

GENERAL PRINCIPLES RELIED ON BY THE SCHOLARS TOWARDS MODERN DEVELOPMENTS: AN ANALYTICAL STUDY

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ABSTRACT

This research deals with the general principles on jurisprudence of developments, through which we can reach to the provisions of all the emerging issues. The problem of not referring to the knowledge of the provisions of these developments to the origin of each updated issue, but mostly just mentioning the emerging issue with its modern terminologies is what makes it difficult for people to understand and know the rule of the issue; Some of these principles are agreed upon such as the Holy Qur'an and Sunnah, whereas some are not agreed upon such as Istishab and Istihsan etc. This study focuses on how to refer to these principles for the sake of ijihad on new developments, because the ijihad that is complete and has the necessary available conditions and moves to manage the issue sought to find its provisions can then search the suitable Shariah provision by referring to the original evidence (the Holy Qur'an and Sunnah), and evidence of dependency such as Ijma'i (Consensus), Qiyas (analogy), al-urf (custom) and a'dah. The researcher will try to focus on the aspects of response to these principles to know the provisions of the new developments. The research adopts inductive approach to try to gather religious texts, views and fatwas on the issue by focusing on the ancient books of Islamic jurisprudence by following the four Imams and arranging their views, and then mentions the views of the contemporary jurists on the new emerging issue and their preference on the issue. The study reached to a number of results, the most important of which the scholars explained and divided them based on essential, complementary and embellishments because of their importance in deducing provisions especially in contemporary emerging issues by making analogy and explanation where there is lack of explicit evidence on the emerging issue.

Key words: Principles, ijihad, religious texts, emerging issues.

PREFACE

The religious evidence is the first reference to the *mujtahid* in making provisions on the latest and contemporary developments; and some of these evidences are agreed upon such as the Holy Qur'an and Sunnah and branch of them like the *Ijma* (consensus) and *Qiyas* (analogy); and another type is evidence of dependency which is not agreed upon in terms of using them as evidence. This is because the evidences that are not agreed upon all go the evidences that are agreed upon in terms of origin and evidence of their existence (1), so *mujtahid* gives out *fatwa* based on the considered evidence; he refers to the Book of Allah first then Sunnah of the Prophet (saw) then *Ijma* (consensus) the *Qiyas* (analogy), then after that he refers to the evidences that are not agreed upon; if he reaches by his *ijihad* to a correct decision from them he issues *fatwa* based on that but in case of contradiction between the evidences he issues his *fatwa* according to best among them (2). And the evidences not agreed upon reached to nineteen and in another view to forty two (3). Imam Qarafi (4) counted them as fifteen evidences (5). But here we limit to what has the greatest importance and the greater need in rule on contemporary and emerging issues looked into by *mujtahid*.

AGREED UPON EVIDENCES

The agreed upon evidences are considered a point of consensus between the majority of Muslims and they are the Holy Qur'an, Sunnah, *Ijma* (consensus) and *Qiyas* (analogy). (Mahalli Shafie: 1999) I will discuss these evidences in the light of the order discussed by the scholars in terms of power in reasoning and how to refer to them in terms of knowing the provisions of the contemporary modern issues.

1.1 The Holy Qur'an

Is the Book of Allah (swt) and is the first origin and the first sources relied on by the people of *ijihad*. If we want to explain the meaning of the Holy Qur'an, it is not possible to be defined precisely, but the scholars tried to give a simple definition and explanation. Below is the definition:

Literal meaning: He read, he is reading, reading. (Turquoise: 2000, 29) This means Book to read. Qur'an also means to combine. (Azhari: 2001, 209).

The technical definition of the Holy Qur'an: the scholars have various definitions for the Holy Qur'an, some are as follow: It was mentioned in *Bahr al-Muhit* that Qur'an: is the speech revealed for the verses to be miracle and worship by reading it. (Zarkashi: 1994, 178). It was mentioned in *Irshad Fuhul* that the Qur'an: is the speech revealed on the Messenger (saw) written and transferred to us by frequency". (Shawkaani: 1999, 85).

Thus, the Holy Qur'an is the origin that should be referred to firstly in deducing provision for emerging issues as all provisions are mentioned in it either expressly or impliedly. (Shafi'i: 1940, 41). That is why the provisions of the Holy Qur'an came either in detail which is little or in brief and this is the majority. Where a verse is brief in terms of provision, the Sunnah must be referred to in order to know the clear provision, and it is not right to differentiate between what Allah has combined together (Qur'an and Sunnah) (Ibn Qayyim al-Jawziyyah: 1991, 220) and the saying of Allah: (So take what the Messenger assigns to you, and deny yourselves that which he withholds from you) refers to this. (Qur'an, Hashr, 59:7)

Hence, I will mention ways of referring to the first origin, the Holy Qur'an in making provisions on contemporary emerging issues by referring to the verse of the Holy Qur'an: (If ye differ in anything among yourselves, refer it to Allah and His Messenger). (Qur'an, Nisa, 4:59).

