

TWO APPROACHES TO THE PARTICULARIZATION OF EFFECTIVE CAUSE (*TAKHSIS AL-'ILLAH*) IN ISLAMIC LEGAL THEORY

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ABSTRACT

In Sunnî Islamic Legal Theory there are two main streams. One of them is developed by *Shâfi'î* School called *Usûl al-shafi'îyyah* or *Tarîkah al-Mutakallimîn* and the other mainly attributed to the Hanafî school and known as *usûl al-Hanafîyyah*, or *Tarîkah al-Fuqahâ'*. Hanafî School also may be divided into two schools as *Hanafî- Mutezilî* school and *Hanafî-Maturidî* school. There are many differences between these two schools which differentiate each from other. The differences between Baghdad centered *Hanafî-Mu'tazilî* school and Samarqand centered *Hanafî-Maturîdî* school on *usûl* are very important. My aim in this paper is to examine and analyse one of those differences as an example. It is the case of particularization of cause (*takhsîs al-'illah*). According to *Hanafî- mutezilî* school restricting the '*illah* on the first case is permissible (*ja'iz*). According to the *Hanafî-Maturîdî* school, however it is not permissible to restrict an '*illah* on the first case. We may exceed the same legal rule on all other cases in which the same '*illah* was included. Then another question arises whether *tahsis al 'illah* is an *istihsan* (abandonment a legal rule for a better rule) or not. Consequently the relationship between *istihsan* and particularization of the cause should be examined.

Keywords: Particularization of the Cause, *Takhsîs Al-'Illah*, Islamic Legal Theory, *Usûl Al-Fiqh*, *Istihsân*, *Qiyâs*, Hanafî School.

1. Introduction

There are two main stream in Sunnî Islamic Legal Theory (*usûl al-fiqh*), one is developed by *Shâfi'î* School and the other mainly attributed to the Hanafî school. The former is called *Usûl al-shafi'îyyah* or *Tarîkah al-Mutakallimîn* whereas the latter is known as *usûl al-Hanafîyyah*, or *Tarîkah al-Fuqahâ'*. *Usûl al-Hanafîyyah* had some essential changes in its evolution through history. *Hanafî tradition* at the beginning and the formation period it was Baghdad

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centered and *Mu'tazilî* oriented. We can consider, Kerhî (d.340/951), Jassâs,(d.370/981) Saymarî (d.438/1045) and Dabbûsî(d.430/1039) as the most prominent scholars of this Hanafî-Mutezilî school. At the end of the 5th. century this *hanafî-mu'tazilî* school changed and became *maturîdî* oriented. The most prominent scholars of this new Samarqand centered school are Alâ al-Dîn al-Samarqandî, (d.539/1144) Lâmîshî, Sarakhsî (d.483/1090). Consequently *Hanafî usûl* tradition is divided into two as *Hanafî-Mutezilî* school and *Hanafî-Maturidî* school. Latter school criticized the former for their *Mu'tazilî* tendencies. Therefore according to latter school if we depend on the *Hanafî-mutezilî* principles we may fall into incorrect details of the principles of the law. It is therefore necessary to avoid a dependence on *Mu'tezilî-hanafî* principles. Thus, it necessitates that the *usul al-fiqh* depends on a specific belief structure. This has been continuously reiterated by numerous scholars who have debated on the issue of *usul* and its relation to belief. Because *usul al-fikh* (islamic legal theory) is a branch of the *usûl al-dîn*.

In this regard 'Ala' al Din al-Samarqandî says in his *Mizan al Usul* "Usul in the Balance":

"Know that *Usul al Fiqh* is a branch of *Usul al Din*; and that the composition of any book must of necessity be influenced by the author's beliefs. Therefore, as most of the writers on *Usul al Fiqh* belong to the *Mu'tazilah* who differ from us in basic principles, or to *Ahl al Hadith* who differ from us in questions of detail, we cannot rely on their books. Our (Hanafi) scholars' books, however, are of two types. The first type is of books that were written in a very precise fashion, because their authors knew both the principles and their application. Examples of this type are: *Ma'khadh al Shar'* "The Approach of the Shari'ah" and *al Jadal* "Argument" by Abu Mansur al Maturidi (d 333/944). The second type of book dealt very carefully with the meanings of words and were well-arranged, owing to the concern of their authors with deriving detailed solutions from the explicit meanings of narrations. They were not, however, skillful in dealing with the finer points of *al Usul* or questions of pure reason. The result was that the writers of the second type produced opinions in some cases agreeing with those with whom we differed. Yet, books of the first type lost currency either because they were difficult to understand or because scholars lacked the resolution to undertake such works."²

