**, or the actual statement by or about the Prophet (s).

Sanad is of two types: connected and disconnected.

1. Connected: two categories: mutawãtir, and ahad.

   Mutawãtir: narrated by four or more narrators in every generation. Provides definitive (qat'i) proof. Closest hadith to the Qur'an in terms of authority.

   Ahad: all traditions that do not fall into the mutawãtir category are regarded as ähãd. Provides presumptive evidence (zanni). This means that: 1-All schools maintain that ahad traditions cannot be used to establish articles of faith. 2-Abu Hanifa maintains that that the efficacy of an ahad haditih is compromised if its narrator acts contrary to his report, eg., washing of utensil licked by dog, as reported by Abu Huraira (r). 3-Malik maintains that an ahãd hadith cannot overrule the living sunna of the people of the city of Medina who lived during the era of the Prophet (s).

2. Disconnected Hadith: aka Mursal or munqati': where the chain of transmitters to the Prophet (s) is disconnected in one or more places

Linguistic Considerations:

In order to derive proofs from the material sources of the law the form and structure of their language is important. They are of several kinds: Considering the words used in terms of clarity; considering the statements themselves in terms of being explicit or implied; and Considering the structure of the imperative phrases.

Words

Words either do, or do not, have stand alone meanings, requiring no further commentary. The following categories are significant:

i-Nass: The weakest form, explicitly states one thing, and implies another. An example is the verse: Those who consume riba will stand only as one driven to insanity because Satan touched him; this, because they asserted that riba transactions were not unlike normal trade, whereas Allah has rendered permissible trade and prohibited riba."(2:275) This verse is meant to distinguish between trade and nba but the words speak explicitly about the permissiblity of trade.

ii-Mufassir: a stronger form, appears where one text comments on another. Salat is mentioned in the Qur'an but its details are to be found in hadith material; the latter is

therefore the mufassir.

iii- Muhkam: This is the strongest form of verses containing stand alone words, eg., "those who defame chaste women, and do not bring four witnesses should be punished with eighty lashes, and never ever accept their evidence" (4:24) According to the Hanafites the testimony of a slanderer is never accepted. This is because they consider the exceptional clause "wa la taqbalu lahum shahadatan abadan. . ." exclusionary.

Ambiguous Words

i-Khafi: a word that is unequivocal except if applied to exceptional

circumstances, eg., sãriq (thief) which appears in the verse on theft. Does it apply to a graverobber who steals coffins and shrouds!! Also the hadith dictates: "A killer must never inherit from his victim" Does killer include erroneous killing? Shafi'i says yes; Mãlik says no.

ii-Mushkil: Because of the word itself the meaning remains obscure, eg., the word *`ain* which means both water and the human eye.

111-Mujmal: a word crowded with meaning, or requiring a cluster of explanations such that the context itself cannot single out the intended meaning. For example, the duty to perform hajj, as mentioned in the Qur'an, needs not just several hadith, but also the interpretations of the jurist.

iv-Mutashãbih: a word whose meaning forever remains shrouded in mystery. Eg., the opening letters of the Qur'an.

The Proofs

The statements themselves provide a variety of proofs:

i-Dalãlat al- `Ibara: This refers to the meaning derived from the words used in the verse itself, eg., "Allah has permitted trade, and forbidden riba". This verse clearly states two laws evident in the words of the verse itself: permissibility of trade, and prohibition of riba.

ii- Ishãrat al-Nass: Here the words point to a meaning but not the verse itself, eg., in the verse "If you fear that you will not deal justly with (more than one wife) then marry one only"[1] (4:3), it is clear that morally, but not legally, one should, under these circumstances, limit one's self to a single wife; but this is not an enforceable law, because the problem will only present itself after the fact. The words of the verse point to the fact, without saying so categorically, that equal treatment of wives is a moral requirement. Another verse, "And their affairs are dispensed with

