THE FUQAHA'S LEGAL THEORY: ITS SOCIAL LEGAL CONCEPTS AND APPLICATION

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Abstrak: Teori Hukum Fuqaha: Konsep Hukum Sosial dan Aplikasi. Masih banyak terdapat tanggapan yang menyatakan bahwa ushûl al-fiqh tidak dapat digunakan demi keuntungan oleh para ahli hukum atau hakim dalam praktek masalah hukum karena mereka melihat bahwa ushul al-fiqh tidak memberi perhatian yang memadai bagi pengembangan metode yang diarahkan dapat memahami fenomena sosial. Namun kajian ini memandang bahwa metode teori hukum fuqaha merupakan upaya untuk menyelaraskan antara putusan dalam sumber-sumber hukum Islam dan menghargai mereka untuk dapat memecahkan masalah sosial dan budaya manusia melalui berbagai pertimbangan. Salah satu elemen penting untuk proses harmonisasi adalah *'illah* (sebab hukum).

Key words*: fuqaha*, teori hukum, *'illah*

Abstract: The Fuqaha's Legal Theory:Its Social Legal Concepts and Application. There are stillmany assumptions stating that ushûl al-fiqh can not be used with profit by jurists or judges in real legal problems because they see that ushûl al-fiqh did not pay adequate attention to the development of methods directed towards understanding social phenomenon But this paper has seen that the fuqah's method of legal theory is an attempt to harmonize the rulings in the islamic legal sources and respect them for solving man's social and cultural problems through reasons. One of the important elements for harmonizing is the *'illah* (legal cause).

Key Words: *fuqah*a, legal theory and *'illah.*

Problematical Background

Ibn Khaldun (732 H71332 AD-808 H/1406 AD) has differentiated between two approaches to Ushûl al-Fiqh. The first is the method of Mutakallimun (theologians) or Syâfi'is and the other is the method of Fuqahâ' or Hanâfis.[1] Under the former method is like the work of al-Juwaynî, al-Burhân, of al-Ghazâli, al-Mustashfâ, of Fakhr al-Dîn al-Râzi, al-Mahshûl, and the work of al-'Amidî, al-'Ihkâm, which is annoted to the three works above. Under the latter, however, is like the work of Abû Hasan al-Karkhi (d. 340 H), Ushûl al-Karkhi, of al-Jashshash, Ushûl al-Jashshas, of Abû Zayd al-Dabbusi, Ta'sîs al-Nazar,

[1] Ibn Khaldun, *The Muqaddimah*, ed, Rosenthal (London: 1958), III, pp, 23-34. In fact, there are three approaches to Ushûl al-Fiqh. The third approach, however, is through combination of the methods above. See, M. Hashimi Kamali, Prinsip dan Teori-teori Hukum Islam, tr. Noorhadi from "Principles of Islamic Jurisprudence," Cambridge: Islamic Text Society, 1991 (Jogjakarta: Pustaka Pelajar, 1996), p. 11.

of Fakhr al-Islâm al-Bazdawi, Ushûl al-Bazdawi, and the work of Shams al-Dîn al-Sarakhsyi (490 H), Ushûl al-Sarakhsyi.[2]

It should be clarified that the Mutakalliniun or Syâfi'is' method has been nothing: connected with Syâfi'i himself (204 H). In other words, Syâfi'i was not first person who gave preference to apply this method, although he, already well known, firstly founded the science of Ushûl al-Fiqh in his al-Risâlah. As George Makdisi has shown us that Syâfi'i was traditionalist who composed al-Risâlah for such ideology to prevent the influence of the ahl al-kalam's (theologians') views into Islamic Law. In this context, he referred to Mu'tazilah trend which was strongly well established in his time based on rationalism. Therefore, as Makdisi argues, in discussing Ushûl al-Fiqh through his al-Risâlah, Syâfi'i did not deal with the matters of both Kalam and legal Philosophy but he consistently discussed the matters that belong to the positive law and its methodology based on Alquran and Sunnah.[3] He all raised the degree of the Prophet's Sunnah after Alquran, which was almost neglected by jurists (mujtahid) before him in applying laws.[4] We shall see the works on Ushûl al-Fiqh of his followers mostly diviated from his al-Risâlah.