² 'Ala' al-Din Abû Bakr Muhammad b. Ahmad al-Samarkandî, *Mizân al Usûl fî Natâ'ij al Ukûl fî Usûl al Fikh*, I-II, Wazârat al-Awqâf wa al-Shu'ûn al-Dîniyyah, Bağdat, 1987, I, 110-111.

The differences between Baghdad centered *Hanafi-Mu'tazili* school and Samarqand centered *Hanafi-Maturidi* school on *usûl* are very important. These differences should be examined one by one in order to find out the roots of the change from Iraq Hanafism (*Mu'tazilizm*) to Maturidi-Hanafism (*Maturidizm*). Especially two cases, here, al-Jassâs from *Hanafi-Mutazili* school and al-Sarakhsî from *Hanafi-Maturidi* school can be examined as an example. A distinguished scholar Dr. Şükrü Özen found out 21 cases which shows us differences between these two school.³ It is not my aim to repeat these cases nor to examine them all since that already been done effectively.

My aim in this paper is to examine and analyse one of those cases. It is the case of particularization of cause (*takhsîs al-'illah*). According *hanafi- mutezili* school restricting the *'illah* on the first case is permissible (*ja'iz*). According to the *Hanafi-Maturidi* school, however it is not permissible (*ja'iz*) to restrict an *'illah* on the first case. We may exceed same legal rule on all other cases in which included same *'illah*. Then another question arises is *tahsis al 'illah* an *istihsan* (abandonment a legal rule for a better rule) or not.

In the following pages we will investigate particularization of cause comparatively between two branches of hanafi *usûl* tradition.

2. *Qiyâs* and *Istihsan* (Analogical Reasoning and Jurisdictional Preference)

Qiyas is one of the basic sources of the Islamic law. "In the classical legal theory *Qiyas* (analogical reasoning) comes last. It is recognized as the fourth principle basis or source of law like other sources. In fact it is mode of legal reasoning (*ijtihad*) not a source of law as the classical quaternion theory depicts. However, it is neither a source of law nor an authority by itself. Instead it is a process of a systematic reasoning to reveal the rule of law. It is dependent entirely on an authority may be *Qur'an* or the *Sunnah*. Sometime it is based on *Ijma'* which also takes its sanction from either of these two sources. Thus these two sources are interlinked ultimately return to the *Qur'an*." In a general manner we may define *qiyas* as comparison of a case not covered by the text with a case covered by the text on account

³. Şukru Ozen, *Ebu Mansûr al-Maturidi'nin Fıkıh Usûlü'nün Yeniden İnşası*, (Reconstruction of Usûl Abû Mansor al Mâturîdî), Unpublished post-doctorate study, İstanbul, 2001. 81.

of their common *Shariah* value ‘*illah* in order to transfer the law of the one to the other.⁴

There are four constitutive elements of *qiyas*, namely *asl* (the original case), *far’* (the paralel case), ‘*illah* (cause or *ratio legis*), and *hukm* (law of the original case). The legal theorists (*usûliyyûn*) who are agree on these four constituents of *qiyâs* are Hanafîs. Al-Bazdawî and Al-Sarakhsî call the ‘*illah* the essential element of *qiyas* (*rukn al-qiyas*). By giving the chapter heading “*Fasl fil-Rukn*” or “*Bâb al-Rukn*”⁵ (chapter on the essential element), they probably mean that the ‘*illah* alone constitutes *qiyas*.⁶

The ‘*illah* constitutes the most important part but also most problematic.