1. What is extracted from the general text as in the verse: (unless they remit it or (the man's half) is remitted by him in whose hands is the marriage tie), (Qur'an, Baqarah, 2:237) consists of father and husband and it means here one of them and this is correct reached to by preference.
2. What is extracted from the brief text such as the verse on *mut'ah* (but bestow on them (A suitable gift), the wealthy according to his means, and the poor according to his means), (Qur'an, Baqarah, 2:236) here *ijtihad* is correct on the value of the *mut'ah* depending on situation of the couple.
3. What is extracted from the conditions of the text like the verse on *mutamatti'i* (He should fast three days during the hajj and seven days on his return) (Qur'an, Baqarah, 2: 196), probably is fasting of three days before *Arafa*, and probably is fasting of seven days on his way returning or after he returns to his country, and here *ijtihad* is correct in giving priority to either one.
4. What is extracted from the evidence of the text, such as the verse: (Let the man of means spend according to his means) (Qur'an, Talaq, 65:7), we use the evidence to estimate the expense of the solvent, the most mentioned in the Sunnah in ransom harm is that each solvent has two and so we took the evidence to estimate the expense of the insolvent with one or less than one as the less what the Sunnah mentions in the expiation of intercourse is that each poor man person has one.
5. What was extracted from the texts: such as understanding the direction of *Qiblat* from one who did not the direction from the verse: (And marks and sign-posts; and by the stars (men) guide themselves) (Qur'an, Nahl, 16:16), by making *ijtihad* to know the *Qiblat* through signs and from the wind and sighting of stars.
6. What was not extracted from the text or origin: He said our people differed in the correctness of *ijtihad* with a strong suspicion into two:

First: It is not correct to even combine it with the origin, as it is not permissible to refer to the Shariah without the origin; this is the apparent view of Shafi'i School of Law, and that is why he used to deny *istihsan* as it is giving preference to suspicion without origin.

Secondly: It is correct to make *ijtihad* with it, as it is origin in the Shariah, so it can be independent from the origin. The scholars did *ijtihad* in estimating non-*hudud* cases in their origin with their opinions such as whipping and detention, for example his estimate with ten lashes in a case, and there is no origin from the Shariah in the case; hence, the difference is that *ijtihad* with preference of suspicion is utilized where there is no *Qiyas* (analogy). (Zarkashi: 1994, 270).

Thus, these six approaches should be looked into in emerging issues to know the rule of the issue while referring its provision to texts. The rule on the issue would be known by reference to the text or its meaning, and this will open a wide scope of knowing the origin of these emerging issues and from then to know these rules; and the most important thing to know related to emerging issues is to know the meaning of the texts as mere text does not fulfill the rule on human beings. (Al-Qahtani: 2010, 397).

1.2 Sunnah

According to Linguists, Sunnah literally means way. It is derived from "*Sanan*", and it means a straight and commendable way. (Anbari: 1992, 339).

Technically, Sunnah means what comes from the Prophet (saw) of speech or action or approval. (Shanqeeti: 2002, 51).

The Sunnah is the second source of the Shariah after the Holy Qur'an, and it is evidence to all Muslims by consensus. The Muslims are unanimous that obeying the Prophet (saw) and following His Sunnah is compulsory (Ibn Taymiyyah: 2005, 29), with clear texts and evidence from the Holy Qur'an. Allah (swt) says: (Say: "Obey Allah and His Messenger.: But if they turn back, Allah loveth not those who reject Faith) (Qur'an, Al-Imran, 3:32), and Allah (swt) says: (So take what the Messenger assigns to you, and deny yourselves that which he withholds from you) (Qur'an, Hashr, 59:7). The Prophet (saw) says: ((Hold steadfastly to my Sunnah and that of my righteous caliphs, stick to it firmly, and beware if newly invented matters, as every newly invented matter is innovation, and every innovation is misguidance) (Abu Daoud: 1999, 200). That is why the Sunnah serves as a key, explanation, giving detail provision to the Holy Qur'an. Thus, a rule cannot be derived only from the Holy Qur'an without referring to the Sunnah. To this effect, Imam Shatibi says:

(It is not proper to derive rule only from the Holy Qur'an without referring to its explanation (Sunnah); as if there are general matters such as the prayer, Zakat, Hajj etc. there is a need to refer to the explanation to understand them)) (Shatibi: 1997, 183), hence, rule on emerging matters can be derived by referring back to Sunnah by following the approaches of references as mentioned above, that is by referring to the origin (the Holy Qur'an) as they are from the same source (revelation from Allah (swt)) because Allah (swt) says: (Nor does he say (ought) of (his own) Desire; It is no less than inspiration sent down to him) (Qur'an, Najm, 53:3-4). We may add two more approaches to the Holy Qur'an and Sunnah in deriving rules for emerging issues in addition to what we have mentioned in the first source, and they are:

1. Where *ijtihad* is extracted from the meaning of text: like extracting effect of *riba* (usury) from wheat, and this is correct according to supporters of *Qiyas* (analogy).
2. What was extracted from semi-text: such as slave in establishing his possession as he is compared with a free person because he can possess as he is an adult, and compared with animal that he cannot possess as he is being possessed; this is correct to both the holders of *Qiyas* (analogy) and its deniers, but the deniers put it inside the generality of one of the misconceptions, and the holders of *Qiyas* (analogy) put it a supplement to one of the misconceptions (Zarkashi: 1994, 270), however, the Holy Qur'an and Sunnah do not differ in explanation of rule, although the Sunnah is independent in explaining some rules, such as the prohibition of a woman's marriage to same husband with her aunt,(

Tirmidhi : 1999, 242) and the prohibition of eating meats of domestic donkeys, and the prohibition of eating meats of all wild animals with fangs (Bukhari: 1422, 136), and other rules.

1.3 Ijma (Consensus)

It is the third evidence after the Holy Qur'an and Sunnah; it follows texts in terms of strength and evidence. *Ijma* (consensus) comes after the texts and can be relied on, as it is illogical for the scholars of the Ummah to agree on something that has no basis of Shariah evidence. (Qarafi: 1973, 322).

The literal meaning of *Ijma* (consensus) is: preparation and determination on the matter. Allah (swt) says: (Get ye then an agreement about your plan and among your partners) (Qur'an, Yunus, 10:71), which means get an agreement about your plan and call your partners. It also means to tighten intention and determination. (Ibn al-Atheer: 1979, 296).

As for the technical meaning, various definitions have been mentioned in books that give the same meaning in their content even though they differ in some definition formats based on the understanding of the scholars of *Usul*; we may mention a definition that combines between all definitions that were mentioned in *Usul* as follows:

It is: agreement of scholars of an era from the Ummah of Muhammad (saw) after his death on a religious issue (Shirazi: 2003, 33).

Majority of scholars of the Ummah are of the view that consensus does not take place except with a link, because the right of establishing religious provisions only belongs to Allah (swt) and His Messenger (saw) and the people of *Ijma* (consensus) have no that right. They said: lack of evidence will lead to error in rules as evidence is the connector to the right decision (Alyan: 1977, 399). Sheikh al-Islam Ibn Taimiyyah has explained that where he says: ((there is never a matter that has consensus except there is an explanation from the Messenger of Allah (saw) but that may be hidden to some people and they know *ijma* (consensus), and they take it as evidence, just like the one who does not know the meaning of the text may take the text itself as evidence, and it is the second evidence with the text, such as the examples mentioned in the Holy Qur'an and *Ijma* (consensus) is another evidence, just as it may be said: the evidence of that is the Holy Qur'an, the Sunnah and the consensus; any of these origins is an indication of the truth, this is because what *Ijma* (consensus) is an evidence to it, the Holy Qur'an and the Sunnah are evidence to it as well, and what the Holy Qur'an stands as evidence to it has been taken from the Messenger of Allah (saw) and both the Holy Qur'an and the Sunnah were taken from Him (saw); there is no issue agreed upon by *Ijma* (consensus) except there is a text)) (Ibn Taimiyyah: 195) .

So, rule on the contemporary jurisprudential developments may be known through *Ijma* (consensus) through different approaches to these developments where *Ijma* (consensus) may find a way to them, some of these approaches are:

First: To be well-versed with places of disagreement between the jurists. He who reaches to this position, is entitled to be a *Mujtahid*, and may be to know the truth in each matter brought to him. Some scholars made it compulsory for a *Mujtahid* to be knowledgeable with the places of differences between the jurists, in order not to claim *ijma* (consensus) on an issue of differences between the scholars; it is to this effect the hadith of Ibn Mas'ud (ra) mentions that the Prophet (saw) said: O Abdullah Ibn Mas'ud: I said, Oh Messenger of Allah, He (saw) said: Do you know who is more knowledgeable among people? I said Allah and His Messenger know best, He (saw) said: The most knowledgeable among people is who sees the truth when people differ, even if he is weak in action, albeit creeping (Tabarani: 1985, 372).

Second: *Ijma* (consensus) may be leant from in knowing the provisions of emerging issues by presenting the issue to all scholars to know their opinions on it, this can only be properly done through the congregation of jurists of the Muslim world, and if they are unable to gather all in one place, they should be notified through different means of communication, and the duty being performed by academies of jurisprudence of research in contemporary issues is not *Ijma* (consensus) in the real sense, but it fills the void caused by lack of *ijma* (consensus) in our contemporary period as a result of weak communication between different parts of the Ummah and its division based on national and geographic considerations not on the basis of Islamic unity; so it is not possible in this kind of situation to know the opinions of all the scholars in knowing the rule of a particular issue, but to get a big number of scholars or majority of them to agree on certain rules will no doubt lead to establishing Shariah rules of the strength and accuracy closer to the power of consensus more than the strength of the *Ijtihad* of individual (al-Qahtani: 2010, 400) .

