

Review paper

An Analytical Reawakening of some Integral Organs of *Usul Al-Fiqh*

Zayyanu Musa Dogon Daji

Department of Islamic Studies, Faculty of Arts and Islamic Studies, Usmanu Danfodiyo University, Sokoto, Nigeria.

Author E-mail: zayyanumusa2@gmail.com

Received 13 July 2022; Accepted 1 August 2022; Published 10 August 2022

ABSTRACT: *Usul Fiqh* discusses the sources of Islamic Law, the *Ijma'* (consensus), *Qiyas* (analogical deduction), *Istihsan* (Juristic preference) and other methods of *Ijtihad* (reasoning and investigation). All the secondary sources are either directly or indirectly based on the primary sources of Islamic law, the Qur'an and the *Sunnah*. For instance, three main elements of *Qiyas* that is *ASL* (original case), *Hukm* (ruling on *ASL*) and the *Illah* (effective cause) are based on primary sources. *Usul Fiqh* also discusses other main issues involving Islamic law such as the effect of custom on law or custom as a source of law, and grades of the Islamic legal provision (i.e. what is *Haram*, what is *Maqruh*; what is *farz*, what is *wazib* and what is *mandub* (recommended) and also the methods of removal of conflict (i.e. *Taa'rud*). Therefore, the paper intends to discuss and elucidate some of the integral tools of *Usul Al-Fiqh* as being them among the basic gadget and instrument of *Usul Al-Fiqh*. The items which are going to discuss are as follows *Ijma'* (consensus), *Qiyas* (analogical deduction), *URF* and *Istishab* (Custom). Looking at the nature and scope of the research analytical method is used when conducting the research.

Keywords: *Usul Al-Fiqh*, *Ijma'*, *Qiyas*, *Urf*, *Istishab*,. Jurisprudence

INTRODUCTION

Usul al Fiqh (*Usul* is plural of *ASL*) the bases or roots of Islamic Law, expound the methods by which *Fiqh* (detail Islamic law) is derived from their sources. In this view, *Usul* is the methodology and the *Fiqh* is the product. *Usul* deals with the primary sources of Islamic law, the Qur'an and the *Sunnah* i.e. *Usul* discusses the characteristics of the Qur'an and *Sunnah*, i.e. methods of deduction of law from the Qur'an and *Sunnah*. In doing that, *Usul* discusses various kinds of words used in the Qur'an and *Sunnah* in particular and Arabic language in general such as the *Amm* (general) and the *Khass* (particular), *Mutlaq* (unconditional) and *Muqayyid* (conditional), *Haqiqi* (literal) and the *Majaji* (metaphorical), various types of clear words and unclear words.

Methods of deductions from the legal verses of the Qur'an and legal Ahadis (singular hadis) are what the *Fuqaha* (jurists) have called *Ibarah al Nass* (whereby *Akham* or rules are derived from the obvious words and sentences themselves), *Isharah al Nass* (where *Akham* are referred from signs and indications inherent in the

text) *Dalalah al Nass* (where *Akham* are derived as a requirement of the provision of the text though the text is silent on the issue). (Kamali, n.d)

In some books of *Usul*, grammar of Arabic language is discussed at length. Of course the knowledge of Arabic language and grammar is a must for one who wants to be a *Usuliun* or a jurisprudent. However, this is not really a subject matter of *Usul*. The benefits of the study of *Usul al Fiqh* are many. From a study of *Usul*, we come to know the methods of interpretations of Qur'an and *Sunnah*, all the secondary sources of Islamic law, the views on *Usul* of major scholars of the past and present, the rules of *Qiyas* and other method of *Ijtihad*, the history of development of Islamic law a legal theory. All these make anybody who studies *Usul* cautions in approach of Islamic law. He develops respect for the methodology of past masters and become aware of the need to follow rules in matters of deduction of new rules of Islamic law. He then is likely to avoid careless utterance and action. *Ummah* can produce great *Mujtahid* only by study of *Usul* in addition to other sciences. (Abu Zahra, 2011).

