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EXPANDING ISLAMIC LAW WITH LEGAL MAXIMS:
The *Raison d'Etre* of *al-Qawa'id al-Fiqhiyah*

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Abstract

The tradition of Islamic legal thought recognizes not only a legacy of usul al-fiqh (Islamic legal theories) also presented its twin, i.e *al-qawa'id al-fiqhiyah* (Islamic legal maxims). While the role of the former is well known in deducing the law from its sources, the role of the latter in legal reasoning is not widely known. This article attempts to locate preliminary historical background of the emergence of this discipline in the history of Islamic thought and the debates around its strategic position in the dynamics of Islamic law from the point of view of dialectical development of science. This study concludes that *al-qawa'id al-fiqhiyah* effectively assist usul al-fiqh to optimize the achievement of maslahah in formulation of the law in a relatively clear distribution of tasks. The usul al-fiqh deal more with the guarantee of loyalty of the law to the divine sources, whereas al-qawa'id al-fiqhiyah play their role in seeking better understanding of the new legal cases in order to provide appropriate solutions. *Al-qawa'id al-fiqhiyah* also take an important role

in loosening the strict procedure of qiyas to get flexibility of Islamic legal system.

Keywords: *usul al-fiqh, principles of Islamic law, the objective of Islamic law, al-Shafi'i, al-Juwayni, al-Ghazali, qiyas, 'illah, ahl al-ra'y, ahl al-hadith.*

Introduction

For the purpose of legal dynamics, Islamic legal discourse not only recognizes *usul al-fiqh* but also *al-qawa'id al-fiqhiyah*. While the former produces *fiqh* (jurisprudence), the latter is built from jurisprudence. Various legal rulings from all aspects of Islamic law are grouped; then, similar cases are categorized under the same rubric to have fallen under a certain maxim. For example, *niyyah* (intention) for rituals and other legal activities such as prayers, alms, fasting is obligatory in Islamic jurisprudence. For that similarity, a maxim that was created signifies that *niyyah* as the determinant in the validity of all activities categorized as legal in Islam. *Al-umur bi maqashidiha*, means that everything depends on its motivations or goals. Likewise, exemptions (*rukhsah*) are found here and there in Islamic jurisprudence for various reasons, such as sickness and travelling, which tolerate absence from fasting, and not attending congregational prayer (*Jum'at*), and so forth. These rulings are grouped into a maxim *Al-Mashaqqat tajlib al-taisir*, which literally means hardships necessitates comfort. However, these maxims are in turn not only useful for categorizing of the existing legal rulings but also for deducing new rulings for novel legal cases with the principle of jurisprudential analogy (*ilhaq*).

If *usul al-fiqh* and *al-qawa'id al-fiqhiyah* are put into Indonesian context, the former remains rarely referred in responding new legal cases, and the latter is rarer. *Al-qawa'id al-fiqhiyah* as a discipline is trivial in the discourse of Islamic law in Indonesia. The study of *al-qawa'id al-fiqhiyah* in Islamic schools is not intended as an instrument in dealing with new legal cases. Instead it is studied as a mere theoretical knowledge. To make the situation worse, the theoretical study of this discipline is merely introductory in nature. Consequently, the lack of full comprehension of *al-qawa'id al-fiqhiyah* cannot improve

the skill to apply it to have willingness to exploit the maxims. It should be added that there has been a decline of the performance of *al-qawa'id al-fiqhiyah* among *pesantrens*, while some *pesantrens* in East Java, which had traditionally taught *al-qawa'id al-fiqhiyah*, have reduced the status of this subject. This is indicated by the removal of an important book on this subject, i.e al-Suyuti's *al-Ashbah wa al-Nadha'ir*, from the compulsory curriculum. This book is now no longer learned classically, but simply presented in public lectures.

Nevertheless, the use of *al-qawa'id al-fiqhiyah* is visible in jurisprudential work of Masjfuk Zuhdi.[1] He discusses legal cases for which neither the Qur'an nor the Hadith provides direct reference. By employing *al-qawa'id al-fiqhiyah*, he gives legal rulings in relation to some cases, although his employment of *al-qawa'id al-fiqhiyah* in the book remains limited. He often employs such maxims as *dar' al-mafasid muqaddam 'ala jalb al-masalih* (preventing harms is given priority over generating utility).[2] Likewise, Nahdlatul Ulama (NU), the biggest Islamic organization in Indonesia, in many occasions employs the maxim: *al-muhafazah 'ala al-qadim al-salih wa al-akhdh bi al-jadid al-aslah* (conserving good old thing and acceting a better new one). In addition, even though NU often employs legal maxims when dealing with public issues of politics and social matters, it seems hesitant in employing them for formulating its fatwa (non-binding legal rulings). For instance, it does not employ *al-qawa'id al-fiqhiyah* which provide potential solutions for legal cases such as procedure of performing prayer on an airplane and performing *tawaf wada'* (farewell *tawaf*) during pilgrimage, although since 1992 NU has provided justitifaction for its muftis in using and employing *al-qawa'id al-fiqhiyah* in formulating fatwas.