The Mutakallimun's method generally expresses theoritical doctrines. Most of their doctrines tend to hardly use the judgment of practical application of theory to furu' (the branches of law). This can be seen, among others, the outlines of work on Ushûl al-Fiqh by this method. Abû Sulaimân declares that in most cases Mutakallimun deductively systimatize their doctrines on Ushûl, on the one hand, to interprete the legal sources (Alquran and Sunnah/Hadith) and the social problems, on the other hand, should be deemed to those doctrines. The general systimatization as follows:

Introduction, which consists of:

1. Explanation about linguistics
2. Syari'ah law
3. Syari'ah indicants or proves (dalâ'il)
4. The method of legal application
5. Mujtahid (jurist) and his obligations

A. The division of words based on dalâlah al-lafaz (indicants of text) from the degree of clarity

B. Analyzing the words from Mujmal (intricate) and Mutasyâbih (enigmatic).

C. Dalâlah al-mafhûm (implied meaning derived from contexture).[5]

GeorseMakdisi and Wael B. Hallaq claim that the first independent and comprehensive works on Ushûl al-Fiqh after al-Risâlahof Syâfi'i were written in the first fourth of tenth century, one or two centuries after Syâfi'i's death.[6] The most works came down to us were written from those and following centuries and treat the problems of Kalam (theology) and

[2] Ibn Khaldun, *The Muqaddimah*.

[3] George Makdisi, Juridical Theology of Syafi'i-Origins and Significance of Ushûl al-Fiqh," *Studia Islamica* LIX (1984). p. 16.

[4] See, Imâm Mâlik, *al-Muwatta'*, (Cairo: 1370), p. 11.; Yâsin Dutton, *"Sunna, Hadith, and Madina 'Amal,"* Journal of Islamic Studies 4: 1 (1993); 1-31. Imâm Mâlik, before Syâfi'i, in most of his legal decisions tended to be more based on the practices of the Madinan people than the Prophet's Sunnah, for legal decisions taken by diciples of Abû Hanîfah, who were younger generation of Mâlik, Abû Yûsuf in his Kitâb al-Kharajand Syaibâni in his al-'Asal. See, among others, Baber Johensen, Islamic Law and Land Tax(London: the Clarendon Press, 1950), pp. 17-23. For Syafi'i`s contribution to Islamic legal theory, see, Joseph Schach, *The Origins of Muhammadan Jurisprudence*, (Oxford: Clarendon Press, 1959); idem., Islamic Law, (Oxford: Clarendon Press, 1964).

[5] Abû Sulaimân, *al-Fikr al-Ushûli*, (Cairo: Dâr al-Shuruq, n,d.), p. 448.

[6] Wael B. Hallaq, *"Was al-Syafi'i the Master Architect of Islamic Jurisprudence?*," International Journal of Middle East Studies 25:4 (1993). p. 594.

Philosophy, which do not properly belong to Ushûl al-Fiqh. Among those problems are the problems of the determination of good and evil, of the qualification of acts before the advent of revelation, and the problem of the imposition of legal obligation on the non-existent.[7] Al-Bashri in his work, al-Mu'tamad, as Makdisi argues, condamns this trend, especially after commenting al-'Umad, the work of Qâdi 'Abd al-Jabbâr. He found in it the matters of Kalam and Philosophy.[8] The other example is the work of 'Izz al-Din bin 'Abd. al-Salam, Qawa'id al-'Ahkâm fî Mashâlih al-'Anam. Through his work, 'Abd al-Salam, as Hallaq has shown, presents several elements into his work not only law proper but also, such as, sufism and political concepts.[9] In short, the works on Ushûl al-Fiqh that mostly came down to us cancerns not only with the law proper, but also with questions of linguistics, logic, methodology, epistemology, and theology. Why they deviated from al-Risâlah of Syâfi'i, it is not our concern here.

It seems that the complexity of the subject leads the modern scholarship relatively little has been focussing on Ushûl al-Fiqh, and finally comes to conclusion that Ushûl al-Fiqhcan not be used with profit by jurists or judges in real legal problems or in Islamic legal reforms.[10] In line with this, among others, Louay Safi in his book The Foundation of Knowledge, after viewing the various methods, from the method of textual analysis to the method of logical analysis until the science and the problematic of metaphysical knowledge, comes to conclusion, among other things, that Muslims' method, including legal method, did not pay adequate attention to the development of methods geared towards understanding social phenomenon but more focused on method of textual analysis and systematization of textual inference, rather than systematically developed scientific methods and procedures.[11]

The Social Legal Concepts and Application of the Fuqaha's Legal Theory

Louay Safi's conclusion is not entirely true since the Fuqaha's method has not been properly consulted, which is, according to the writer, more applicable. To prove this, the rest of this paper will discuss 'illah (legal cause) as one of the important elements in Fuqaha's legal theory, then will campare it with the Mutakallimun's.

