بِسْمِ اللهِ الرَّحْمَنِ الرَّحِيمِ

An Introduction to Methodology of Islamic Jurisprudence

(Uṣūl al-Fiqh)

A Shiite Approach

An Introduction to Methodology of Islamic Jurisprudence

(Uṣūl al-Fiqh)
A Shiite Approach

Alireza Hodaee

CONTENTS

IX

XI

PREFACE

Uṣūl al-Fiqh, the methodology of jurisprudence, which is usually – and inaccurately, if not incorrectly – translated "principles of jurisprudence," is an Islamic science which is developed by Shiite scholars in two recent centuries into an unparalleled intellectual, logical system of thought and a comprehensive branch of knowledge which not only serves as the logic of jurisprudence but as an independent science dealing with some hermeneutical problems.

Lack of precise English equivalents to expressions and terms of this complicated science indicates the least difficulties of preparing the first English version of Shiite *uṣūl al-fiqh*. Relying on the Almighty's constant grace, however, I did my best to present this unique Shiite science to the western world in its best fashion; and I pray to the Almighty to have been successful in doing such a difficult job. Nonetheless, it should be noted that most of complicated arguments of such profound science cannot be presented in an introductory work; they should be pursued in detailed books written by great Shiite *Uṣūlīs*. I have to express my gratitude to my dearest friend, Dr. Seyyed Mohsen Miri, head of Islam and West Research Center of al-Mustafa International Research Institute (M.I.R.I), who prepared the ground for constitution of this work.

Alireza Hodaee
Tehran, April, 2013

TRANSLITERATION KEY

Arab./Pers Letter	Roman Equivalent	Arab./Pers Letter	Roman Equivalent
ء	' (except when initial)	ض	đ
ا	a	ط	ṭ
ب	b	ظ	ż
پ	p	ع	،
ت	t	غ	gh
ث	th	ف	f
ج	dj	ق	q
ح	ĥ	ک	k
خ	kh	ل	l
د	d	م	m
ذ	dh	ن	n
ر	r	ه	h
ز	z	و	w
س	s	ى	y
ش	sh	ﺔ	h or t
ص	ş		

Short Vowels		Long Vowels		Diphthongs	
ـَ	a	ىٰ or آ	ā	ـَو	aw
ـُ	u	ـُو	ū	ـَي	ay
ـِ	i	ـِي	ī	ـِّي	iyy (final form: ī)
				ـُّو	uww (final form:ū)
				ـِيا	iyā
				ـّ	the letter is doubled

Introductory Discussions

Definition of the Science of *Uṣūl al-Fiqh*

The science of *uṣūl al-fiqh* is a science in which such rules whose results are placed in ways of deduction of juristic precepts are discussed. For instance, performing the prayers (*ṣalāt*) is mandatory in Islam, and this Qurʾānic verse proves that obligation: "And that perform the prayers." (6:72) However, denotation of the verse is dependent upon the imperative, like "perform" in that verse, being apparent in the obligation on the one hand and Qurʾānic apparent meanings being authoritative proofs on the other. Those two issues are dealt with in the science of *uṣūl al-fiqh*. Now, when the jurist learns through this science that the imperative is apparent in the obligation and that the Qurʾānic apparent meanings are authoritative proofs, he can infer from the said verse that the prayers is mandatory.

In the same way, deduction of every juristic precept inferred from any juristic or intellectual proof must be dependent upon one or more issues of this science.

It should be known that precepts are of two kinds:

1. The precept is directed to something *per se* as it is an act; such as the prayers, since the obligation is directed to the prayers as it is prayers and an act *per se* without consideration of anything else. Such precept is called "the actual precept" (*al-ḥukm al-wāqiʿī*) and the proof proving it "the persuasive proof" (*al-dalīl al-idjtihādī*).

2. The precept is directed to something as its actual precept is unknown; such the dispute among jurists whether or not smoking is unlawful. Here, where there is no proof to support any of the existing opinions, the jurist doubts the primary, actual precept of the disputed matter, and since he is not supposed to remain perplexed practically there must exist another

precept, though intellectual, for him, such as obligation of precaution, clearance from obligation, or ignoring the doubt. Such a secondary precept is called "the apparent precept" (*al-ḥukm al-ẓāhirī*) and the proof proving it "the juristic proof" (*al-dalīl al-faqāhatī*) or "the practical principle" (*al-aṣl al-ʿamalī*).

Discussions of the science of *uṣūl al-fiqh* cover both of such precepts.