The principal objectives of *Usul*

The principal objectives of *Usul* is to regulate *Ijtihad* and guide the jurist in his effort at deducing the law from the sources.

Imam Shafii is considered to be the father of the science of *Usul*. This is true in the sense that the systematic treatment of the principles of *Usul al Fiqh* was first made by him. Before him, the jurists of course followed some principles in the deduction of law but these principles were not integrated and systematized. After Shafii, many scholars have contributed in the study of *Usul*, of them, the most famous are: Abul Hasan al Basri (d. 436), Imam al Haramayn al Juwayni (d. 487), Abu Hamid al Gazali (d.505), Fakruddin al Razi (d.606), Saifuddin al Amidi, Abu Hasan al Karkhi (d.349), Fakhruddin al Bazdawi (d.483), Abu Bakr Jassas (d. 370), Sadr al *Shari'ah* (d.747), Tajuddin al Subki (d.771), and Al Shatibi. There have been many writers on *Usul* in modern times, particularly in Arab lands. (Abu Zahra, 2011).

Initially two approaches developed in the study of *Usul*, the theoretical and the deductive. The theoretical approach was developed by Imam Shafii who enacted a set of principles which should be followed in the formulation of *fiqh*. On the other hand, primarily the early and later Hanafi scholars looked into the details of law given in the Quran and *Sunnah* and derived legal rules or *Usul* principles there from. However, the later scholars combined the two approaches and presently the subject essentially follows the same format. (Ahmad, n.d)

Ijma' (Consensus of opinion)

Ijma' is the verbal noun of Arabic word *Ajma'a* which has two meanings: to determine, to agree upon something. *Ijma'* is considered the third of proof of *Shari'ah* after the Quran and the *Sunnah*. As a proof of *Shari'ah*, it is basically a rational proof. An *Ijtihad* or an interpretation of one or a few scholars when becomes universal becomes *Ijma'* (Ash-Shawkani, n.d).

The classical definition of *Ijma'*, as laid down by *Ulama'* of *Usul*, is categorical on the point that the universal consensus of the scholars of the Muslim community as a whole can be regarded as conclusive *Ijma'*. However universal *Ijma'* are indeed very few. As evidence show, it is extremely difficult to prove *Ijma'* on particular issues, particularly in the case of issues open to *Ijtihad* or *tawil*. There is no authentication of *Ijma'* through *Isnad* (chains of narrators). (Ash-Shawkani, n.d).

The only form of *Ijma'* upheld by majority is the *Ijma'* as Sahabis only. Majority of *Ulama'* of *Usul* think that *Ijma'* can take place on *Sharii'h* and devotional (*Ibadah*) and dogmatic (*Itiqad*) matters. For the first time *Ijma'* occurred among the companions of the Prophet (SW). *Ijma'* initially helped unity of *Ummah* in some matters. *Ijma'* also

ensure correct interpretation as broad consensus is unlikely to take place on incorrect matter. *Ijma'* also enhances the authority of the rule on which there is *Ijma'*. Unanimity of *Ulama'* on an issue of a particular time is a requirement of *Ijma'*. The agreement must be expressed by clear opinion of all scholars of the time. (Al-Baidhawi, n.d). *Ijma'* must consist of the agreement of all *Mujtahidun*. Though many *Ulama'* consider majority to consist of *Ijma'*.

Any agreement of majority can be a proof but cannot be a binding proof because to be binding, it must fulfill the conditions stated in the Ahadith in support of *Ijma'* (which is nothing short of *Ijma'* of all people, at least all scholars). There is no good ground to exclude any scholar of any school of Islam, as long as the school or group itself is not considered outside Islam by the Muslims. (Al-Baidhawi, n.d).

The *Ulama'* have no the whole maintained that the textual evidence in support of *Ijma'* does not amount to conclusive proof. The Ayats quoted in support of *Ihma* (4:59, 4:83; 4:115, etc) are not conclusive for *Ijma'*. Imam Gazali says these Ayats are indications, not clear Nass of *Ihma*. Suyuti's interpretation is the same. Abduh does not find any *Ijma'* in these Ayat. Al Amidi says, "these give rise to probability (Zann), not positive knowledge" (Kamali, n.d).