The Fuqaha's method approaches Islamic law by postulated methological principle or opinions given by authoritative legal sources (Qawâ'id al-Fiqhiyyah). Their theories, therefore, formulated for outlining contextual application, tending to synthesize between principles and realities and trying harder to compromise between them.[12] This can be seen from the work of al-Dabbusi, Ta'sts al-Nazar. Through his work he intends to show the distinct opinion (ikhtilâf) among jurists, hoping that it can help whom involved in the legal investigation and its application (tanâzur), by giving methodological principles and then followed by rulings that extracted from them. As an example of a methodological principle is the preferability of a tradition

[7] George Makdisi, "Juridical Theology of Syafi'i," p. 16.

[8] George Makdisi, "Juridical Theology of Syafi'i," p. 15.

[9] Wael B. Hallaq, "Ushûl al-Fiqh: Beyond Tradition," *Journal of Islamic Studies* 3:2 (1992), p. 185.

[10] Hallaq has critisized some modern scholars who claim that Ushûl al-Fiqh is purely theoritical religious science and remains substantly unchanged, see his, "Considerations on the Function and Character of Sunni Legal Theory," *Journal of the American Oriental Society*, 104:4 (1984), p. 679.

[11] Louay Safi, *The Foundation of Knowledge,* (Malaysia: International Islamic University Malaysia Press, 1996), p. 118.

[12] Kamali, *Prinsip dan Teori-teori Hukum Islam,* p. 10.

of the Prophet qualified as "ahad", that is transmitted by a relatively small number of transmitters to a valid qiyâs (analogy or legal deduction).[13]

The particular method of deduction used in both Mutakallimun and Fugaha' is qiyâs. Technically, according to al-Syaukâni, qiyâs is legal deduction as a way for extending a ruling stated in legal sources (nas) to a new case unstated in them, for they both share the same 'illah (legal cause).[14] Most legal theories (Ahl al-Ushûl) and jurists agreed on four component parts of qiyâs, namely:

1. Original case. Its ruling stated in legal sources
2. New case (far') which is not stated in legal sources
3. 'Ilah (cause). It is sometimes called washf (quality) found in both original and new case.
4. Derivative law.[15]

Al-Jashshash, however, emphasizes that there is an important difference between two methods. For Mutakallimun, qiyas leads to certain knowledge while for Fuqaha' it can help jurists to reach the conclusion, as the quality with only the most probable opinion (ghâlib al-zann). The distinction between them is due to the difference in the nature of the relationship between the 'illah and the judgment depending upon it.[16] He clarifies further the distinction by arguing that for Mutakallimun the 'illah and the judgment depending on it are so related that when the first exists, the second will also exist with it. For Fuqaha', however, the relationship concerned is different. That is the judicial judgment does not necessarily follow from the 'illah. In other words, Fuqaha' believe that a true judicial judgment does not need to follow necessarily only from a true 'illah. Mutakallimun, on the other hand, declares that a true judicial judgment can only follow from a true 'illah, for the judgment and 'illah imply one another.[17]

Therefore, according to al-Jashshash, the 'illah among the Fuqaha' is considered to be conjectural. But this, as he argues, does not mean that someone can never come to true judicial judgement, although it is possible to hit upon the 'illah found for it is false, and that also does not rule out the possibility of both being false. Further, he argues that a true judicial judgment with the 'illah relating to it will also be true only when the 'illah is definitely stated in the authoritative legal sources. But al-Jashshash realizes that as such 'illah found only in very few cases, that is explicitly stated and adopted in a particular case. In large majority of cases, however, the 'illah is left to individual jurist to determine what it might be.[18]

So, what the rules used by Fuqaha.' to support a certain conjectured 'illah unstated in the authoritative legal sources?. Amir Badsyah claims that, on the whole, Fuqaha' were interested in looking for some methodological rules that would help them in deciding the proper 'illah. According to them, the proper 'illah, among other things, should be extensible (muta'addiyah), through which the qiyâs is considered to be valid. While most Mutakalimun hold that by inextensible 'illah ('illahqashîrah)

[13] Abu Zayd al-Dabbust, *Ta'sîs al-Nazar*,(Cairo: n.d,), p. 2. Al-Karkhi'sUshûl is supplemented to Ta'sîs al-Nazar. See also, 'Ali Ahmad al-Nadhawi, *al-Qawâ'id al-Fiqhiyyah*, (Damascus: Dâr al-Qalam, 1986/1406 H),p. 132

[14] Muh. Syawkani, *Irsyâd al-Fuhul,* (Dâr al-Fikr: n.d.), p. 204.