Subject-Matter of the Science of *Uṣūl al-Fiqh*

Different things are said by various *Uṣūlī*s to be the subject matter of this science. However, there is no need to treat them as true and, as later *Uṣūlī*s have said, this science has no specific subject-matter. It discusses various subjects which are all common in its purpose, which is inferring juristic precepts. Detailed discussions on this topic can be found in detailed works of *uṣūl al-fiqh*.

Benefit of the Science of *Uṣūl al-Fiqh*

Since it is clearly known that any human voluntarily act has a precept in Islam, whether obligation, unlawfulness, or any of the five-fold burdensome precepts, on the one side, it is known that not all those precepts are known to everyone by self-evident knowledge but most of them are in need of survey and proof, i.e., they are deductive on the second, and *uṣūl al-fiqh* is the only science formulated for proving juristic precepts on the third, the benefit of this science would be seeking assistance for deducing precepts from their proofs.

Parts of the Science of *Uṣūl al-Fiqh*

Discussions of this science are presented in various parts in the works of *uṣūl al-fiqh*. However, the best division is presented by al-Muḥaqqiq al-Iṣfahānī (d. 1940) in his last course of teaching (as narrated by his great student Muḥammad Riḍā al-Muẓaffar in his *Uṣūl al-Fiqh*, p. 11) according to which all *uṣūlī* topics are discussed in the four following parts: Discussions of "terms" (*mabāḥith al-alfāẓ*), those of "intellectual implications" (*mabāḥith al-mulāzamāt al-ʿaqliyya*), those of "the authority" (*mabāḥith al-ḥudjdja*), and those of "practical principles" (*mabāḥith al-uṣūl al-ʿamaliyya*).

Discussions of terms deal with denotations and appearances of terms from a general aspect, such as appearance of the imperative in the obligation, that of the prohibition in the unlawfulness, and the like.

Discussions of intellectual implications survey implications of precepts even though such precepts may not be inferred from terms, such as discussing truthfulness of mutual implication of intellectual judgments and juristic precepts, of obligation of something necessitating obligation of its preliminaries (known as "the problem of preliminary of the mandatory act"), of obligation of something necessitating unlawfulness of its opposite (known as "the problem of the opposite"), of possibility of conjunction of the command and the prohibition, and so on.

Discussions of the authority investigate whether some specific thing is juristically treated as a proof; for instance, whether report of a single transmitter, appearances, appearances of the Qur'ān, *Sunna*, consensus, intellect, and the like are authoritative proofs.

Discussions of practical principles deal with what the jurist refers to when he cannot find a persuasive proof, such as the principle of clearance from obligation, that of precaution, and so forth.

Convention (*al-Waḍ'*)

A smoke essentially denotes a fire; but the case is not the same with denotation of words – whatever the language may be – for in that case all people throughout the world should have been speaking the same language. Thus, denotation of words is just through convention. That convention, however, is not made by a specific person, otherwise that person should have been named in the history of every language; rather, it is the human nature that invents a specific word when man wishes to denote a specific meaning and communicate others. Others, in turn, do the same; and with the passage of time the structure of a language takes shape, and then its vocabulary and grammar gradually develop. Convention of a word, therefore, means to make that word for a meaning and to designate it to that meaning.

Words normally denote their meanings by making (*al-ḏja'l*) and specification, and this kind of convention is called "convention by specification (*al-waḍ' al-ta'yīnī*)." However, that denotation is sometimes caused by specification of a word to a meaning by repetition in the usage which makes minds familiar with it in such a way that as soon as one hears the word one refers to the meaning. This kind of convention is called "convention by determination (*al-waḍ' al-ta'ayyunī*)."

Varieties of Convention

In the convention, the term and the meaning must necessarily be conceived; for convention is a judgment on the meaning and the term, and making judgment on something is not acceptable unless it is conceived and known – even though in an undifferentiated mode, for any given thing can be conceived either by itself (*bi-nafsih*), or by its general facet (*bi-wadjhih*). For instance, when you see a white object from a distance you can judge that it is white while you do not know what exactly it is; this judgment is acceptable because you have somehow conceived it – as a thing, an animal, or the like – and that is not like an absolutely unknown object which in no way can be judged.

Now, since the meaning must be conceived on the one side, its conception is of two kinds on the second, and it is particular or general on the third, the convention can be divided into the four following varieties:

1. The conceived meaning is particular and the object of convention is the very particular, i.e., the object of convention is a particular meaning conceived by itself and not by its general facet. This kind is called "the convention particular and the object of convention particular (*al-waḍ' khāṣṣ wa'l mawḍū' lah khāṣṣ*)."