About 10 Ahadith are quoted in support of *Ijma'* (see Kamali). Ahmed Hassan observes these hadith are inconclusive in *Ijma'*. A number of *Ulama'* (including Shafii and Mutazila scholars) have said that *Ijma'* of classical definition is not feasible because of the huge number of the *Ummah* or its scholars or distances. It is for this reason that imam Shafii confines the occurrence of *Ijma'* to the obligatory duties only. For the same reason, Zahiris and Imam Ahmad refer by *Ijma'* to the consensus of companions only. (Abdel Hey, 2016).

Abdul Wahab Khallaf is of the view that *Ijma'* of classical definition is no longer possible in modern times (because of huge number of scholars spread over continents). Khallaf is right. Old style *Ijma'* is no longer possible. You can have only local *Ijma'*, which is useful in lawmaking through parliament but they cannot be (by definition) binding forever. (Abdul Wahab, 2003).

Ijma' are of two types: *Ijma'* al Sariah (explicit *Ijma'*) and *Ijma'* al Sukuti (*Ijma'* by silence). *Ijma'* sukuti (which occurs when one or a few scholars agree on something and no dissent is known) is not a proof according to a majority of scholars. According to the majority *Ijma'* must be founded in a textual authority (Quran and *Sunnah*) or *Ijtihad*. There are 3 views on whether *Qiyas* can be a basis of *Ijma'* or not (Kamali, n.d). Some agree, some disagree, some partially agree.

Ijma' can be transmitted by *Ahad* or *Mutawatir* report of scholars. There is no *Mutawatir* report of *Ijma'* except those of *Ijma'* of companions. Iqbal gives a proposal to transfer performance of *Ijma'* to the legislative assembly, which is only possible form of *Ijma'* in modern times. Iqbal

is right. His ideas require acceptance. However, such *Ijma'* cannot be of universal validity nor can it be considered building (unless made into a local law which then remains valid until revoked) (Abdul Wahab, 2003).

QIYAS (Analogical Deduction)

Literally *Qiyas* means measuring or ascertaining the length, weight or quality of something. *Qiyas* also means comparison to establish equality or similarity between two things. In the language of *Usul*, *Qiyas* is the extension of a *Shari'ah* ruling from an original case (Asl) to a new case (Far') because the new case has the same effective cause (Illah) as the original case. (Mahmassani, n.d).

The original case is regulated by a text of the Quran or the *Sunnah* and *Qiyas* seeks to extend the original ruling to the new case. The emphasis of *Qiyas* is identification of a common cause between the original and new case. Jurists do not consider law derived through *Qiyas* as a new law. However, for all practical, *Qiyas* leads to new ruling of a different matter. (Mahmassani, n.d).

Qiyas is a methodology developed by jurists through which rulings in new areas are kept close to the Quran and *Sunnah* because new rulings are based on the Illah (causes) discovered in the legislation of the Quran and *Sunnah*. Rulings on new areas could diverge a lot, if *Qiyas* was not applied. This is a major justification for validity of *Qiyas*.

Qiyas is a rationalist doctrine (because intellect is largely used to find out the Illah), but in *Qiyas* personal opinion (*Ra'y*) is kept subservient to divine revelation (in that Illah is discovered from the text of the Quran and the *Sunnah*). *Qiyas* does not change any law of the text (Quran and *Sunnah*) for expediency. *Qiyas* as a methodology means that the jurists accept that the rules of *Shari'ah* follow certain objectives (*Maqasid*) which are in harmony with reason. Zahiris (a group of literalist scholars) do not accept *Qiyas*. However, majority is right on this point. (Mahmassani, n.d).