In fact the issue of particularization of the cause is interlinked with the effective cause (legal cause-‘*illah*). “Another problem which requires a detailed treatment is co-extensiveness (*tard*). *Tard* has been explained as whenever the cause exist the effect or rule (*hukm*) also exists. But when quality which is considered to be the ‘*illah* in acertain place exists and effect or rule does not exist, it is tecnicly called *nakd* (separation of the effect from the cause). There is a disagreement among the jurist about the condition of co-extensiveness about conditions of the *illah*. Those who stipulates the co-extensiveness for the *illah* think that the separation of cause from effect voids the *illah*. Those who do not stipulate the co-extensiveness for he *illah* validate the separation of cause from effect. Hence they allow the particularization of the ‘*illah* (*takhsîs al-‘illah*)”⁷

Istihsan literally means “to approve or to deem something preferable. It is a derivation of *hasuna* which means being good or beatiful.

Istihsan juristically means, that it is method of exercising personal opinion in order to avoid any rigity and unfairness that might result from literal enforcement of the existing law. “Juristic

⁴. Ahmad Hasan, *Analogical Reasoning in Islamic Juriprudence*, Islamic Research Institute Press, Islamabad, 1986, 15; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Islamic Text Society, Cambridge, 1991, 196

⁵ Shams al A'immah Abû Bakr Muhammad b. Ahmad al-Sarakhsi, *Usul al-Sarakhsî*, I-II, ed: Ab al-Wafâ al-Afghânî, I-II, Dâr al-Ma'rîfah, Beirut, n.d., II, 174; Alâ' al-Dîn 'Abd al-'Azîz Ahmad al-Bukhari, I-IV, *Kashf al Asrâr an Usûl Fakhr al-Islâm al Bazdawî*, Dâr al Kitâb al-Arabî, Beirut, 1991/1411, III, 1064.

⁶. A. Hasan, *Analogical Reasoning*, 167.

⁷. A Hasan, *Analogical Reasoning*, 206-207.

preference” is a fitting description of *istihsan*, as it involves setting aside an established analogy in favour of an alternative ruling which services the ideals of justice and public interest in a better way.⁸

Istihsan in Islamic Law and equity in Anglo-Saxon law may close up to some extent. since there is an obvious paralel between equity and *istihsan*. Although they bear a close similarity to one another but the they are not identical. Equity is a western legal concept which is grounded in the idea of fairness and conscience, and derives legitimacy from a belief in natural rights or justice beyond positive law. *Istihsan* in Islamic Law and equity in Anglo-saxon law are both inspired by the principle of fairness and both of them authorise departure from a rule of positive law when its application leads to unfair results. However the basic difference between these two principle is while equity based on the concept of natural law and it is an independent principle whereas *istihsan* based on the values and principles of Islamic Law and.⁹ It is a principle in the restriction of the primary sources namely Qur’an and sunnah.

According Karkhi and al-Jassâs *istihsan* is not the name of a legal source but a process of preference between two sources of law.

This notion was adopted by al-Sarakhsî but a serious difference came up. According to al-Sarakhsi as a result of identifying *istihsan* as a methodoligal procedure to defining it as a legal source.¹⁰ al-Sarakhsi considers *istisân* to be a method of seeking facility and ease in legal injuctions. It involves a departure from *qiyas* in favour of a legal rule which abrogate hardship and bring ease to people.

3. Relationship Between *Istihsan* and Particularization of the Cause (*Takhsis Al-‘Illah*)

The problematic issue of *takhsis al’illah*, meaning that a legal rule does not take effect despite the fact that its cause is present, is accepted by Jassâs and Dabbûsî as a valid procedure in Islamic legal theory, but later *Hanafî* jurists considered it invalid like al-Sarakhsî. The first approach of *Istihsan* is Jassâs’ who belongs to the *Hanafîs* of Iraq and the latter approach is *Hanefî*’s of SEmerqand who were based

⁸. al-Sarkhasi, *al-Usûl*, II, 200; Kamali, *Principles of Islamic Jurisprudence*, 246.

⁹ Makdisi, John, “Legal Logic and Equity in Islamic Law”, *American Journal of Comparative Law*, pp.63-95, 1985, 63; Kamali, *Principles of Islamic Jurisprudence*, 245.