2. The conceived meaning is general and the object of convention is the very general, i.e., the object of convention is a general meaning conceived by itself and not by a general facet. This kind is called "the convention general and the object of convention general (*al-waḍ' 'āmm wa'l mawḍū' lah 'āmm*)."

3. The conceived meaning is general and the object of convention is an instance of that general and not itself, i.e., the object of convention is a particular meaning conceived not by itself but by its general facet. This kind is called "the convention general and the object of convention particular (*al-waḍ' 'āmm wa'l mawḍū' lah khāṣṣ*)."

4. The conceived meaning is particular and the object of convention is a general facet of that particular. This kind is called "the convention particular and the object of convention general (*al-waḍ khāṣṣ wa'l mawḍū' lah 'āmm*)."

There is no dispute among *Uṣūlīs* that the first three varieties are possible, and the first two varieties have occurred — the first like proper nouns, and the second like common nouns such as water, heaven, star, and the like. Dispute is over the possibility of the fourth as well as the occurrence of the third. Referring the reader to detailed works on the Shiite *uṣūl al-fiqh*, here we just mention that the fourth is impossible – for the particular cannot be a facet of the general;

rather, the case is vice versa, i.e., the general is a facet and aspect of the particular – and the third has occurred and its instances are prepositions, demonstrative pronouns, pronouns, and the like.

What we discussed was concerning the meaning. That discussion can somehow be pursued with regard to the term as well. If the term is specified for the meaning while it is conceived by itself, as is the normal procedure, the convention is called personal (*al-shakhṣī*), and if it is conceived by its general facet it is called typical (*al-nawʿī*) — like dispositions in typical phrases and sentences, as the disposition in conditional clauses to denote that the consequence is dependent upon the antecedent.

Signs of Literal and Figurative Meanings

Usage of a term in its designated meaning is literally correct, in another meaning with which it has some pertinence along with some contextual evidence is figuratively correct, and in another meaning without any pertinence is wrong. Therefore, usage of a term literally and figuratively is correct and "the usage" cannot specify whether a term is designated for a meaning or it is used figuratively.

Now, should one know, through assertion of philologists, that a term is designated for a meaning it would obviously be clear that such word is to be used literally in that meaning and figuratively in other pertinent meanings. However, the case is not that clear sometimes and one may wonder how to treat the usage. What can one do in that case in order to find out whether such a usage is literally correct or it is figuratively so and hence one should use it with some contextual evidence?

Uṣūlīs have mentioned some signs of recognition of the literal meaning the most important of which being preceding (*al-tabādur*) and incorrectness of divesting (*ʿadam ṣiḥḥat al-salb*). By *tabādur* is meant that when one thinks of a term, a specific meaning comes to one's mind first – from the very term without there being any contextual evidence – and precedes other meanings. This clearly proves that the term indicates its meaning merely because of convention and nothing else. By *ʿadam ṣiḥḥat al-salb* is meant that divesting a term of a meaning is not correct. To exercise both of these signs, let us consider the example of the term "lion." We know that this term is used for a specific animal literally and for a brave man figuratively. Now, when you hear the term "lion" it is the meaning of that animal which comes to your mind first and not a brave man, and this is *tabādur*. Also, you cannot divest "lion" of that animal while you can do that of a brave man, and this is *ʿadam ṣiḥḥat al-salb*. Thus, *tabādur* and *ʿadam*

şiĥĥat al-salb are two signs which indicate the literal meaning of a term.

Literal Principles

When a doubt occurs concerning a term it can be of two kinds: a doubt concerning convention whether that term is specified for a certain meaning, and a doubt concerning intention of a speaker whether he has meant the literal or figurative meaning. Presenting two signs of recognition of the literal meaning, the pervious discussion dealt with the first kind of doubt. However, that is not enough for the removal of the second doubt, for those signs cannot determine speaker's intention. What can we do, then? *Uşūlīs* have presented some principles in this connection, called "literal principles (*al-uşūl al-lafżiyya*)," their most important ones being the following:

1. *The Principle of Literalness (Aşāla al-Ĥaqīqa)*. This principle is used when one doubts whether a certain speaker has intended the literal or the figurative meaning, where there is no contextual evidence while its existence is probable. In that case, it is said that "the principle is the literalness," i.e., one should principally treat the term as being used in its literal and not figurative meaning, for to use a word figuratively needs contextual evidence which does not exist.

2. *The Principle of Generality(Aşāla al-'Umūm)*. This principle is used when a speaker has used a general term and one doubts whether it is still general or it has been restricted. In that case, it is said that "the principle is the generality," i.e., one should principally treat the term as being used in its general meaning without being restricted.