Qiyas does not give rise to certain. *Qiyas* is therefore speculative. Law derived through *Qiyas* cannot be of same authority as that of textual ruling (of Quran or *Sunnah*). There can be difference of opinion on the law derived through *Qiyas*, as is the case with almost all *Ijtihadi* law. (see examples of *Qiyas* in p. 199-200 in Kamali's book). The essential requirement of *Qiyas* are ASL (original case, on which a ruling has been given), *Hukm* (ruling on the original), Illah (cause of ruling in the original case) and Far' (new case on which ruling is to be given). In the case of prohibition of wine drinking (Maida: 90) if it is to be extended to narcotic drugs. The requirement of analogy would be fulfilled in the following manner. (Abdur-Rahim, n.d). Asl Far' Illah *Hukm*. Wine drinking taking narcotic drugs in toxic ting effects prohibition.

One condition of Asl (the subject matter of original ruling) is that the Quran and *Sunnah* are the source of

the Asl (many scholars do not consider *Ijma'* to be basis of Asl). According to majority, one *Qiyas* cannot form Asl of another *Qiyas*, however, Maliki jurist Ibn Rushd thinks *Qiyas* can be basis for another *Qiyas*. Modern jurists Abu Zahra and Muhammad Al Zarka agree. Minority seems to be right as long as it does not contradict *Nusus* (clear texts or rulings) of the Quran and *Sunnah*. (Abdur-Rahim, n.d).

Conditions pertaining to *Hukm* (a ruling in the original case) are:

It must be a practical sharii ruling (*Qiyas* does not operate in the area of belief).

Sharii ruling must not be an abrogated one.

The *Hukm* must be amenable to understanding through human intellect (see examples in the text book).

Hukm must not be limited to exceptional situations (in that case it cannot be basis of *Qiyas*, such as the prohibition of marriage of widows of the prophet (SM) with others.

Qiyas is operative or extendable in *Hudud* (prescribed penalties), according to majority. New case on which ruling is to be given (Far') must not be covered by *Nusus* (texts). *Qiyas ma'al tariq* (analogy with discrepancy) is not permitted (see example in Kamali).

The effective cause (Illah) must be:

Munasib (proper, according to *Mujtahid* or scholar of *Fiqh*).

It must be a constant attribute (*Mundabit*)

It must be evident (zahir, see example in kamali)

According to majority, Illah must be *Muta'addi* (that is transferable to other cases. Some hold different view with regard to *Tadiyah* (transferability). The effective cause must not run counter to *Nusus*. The effective cause may be clearly stated in the nass (text) but such cases are not many (Ref. Quran: 4:43, 59:7; and also reference of the hadith in Kamali).

Arabic expression such as Kay-la (so as not to), li ajli (because of), li (for), fa(so), bi (because), anna, inna also indicate Illah in many cases (Ref. 5:38, 4:34). The word "Sabab" (cause) is also used as a substitute for Illah. However, some scholars make distinction between the two. The distinction is not substantive or even clear. However, Illah has become popular in usage.

When the Illah is not clearly stated in the nass, it is the duty of the *Mujtahid* to find out the Illah (reason) for the ruling of the text through *Ijtihad*. This is done by a 2-stage process. The starting point is "Takhrij al manat" (extracting Illah- manat is another word of Illah).

Now Illah for a ruling may appear to be a few instead of

one (see the example of Illah of prohibition of riba in p. 214 in Kamali). In that case the *Mujtahid* proceeds to eliminate the proper Illah and find out the proper (*Munasib*) Illah. This process is called *Tanqih al manat* (isolating the Illah).

Tahqiq Al Manat consists of investigation of the presence or otherwise of Illah in the new case (far') where the ruling is to be extended. (whether analogy can be extended to pick-pocket from thief or weather herbal drink has the same Illah as wine).

One classification of *Qiyas* is (a) *Qiyas-Al-Awla* (b) *Qiyas-Al-Musawi* and (c) *Qiyas-al-Adna*. *Qiyas-Al-Awla* (superior *Qiyas*) means where the effective cause is more evident in the new case (far') than the original case (asl). (Ref. 17:23; see also text book). In *Qiyas-Al-Musawi* (analogy of equals), Illah is presently in Asl and far' equally (Ref. Quran 4:2). In *Qiyas-Al-Adna* (analogy of inferior), Illah in Far' is present less clearly than the original case (Asl), this *Qiyas* also is accepted by *Usulian*.