1.4 Qiyas (Analogy)

Is the fourth of the agreed upon evidences and it follows the Holy Qur'an, Sunnah and *Ijma* (consensus) in terms of power and position; as though there is no text related to it, but Allah (swt) has explained signs that indicates it in the places of the Holy Qur'an and Sunnah by way of analogy (al-Qahtani: 2010, 401).

Qiyas (analogy) literally means: to estimate (Azhari: 2001, 179).

As for the technical definition, it has been given various definitions that actually refer to two things:

1. Those who perceive that *Qiyas* (analogy) is independent evidence define it as: ((linking branch with origin in its rule)) or ((to equal branch with the origin in the purpose of the rule)) (Ibn Amir: 1983, 8).
2. As for those who see *Qiyas* (analogy) as an act of *mujtahid* which means is not independent evidence, they define it as: ((Referring the branch to the origin with a reason linking between them)) or ((Referring branch to origin in some of its provision on the meaning that combines between them)) (Baghdadi: 1421, 447).

WAYS OF REFERRING TO *QIYAS* (ANALOGY) IN THE IDENTIFICATION OF NEW DEVELOPMENTS

1. The greatest thing worth knowing related to *Qiyas* (analogy) in the Fiqh of new developments is knowing the purpose; that is why some of the Hanafis hold the view that purpose is the only pillar of consensus, and what the majority of the jurists consider as pillars are mere conditions (Alhoireny: 2009, 423).

2. Since the texts are few and finite, incidents and renewable issues are many and infinite; the texts cannot afford to provide every incident with a stipulated provision, thus, the only solution is for the *mujtahid* to use *Qiyas* (analogy) and what is related of consideration and reasoning, hence, the need for *Qiyas* (analogy) is continuous and its benefits are infinite as long as there are incidents and issues that arise from time to time throughout the years and centuries until the Day of Judgment 9 Namalh: 1810).
3. Texts as clearly evident are limited and confined, and *Ijma* (consensus) are limited, and incidents happen every day, and repeat every moment and must have provisions from the origin of Shariah (al-Qahtani: 2010, 404).

The Companions (ra) followed this way to identify emerging incidents, Ibn al-Qayyim says: ((The companions of the Prophet (saw) used to do *Ijtihad* in new emerging issues and measured some provisions with some and considered a rule with its counterpart)) (Ibn Qayyim: 1991, 155).

DISPUTED EVIDENCES

The disputed evidences all go back to the agreed upon evidences in terms of origin and evidence of its proof (Jizani: 1427, 278). The *Mujtahid* issues fatwa based on the considered evidences in sequence; he relies first on the Holy Qur'an, then Sunnah, then *Ijma* (consensus), then *Qiyas* (analogy), then after that the disputed evidences, if he finds something correct he issues the fatwa by relying on it, and if he finds two contradicting evidences he issues the fatwa by relying on the best among them (Ibn Qudamah : 2002, 438). The disputed evidences reach to nineteen and some scholars counted them at forty and above (Zuhaili: 1986, 734), but here we will concentrate on the most important ones and more needed in providing rules on contemporary and emerging issues.

2.1 Statement of the Companion

Both the scholars of *Usul* and Hadith define the companion each according to his approach; I will mention brief definition of each group. According to the scholars of *Usul*, the companion is the one who met the Prophet (saw) and believed in Him and stayed for long time with Him (Zuhaili: 1986, 850).

According to the scholars of hadith, the companion is the one who met the Prophet (saw) and believed in Him, or saw Him even for an hour of the day, regardless of whether he narrated from Him or not (Omari: 1994, 63).

APPROACHES IN MAKING REFERENCE TO STATEMENT OF THE COMPANION IN NEW DEVELOPMENTS

Looking at the fatwas of the companions (ra) we will find mainly six approaches by considering them as a source of knowing rules on Sharia. Ibn al-Qayyim mentioned these approaches as follows:

1. To hear it from the Prophet (saw).
2. To hear from the person who heard it from the Prophet (saw).
3. To understand it from the Holy Qur'an understanding that is hidden to us.
4. To be agreed by the great among the companions but conveyed to us by only one companion.
5. To understand the language and meaning of the words that we do not understand, or because of current evidence coupled with the speech, or because of a number of issues he understood for the length of period he saw the Prophet (saw). Seeing His actions, situation, history, listening to His words, understanding their purposes, evidencing revelation and its interpretation, with all these he understands something that we do not understand, so based on these five estimates his *fatwa* may be evidence that must be followed.
6. To understand what the Prophet (saw) did not mean and erred in his understanding, so based on this his statement cannot be evidence; and it is well known that the occurrence of probability from five is more that of one; there is no doubt about this from a sane person; this is because it indicates that his statement is correct not what he disagreed with of the statements of those after him; what is required is just a strong suspicion, and working with it is a must (Ibn Qayyim: 1991, 113).