In addition to scarcity of *al-qawa'id al-fiqhiyah* usage, academic books written in Bahasa Indonesia, which dedicate discussion solely about *al-qawa'id al-fiqhiyah* are also insufficient in term of their number

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[1] Read Masjfuk Zuhdi, *Masail Fiqhiyah: Kapita Selekta Hukum Islam* (Jakarta: Gunung Agung, 1997).

[2] This well-known maxim cannot be found in treatises on *al-qawa'id al-fiqhiyah*. Perhaps, it was invention of Indonesian Muslims and spread orally as it is the case of ither *al-qawa'id al-fiqhiyah* which began as oral traditions.

and quality. Indeed, a book by Imam Musbikin on *al-qawa'id al-fiqhiyah*, is available.[3] but its presentation is so poor that readers find it difficult to understand. Even there is also no book explaining the relation of *al-qawa'id al-fiqhiyah* with *usul al-fiqh*.

This article attempts to locate preliminary historical background of the emergence of this discipline in the history of Islamic thought and the debates around its strategic position in the dynamics of Islamic law. Parts of this article are mere speculative opinions which are intended to ignite discussion on the position of *al-qawa'id al-fiqhiyah* in the constellation of methodological Islamic studies and disciplines (*al-'ulum al-manhajiyah*).

Academic Challenge

The history of Islamic legal thought is created by those who believe that the essence of Islamic law is God's law. They originated from a society living in accordance with God's law and consistently maintained Islam as a set of complete way of life. That Islamic law is the God's law is a notion which is accepted unanimously by all streams of Muslims, from the most extreme conservative groups to the most liberal ones. The thoughts from various legal schools are essentially an effort to reach a meeting point between God's command and reality. In other words, the history of Islamic legal thought is designed to find a compromise between revealed texts and human reason, or a history of the search for God's true intention from the perspective of human reason, which is confined in their context. Thus, contestation and difference of opinion among Islamic jurists should be viewed from this perspective. In this way, *fiqh* (Islamic jurisprudence) is actually the revealed law which has been translated into reality in a given context. In this contestation process, the history of Islamic law once witnessed a lively debate between two opposing camps of *ahl al-hadith* and *ahl ra'y* (people of reason). The latter was accused of having inserted personal opinion (*ra'y*) in the area of divine law, which should have been the domain of the prophetic tradition. Among the surviving Sunni schools of law, *ahl ra'y* is attributed to the Hanafi school, for which its eponym

[3]Imam Musbikin, *Qawa'id al-Fiqhiyah* (Jakarta: Rajawali Press, 2001), pp. 1-35.

Abu Hanifah is considered the champion of *ra'y*. Meanwhile, the followers of the Maliki school along with its eponym, Malik ibn Anas, are seen as ahli hadis who refer their legal rulings to the tradition of the prophet. The Shafi'i, Hanbali and Zahiri school, are also classified into this ahl *al-hadith* camp.[4]

The two camps successfully passed through a phase of history of Islamic law which - according many historians of Islamic law was a very productive era, so that it was called the golden era of Islamic law. The momentum contributing to such attribute is the introduction of Islamic world to advanced cultures and civilizations outside the Arabian Peninsula after Islamic conquest of several areas. Reactions and various modes of thinking were heavily influenced by specific factors experienced by individual jurists. Following this intellectual spark, pioneering efforts emerged to formulate legal methodologies which is valid in the eye of God as well as skillful in responding social legal issues. The term *ra'y* which was known since the period of the Prophet, but its concept remained vague, gradually gained its form. In the early Abbasid period, in the effort for consolidating and integrating legal doctrines, Islamic legal thought successfully constructed a method of logical deduction of *qiyas* which marked the systematization and acceptance of *ra'y* into the body of Islamic legal thought. An example of *qiyas* in its early days is the issue of *mahr* (dowry) which among other things was considered as an exchange of consummation. The minimum amount was three Medinan *dirhams* equaling ten Kufa *dirhams*. Using *qiyas* procedure, this ruling then was applied to minimum amount of stolen goods which was liable for cutting hands of the thief.[5]

Nevertheless, practical consideration occasionally urges jurists to abandon rigid logical thinking. There is a more relaxed method of *istihsan* (juristic preference) which originally an offshoot of *qiyas*. In this method, a jurist applies a certain consideration for specific cases and abandons *qiyas*. An example of consideration for abandoning *qiyas* is

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[4] Imran Ahsan Khan Nyazee, *Theories of Islamic Law* (Islamabad: The International Institute of Islamic Thought, 1994), p. 148.

[5] Noel J. Coulson, *Hukum Islam dalam Perspektif Sejarah*, translated by Hamid Ahmad (Jakarta: P3M, 1987), p. 45.

public welfare in the case of murder case by many people. In that case, all co-actors are liable for capital punishment for the reason of public welfare. The ruling to uphold public welfare is in line with the injunction of the Qur'an although it is vaguer than the aspect of fair retaliation which is derived from *'illah* (*ratio legis*) of *qiyas*.[6]

Apparently, *qiyas* is the embryo of other Islamic legal methods. It is the main feature of *qiyas* which is called *'illah* (*ratio legis*) which has given birth the concept of stretching stipulations of revelaed texts towards novel cases about which the texts are silent. There has been collective awareness about the impossibility of mere reliance on textual meaning of the revealed texts to deal with societal dynamics, since the texts has finished along the that with of the Prophet. Thus the number of the revealed texts, be they the Qur'an and prophetic traditions, are limited, whereas novel cases keep to appear. The problem is then about to determine the type of *qiyas* which is validly and swiftly capable of dealing with these cases.