[1] "Wa in khiftum alla tuqsitu fi al-yatama fa **i**nkihu ma taba lakum min a**l-**nisa`i mathna wa thulatha wa ruba`a fa in khiftum an la ta`dilu fa wahidatan aw ma malakat aimanukum thalika adna an la ta`ulu

through mutual consultations."[2](42:38) speaks about the need for shura, whilst the words point to the need to have an integrated social existence.

iii- Dalãlat al-Nass: here the intent is known from the text itself, even if the words do not say so explicitly. Thus in the verse "And say not to them (parents) so much as 'ugh"[3] it is clear that if 'ugh' is not acceptable, all the more reason that openly insulting or otherwise injuring them is completely forbidden. The words of the verse however, do not state this explicitly.

iv- Mafhum Mukhãlif: to infer the opposite of what is explicit in a verse, eg., in the verse "Forbidden unto you is carrion, blood, the flesh of swine, and sacrifices made in the name of deities other than Allah"[4] (2:173), the mafhum mukhãlif is that animals not slaughtered in the name of any deity, including Allah, are therefore permissible. Hanafites object however, and say that this is not a legitimate method of determining law. For example, using this method of deriving law, in the verse "Indeed the number of months in the eyes of Allah are twelve of which four are sacred; now, do not oppress others in these months"[5] (9:36), gives the impression that oppression outside these months is acceptable.

'Aam and Khas: Exclusionary and Inclusionary statements.

This is perhaps the most important and the most controversial section in Usul al-Fiqh. It is the task of determining the people, places etc., that are included or excluded in verses that are general. Questions asked in this regard include: What kind of authority does an 'am verse wield? Is it unequivocal (qat'iyya) or equivocal (zanniyya)? What authority does the Qur'an wield over the hadith and vice versa? In other words, what is the validity of an 'am verse in light of a khãss

---

[2] "wa amruhum shura bainahum"

[3] "Waqada rabbuka an la ta`abudu illa iyyahu wa bi **a**l-walidayn ihsanan; in ma yablughanna `indaka al-kibara ahaduhuma aw kilahuma fa la taqul lahuma uffin w ala tanharhuma wa qul lahuma qawlan karima**n**

[4] "Innama harrama `alaykumu almaitata wa **al-**dama wa lahma al-khinziri wa ma `uhilla bihi li ghayri Allahi fa man idturra ghayra baghin wa la `adin fa la ithma `alayhi inna Allaha ghafurun raheem.

[5] "Inna `iddata a**l-**shuhuri `inda Allahi ithna `ashara shahran fi kitabi Allahi yawma khalaqa a**l-**samawati wa **a**l-arda minha `arba'atun hurum. Thalika a**l-di**nu al-qayyimu; fa la tadhlimu fihinna anfusakum "

hadith. Can a hadith abrogate, or specifiy the text of the Qur'an?

Hanafis regard the 'am verse as having universal application, as being unequivocal in its interpretation, and not being specifiable. Thus the verse "Those among you who die, leaving behind widows, the (latter) must guard themselves (be in mourning) for four months and ten days."[6] (2:234) Because this is an 'am verse, and for Hanafites it is unequivocal, its ambit includes all kinds of widows, including those whose marriages have not been consummated.

Shafis and Hanbalis regard the 'am verses as being equivocal, and more importantly, open to specification by ãhãd hadith. These schools distinguish between the strength of the Qur'an as source material (qat'iyya 'l-thubut) and its legal strength when 'am (zanniyya 'l-dalala), and between the strength of ãhad hadith material (zanniyya 'l-thubut) and its legal authority (qat'iyya 'l-dalala). On this basis they argue, a non mutawãtir hadith is able to specify an 'am verse. According to the Hanafis this is abrogation (naskh) and thus impermissible, whilst for the others it is a case of specification. For example, the 'am verse "0! Ye who Believe! When preparing for prayer, wash your faces, and your hands up to the elbows. and wipe your heads. . ."[7] (5:6) does not prescribe sequence in the performance of the wudu, according to the Hanafis . For the Shafis however, the following hadith: "Allah accepts not the prayer of a person until he places the acts of cleansing in their proper places; let him therefore, wash his face, then his hand. . ." does indeed prescribe sequence in the performance of the wudu. Malikis on the other hand allow this sort of *takhsis* only if the act in question is integral to the practices of the people of Medina. For example, in light of the verse: "Say! Of the revelation vouchsafed to me I find nothing prohibited except carrion. . . ."[8] (6:145) , and in light of the practices of Medina, Malik rejects the *ahad* hadith prohibiting the consumption of clawed animals. All schools agree however, that if the hadith is mutawãtir or mashhur then takhsis of the Qur'an is permissible.