⁹. Murteza Bedir, “The Power of Interpretation: is *İstihsan Qiyâs*”, *Islamic Studies*, 42/1, 2003, pp. 7-20, 11.

in central–Asia, where it was popularized, particularly by the likes of Sarakhsi and Bazdawi. There was, however, another *usul* tradition allegedly started by Abu Mansur al-Maturidi (d.333/945) the main characteristics of which emphasises the theological aspects of *usul* concepts. Investigation of the works of three representatives of this tradition, namely, Sadr al-Islam al-Bazdavi (d. 491/1098), Ala al-Din al-Samarqandî and Mahmud Ibn Zayd al-Lamishî, reveals that *istihsan* does not deserve to be the discipline of *usûl al-fiqh*, as it did in the previous *Hanafî* tradition.¹¹

Istihsan is of two kinds. *Istihsan* is not a separate source apart from *Qiyas* according to Sarakhsi. Our scholars use separate names in order to differentiate these two different sources.¹² Already al-Sarakhsi discussed *Istihsan* under the title *Faslun fi Beyani al-Qiyas ve al-İstihsan* (Part on explaining *Qiyas* and *Istihsan*)¹³

Some later scholar asserted that it is better to applicate with *istihsan* and while applying *Qiyas normal (jaiz)*. However, Sarakhsi argues that even if it is *jaiz* applying *Qiyas*, it is still better to apply *illah* (ratio-legis cause).

There are various definitions of *Istihsan* and one of the early *Hanafî usûli* Abu Bakr al-Jassas provided two meanings for *Istihsan*.

First meaning is use of *Ijtihad* and preferred opinion for description of the amounts and measures which are left to our *Ijtihad* and opinions. Our scholar has named this kind of *ijtihad istihsan*. There is an agreement among scholars in this sense of *istihsan*.¹⁴ In this sense, *istihsan* is an important branch of *ijtihad*.

Second meaning is “departure from *Qiyas* in favour of another which is better than it.” The very second definition can be classified in two types. One type is preference between two conflicting instances of *Qiyas*. Al-Jassâs says that: “It is the case where a new case (*far*) is claimed by two original cases (*aslân*) since it bears resemblance to both of them. It is however for the new case to be joined only to one of the two, due to the existence of the stronger proof for the one preferred. The reason why they called it *istihsan* is that if it did not fall

¹¹ Bedir, “The power of interpretation: Is *isithsan qiyas*?”, 17-18

¹² Al-Sarakhsi, *al-Usûl*, II, 201

¹³ Al-Sarakhsi, *al-Usûl*, II, 199

¹⁴ Ahmad b. Ali al-Râzî al-Jassâs, *al-Fusûl fi al-Usûl*, I-IV, Wazârat al-Awqâf wa al-Shu’ûn al-Dîniyyah, 1414/1914, 4/233-234

under the second case it would fall under the first one, for it bears a resemblance to the first one, too.¹⁵

Abu Hasan says that *istihsan* is; departure from a rule for a better rule, where if the latter rule did not exist, the former would be valid.¹⁶

The other type is particularization (non-effectiveness¹⁷) of a legal rule despite the existence of the cause ('*illah*-ratio). Here is one of the examples, which al-Jassâs quoted in order to explain this method: *A man says to his wife: "If you menstruate you are repudiated and the wife replies: "I am menstruating". According to Qiyas, she should not be trusted until the menstruation is verified by other means, or until the husband confirms her. We however deem it good that the divorce (talaq) shall take effect. Muhammed says; "This Istihsan involves a kind of Qiyas"*¹⁸

Cassâs says; they called it the abandonment of legal rule despite existence of the cause (*illah*) *Istihsan*.¹⁹ "Abandonment of *Qiyas* is called *Istihsan*."²⁰ In this type *Istihsan* is operating as particularization of the cause. (*takhsîs al-'illah*). If jurists do not enforce the basic case's legal rule for a new case, which resembling to the *asl*. This is the very restriction of the legal rule on basic case and not allowing to exceed to new case (*fer'*). So in this case, cause no longer effect on new case (*fer'*) and legal rule not applied to new case which was based on the cause.

Departuring from *Qiyas* in spite of the existence of the cause is possible. This departure of *Qiyas* some time takes place in consideration of a *nass*, *Qiyas* and sometimes in consideration of another *Qiyas*, which needs to make a legal rule out of it.²¹ That means that the legal rule does not function, in spite, of the existence of the cause.