The only legal solution to make legal rulings of revealed texts potential for proving solutions for all aspects of human affairs is by elaborating general principles of Islamic law. These principles are abundant in both revealed texts, the Qur'an and the tradition of the prophet. Thus, the method for discovering these legal principles is extremely important because they will determine the true objective of Islamic law. From there, the method of deducing legal rulings from the legal principles is inevitably crucial.[7]

Starting from *Qiyas (Analogy)*

What happened to the Shafi'I school, for instance, was an illustration of the gradually felt need of *al-qawa'id al-fiqhiyah* which was parallel with the development process of *qiyas* concept. This school of law seems to grow from the awareness to control tendency of liberal thought at that time. However, this control, at least in theoretical perspective, became so rigid. Therefore, systematic and measured efforts were undertaken to give space in form of corrective actions or

[6] *Ibid.*, pp. 45-46.

[7] Nyazee, *Theories*, p. 194.

reconstructions of practical solutions which originally had deviated from the written rules.

Although some historians of Islamic law considered that *ahl al-hadith* were victorious in 'the battle' against *ahl ra'y*, what really happened was not a clear cut dichotomy. If the emergence of al- Shafi'i (150/767-204/819) was viewed as a sign of that victory, the internal development of this school turned out to accommodate evolutionary compromises. Within this evolutionary process al-Juwayni, better known as Imam al-Haramayn (419-478/1085), was the jurist of this school, who further elaborated the concept of *qiyas*. From then on appeared several concepts of *qiyas* in the school far outside the boundary set by al-Shafi'i himself.

Initially, al-Shafi'i used *qiyas* to elaborate stipulation of *nass* (divine texts of the Quran and the Sunna). He sketched a clear procedure of *qiyas* and stated that it was the only valid means of *ijtihad*. There was no room for textual interpretation which gave further liberty for jurists. According to him, all legal rulings must always refer back to *dalil* (textual references) derived from the Qur'an or prophetic tradition.[8] With this statement, he univocally refused the concept of *istihsan* which was developed in the Hanafi circle. *Istihsan* was not valid dan useless[9].

Al-Shafi'i stated that there were two types of qiyas; *qiyas al-ma'na* dan *qiyas al-shabah:*[10]

> *Wa al-qiyas min wajhaini: ahaduhuma ayyakuna asy-syai'u fi ma'na al-ashli, fala yakhtalifu al-qiyasu fihi. Wa ayyakuna asy-syai'u lahu fi al-ushuli asybahu, fadzalika yalhaqu biaula bihi wa aktsaruha syibhan bihi. Wa qad yakhtalifu al-qayisuna fi hadza.*
>
> *Qiyas* is executed from two aspects. The first is when a case is contained in the *ma'na* (essence) from *asl* (original and referred case). In this case, no jurist disagrees in its validity. The second is whenever a certain case contains some similarities with examples of some *asl*. Consequently, this

[8] Muhammad bin Idris al-Shafi'i, *al-Risalah,* ed. Ahmad Muhammad Shakir (Beirut: Dar al-Kutub al-'Ilmiyah, nd), p. 477.

[9] *Ibid.*, p. 503.

[10] *Ibid.*, p. 479.

case is analogized with an example which bears more similarities (*shabah*) with it. The jurists who use this type of *qiyas* may disagree in this.

Al-Shafi'i gives example for the first type by elaborating the meaning of *'uff'* (bad language to parents) in a verse in the Qur'an. Al-Shafi'i states that all other bad treatments to parents, be they lighter or worse, are considered to have fallen into this category. In the Hanafi school, such textual interpretation is named *dalalat al-nass* or textual implication.

For the second type of *qiyas*, al-Shafi'i puts forward a case in which a person unlawfully hunts an ostrich because of performing *hajj* rituals. Consequently, he or she has to pay fine with the price of a *halal* animal which resembles (*mithl*) that ostrich. According to al-Shafi'i, determining this *halal* animal is the domain of *ijtihad*.[11] Later on, the procedure of finding similarities is called *tahqiq al-manat* (defining physical similarities of novel cases) by al- Ghazali (w. 505/1111).[12]

This textual interpretation underwent evolution after al-Shafi'i which leaned towards flexibility. Another reason is al-Shafi'i's assertion that no novel cases for which textual reference is silent.[13] There were evidences proposed to prove that *qiyas* which is simple and textual was reliable to deal with novel cases. Al-Juwayni, for instance, denies opposing opinion by stating that al-Shafi'i requires all legal rulings of *qiyas* to have connection with *asl* whatsoever because al-Shafi'i also uses more flexible method of what he called as *ma'ani mursalah* (beneficial meanings).[14] It seems that al-Shafi'i's first type of *qiyas* underwent process of refinement.

