**PARA-FIQH:**

Bridging Thematic *Fiqh* to *Uṣūl*

and *Uṣūl’s* Response to Specialization of *Fiqh*

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**Abstract**

The latest trend regarding the study of contemporary thematic Islamic jurisprudence (*fiqh*) is built upon a paradigm that *fiqh*, as a science developed in the Islamic tradition, is able to respond to every modern challenge. This paradigm seems to be incompatible with the study of the Islamic legal theory (*Uṣūl-fiqh*) which is considered stagnant. However, the study of *Uṣūl al-Fiqh* is, the initial gate to the discussion of legal reasoning which enables those who master it come up with theoretically correct rulings and hopefully responsive to the needs of the times. Discussing the thematic Islamic jurisprudence (*fiqh*) without going through the *Uṣūl al-Fiqh* thinking framework may lead to a serious gap to the product of the thematic *Fiqh* study. The thematic *Fiqh* studies such as *Fiqh* siyāsah (Islamic jurisprudence on constitution), *Fiqh* munākahat (Islamic jurisprudence on marriage), and Islamic jurisprudence on health issues are not infrequently distorted from the actual context. This article offers a way of dealing with the gaps. In this case, the terminology presented is para-*fiqh*. Para-*Fiqh* is a term to bridge the trend between the thematic *Fiqh* studies and the stagnancy of *Uṣūl al-Fiqh* study which, in turn, give birth to the antithesis in the form of thematic *Uṣūl al-fiqh*. This article employs the conceptual-doctrinal approach which seeks to present the problems of various
classical literatures of the Muslim scholars. By scrutinizing the concept para-fiqh, it is hoped that: first, this article presents a universal legal argument on some particular legal themes; second, it explains the principles of to understand the thematic Fiqh products. The findings emphasize that the para-Fiqh concept is important for enriching the intellectual tradition of Muslim communities, as well as being a bridge between the gaps created by the study of Islamic jurisprudence (fiqh) and the study of Islamic legal theory (Uṣūl-fiqh).

**Keywords**: para-fiqh; thematic Uṣūl, thematic fiqh, Uṣū al-jināyat; Uṣū al-muʿāmalat.

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**Abstrak**

Trend terbaru mengenai kajian fikih tematik kontemporer saat ini membangun paradigma bahwa fikih adalah salah satu ilmu yang berkembang dalam tradisi Islam yang mampu merespon tantangan zaman. Paradigma ini seakan tidak sebangun dengan kajian Ushul Fiqh yang dianggap stagnan. Namun demikian, kajian Ushul Fiqh sebenarnya adalah gerbang awal pembahasan penalaran hukum sehingga melahirkan keputusan-keputusan hukum yang tepat. Membahas Fiqh tematik tanpa melalui kerangka berfikir ushuliy membawa gap yang serius terhadap produk kajian Fiqh tematik tersebut. kajian-kajian tematik seperti Fiqh siyāsah, fiqh, munākahat, fikih kontemporer dan kesehatan tidak jarang terserabut dari konteks yang sebenarnya. Artikel ini menawarkan sebuah jalan lintas mengenai gap yang terjadi. Dalam kasus ini, terminology yang dihadirkan adalah para-fikqh. Para-Fiqh adalah istilah untuk menjembatani antara trend kajian Fiqh tematik dengan stagnasi kajian ushual-fiqh; sehingga melahirkan antitesa berupa ushul Fiqh tematik. Kajian dalam artikel ini bersifat konseptual-doktrinal yang berusaha menyajikan persoalan dari berbagai pustaka klasik sarjana Muslim. Artikel ini menemukan ada 2 tujuan: pertama,
A. Introduction

In Islamic intellectual tradition, Islamic law exclusively studied by two different sciences, Uṣūl al-Fiqh and Fiqh (Islamic Jurisprudence). Uṣūl al-Fiqh defines Islamic law as the god’s command related to mukallaf actions, while Fiqh refers as the result of god’s command, not the command itself. Both terms emphasize in different field; Uṣūl focuses on legal evidence, which is the god’s command, while Fiqh focuses on legal action contained in legal evidences. Uṣūl supposes to be the reference of Fiqh; therefore, the whole study of Fiqh must refer to Uṣūl as its foundation. Its foundation is recognized from its name “Uṣūl al-fiqh” which means “the foundation of Fiqh”. Uṣūl provides principles for Fiqh to comprehend legal evidences and furthermore explains the legal action in detail to be implemented.