There are two opinions about the particularization of the cause. First is approving and the second one is rejecting.

A group from our scholars agreed on particularization of the cause and asserted that this is Abu Hanifa's opinion. They said;

¹⁵ Jassâs, *al-Usûl*, IV, 234, (English translation was adapted from Bedir, 12); al-Sarkhasi, II, 200

¹⁶ Jassâs, *al-Usûl*, IV, 234

¹⁷ Bedir, "The Power of Interpretation: is *Istihsân Qiyâs* ?",12

¹⁸ Jassâs, *al-Usûl*, IV, 234, (English translation was adapted from Bedir, 12)

¹⁹ Jassâs, *al-Usûl*, IV, 233

²⁰ Jassâs, *al-Usûl*, IV, 235

²¹ Jassâs, *al-Usûl*, IV, 243

“*Qiyas* and *Istihsan* is to say particularization of cause (ratio)”.²² We can say at least that in one aspect *Istihsan* has a direct relation between particularization of the cause, even if it is the particularization of the cause.

Particularization of the cause (legal ratio, ‘*illah*) is an debatable issue. It can be specified according to the Iraq jurists, Abu Zayd al-Dabûsî and *Mutazilî* (except Huseyn al-Basrî) while it can not be particularized according to Semerqant Jurists in which Maturîdî is included and Buhara jurists.²³ Both side claimed that Imam Abu Hanife would agree with their opinion.

Here are some examples of the particularization of *illah*;

A man who eats or drinks by forgetting that he was fasting has broken his fast according to the *Qiyas*. The meaning of fasting is to avoid eating, drinking and having sexual intercourse through the entire day. But here this does not exist, since he has eaten. Therefore his fast should be invalid (null). But according to *Istihsan*, fast is not void since there is a *Sunnah* (tradition) that declares that whoever breaks his fast by absent-mindedness, his or her fast is still valid. The deed or reason that makes the fasting invalid exists for the man or woman who is forgetful but it does not make the fast void. Cause (‘*illah*) exists but it does not bear the legal rule. This is the very particularization of the cause (*tahsîs al-‘illah*).

As a second example, murderers should be executed or punished by capital punishment (*qisas*). Murder or killing of a man or woman is the *illah* of execution or capital punishment. In the case where the murderer is a father of the victim, the execution is not enforced. Again the rule of particularization takes place and the Ummah seem to have had a consensus on the particularization of the cause.²⁴

Some other scholars of Law are of the opinion that particularization of *illah* is void. In the head of this group is al-Maturîdî. He says that: “Whoever accepts the particularization of *illah* attributes conflict (paradox) to doings and rules of Allah. Because *illah* can be apparent only by the making of Allah that it is *illah*. Allah makes an *illah* for a legal rule in the case while “*illah* is present and law is absent” that means to attribute conflict to HIS law and doings.

²² Abu al-Yusr Muhammad b. Muhammad al- Bazdawî, *Kitâb fihî Ma’rifah al-Hucac al-Shar’iyyah*, al-Ma’had al-İlmî al-Fransî li al-Asâr al-Sharkiyyah, Cairo, 2003

²³ Özen, *Maturidi*, 99

²⁴ *Kitâb fihî Ma’rifah al-Hucac al-Shar’iyyah*, 45

That is to say, firstly making it is *illah* then again making of it is not *illah*. It is impossible to make *illah* which Allah did not make *illah* and to not make *illah* which Allah made *illah*. The Owner of the *Shari'ah* removed the idea of absolute eating or drinking from breaking the fasting. The cause of breaking of the fasting is eating and drinking with awareness.²⁵

Then how could we interpret the examples of *Istihsan*, which has been enumerated as examples of the particularization of the cause by the group who rejects the particularization of cause. In the first example eating and drinking is breaking the fast. But if any one eats or drinks by absent-mindedness then the fasting will not be void. Supporters of the opinion of particularization of the cause said that: here cause (*illah*-eating or drinking) exists but the legal rule no longer functions because of the hadith. But the group who did not accept the particularization of the cause says that: in this example *illah* is not pure eating or drinking, but it is eating and drinking with awareness. Therefore there is not cause in the example of eating and drinking by forgetting. If cause does not exist, legal rule will not exist. Then the second example could be interpreted in the same method. Murder is the cause for capital punishment but if the murderer is the father of the victim, then the murderer should not be punished by capital punishment since there is another *nass* preventing that. It seems that in the new case, legal rule does not work even if the cause exists there. But according to *Maturidî-hanaflî* tradition, pure murder is not the cause. The real cause is in the new case where a murder of a son has occurred. Therefore, in the new case the real cause is not present then the legal rule will no longer be present.