Therefore, when there are *istihsan* and *maslahah mursalah* outside the Shafi'i school, the need for the school to adopt both

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[11] *Ibid.*, p. 480.

[12] Nyazee, *Theories*, p. 185.

[13] *'Kullu ma nazala bi muslim fafihi hukm lazim aw 'ala sabil al-haqq fihi dilalah maujûdah wa 'alaihi idza kana bi 'anihi hukm itba'ihi wa idza lam yakun fihi bi 'ainihi thuliba al-dilalah 'ala sabil al-haqq fihi bi al-ijtihad wa al-ijtihad al-qiyas'*, al-Shafi'i, *al-Risalah, p.* 477.

[14] Abu al-Ma'ali 'Abd al-Malik bin Yusuf al-Juwayni, *al-Burhan fi Usul al-Fiqh* (Kairo: Dar al-Ansar, 1400 H.), 1-321. *Ma'ani* is the plural form of the word *ma'na*.

methods was inevitable. Apparently, al-Shafi'i jurists realized that *qiyas* as the only valid method for *ijtihad* became so flexible that they tried to accommodate as many methods of interpretation as possible, such as *istihsan, istishab* and *istislah* into the domain of *qiyas*. The only methods which is impossible for incorporation was individual opinion of the companion (*qawl sahabi*). However, the Shafi'i school did not consider this method binding because al-Shafi'i considered it as rational endeavour that it had to be invalidated if it was contradictory to *khabar wahid* (solitary *hadith*).[15]

Al-Juwayni, the tutor of al-Ghazali, had exposed to the Hanafi school which uses inductive method in formulating its *usul al-fiqh* (legal theory). It means that it builds its method from its specific legal rulings. These methods are used to exercise deductive analysis of novel cases. This might have inspired al-Juwayni to emphasize the importance of *qa'idah* which was an inevitable consequence of the refined *qiyas* theory.[16] Using this idea, he intended to introduce a foundation for another variant of extra textual analysis of *qiyas al-ma'na,* that is *qiyas al-'illah.*[17]

Al-Juwayni passed through a new theory to his successors, which was a hybrid of the Hanafi school's ideas about legal principles, principles of *maslahah* of the Maliki school, and al-Shafi'i 's opinions. This theory was later developed by al-Ghazali. Imran Ahsan Khan Nyazee illustrates correlation between al-Juwayi's theory and that of al-Ghazali and finds that al-Ghazali had given a life to that theory.[18] Al-Ghazali had formulated his theory about the the objectives of Islamic law or better known as *maqasid al-shari'ah* (intentions of the divine law). Unexpectedly, this theory is well elaborated within the Shafi'i circle, not in a more rationalistic Hanafi school.

Upon the theories proposed by his mentor, al-Ghazali developed a theory by unifying opinions of early jurists, such as Abu Hanifah,

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[15] Nyazee, *Theories,* pp. 132-3.

[16] *Ibid.*, p. 196.

[17] M. Khalid Masood, *Islamic Legal Philosophy: a Study of Abu Ishaq al-Shatibi's Life and Thought* (Delhi: International Islamic Publisher, 1989), pp. 151-152.

[18] Nyazee, *Theories,* p. 196.

Malik, Abu Yusuf, and al-Shaybani. Al-Ghazali's theory is essentially an essence that combines early legal rulings and theories of the past. Although al-Ghazali seems to be loyal to his school of law (Shafi'i), it is incorrect to attribute his theory as al-Shafi'i's. His theory is far more flexible yet more complex compared to rigidity of al-Shafi'i 's proposal.[19] The brilliance of al-Ghazali's work lies on the shift from the emphasis by the jurists of what they should do in formulating legal rulings to the emphasis on the fact that they have really done in that process.[20]

Al-Ghazali's theory of the objective of Islamic law had been debated by many jurists for centuries but never really applied into practice. The reason was that al-Ghazali's theory was not formulated as a tool for legal interpretation because this area of law had been considered accomplished. Instead, his new theory was prepared as a legal equipment for *imam* (head of the state) in implementing flexible part of the law which constantly evolve with the time. That is the formidable theory of objective of Islamic law(*maqasid al-shari'ah*).[21]

From Principles and Objectives to Maxims

Qiyas (deductive analogy) is used in Islamic law to expand the reach of law about specific cases of the texts so that it can reach novel cases which their textual reference is unavailable. This can be achieved by locating the *'illah* (*ratio legis*) of the law in the text. If the identical *'illah* is found in a novel case, the legal status of the case in the text also applies to the novel case. The validity of this analogy highly depends on finding the sound *'illah* in the text. Therefore, the most discussed aspect of *qiyas* in Islamic legal theory is *'illah*.[22]

An easy way to explain the work of the rigid *qiyas* is using hypothetical case which might not be suitable with the actual occurrence. For a starter, let's consider several cases in one category. The basis of the categorization is characteristic similarities.

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[19] *Ibid.*, p. 190.
[20] *Ibid.*, p. 198.
[21] *Ibid.*, p. 190.
[22] *Ibid.*, p. 198.