There is another classification of *Qiyas* into *Qiyas jail* (obvious analogy) and *Qiyas khafi* (hidden analogy). *Qiyas* is accepted by majority including 4(four) *Sunni* schools of Zaydi Shias. Oproofs of *Qiyas* are in verse 59:2 of the Quran, indications in verses 4:105, 2:79 and 59:7. *Sunnah* also supports *Qiyas* in that *Ijtihad* has been referred to in *Sunnah* and *Qiyas* is the most important method of *Ijtihad* (see Kamali, proof of *Qiyas*,. (Kamali, n.d).

Arguments against *Qiyas* have been put forward by mainly Zahiri school. They contend that Quran 6:89 (we have neglected nothing in the Quran) is against *Qiyas*. They also say, *Qiyas* is based on Illah which is based on conjecture. They also say Quran 49:1 is against *Qiyas*. All these are very weak arguments and most of Ummah could not accept them. Majority hold that *Qiyas* is applicable in *Hadud* (prescribed penalties). Hanfis say that *Qiyas* is applicable to "Tazir" penalties (penalties which have been laid down by parliaments/courts not by Quran and *Sunnah* specifically but not to *Hadud* (punishments prescribed in the Quran and the *Sunnah*). Hanafi opinion in this regard is more cautions. (Mohammad, n.d).

Urf and Istishab

URF (custom) *Urf* (custom) is defined in *Usul* as "recurring practices which acceptable to people of sound nature. *URF* and its derivative 'Maruf' both occur in the Quran, mostly in the sense of 'good' (as opposed to 'bad or evil) adherence to Allah's injunctions (The Quran 3:110; 7:199). However, 'Rrf' has been used in the sense of custom also in some places in the Qur'an (ref. 2:233 with regard to maintenance of children). (Kamali, n.d). The *Shari'ah*, therefore, has principle approved custom in determination of rules regarding 'halal' and 'haram'. *Fuqahan* also adopted *URF* in the determination of the

Akham of *Shari'ah*. The rules of *Fiqh* which are based on juristic opinion (ray) or *Ijtihad* have often been formulated in the light of prevailing custom. It is therefore permissible to depart from them if the custom on which they were founded changes in course of time.

A rule propounded by some *Fuqaha* (Suyuti and Sarakshi) is that "what is proven by *URF* is alike that proven by *Shari'ah*. This was adopted by Turkish *Khilafat* in *Al-Majallah*. However, this rule is applicable in the case of *URF* of the Muslim nations and when the *URF* is not in conflict with the rules, essence and spirit of *Shari'ah*. *URF* of non-Muslim societies must be very carefully examined. (Kamali, n.d).

Customs which were prevalent in Arabia in the lifetime of the Prophet (SM) and which were not over-ruled by the Prophet (SM) are treated to have received his tacit approval and considered as a part of *Sunnah taqiriyah*. An example of this is payment of *Diat* (compensation of murder) to the family of murdered by "Aqilah" (male kinsmen of murder-female relations have no obligatory liability in this regard, they can however pay, if they want), where payment of *Diat* has been agreed upon. For seeing the rule of *Qiyas* and *Diat*, refer to some Islamic law books. (Abdul Wahab, 2003).

The following are the conditions of URF

It must be common and recurrent

URF must be in practice t the time of transaction, i.e. past *URF* is no basis.

Custom or *URF* must not violate the nass or clear stipulation of the Quran and the *Sunnah*.

Custom must not contravene the terms of a valid agreement (valid according to *Shari'ah*)

There is difference between *URF* and *Ijma'*. *URF* is essentially a local or national practice whereas *Ijma'* is on agreement of *Ulama'* is on agreement of *Ulama'* across places and countries. There are other differences which are not substantial in character. (see kamali). *URF* has been sub-divided into *Qawli* (verbal) and fill ((actual) verbal *URF* consists of agreement of people on the meaning of words. As a result, the customary meaning becomes dominant meaning and literal meaning is reduced to the status of an exception. Actual *URF* is the practiced the people. (Abdul Wahab, 2003).