Mutlaq and Muqayyid: Qualified and Unqualified Statements

For example, the mutlaq verse: "Free a slave"[9] is unqualified, and may therefore, include all slaves: males, females, the aged, the young, Muslims, as well as non-Muslim. For some

---

[6] Wa **a**lladhina yutawaffawna minkum wa yadharuna azwajan yatarabbasna bi anfusihinna arba`ata ashhurin wa`ashran fa idha balaghna ajalahunna fa la junaha `alaykum fima fa`alna fi anfusihinna bi **a**lma`rufi.

[7] Ya ayyuha alladhina amanu itha qumtum ila a**l-**salati fa **i**ghsilu wujuhakum wa aidiyakum ila al-marafiqi wa **i**msahu bi ru'usikum wa arjulakum ila al-ka`bayn

[8] "Qul la ajidu fi ma 'uhiya ilayya muharraman `ala taa`imin yat`amuhu illa an yakuna maytatan aw daman masfuhan aw lahma khinzeerin fa innahu rijsun aw fisqan 'uhilla li ghayri Allahi bihi faman idturra ghayra baghin wa la `adin fa inna rabbaka ghafoorun raheem**un**

[9] "fakku raqabat"

scholars however this verse is qualified by the verse: "Free, therefore, a Muslim slave."[10] When qualifying verses the following factors are considered: attributes, conditions, conditional particles, objectives, and time constaints.

An unqualified statement, according to Abu Hanifa, may only be qualified by a source having the same subject and ruling. For example, the word blood in the verse: "Forbidden unto you is carrion, blood, and the flesh of swine..."[11](2:173) may be qualified by the word "flowing" in the verse: "Say! Nothing of that revealed to me, has been rendered impermissible to one feeding himself except if it is carrion and flowing blood. . ." because both verses share the same subject (dietary laws) and the same ruling (prohibition of blood)

The other schools extend this rule to include cases where the purposes of the two verses differ. Eg., "so let two witnesses from among you bear witness." This is in commercial transactions. It is qualified by the verse "So let two just witnesses from among you bear testimony."[12](5:106) This verse deals with cases of divorce etc., but its ruling has been extended to include commercial transactions.

Thus if two verses of the Qur'an contradict each other they are reconciled by way of the khass/amm or the mutlaq/muqayyid rules. Another way however is through abrogation.

Naskh (Abrogation)

For the mechanism of naskh time is of the essence, because an earlier ruling is abrogated by way of a later ruling. An eg. of this is the switching of the qibla from Jerusalem to Mecca.

The Qur'an does abrogate the Qur' an, the sunna abrogates the sunna, but does the sunna abrogate the Qur'an? And does the Qur'an abrogate the sunna? Shafi'i insists that cross abrogations (Q>s & s>Q) do not take place. Shafi'i's fear was that one verse of the Qur'an would then abrogate a slew of prophetic prohibitions, in the matter of trade, for example.

Others state that the sunna which is mutawãtir or mashhur has the capacity to abrogate the Qur'an

Iima'

Ijma` along with qiyas, is considered the rational sources to the Qur'an and the sunna, the shari`ah's material sources. Ijma' is the universal consensus of the Muslim jurists of a given

[10] "Fakku raqabatin muminatin

[11] "Innama harrama `alaykumu al-maytata wa **al-**dama wa lahma al-khinzeeri wa ma `uhilla bihi li ghayri Allahi faman idtturra ghayra baghin wala `adin fa la ithma `alayhi inna Allaha ghafurun rahim**un**

[12] Ya ayyuha alladhina amanu shahadatu baynikum idha hadara ahadakumu al-mawtu heena al-wasiyyati ithnani

era following that of the Prophet (s), and covers only those matters not covered by the material sources. Ijmä' has undergone three phases, starting with the rightly guided caliphs who strove to obtain consensus among the Companions; then the Successors to the Companions who strove to obtain the consensus of their peers; and then the jurists of a given locality such as Medina, or Kufa who strove to obtain consensus among scholars of their area.