3. *The Principle of Absoluteness(Aşāla al-Iṭlāq)*. This principle is used when a speaker has used an absolute term which has some states and conditions and one doubts whether its absolute meaning is intended by the speaker or he may have intended some of those states or conditions. In that case, it is said that "the principle is the absoluteness," i.e., one should principally treat the term as being used in its absolute meaning without being limited to some states or conditions.

4. *The Principle of Appearance(Aşāla al-Żuhūr)*. When a term is explicitly used in a meaning in such a way that no other meaning is probable it is called *naşş*, and when it is used in a meaning not in such an explicit way, i.e., some other meaning is also probable though that probability is not considerable and people usually ignore it, it is called *żāhir* (apparent). Now,

when a speaker uses a term in the second way and one doubts whether some other meaning is meant, it is said that "the principle is the appearance," i.e., one should principally treat the term as being used in its main meaning and not the less probable one.

In fact, all literal principles refer to this one; for the term is apparent in its literal, general, absolute (when it is general or absolute) meaning and not vice versa.

As for the authority of such principles, they are all based on "the conduct of the wise (*binā' al-'uqalā*)" — which is to be discussed in the third part in detail. According to that conduct, we see that the wise practically consider the apparent meaning of terms in their communications and ignore other inconsiderable probable meanings – as they ignore the probability of heedlessness, fault, jest, ambiguousness, and the like – and since the divine lawgiver has not prohibited us from that conduct and has not declared another specific way in His communications, we lawfully conclude that He has indorsed and confirmed that conduct having treated apparent meanings as authoritative proofs – precisely as the wise do.

Usage of One Term in More than One Meaning

Doubtless usage of a homonym in one of its meanings along with contextual evidence is allowed, and in case no such evidence is provided the term will become ambiguous having no indication. Also, there is no doubt that such term can be used in all of its meanings as such – although figuratively and in need of contextual evidence inasmuch as it is an unconventional usage. The dispute is over veraciousness of using a homonym and intending more than one meaning in the same usage in such a way that every meaning is separately meant by the term as if it is uttered to denote it alone. Ignoring details and different opinions, we should say that such usage is incorrect and not allowed; for using a term to denote a meaning means creation of that meaning by that term – although not by its real but rather its conventional, secondary existence (since there is only one existence which is attributed to the term in a primary, essential and to the meaning in a secondary, accidental manner, existence of the term is secondarily existence of the meaning). Hence, when a speaker utters a term in order to use it in a meaning he indeed utters the very meaning and not the term, and delivers the meaning to the hearer. In this way, the term is considered by the speaker, and even for the hearer, secondarily and as an instrument for and a way to the

meaning. The term is annihilated in the meaning. Thus, what is considered primarily and independently is the meaning and not the term. The case is like an image in the mirror; the image exists by the existence of the mirror. The real, essential existence belongs to the mirror and that very existence is secondarily and accidentally attributed to the image. When one looks at the image in the mirror one is in fact looking at it through the mirror in one look. That one look is primarily and independently at the image and secondarily and dependently at the mirror. Consideration of the mirror, therefore, is secondarily with regard to that of image – as was the case with the term.

That is why one term cannot be used except in one meaning. For if it is used in two meanings independently in such a way that both of them are meant by the term, as in the case where any of them is used alone, it necessitates that every one of them should be considered primarily, which, in turn, necessitates that the term should be used secondarily twice at once. This is obviously impossible, for one thing can have only one existence in the soul at any given moment.

What we said is not true only as to two, or more, literal meanings. It is true even where one uses a literal and a figurative meaning at once, for the problem is the same: attachment of two considerations to one object at one moment.

The Juristic-Literal Meaning *(al-Ĥaqīqa al-Shar'iyya)*

Doubtless all Muslims understand specific juristic meanings from such words as *ṣalāt* (the prayers), *ṣawm*(fasting), *ĥadjdj* (pilgrimage to Mecca), and the like, while we know that such meanings were unknown to Arabs before Islam and were transferred to those new juristic meanings after the Islamic era. Now, the question is that whether such transfer has happened in the holy Prophet's time so that we may have the juristic-literal meaning or it has occurred after him and therefore what we have in hand is Muslims' literal meaning *(al-ĥaqīqa al-mutasharri'iyya)*.

The answer to that question would make a difference in the process of inferring juristic precepts from the Qur'ān and *Sunna*. Should there exist the juristic-literal meaning, any such term without contextual evidence would be predicated to its juristic meaning, while it must be interpreted as its usual meaning if such a juristic-literal meaning does not exist.