If a novel case is found in the Qur'an and/or the Sunna and the characteristic that becomes the basis for a legal status is also determined, then the legal status can also be applied to other cases in the same category which bear an identical character. For instance, the text has decided that an immature boy cannot manage his property and his marriage. The ruling on this case is about guardianship (*wilayah*) in which his guardian must take care of his business. If the determining character can be ensured, that is 'the state of being immature', the guardianship is applied to other cases which involve 'being immature'. In addition, immature girls, which are not mentioned in the text, are covered in this issue by expanding the legal guardianship coverage upon them. This works in lowest level of *qiyas* and is an example of rigid *qiyas*.[23]

However, there are other cases where someone is not considered immature but cannot manage his or her life because of idiocy (*ma'tuh*) or insanity (*majnun*). Can they be positioned under guardianship? The answer is certainly 'yes'. Nevertheless, the unifying character must be predefined between the available case and the novel case. To do this, we must step up one level and state that the corresponding character is the absence of legal competence for the case of immature boys and girls. Is this character found in idiots and mad people? If so, the guardianship status can also be applied to that case.

The difference between both characters which is ascertained as the *'illah* is crucial. On the lower level, we move from a specific case to next level by saying that, for instance, A is a small boy and therefore must be under guardianship. B is a small boy too and therefore must be under guardianship. Like climbing a ladder, we leave specific (*khass*) cases and enter the domain of *hikmah* (philosophy) behind the original case. The further we leave bottom step of the ladder, it will be gradually a statement of general principles of Islamic law.

What we are doing is portraying a general principle, when we say that "all people who do not have legal competence or ability to give legal approval are put under guardianship". If we move one step higher from that statement, we can say that all cases about emergency situation

[23] *Ibid.*, pp. 198-199.

which are associated with legal approval will fall under guardianship regulation. As mentioned before, we are not in the discussion of the rigid qiyas, but we enter the area of flexible general principle although the concept of emergency (*darurah*) is very vague.

Perhaps, guardianship nowadays can also be subjected to a *safih* (retarded) who actually neither immature nor having no legal competence, but wasteful of his or her property. This idea may be explored further to reach trade law especially to deal with unhealthy companies which waste the investors' money.[24]

In jurists' terminology, when a rigid *qiyas* is applied, *'ayn* (specific case for instance the state of immaturity) of the characteristic which has been acknowledged by the law in *'ayn* of the law, that is guardianship. When the jurists move upward for one category, they will say for instance that the general category that is incompetence from the characteristic has been acknowledged in 'ayn of the law, that is guardianship. Several other possibilities are also open.[25] As long as general rulings or these specific cases are originated from divine text then it is fine. However, the question is whether one has liberty to determine characteristics or general rulings based on his or her basic understanding of the Qur'an or the sunna. Here debate begins and new theory is envisaged.

The Authority of *Al-Qawa'id Al-Fiqhiyah*

It is now the time to compare the procedure of formulating those general legal principles with the elucidation of Islamic legal theorists about what they have concluded concerning the essence of *al-qawa'id al-fiqhiyah* using terminologies they have made. In this regard, Taj al-Din al-Subki (w. 771 H.),[26] says:

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[24] *Ibid.*, pp. 198-199.

[25] *Ibid.*, p. 199.

[26] Cited in 'Abdullah bin Sa'id Muhammad 'Abbadi al-Lahji al-Hadrami al-Shahari, *Idah al-Qawa'id al-Fiqhiyah* (Surabaya: al-Hidayah, 1410 H.), 10. This definition is apparently not specified for *al-qawa'id al-fiqhiyah* because he only state *al-qa'idah* explicitly. So this is a definiton of maxim. However, because the definition is in a treatise on *al-qawa'id al-fiqhiyah*, it is presumably suitable to define *al-qawa'id al-fiqhiyah*.

"Al-Qa'idah: al-`amr al-kulliy alladzi yanthabiqu 'alaihi juz`iyyat katsitah tufhamu ahkamuha minha"

Legal maxim is a general principle that can be applied to a number of specific cases whose rulings can be understood from it.

With this definition, Imam Taj al-Din stresses the function of *al-qawa'id al-fiqhiyah* as general maxim of *fiqh* (Islamic jurisprudence), or the essence of its rulings. Seeing the essence of Islamic jurisprudence's rulings means seeing jurisprudence from many specific cases (*furu'*) which fall into its category. Thus, if a maxim views the importance of *niyyah* (intention), the status of all legal activities which requires *niyyah* can easily known by looking at this maxim. The maxim leads jurists to apply it into prayers fasting, marriage, divorce, and so on.

Meanwhile, 'Abdullah bin Sa'id Muhammad 'Abbadi al-Lahji al-Hadrami al-Shahari[27] defines *al-qawa'id al-fiqhiyah* as follows:

"Qanun tu'rafu bihi ahkam al-hawadits allati la nash 'alaihi fi kitab aw sunnah aw ijma'"

Stipulation that can be used to discover legal status of novel cases for which textual references (the Qur'an, the hadith or the consensus) are silent.