Furthermore Sarakhshi criticised these scholars' opinion by saying that; "It is a big mistake to accept particularization of cause and says that there is no opposite to the opinion of past scholars and *ahlu al-Sunnah*. He who accepts the particularizing of cause is out *ahlu al-Sunnah* and has tendency to *Mutazilah* in *usûl* subjects."²⁶

From the above discussions it is clear that the ones who do not accepting particularization of *illah* is of the opinion that the issue is problematic due to the belief structure at the same time and whoever accepts particularization of *illah* is from *Mutazilah* and is therefore not a part of the *Ahlu-Sunnah*.

The claim that when anybody accepts particularization of the *illah* opinion of the *Mutazilah* school is not anymore of the *al-ahlu Sunnah* should be viewed from a *Mutazilah usûl* books. Mutezilî *usûlî*

²⁵ *Kitâb fîhi Ma'rîfah al-Hucac al-Shar'îyyah* 45–46

²⁶ Al-Sarahksî, *al-Usûl*, II, 208

Abu al-Hussain al-Basrî entitled a chapter in book as “part on the particularization of the cause”²⁷. Abu Hussain argues that; “know that the meaning of the *illah* may exist in the new case without its legal rule, or that there may exist meaning and literal word in the new case without its legal rule”.²⁸ Thereafter, he spoke about *Istihсан* under the title “speaking on *Istihсан*”²⁹.

As has been earlier seen generally from above examples of *Istihсан* particularization of the ‘*illah* goes to *Istihсан*’.

On the one side Abu Hussain al-Basrî al-Mutazilî says that: “speaking on the *Istihсан* as explained by Abu Hanife’s friends takes place on the meaning and on the statement. *Istihсан* in the meaning of some signs (causes) may be more powerful from the others. It is possible (*jaiz*) to turn from one sign to another. That means *Istihсан*.”³⁰ In other words, speaking on the *Istihсан* in the sense of preferring one sign over another is speaking of the particularization of the cause. On the other hand, *Sarakhsi* argues that the one who says “speaking on *Istihсан* is speaking with regards to the particularization of cause (*ilah*) has fallen into error.”³¹

4. Conclusion

Hanafis of Iraq are distinguished on a few point from the *Hanafis* of Samarqand as has been earlier mentioned. We see that in the context of the issue of particularization of the cause. This issue has been linked with *Qiyas* and *Istihсан*, especially with the conditions of ‘*illah*. Whoever asserts that co-extensiveness is necessary condition for the validity of the ‘*illah* and it is necessary that the effect should be found in every places without separating from it, does not justify the particularization of the ‘*illah*. This view is attributed to Hanafi scholars of Samarqand such as Abu Mansûr al-Maturidi, al-Bazdawî, and al-Sarakhsi.

On the other hand, whoever does not assert that co extensiveness is necessary condition for the validity of ‘*illah*, and the ‘*illah* is sound if the effect is separate from it at any place due to the fulfilment of the conditions, does justify the particularization of the

²⁷ Abu al-Hussain Muhammad b. Alî b. Tayyib al-Basrî al-Mu’tazilî, *al-Mu’tamad fî al-Usûl al-Fiqh*, I-II, Dar al-Kotob al-Ilmiyyah, Beirut, 1426/2005, II, 283–295 (here in after *al-Mu’tamad*)

²⁸ *Al-Mu’tamad*, 283

²⁹ *Al-Mu’tamad*, 295–296

³⁰ *Al-Mu’tamad*, II, 296

³¹ al-Sarakhsi, *al-Usûl*, II, 208

'illah. According to the legal rule remains separate from the 'illah without non-fulfilment of the condition the 'illah will be void. This view has been attributed to Hanafis of Iraq like al-Karkhî, al-Jassâs and al-Dabbûsî.³²

The question of the reasons of differences between these two Hanafî traditions still remains to be studied in more detail in further studies. This paper has aimed to discover the *raison d'être* of the differences in the context with regards to the particularization of cause. However, it is imperative to point out the necessity for further studies on these topics to understand the wider subject of law.