2.2 *al-Istihsan*

There are various definitions of *Istihsan* by the scholars according to their Schools and their view on the subject; some of these definitions are as follow:

1. Imam Ghazali defines it as: ((what the *mujtahid* sees as good by his mind)) (al-Ghazali: 1993, 171).
2. According to Imam Shatibi: ((is the use of a partial interest in facing holistic analogy)) and he is from Maliki School of law (Shatibi: 1997, 639).
3. Ibn Qudamah al-Hanbali: ((reverse with the rule of the issue from its counterpart because of evidence from the Holy Qur'an or Sunnah)) (Ibn Qudamah: 2002, 473).
4. Abu al-Hassan al-Karkhi from the Hanafi School of law defines it as: ((reverse with the rule of the issue from its counterpart because of evidence stronger than the first)) (Aamidi: 2000, 137).
- 5.

The Hanafi School of law mentioned various definitions for *Istihsan*, and perhaps the best is mentioned by Abu al-Hassan al-Karkhi (al-baga: 1993, 122).

The truth is that there is no disagreement among the scholars on *Istihsan*, but the difference is only verbal, as said by a group such as *al-amidi* and *Shaukani*. They said: the truth is that disputed *Istihsan* cannot be achieved, but the difference in reality is to consider custom or interest valid for limit general evidence, and this is similar to what is called in the conventional law term as adopting the spirit of the law and its general rules (Zuhaili: 1986, 739).

WAYS OF REFERRING TO *ISTIHSAN* IN CONTEMPORARY JURISPRUDENTIAL DEVELOPMENTS

First: If an issue is brought to *Mujtahid* having conflict between two analogies, first: clear analogy that requires a particular rule, and second: hidden analogy that requires another rule, and the *mujtahid* gets a reason in his mind to give preference to the second analogy, or reverse from the clear analogy to the hidden analogy, and this is what *Istihisan* is; and the rule established by *Istihisan* is known as “*al-Hukm al-Mustahsan*”, that is a rule contrary to clear analogy.

Second: If an issue is referred to *mujtahid* on contemporary developments that falls under general rules or general origin, and he finds a specific reason to exempt this partial issue from the general origin, and reverse it from the established rule to another rule because of a reason in his mind; this is what is known as *Istihisan*, and the reason for that rule is known as “*waj al-Istihisan*”, and the rule is known as “*al-Hukm al-Mustahsan*”, which means it has been established contrary to analogy which is the general origin or general rule (Zidane: 1994, 231).

2.3 *al-Istishab*

al-Istishab means: what has been established in the past, the origin is that it remains in the future; that means that issue remains as long as there is nothing to change it (Shaukani: 174), and this definition is closer to the definitions given by the scholars of *Usul*; based on this if a person is known to be alive, that presumption continuous until an evidence of his death is established’ and whoever marries a virgin and claimed that she is not a virgin after sexual intercourse with her, his statement is not accepted without evidence, because the origin is that she is a virgin from the beginning (Zidane: 1994, 267).

WAYS OF MAKING REFERENCE TO *AL-ISTISHAB* TO IDENTIFY CONTEMPORARY DEVELOPMENTS IN JURISPRUDENCE

It is known that in trying to establish a rule for a contemporary development, *al-Istishab* may only be referred to where there is no specific rule for the issue; if the *mujtahid* tries all his best to get a rule for the issue but could not get, then he refers to *al-Istishab* (*al-Qahtani*: 2010, 418).

That is why it is said: ((it is the last resort in issuing *fatwa*; this is because if a *mufti* is asked a particular incidence, then he searches the rule from the Holy Qur’an, then *Sunnah*, then *Ijma* (consensus), the *Qiyas* (analogy), if he does not find, he uses *al-Istishab*; if the doubt is on the termination of a rule, then the origin is its continuity; and if it is on its establishment, then the origin is its non-establishment)) (*Zarkashi*: 1994, 14).

Based on this, a number of rules and principles have been formed where *mujtahid* may be able to form a rule by using them related to modern developments, and these rules are branch of *al-Istishab*, they are:

First: The origin in everything is permissibility: it is taken from this that contracts and acts and various transactions between people are all permissible except there is evidence prohibiting them; and this is the view of a group of jurists.

Second: The origin is presumption of innocence: This has been used in civil and criminal cases; whoever claims a right on another, the origin is non-existence, except the plaintiff can prove it; and the defendant is innocent except proving guilty.