Al-Sahari resolutely locates *al-qa'idah al-fiqhiyah* in its function to produce jurisprudence for cases which are literally not supported by the Qur'an, the hadith and consensus. This simply considers maxims of *al-qawa'id al-fiqhiyah* as 'the textual reference' for novel cases.

Mustafa Ahmad al-Zarqa defines *al-qawa'id al-fiqhiyah* as:[28]

"Ushul fiqhiyyah kulliyyah fi nushush mujizah dusturiyyah tatadhammanu ahkaman tasyri'iyyah 'ammah fi al-hawadits allati tadkhulu tahta maudhu'iha"

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[27] *Ibid.*, p. 9.

[28] Mustafa Ahmad al-Zarqa, "Lamhah Tarikhiyah 'an al-Qawa'id al-Fiqhiyah al-Kulliyah", in Ahmad Muhammad al-Zarqa, *Sharh al-Qawa'id al-Fiqhiyah* (Damaskus: Dar al-Qalam, 1996), p. 34.

> *General jurisprudential principles which are formulated into concise legal words that contain Islamic legal rulings in general which fall under their category.*

Mustafa Ahmad al-Zarqa did not elaborate what he means by 'principles' in his definition. Instead, he explicitly equates the term *qa'idah* with principle. After supplying examples of Islamic legal maxim, he states:[29]

> "wa yutsamma amtsaluha al-yaum fi ishthilah al-qanun 'mabadi`', jam' mabda`'
>
> *The maxim in our modern usage is called "mabadi", the plural form of "mabda' which simply means principle.*

It can be assumed that al-Zarqa considers *al-qawa'id al-fiqhiyah* as principles of Islamic law which are equivalent with similar principles in Common law, such as the principle of equality before the law and determinacy of law.

Later on, al-Zarqa states that *al-qawa'id al-fiqhiyah* is not an instrument to formulate legal rulings, but it is useful in facilitating the mastery of Islamic jurisprudence, that is mastery of specific legal rulings by mastering their essence. Thus, he only emphasizes the function of *al-qawa'id al-fiqhiyah* merely as simple and concise conceptualization which is formulated by generalizing rulings of Islamic jurisprudence what have been produced by Islamic jurists.[30] Therefore, the function of *al-qawa'id al-fiqhiyah* is simply to record and master those rulings.

From these definitions, there are different opinions concerning the role of *al-qawa'id al-fiqhiyah* between al-Sahari in one side and al-Subki dan al-Zarqa in another. Is *al-qawa'id al-fiqhiyah* merely a product of generalization of past rulings of Islamic jurisprudence? Or does it also function as an instrument for answering novel cases? More recent writers tries to locate the precise position of *al-qawa'id al-fiqhiyah* in the the study of Islamic law. 'Aliyy Ahmad al-Nadwi proposes this decisive

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[29]*Ibid.*, p. 33.

[30]Al-Zarqa, "Lamhah Tarikhiyah", 36. on the function of *al-qawa'id al-fiqhiyah* al-Zarqa wrote; *'fa hiya dasatir li al-tafqihi la nushûsh li al-qadha'.*

question, "can we use *al-qawa'id al-fiqhiyah* as *dalil* (textual reference) in the process of *istinbat* (legal interpretation)?" [31]

After citing opinions of early authorities, he explains that *al-qawa'id al-fiqhiyah* cannot be used as *dalil* for several reasons: Firstly, those Islamic legal maxims are actually drawn from the rulings of Islamic jurisprudence (*furu'*) which are not appropriate to be an independent legal references (*dalil*) for *furu'* itself. Secondly, most maxims of *al-qawa'id al-fiqhiyah* contain exemption cases (*mustathnayat*).[32] Therefore, a novel case which is considered to have fallen into domain of a maxim is actually an exempted case. In addition, the maxims are merely guide (*shawahid*) which should only be employed to formulating solutions for novel cases based on available Islamic jurisprudence.

Nonetheless, al-Nadwi further explains that this barren position of *al-qawa'id al-fiqhiyah* is not inclusive. There are some maxims which are formulated based on the textual references of the Qur'an and the Sunnah such as *al-dharar yuzalu, al-yaqin la yazulu bi al-syakk* and *al-'adah muhkamah* which automatically play as *dalil*. Such maxims become *dalil*-like (*shibh al-adillah*), therefore they can be used as legal consideration for *fatwa*s or court verdicts.

Finally, al-Nadwi clarifies that invalidity of using legal maxims by judges and *mufti*s is whenever corresponding ruling of Islamic jurisprudence is available to respond the addressed case. In contrast, whenever no ruling whatsoever can be found in Islamic jurisprudence to deal with the case and a certain maxim can give solution, the use of maxim in this situation is allowed as long as the maxim really fits with the addressed case. [33]

The way of al-Nadwi[34] in explaining the function of *al-qawa'id al-fiqhiyah* expresses his hesitancy. He should have explained that *al-*

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[31] 'Aliyy Ahmad al-Nadwi, *al-Qawa'id al-Fiqhiyah* (Damascus: Dar al-Qalam, 1998), p. 329.

[32] *Ibid.*, pp. 329-330.