URF Qawli and URF fi'li are both sub-divided into two further types

Al-URF amm or practice of all people everywhere (such *URF* is almost non-existent).

Al-URF-al Khass is the practice of a particular country or locality or some places. This is the *URF* with which *Usul* is mostly concerned.

URF has also been classified as *URF al Sahih* (valid *URF*-valid according to Quran and the *Sunnah*). And *URF –al-Fasid* (disapproved *URF*, not valid according to the Quran and *Sunnah*). (Al-Baidhawi, n.d).

Dr. Jamal Badwai has divided *URF* into 3(three) types-positive, neutral and negative. An example of positive *URF* is generosity or hospitality. A neutral *URF* is preference for particular diet of a particular place. A negative *URF* is a tradition which goes against Islamic law and teaching. Dr. Jamal mentions that if a local custom is negative, then it must be rejected. (Ref: Dr. Jamal Badawi, Islamic teaching course, Lecture No. G-23).

URF is a source of Islamic law is quite sensitive. In this area, we should depend on the views of the majority of senior scholars. *URF* has been justified on the basis of Qur'anic Ayats 22:78 and 7:199, but these verses are not Qati in this respect. Some traditions have also been quoted in support (see kamali) but these are also not clear evidence in support. *URF* is not an independent proof on its rights. However, it can play useful part in interpreting and implementing Islamic la. It is also noted that the rise of codified statutory legislation of modern states, has to some extent reduced the need of *URF*. (Ash-Shawkani, n.d). As we have noted earlier, rules based on *URF* are liable to be changed. Some examples can be seen in the text book. In future also rules based on *URF* or *Ijtihad* will continue to change, where needed.

Conclusion

In conclusion we can say that *Ijma'* can be of limited use only in future. *Qiyas*, *Istihsan*, *Maslaha* are more importance in future. In conclusion, *Qiyas* is redundant where Nass is there, according to majority. Some hold that *Qiyas* (which is speculative) can specify or quality speculative of the Quran and the *Sunnah*. Some *Ulama'* hold that *Qiyas* can take priority over *Ahad* hadith, if *Qiyas* is supported by other strong evidence. *Qiyas* will continue to be a major instrument of *Ijtihad* in future, along with *Istihan* and *maslaha*. The researcher says that *URF* is no longer an important proof or source of Islamic law. However, it may help sometimes in understanding, interpretation and implementing Islamic law. A very cautious approach should be taken in this regard. *Istishab*: *Istishab* literary means courtship or companionship. In *Usul-al-Fiqh*, *Istishad* means presumption of existence or non-existence of facts. It can be used in the absence of other proofs (*dalil*).

REFERENCES

- Abdel Hey, M. F. (2016). *Usul al-Fiqh Rise, Developments, Methodologies, and Literature*, Cairo: Dar Al-Salam
 Abdul Wahab A. (2003). *Ilm Usul Al-Fiqh* (Arabic), Dar, Al-Fikr, Cairo.
 Abdulkarim, Z. (2011). *Al-Wajiz Fi Usul Al-Fiqh*, Beirut, Lebanon: Muassasah Risalah.,

- Abdur-Rahim, (n.d). *Principles of Muhammedan Jurisprudence*
 Abu Zahra, M. (1999). *Usul Al-Fiqh* (Arabic), Cairo, Dar Al-Qalam, Kuwait.
 Ahmad, H, (n.d). *The Doctrine of Ijma' in Islam*, Islamic Research Institute, Islamabad.
 Al-Baidhawi, M. (n.d). *Minhaj Al-Usul and its explanation*, n.p, n.p.
 Ash-Shawkani, I. (n.d). *Irshad Al-Fuhul ila Tahqis al-Haq Min Ilm Usul*, n.p n.p.
 Kamali, H. I. (n.d)). *Islamic Jurisprudence*, n.p, n.p, Islamic Texts Society, Cambridge, U.K.
 Mahmassani, S. (n.d). *The Philosophy of Jurisprudence in Islam*, Leiden, E.J. Brill.
 Mohammad, A. (n.d), *Usul Al- Fiqh* (Arabic), n.p, n.p.