Third: Certainty does not go away with doubt: He who performs ablution and has a doubt it has spoilt he remains at the state of ablution; and whoever marries remains so with the wife except divorce has been established with certainty. The purpose of this rule is that: Certainly has already been established without doubt, then that shall continue unless evidence can be established that it ceases, but mere doubt cannot eliminate certainty (*Suyuti*: 1990, 51).

2.4 *Sadd Adh-Dharaa’i* (Prevention of Means (to Sins))

Adh-Dharaa’i is the plural of *Dhari’ah*: which is means; it means: all permissible means whether it is intended to reach to evil through it or not, but often most likely will lead to evil, and its evil is more likely than its good (*Namlah*: 1999, 1016).

The meaning thus is: blocking means to evil if the result is evil, because evil is prohibited (*Zuhaili*: 1986, 873). According to Imam *Shatibi*, it is: ((prohibition of the permissible in order not to reach to the forbidden)) (*Shatibi*: 1997, 564).

CRITERIA OF APPLYING *SADD ADH-DHARAA’I* ON NEW DEVELOPMENTS:

1. The issue intended to be blocked there is certainty of its occurrence or the probability is high because Shariah provisions and what are related to them can only be built on realities, but suspicions and assumptions may be a form of stress and stiffness, and that is why the rule in jurisprudence for establishing rule and determining the pros and cons on arising issues is that: (there is consideration given to suspicion and assumption).
2. The evil in the act intended to be blocked is bigger than the benefit; and this criteria is in line to the general Shariah rule in determining benefit in Shariah rules, and appeasement process in protection of the five necessities (*Alhoireny*: 2009, 239).
3. Not to have on the evil intended to be blocked another equal evil or greater than it; and this is when many evils are gathered in a single act, in that situation we commit the minor evil to prevent the major evil because of the rule in jurisprudence: ((If there are two evils, the greater one is avoided to commit the lesser one)) (*Sayuti*: 87).
4. The generality of evil or benefit, as the Shariah is general in its rules, objectives and provisions, these criteria are made because way of *Sadd Adh-Dharaa’i* is beset with difficulty and hardship to consider and reconcile and combine and differentiate (*Ibn Qayyim*: 1991, 553).

2.5 *al-Maslahah al-Mursalah* (Public Interest)

al-Maslahah means bringing benefit, and blocking the evil (Ibn Qudamah : 2002, 478); it has a positive side which is bringing benefit, and negative part which is blocking evil (Zidane: 1994, 236). *al-Maslahah al-Mursalah* is: all benefit inside the five purposes of the Shariah, without having a special guide for acceptance or rejection (Namlah: 1999, 1003), and if the issue or the new development has no provision and no purpose to consider it as Shariah provision, and a suitable reason for legislating a new rule is found; which means legislating a rule will block evil and bring benefit; this suitable issue in the incident is called *al-Maslahah al-Mursalah* (public interest) (al-Qahtani,: 2010, 560).

REFERENCE TO *AL-MASLAHAH AL-MURSALAH* (PUBLIC INTEREST)

Legislating rule on new developments is by reference to *al-Maslahah al-Mursalah* (public interest) that does not depart from the purposes of the Shariah and the five known fundamentals. Imam Razi says in *al-Mahsul*: ((each provision requires either to have benefit free from corruption or corruption free from benefit or free from benefit and corruption or to comprise of both of them, and this is in three categories because they either be equal or the benefit is greater or the corruption is greater, and they are in six categories:

1. That it requires benefit free from corruption and this must be legislated because the aim of legislation is protection of benefits.
2. That it requires a valid purpose, this shall also be legislated leaving a lot of benefits for the sake of little evil is much evil.
3. That the two are equal, and this shall not be legislated.
4. To be free from both, this shall also not be legislated.
5. To be pure evil, there is no doubt that it shall not be legislated.
6. Where the evil is greater than the benefit, this must not be legislated as well and must be avoided.

The aforementioned six categories is basis of the religion of the Prophet and is the purpose of legislation, and the Holy Qur'an and Sunnah indicates that the issue is like both explicitly and impliedly)) (Razi,: 1997, 166).

Reference may be made to the above mentioned categories in new developments by using mind; if the mind indicates there is pure or greater benefit then a rule may be legislated as it follows the purpose of *Shariah* (al-Qahtani: 2010, 564).

FINDINGS

The most important findings found by the researcher are:

1. The right way to make *ijtihad* in contemporary modern developments starts by choosing the right evidence from the Holy Qur'an, Sunnah, *Ijma* (consensus) and *Qiyas* (analogy) followed by *Istihsan*, statement of the companion etc. as mentioned in this research.
2. Analysing texts and evidence between their meanings, explanations and understandings and considering fundamental principles while legislating rules.
3. Following the moderate approach in providing rule on new developments and avoiding exaggeration in following easy *Shariah* rules for interest and fabrication between different Schools of law even if that violates the texts.
4. *Mujtahid* shall not be haste and rush in providing rule on an issue, but he must be careful by looking at what is in line with the purposes of *Shariah* of bringing benefit and blocking evil, that is by deep research in the general principles.
5. Identification of the rule may be disputed evidence, such as statement of the companion, *al-Istihsan*, *al-Istishab* that may only be referred to when there is no specific rule on the incident.