It is obviously clear that those new meanings were not made through convention by specification, for in that case it should have been narrated to us in one way or another. As for the convention by determination, it must be said that it had doubtlessly happened in Imām Ali's time, for by that time all

Muslims have been using such terms in their new juristic meanings for a long time. Hence, since in Shiite jurisprudence only such prophetic *ḥadīths* that are narrated by holy Imāms are treated as valuable, all such terms in their words should be predicated to their new juristic meanings where they are void of any contextual evidence. As for the holy Qur'ān, there is no room for such a dispute, since almost all such words are used in it along with contextual evidence and convey their new juristic meanings.

The Sound (*al-Ṣaĥīĥ*) and What Incorporates Both (*al- A'amm*)

There is a dispute among *Uṣūlīs* whether terms of acts of worship and transactions are designations specified for sound meanings (i.e., perfect in terms of parts and conditions) or for what incorporates imperfect (*al-fāsid*) ones as well. In other words, when such term is used, should it be predicated only to perfect instances or could it be predicated to imperfect ones too (the latter being termed "what incorporates both" in this discussion)?

The outcome of this discussion is that when it is doubted whether or not a condition is considered in a specific act of worship or transaction, one who believes in the latter (who is called *al-a'ammī*) can refer to the principle of absoluteness in order to negate consideration of that condition while one who believes in the former (who is called *al-ṣaĥīĥī*) cannot.

To explain this, let us take an example. When the Lord commands us to actualize something and we are doubtful whether that thing would be realized by bringing about a specific external instance, such case can have two states:

1. It is known that designation of the commanded holds true for that instance, but it is probable that an additional condition is taken into consideration in the Lord's purpose which does not exist in that instance. For example, when the Lord commands to free a slave, it is known that "slave" does hold true for an unbelieving one, but we are doubtful whether or not the condition of "faith" is considered in the purpose of the Lord and therefore it becomes probable that being faithful is a condition of the commanded. In such case, one is principally supposed to refer to the principle of absoluteness in order to negate consideration of the probable condition. Hence, acquiring that condition would not be mandatory and one can content oneself in the position of obedience with actualizing the doubtful instance (i.e., freeing an unbeliever slave in the given example).

2. It is doubted whether designation of the commanded holds true for that

external instance. For example, the Lord has commanded to perform dry ablution with *al-ṣaʿīd* in case of lack of water and we wonder whether *ṣaʿīd* means soil alone or it includes stone and whatsoever lies on the ground as well. Here, the doubt is over *ṣaʿīd* holding true for other than soil. In such case, one cannot refer to the principle of absoluteness in order to enter the doubtful instance in the designation of the commanded so that one can content oneself with it in the position of obedience. Rather, one should refer to such practical principles as precaution or clearance in accordance with the situation.

Now, when the Lord commands us to perform *ṣalāt* (the prayers) and we doubt whether *sūra*, for example, is part of *ṣalāt*, the case would be an example of the first state should we hold that *ṣalāt* is designation of what incorporates both, and would be an example of the second one should we hold that it is designation of the sound. The reason for the former is that we know that designation of *ṣalāt* holds true for the one which lacks *sūra* and we only doubt whether or not an additional condition is taken into consideration. In that case one may refer to the absoluteness of the Lord's speech, negate consideration of the additional condition, and content oneself in the position of obedience with performing *ṣalāt* without *sūra*. The reason for the latter is that when consideration of *sūra* is doubted, it is in fact doubted whether or not designation of *ṣalāt* holds true for the one which lacks *sūra*. For, designation of the commanded is the sound and the sound is designation of the commanded; therefore, what is not sound is not *ṣalāt*. Thus, what lacks the doubtful part is both doubted whether it is veracious and whether designation of the commanded holds true for it. In this case, it is not allowed to refer to the principle of absoluteness in order to negate consideration of *sūra* as part of *ṣalāt* so that one can content oneself in the position of obedience with the instance lacking *sūra*. Rather, one should refer to either the principle of precaution or that of clearance – on the basis of what will be explained in the fourth part.

What is the justifiable opinion, then? It is the second one, i.e., terms being specified for what incorporates both, since it is the denotation of preceding (*al-tabādur*) and incorrectness of divesting (*ʿadam ṣiḥḥat al-salb*) which are two signs of literalness – as explained earlier. When we think of a term, what incorporates both comes to the mind first and precedes the sound, and also it is not veracious to divest the term of the imperfect instance.