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³² A. Hasan, 207

ÖZET

İslam Hukuk Teorisinde İletin Tahsisi Meselesine İki Yaklaşım

İmam Şafiî'nin (h. 204) Usûl kitabından sonra bize ulaşan ilk yazılı usûl eseri Ebu Bekr el-Cassas'a (h.370) aittir. İslam Hukuk Bilimi (usulü'l-fıkh) tarihinde Şafiî Metodu ve Fukaha metodu (Hanefî usulü) olmak üzere iki ekol ortaya çıkmıştır. Hanefî yöntemi de tarih içerisinde ikiye ayrılabilir. İlki Irak merkezli olup, önde gelen alimlerini Kerhî, Cassâs, Debbûsî'nin oluşturduğu Hanefî-Mutezilî usûl geleneğidir. Diğeri ise Semerkant (Mâverâünnehir) merkezli Hanefî-Maturîdî usûl geleneğidir. Önde gelen alimleri olarak İmam Maturîdî, Serahsî, Semarkandî'yi zikredebiliriz. Elbette bu iki usûl geleneği arasında pek çok ihtilafî nokta bulunmaktadır. Bu ihtilafın oluşumunda usûl eserlerinin sahiplerinin itikatlarının ve inaçlarının rol oynadığını ikinci geleneğe mensup alimlerden Semerkandî *el-Mîzân* adlı eserinin girişinde belirtir. Semerkandî bunu şöyle izah eder: "Usulü'l-fıkh, usûlü'l-kelam ilminin bir dalıdır. Dal kökünden gelir. Kökünden gelmeye onun soyundan denemez. O halde bu sahada telif edilen kitabın, yazarının inancına göre olması gerekliliği vardır. Usulü'l-fıkh alanındaki eserlerin çoğu usûlde bizden farklı olan Mu'tezile'ye veya ayrıntıda bizden farklı olan ehli hadise aittir. Onların yazdıklarına dayanmak bizi usûlde hataya düşmeye ya da ayrıntıda yanlışta götürür. Her ikisinden de sakınmak aklen ve şer'an vaciptir." Aslında burada başta Cassâs olmak üzere Irak merkezli alimlerin usullerinin mutezilî kaynaklı olduğu ifade edilir. Çünkü bunu Serahsî illetin tahsisi meselesinde daha açık bir ifadeyle Cassâs'ın görüşünün Mutezilî görüş olduğunu belirtir.

Bu nedenle iki gelenek arasındaki ihtilafın daha iyi irdelenmesi iki gelenek arasındaki ihtilafî meselelerin tek tek incelenmesiyle gerçekleşebilir. Dr. Şükrü Özen *Ebu Mansûr el-Maturîdî'nin Fıkh Usulü'nün Yeniden İnşası* adlı çalışmasında 21 tane ihtilaf noktası tespit etmiştir. Elbette bu çalışmada tüm bu noktaların hepsi incelenme imkanına sahip değildir. Bu hususların her biri ayrı ayrı çalışma konusu yapılmak durumundadır. Çalışmamızda tespit edilen pek çok ihtilafî konulardan biri olan illetin tahsisi meselesini ele alarak iki gelenek arasındaki ihtilafın bu örnek bağlamında izini sürmeye çalışacağız. Bu anlamda illetin tahsisi konusunun kıyas ve istihsandan bağımsız olması düşünülemeyeceği için bu kavramlarla olan ilişkisi üzerinde de durulmaya çalışılacaktır. Özellikle illetin tahsisi istihsan ilişkisi irdelencektir.

Key Words: İletin Tahsisi, Kıyas, İstihsan, Hanefi Usûl Geleneği, Hanefî-Mutezilî Usulü, Hanefî-Maturîdî Usulü.