Kinds of ljma'

- Ijmã' sarih or categorical consensus occurs when all eligible scholars voice their opinion on any given matter.
- Ijmã'sukuti or implied Ijmâ' occurs when one or more scholars make a pronouncement about which others remain silent—Shãfi`i rejects this kind of ijma`

Qiyas

In order to extend the ambit of the sharia to cover areas not explicitly addressed by Islam's sacred sources, the instrument of qiyas or legislation through analogical reasoning was sanctioned by the majority of Muslim scholars. When faced with new issues that were non existent in the early communities jurists searched for similar situations in the Qur'an and the sunna, and then applied the old law to the new situation. The 'illa or the effective cause must exist in both the source as well as the new issue for the analogy to be valid. The process of qiyas comprises of four steps:

i-Asl: The source upon which the new rule will be based.

ii-Far': The unresolved issue that necessitates qiyas..

iii-Hukm: The ruling in the 'asl that may be extended to apply to the new issue..

iv- `Illa: The effective cause which must be found in the asl as well as the far` for the hukm to transfer..

Secondary Sources

Besides the foregoing sources different schools also use some of the following tools to extend the ambit of the law.

- Istihsan: This is the exception to a rule that was consistently applied in other situations, but not in this one, because doing so would go against the general principles of Islam. E.g., qiyas dictates that in every situation the witness to a case must be known to be reliable but an exception is made in cases where the judge is in a place where the

---

dhawa `adlin minkum

witnesses are unknown to him. Istihsãn is popular with the Hanafites and opposed strongly by the Shafiites.

- 'Urf: When no scriptural evidence (nass) is available Hanafites and Malikites use this mechanism. It is defined as public practice that does not contradict the sources of Islam, and it is legitimated by the hadith "That which Muslims regard as wholesome is also regarded as such by Allah."
- Maslaha Mursala: To preserve what Shatibi and others call the the five overall objectives of Islamic law, i.e., faith, life, mental faculties, geneology, and property, the Malikites allow the establishment of extra scriptural rules. They argue that this is in fact the objective of the Qur'an as well. Guilt by association for accessories to homicide falls in the interests of the public good. The same is true of the law allowing allegiance to a less eligible political candidate in the interests of political order. Malikis also allow the imposition of taxes not sanctioned by the sacred sources also in the interests of the public good.

Bibliography

Articles

Early Islamic Theological and Juristic Terminology: "Kitab al-Hudud fi 'l-usul," by Ibn Furak
M. A. S. Abdel Haleem
Hanafi Usul al-Fiqh through a Manuscript of al-Gassas
Marie Bernand
Considerations on the Function and Character of Sunni Legal Theory
Wael B. Hallaq
Illa and Qiyas in Early Islamic Legal Theory
Nabil Shehaby
Was the Gate of Ijtihad Closed?
Wael B. Hallaq
On the Authoritativeness of Sunni Consensus
Wael B. Hallaq
The Exegesis of Q. 2: 106 and the Islamic Theories of "naskh: ma nansakh min aya aw nansaha na'ti bi khairin minha aw mithliha"
John Burton
Was the Gate of Ijtihad Closed?
Wael B. Hallaq
Custom and the Muslim Law in British India
George Rankin
Ahmad Ibn Hanbal's Fiqh
Susan A. Spectorsky

Books

Principles of Islamic jurisprudence / **Mohammad Hashim Kamali**

A History of Islamic Legal Theories: An Introduction to Sunni **Usul** Al-Fiqh" by Wael B. Hallaq