[15] Muh. Syawkani, *Irsyâd al-Fuhul.*

[16] Abû Bakr al-Jashshash, *Ushûl al-Fiqh,* (Cairo: Dâr al-Kutub, n.d.), II, fol. 46v.

[17] Abû Bakr al-Jashshash, *Ushûl al-Fiqh,* fol. 97r.

[18] Abû Bakr al-Jashshash, *Ushûl al-Fiqh,*fols, 96v-97v.

the qiyâs can be valid.[19] The dispute comes, al-Sadr al-Shari'ah argues, due to the definition toward the 'illah. Fuqaha' define 'illah as ta'tsîr (the effectiveness of' illah), that means that law of Allah takes into consideration the jins (genus) of the quality (jins al-washf) or its naw' al-washf (species) in the jins al-hukm (genus of the rule) or in its naw' al-hukm (species of rule), by which the 'illah has ability to produce judicial judgments other than stated in the legal course. Consequently, as he continues, if the quality is restricted to the text of legal source and is not found in another new case, the probality of the 'illah does not exist at all, for when the genus of the 'illah or its species does not exist in the other case. For instance, most Mutakallimun of the opinion that the prohibition of usury in gold and silver, as stated in the Alquran, is by reason of their monetary value, and this is claimed to be their 'illah. But according to Fuqaha' such 'illah is not extensible to other metals.[20]

Here, al-Jashshash gives the example on this. He refers to the girl's need to have her father as legal guardian before she marries. The Hanafis claimed that the reason for such guardianship is the girl's immature age, while Syâfi'is thought it to be the girl's virginity. For support, both cite certain rulings stated in the legal sources, as original case. But the arguments quoted by both opposing groups cut both ways. The Hanafis, however, can still claim that their 'illah is better supported than their opponents by showingthat their 'illah is effective and extensible, for it is the same 'illah that produces some of rulings regulating the selling and buying of goods and properties. It is the girl's age that determines whether she needs or not legal guardians when she sells or buys goods or properties. Virginity, consequently, as al-Jashshash argues, is irrelevant in this context.[21]

Mutakallimun, al-Sarakhsyi tells, however, claim that the 'illah exists in the inextensible which is expressly mentioned in the text just as it exists in a parallel case which is not stated in the text. Therefore, according to them, the textual ruling is attributed to its 'illah and becomes connecting link to parallel case. In other words, the textual ruling here stands originally on the 'illah like the rule of the parallel case. It is clear therefore, as he says more, that the Mutakallimun consider the inextensible 'illah as a legal cause ('illah al-Shar'i) analogous to rational causes ('illah al-'aqli). As in the rational sciences, cause and effect can not be separated from each other, and as the existence of effect depends on the existence of its cause. Hence the qiyâs is meant originally deductive for individual case, not the extension to other cases.[22]

Logically, as al-Jashshash realizes, the separation of cause from the effect is not allowed in any case. But this applies only in the strict logical sense, that is the ability of rational sciences to generalize without exception that renders them totally demontrative. If it is, al-Jashshash argues, insisted in legal arguments will be misleading, for sometimes there is a contradiction between derivative judicial judgment through qiyâs with certain ruling in legal sources. Therefore, the case will be different in religious science, including legal discussions, which knows the particularization (takhshîsh al-'illah).[23]

[19] Amir Badshah, *Taysîr al-Tahrîr,* (Cairo: Mushtafâ al-Bâbi al-Halabi, 1351), IV, p. 5.

[20] Sadr al-Shari'ah, *al-Tawdih,* (Cairo: Dâr al-'Ahd al-Jadîd li al-Tiba'ah, 1957), II, 67.

[21] Al-Jashshash, *Ushul al-Fiqh,* fols. 96v-97r.

[22] Al-SharakhsI, *Ushu1 al-Sharakhsyi,* (Cairo: 1954), H, 192.