SOURCES AND REFERENCES

- Aamidi, Syed Abul Hassan Din Ali ibn Abi Ali bin Mohammed bin Salim al-Amidi Thalabi .631 AH, *al-Ahkam fi al-Usul al-Ihkam*, d. I, verification: Abdul Razzaq Afifi, 2000. Beirut, And Damascus: Islamic office.
- Abu Daoud, Suleiman bin Shaggy ibn Ishaq ibn Basheer bin Shaddad ibn Amr Azadi Sijistani .275 H, Sunan Abi Dawood, d. I, Verification: Mohammed Mohiuddin Abdul Hamid, 1999. Beirut: Modern Library.
- Al-baga, Dr. Mustafa Deeb al-baga, d. T, the impact of the different evidence (the sources of legislation) in Islamic jurisprudence, i 2 Ed.: 1413, 1993, Damascus: Dar Dar Qalam wa Dar al-Ulum al-Insaniyyah.
- Al-Ghazali, Abu Hamid Muhammad ibn Muhammad (d. 505 AH), *Mustasfa*, i 1Ed: 1413, 1993, verification: Mohamed Abdel Salam Abdel Shafi, Beirut: Dar Kutub al-Ilmiyyah.
- Alhoireny, Wael Suleiman bin Abdullah bin Alhoireny, d. T., *al-Manhaj fi istinbat ahkam an-Nawazil*, i 1 Ed.: 1430, 2009, Riyadh: Rushd Library.
- Al-Qahtani, Dr. Misfer bin Ali bin Mohammed al-Qahtani, d. T., *Manhaj istinbat ahkam an-Nawazil al-Fiqhiyyah al-Mu'asirah Dirasah Ta'asiliyyah Tatbiqiyyah*, 2 Ed. 1431, 2010, Riyadh: Dar Al-Andalus al-Khadra', and Beirut: Dar Ibn Hazm.
- Alyan, Rushdie Alyan, d. T, the consensus in the Islamic Sharia, i e 11 397 1977, Saudi Arabia: Islamic University.
- Anbari, Muhammad bin Qasim bin Mohammed bin Bashar Abu Bakr Anbari .328 H, *az-Zahir fi ma'ani kalimat an-Nas*, i e 1 Ed. 1412, 1992, verification: Dr. Hatem Saleh Damin, Beirut: Message Foundation.
- Azhari, Abu Mansour Mohammed bin Ahmed .2001, *Tahzib al-Lughah*, 1 Ed., verification: Mohamed Awad Mur'ib, Beirut.
- Baghdadi, Abu Bakr Ahmad ibn Ali ibn Thabit ibn Ahmad ibn Mahdi al-Khatib al-Baghdadi .463 H, *al-Faqih Wa al-Matafaqqih*, i 2 Ed.: 1421, verification: Abu Abd al-Rahman ibn Yusuf Adil Algazari, Saudi Arabia: Dar Ibn al-Jauzi.