[33] *Ibid.*, pp. 330-331.

[34] As far as the author knows, the book by al-Nadwi, *al-Qawa'id al-Fiqhiyah*, is the most comprehensive in providing introduction about *al-qawa'id al-fiqhiyah*. See al-Nadwi, *al-Qawa'id al-Fiqhiyah*, pp. 35-158.

qawa'id al-fiqhiyah can function as *nass* whenever corresponding *nass* is silent in responding the addressed case and the *maslahah* (utility) consideration encourages that function. He should have pushed forward 'yes' answer, except proven otherwise. This explanation is apt with the opinion of al-Suyuti, the jurist who is responsible for the refinement of *al-qawa'id al-fiqhiyah* in term of content and composition. Al-Suyuti (849-911 H.) explains the benefit of this discipline:[35]

> *"I'lam anna fann al-asybah wa al-nazha` ir fann 'azhim biha yaththali'u 'ala haqa`iq al-fiqh wa madarikihi wa ma'khadzihi wa asrarihi wa yatamayyazu fi fahmihi wa istihdharihi wa yaqtadiru 'ala al-ilhaq wa al-takhrij wa ma'rifah ahkam al-masa`il allati laisat bi masthurah wa al-hawadis wa al-waqa`i' allati tanqadha 'ala mamarr al-zaman. Wa li hadza qala ba'dh ashhabina al-fiqh ma'rifath al-nazha`ir."*
>
> *You must know that the discipline of al-ashbah wa al-naza'ir (al-qawa'id al-fiqhiyah) is very important so that people can unearth the essence, dalil, source and the secret of Islamic jurisprudence. People can also get a special way of understanding Islamic jurisprudence and be prepared with rulings they need to know. People will achieve the skill to conduct ilhaq and takhrij (a process of deducing new rulings based on maxims) and provide rulings for novel cases that never cease to appear. Therefore, some jurists indicate that the essence of Islamic jurisprudence is knowing naza'ir (similar cases that categorized under each maxim).*

How to provide rulings whenever *nass* do not (explicitly) speak is the question for both *usul al-fiqh* as well as *al-qawa'id al-fiqhiyah*. In *usul al-fiqh* (Islamic legal theory) with the development in the hand of al-Ghazali, *maslahah* (utility) seems to move from merely a consideration in formulating legal rulings to becoming a source of deducing new rulings.

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[35] Jalal al-Din 'Abd al-Rahman al-Suyuti, *al-Ashbah wa al-Naza'ir fi al-Furu'* (Beirut: Dar al-Fikr, nd), p. 5.

At the same time, *maslahah* in the study of *al-qawa'id al-fiqhiyah* focal point. *Maslahah* is a legal consideration, source of law as well as the objective of law. Therefore, all maxims in *al-qawa'id al-fiqhiyah* can be distilled into a single maxim of *jalb al-masalih* (literally means 'to generate welfare').

Al-Suyuti divided his book, *al-Ashbah wa al-Naza'ir,* into several chapters. The first chapter is a formulation of the principle of *fiqh* or the essence of *fiqh* in which all legal issues and each aspects of *fiqh* must be categorized into some or all five maxims in this chapter. The exact title of this chapter is "al-Qawa'id al-Khams allati Dhakara al-Ashab anna Jami' Masa'il al-Fiqh Yurja' Ilayha" (five maxims that Shafi'ite jurists consider them reference for all *fiqh* issues). These maxims are good illustration about principles of Islamic jurisprudence which emphasize certain basic principles of law. They are the importance of motivation factor in legal activities, legal determinacy, and the protection of people from heavy legal burden, prevention from exposure to any kind of hardship, and accommodation of local legal practices (custom).

This first chapter primarily underlines the *maslahah* orientation toward solving cases which using simple reason and common sense. Each maxim has subordinate maxims which are affiliated to it which sharpen the coverage of *fiqh* character. Nowadays, Muslim jurists called these five maxims as *"al-qawa'id al-asasiyah"* (canonic maxims).[36]

The second chapter which consists of forty maxims is called *"Qawa'id Kulliyah Yatakharraju 'alayha Ma La Yanhasiru min al-Suwar al-Juz'iyah"* (general maxims used for *takhrîj* (developing) legal rulings of unlimited practical cases). Nowadays, Muslim jurists call these second maxims as *"al-qawa'id ghayr al-asasiyah al-muttafaq 'alayha"*, or undisputed non-canonical maxims.

These maxims, suitable with their chapter, are applied maxims which produce new legal rulings just like the texts of the Quran and the Sunnah usually do. For example, the eighth maxim which state "the neighboring area has similar legal status to that of the main area" gives

[36]For further detailed account about the role of *al-qawa'id al-fiqhiyah*, see Abdul Mun'im Saleh, *Madhhab Syafi'I ; Kajian Konsep al-Maslahah* (Yogyakarta: Ittaqa Press, 2001), p. 81.

legal basis for a state to have air zone and sea exclusive zone for certain radius of miles. In addition, this maxim can also be used by owners of street side houses to prevent cars from parking in front of their gateway.