[23] Al-Jashshash, *Ushul al-Fiqh,* fol. 97v

According to some jurists, istihsân (legally preferable) may constitute such particularization. The particularization in legal discussion is so important among Fuqaha', for not always do the legal judgment concluded through qiyâs will compromise with other ruling in the legal sources.[24] The example of istihsân by particularzation is given by IbnTaymiyyah.

According to qiyâs, "the produce of land is seized by force must belong to the usurper if he has cultivated the land." But according to istihsân, "the produce must belong to the owner's property and the usurper only receives a wage." The 'illah in Istihsân, which particularizes the 'illah of qiyâs, is based on the tradition of Prophet, transmitted by certain Râfi' bin Khadij from Prophet, which says that 'He who cultivates the land of other people receives a wage; the crop is the property of the owner.[25]

Thus, from example above, the legal effect of' 'illah does not always support the other ruling in the legal sources. Al-Jashshash is further to say that there are two kinds of 'illah, one based on fact (washflâzim) and other is on convention (washf lâ yakunlâzim). The conventional 'illah is based on people's customes ('urf/ 'adat al-nas), the effect of it will endure as long as the social convention does. On this perspective, the concept of urf is so important and becomes one of the sources of Islamic law in Fuqaha's method. Al-Jashshash gives an example and claims that it is true 'illah for certain types of riba or unlawful gain propossed by Hanafis. Islamic law defines that wheat and barley are among the commodities in which unlawful gain is prohibited when they are exchanged. Hanafts argue that wheat and barley were only given as example for a certain class of commodities, precisely those in which the dry measure is used. Thus, they take the dry measure as the 'illah for prohibiting riba in wheat and barley and extend the prohibition to all commodities in which the dry measure is used. Al-Jashshash in this case holds that their 'illah is true, although based on convention, since the people has not abandoned using the dry measure for the commodities concerned. Otherwise, it will be a false 'illah. He also gives the factual 'illah, Islamic law defines that it is not obliged for a woman who is in menstruation to pray. The example cited is when Fatîmah bintiHubaysh told the Prophet that she was bleeding and was not sure if the bleeding was caused by menstruation. She then asked him if she should perform praying. The prophet told her, however, that the blood was due to the cut in the vein and asked her to perform such ritual. The cut in the vein, according to al-Jashshash, as true 'illah that is established by the fact.[26]

Conclusion

The Fuqaha's method of legal theory is an attempt to harmonize between, on the one hand, the rulings in the Islamic legal sources and, on the other hand, their respect for solving man's social and cultural problems through reasons. The attempt was primarily motivated by the practical aim, believing that the constantly emerging legal problems could be solved without violating the basic Islamic tenets. One of the important element for harmonizing is the 'illah (legal cause), that is the link between the newly

[24] Mushtafâ Jamâl al-Dîn, *al-Qiyâs*, (Najaf: Matba'ah al-Nu'man: 1970), p. 210.

[25] Hallaq, "Considerations and Function," p. 683, See also, IbnTaymiyyah, "Mas'alat al-Istihsân" in Arabic and Islamic Studies in Honor of H. A R. Gibb, ed. G. Makdisi, (Cambridge: Harvard University Press1965), pp, 457-458.

[26] Al-Jashshash, *Ushûl al-Fiqh*, fols. 90r-90v and 103r.

introduced judicial judgment and those stated in the authoritative legal sources (qiyâs). 'Illah, according to Fuqaha', should be extensible (muta'addiyah), and as ta'tsîr (the effectiveness of' 'illah) that are to make judicial judgments more extensble and applicable.

Mutakallimun, on the other hand, treat the 'illah as the link that relates respectively to the conclusion and premises of rational sciences. Furthermore, the Mutakallimun's method of legal theory mostly relates to theoritical doctrines which hardly use the judgment of practical application of theory to furû'. This can be seen from the general outlines of works on Ushûl al-Fiqh. Most of them deal with the problems that do not properly belong to Ushûl al-Fiqh, such as theology. Therefore, it is not surprising when modern scholars of Islam, such as Louay Safi who, after viewing the various methods; from the method of textual analysis to of logical analysis until the science and the problematic of metaphysical knowledge, concludes, among other things, that Muslims' legal methods do not pay adequate attention to the development of methods geared towards understanding social phenomenon, but more focus on method of textual analysis and systematization of textual inference rather than systematically develope scientific methods and procedures. Unfortunately, his conclusion is not entirely true since the Fuqaha.'s method has not been properly consulted.

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