- Bukhari, Muhammad bin Ismail Abu Abdullah Bukhari Aljafee, d. T., al-Jamu al-Musnad as-Sahih al-Mukhtasar min Umur Rasulillah (saw) wa sunanihi wa ayyamihi, i 1 Ed., 1422, Verification: Mohammed Zuhair bin Nasser Nasser, Dar Tauq an-Najah.
- Ibn al-Atheer, Majd al-Din Abu Saadat Al Mubarak bin Mohammed bin Muhammad ibn Muhammad ibn Abd al-Karim al-Shaibani al-Jazari, 606, an-Nihayah fi Garib al-Hadith wa al-athar, 1399 E - 1979, Verification: Tahir Ahmad az-Zawi - Mahmoud Mohammed Tunahi, Beirut: al-Maktabah al-Ilmiyyah.
- Ibn Qayyim, Muhammad ibn Abi Bakr ibn Ayyub bin Saad bin Shamsuddin bin Qayyim al-Jawziyyah.751 H, I'lam al-Muwaqqi' in an Rab al-alamin, 1 Ed.: 1411, 1991, Verification: Mohamed Abdel Salam Ibrahim, Beirut: Dar al-Kutub al-Ilmiyyah.
- Ibn Qudamah, Abu Mohammed, Muwaffiq al-Din Abdullah bin Ahmed bin Mohammed bin Qudamah Aljmaeili Maqdisi then Damascene Hanbali .620 H, Raudat an-Nazir wa jannat al-Manazir fi Usul al-Fiqh ala Mazhab al-Imam Ahmad ibn Hanbal, 2 Ed.: 1423-2002, Rayyan Foundation for printing, publishing and distribution.
- Ibn Taymiyyah, Ahmed bin Abdul-Halim Ibn Taymiyyah Harrani, d. T., Majmoo al-Fatawa, 3 Ed.: 1426, 2005, Verification: Anwar al-Baz, Amer Al-Jazzar, Dar al-Wafa.
- Jizani, Mohammed bin Hussein bin Hassan Jizani, d. T., Landmarks jurisprudence of the Sunnis and the community, i 5: 1427, Saudi Arabia: Dar Ibn al-Jauzi.
- Mahalli, Jalal al-Din Muhammad ibn Ahmad Shafie .864 H, Sharh Waraqat fi Usul al - Fiqh, i 1 Ed.: 1420, 1999, verification: Dr. Husam al-Din ibn Musa Afanah Associate professor of Islamic Jurisprudence.
- Namlah, Abdul Karim bin Ali bin Mohammed Namlah, al-Muhazzab fi ilm Usul al-Fiqh al-Muqaran i 1 Ed.: 1420, 1999, Riyadh: Rushd Library.
- Omari, Akram Ben Dhia Omari, d. T., Buhuth fi tarikh as-Sunnah al-Musharrafah, i 4 Ed., 1994. Beirut: Dar Bisat.
- Razi, Abu Abdullah Muhammad ibn Umar ibn al-Hasan ibn al-Husayn al-Razi Taymi aka Fakh al-Din al-Razi Khatib ar-Rayyi .606 H, al-Mahsul, i 3 Ed: 1418 --1997, verification: Dr.
- Shafi'i, Abu Abdullah Muhammad ibn Idris bin Abbas bin Othman bin Shafie bin Abdul Muttalib ibn Abd Manaf Matlabi Qurashi al-Makki, 204 H, the message, i 1: 1358 e 1940, verification: Ahmed Shaker, Egypt: Al-Halabi Library.
- Shanqeeti, Ahmed bin Mahmoud bin Abdul Wahab Shanqeeti, d. T., Khabar al-Wahid wa hujjatuhu, i 1 Ed., 1422, 2002, Madinah Munawwarah: Scientific Research at the Islamic University.
- Shatibi, Ibrahim bin Musa bin Mohammed Allkhmi Granada famous with Shatibi .790 H, al-Muwafaqat, i 1: 1317 e 1997, verification: Abu Ubaidah famous Bin Hassan Al Salman, Dar Ibn Affan.
- Shawkaani, Mohammed bin Ali bin Mohammed bin Abdullah Shawkaani Yemeni .1250 e, Irshad al-Fuhul ila Tahqiq al-Haqq min Ilm al-Usul, i 1Ed: 1419, 1999, Verification: Sheikh Ahmed Azw Inayah, Beirut, Dar Kutub al-Arabiyyah.
- Shirazi, Abu Ishaq Ibrahim ibn Ali ibn Yusuf Shirazi .476 H, al-Lam'u fi Usul al-Fiqh, i 2 Ed: 2003 - 1424. Beirut: Dar al-Kutub al-Ilmiyyah.
- Suyuti, Abdul Rahman bin Abi Bakr Al-Suyuti .911 H, al-ashbar wa an-Naza'ir, i 1Ed: 1411 E - 1990, Beirut: Dar kutub al-Ilmiyyah.
- Tabarani, Suleiman ibn Ahmad ibn Ayyub bin rainy Allkhmi Shami, Abu al-Qasim al-Tabaraani .360 H, al-Mu'ujam as-Sagir, i 1 Ed.: 1405 to 1985, verification: Mohammed Haj Mahmoud thanks Omrer, Beirut, Amman: Islamic office, Dar Ammar.
- Tirmidhi, Mohamed Bin Issa Abu Issa al-Tirmidhi, Sulami, d. T., Sahih Sunan al-Tirmidhi, d. I, verification: Ahmad Muhammad Shakir et al., 1999. Beirut: Revival of Arab heritage House.
- Turquoise Abadi, Majd al-Din Abu Tahir Mohammed bin Yaqub Turquoise Abadi .817 H, Qamus Muhit, i 8 Ed.: 1426, 2000, verification: Office of the investigation in the Message Heritage Foundation, Beirut: Message Foundation.
- Zarkashi: Abu Abdullah Badr al-Din Mohammed bin Abdullah bin Bahadur Zarkashi (d. 794 AH), al-Bahr al-Muhit fi Usul al-Fiqh, i 1Ed. 1414 E - 1994, Dar al-Kutbi.
- Zidane, Dr. Abdul Karim Zidane, d. T., Brief in jurisprudence, i 4: 1415, 1994, Oman: Matkabat al-Basha'ir.
- Zuhaili, Dr. Wahbah, d. T, al-Fiqh al-Islami wa adillatuhu, i 1Ed: 1406, 1986, Damascus: Dar al-Fikr

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