In every discussion of *al-qawa'id al-fiqhiyah* there is always exempted cases because they are more apt to fall under different maxim. This indicates the trace of sound logical thinking of *istihsan, sadd al-dhari'ah* and common sense. There are the rest five chapter in al-Suyuti's book, but they are not relevant to discussion of this article.

Concluding Remarks

Since the beginning, *al-qawa'id al-fiqhiyah* are not the part of *usul al-fiqh* because both are different, although sometimes they are discussed at the same time in contemporary *usul al-fiqh* writings. *Al-qawa'id al-fiqhiyah* refer to a set of abstract legal instruments which is drawn from a detailed study of *fiqh* (Islamic jurisprudence). It contains theoretical guidelines about several aspects of Islamic jurisprudence. Therefore, this discipline is a part of Islamic jurisprudence and separated from *usul al-fiqh*. More than two hundred maxims are compiled under the better known subject of *al-ashbah wa al-naza'ir*. A hundred maxims of which had been adopted in the introductory part of *Majallah al-Ahkam al-'Adliyah* which was enacted in the middle of the 19th century of the Ottoman empire.[37] Indeed, the term of *al-qawa'id al-fiqhiyah* resembles *usul al-fiqh*, but they are different. This difference is indicated by the fact that from the beginning they are written in different book titles.

Recently, there is a certain tendency of contemporary writers to incorporate several maxims of *al-qawa'id al-fiqhiyah* into *usul al-fiqh* books. For example, 'Abd al-Wahhab Khallaf in his book entitled *'Ilm usul al-Fiqh* inserted some legal maxims under a sub-heading of *al-qawa'id al-usuliyah al-tashri'iyah* (*usul al-fiqh* maxims/principles for legislation). Meanwhile, language principles which originally is a part of *usul al-fiqh* under the sub-heading of *al-qawa'id al-usuliyah* was

[37] Mustafa Ahmad al-Zarqa', *al-Fiqh al-Islami fi Thawbih al-Jadid*, vol. 2 (Damaskus: Matabi' Alif Ba', 1968), p. 57; Mahmud al-Sharbayni, *al-Qada' fi al-Islam* (T.t.: al-Hay'an al-Misriyah al-'Ammah li-Kitab, 1987), p. 6.

rewritten in that book under sub-heading of *al-qawa'id al-usuliyah al-lughawiyah.*[38]

It is not clear the reason of this shift. Yet, it can be assumed that this initiative is motivated by the desire to insert harder ideas of *maqasid al-shari'ah* (the objective of Islamic law) into the domain of *usul al-fiqh.* Put differently, this move is motivated by the desire to function *al-qawa'id al-fiqhiyah* as an instrument of legal interpretation for novel cases. At least, it can inspire the process of *usul al-fiqh.* Thus, it is expected that the ideas of *maqasid al-shari'ah,* that is *maslahah* (utility), become operational, not merely a philosophical debate.

This issue brings back the origin of both disciplines which were born as "twins" although with different character. While *usul al-fiqh* focuses on the deductive method of interpretation of the texts of the Qur'an and the Sunnah, *al-qawa'id al-fiqhiyah* inductively understand novel cases.[39]

Still, when *al-qawa'id al-fiqhiyah* enters into the sudy of *usul al-fiqh,* the ideas of *maslahah* which is promoted by *al-qawa'id al-fiqhiyah* are not only operational for novel cases, but also they will inspire Muslim jurists in all levels of Islamic legal endeavours; from selection of *dalil* , legal interpretation process, the selection of interpretation product, legal ruling formulation, and in disputed cases.

Certainly, it is unfortunate if considerations of *al-qawa'id al-fiqhiyah* are not accounted in the steps of Islamic legal dynamics provided that this discipline is able to contribute in creating a more flexible and rational Islamic jurisprudence and to provide options for new legal ruling without referring back to textual sources of the Qur'an and the Sunna. This is so because the aim of this discipline is to deal with novel cases about which textual sources are silent. The legal maxims of this discipline, which is resorted from inductive analysis, are employed as the basis of deductive thinking in order to create new

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[38] 'Abd al-Wahhab Khallaf, *'Ilm Usul al-Fiqh* (Jakarta: al-Majlis al-A'la al-Indunisi li al-Da'wah al-Islamiyah, 1972), p. 207.

[39] Badr al-Din Muhammad bin Abi Bakr bin Sulayman al-Bakri al-Shafi'i, *al-I'tina' fi al-Farq wa al-Istithna'*, vol. 1, Muhammad al-Mu'awwad (Beirut: Dar al-Kutub al-'Ilmiyah, 1991), "Editor's introduction", p. 11.

ruling instantly. Legal sources (*al-adillah al-shar'iyah)* such as *maslahah, istihsan, istishab, 'urf* and *sadd al-dhari'ah* can be conveniently employed for thinking method in this discipline.

Therefore, resorting past intellectual heritage in relation to dynamics of Islamic law by relying merely on the concept of *usul al-fiqh* clearly results in incomplete outcome because thinking method for incorporating local and contemporary aspirations with supportive atmosphere has been provided by this *al-qawa'id al-fiqhiyah* all along.

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