1 See Khudhārī Bek, Ushū al-Fiqh, vol. 1 (Eigypt: al-Maktabah al-Mishriyyah al-Kubrā, 1969), p. 20. Az-Zarkasyī, al-Bahr al-Muhīth fī Ushūl al-Fiqh, vol. 1 (Kuwait: Wizārah Awqāf wa as-Syu’ūn al-Islāmiyah, 2002), p. 117.

2 Wahbah Zuhaili, Ushūl al-Fiqh al-Islāmi, vol. 1 (Beirut: Dār al-Fikr, 1986), p. 37.
Therefore, the development of Fiqh⁳ should be followed by Uṣūl and on contrary. But, in fact, the growth of Fiqh cannot be equalized by Uṣūl. The current trend of Fiqh are its specialization –some scholars showed particular studies in only one certain legal theme like muʿāmalat, munākahat- of themes of Fiqh discussion and the emerging of contemporary issues like modernity and health. On the contrary, Uṣūl has been far more stagnant compared to Fiqh. The literatures of Uṣūl in its early period were not much different with the current literature. Despite its stagnancy, some growth of Uṣūl revealed only in aspect of systematization and definition. We could easily compare early Uṣūl literatures with modern literatures, such as: Irsyād al-Fuhūl,⁴ Uṣūl al-Bazdawī,⁵ al-Mahṣūl,⁶ Iʿlām al-Muwawaqqiʿīn,⁷ al-Ihkām,⁸ al-İṭişām,⁹ and Uṣū al-Fiqh al-Islāmî,¹⁰ Ushū al-Fiqh,¹¹ Uṣū al-Fiqih,¹² al-Wādīh fī Uṣū al-Fiqh¹³.

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³ The development of Fiqh is described by Abu Ameenah Bilal Philips in six stages, refer to Abu Ameenah Bilal Philips, The Evolution of Fiqh (Islamic Law and The Madhhab) (Riyadh: International Islamic Publishing House, 1990), p. ii-iii.
⁴ Muhammad ʿAlī al-Syawkānī, Irsyād al-Fuhūl, vol. 1 (Riyadh: Dār al-Fadhilah, 2000), p. 615
⁵ ʿAli bin Muhammad al-Bazdawī, Ushūl al-Bazdawī, (Mir Muhammad Kutb Khanah Markaz Ilm wa Adab), p. 388
⁶ Abū Bakar bin al-ʿArabiy, al-Mahshūl fī Ushū al-Fiqh (Oman: Dār al-Bayāriq, 1999), p. 173
⁷ Ibn Qayyim al-Jauziyyah, Iʿlām al-Muwawaqqiʿīn ʿan Rabb al-ʿAlamīn, vol. 1-7 (Saudi Arabia: Dār Ibn Jauzi, 1423 H), p. 309
⁸ Ibn Hazm, al-Ihkām fī Ushū al-Ahkām, vol. 1 (Beirut: Dār al-Afāq al-Jadidah, 1979), p. 151
⁹ Abū Ishāq as-Syathibī, al-Iʿṭishām, vol. 2 (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1988), p. 520
¹⁰ Zuhalī, Uṣūl..., p. 16
¹¹ Muhammad Khudhāri Bek, Ushū al-Fiqh, vol. 1 (Eignty: Maktabah at-Tijāriyah al-Kubrā, 1969), p. 13.
¹² Mardani, Ushul Fiqh (Jakarta: Grapindo Persada, 2013), p. 2.
¹³ Muhammad Sulaiman Abdullah Al-Asyqar, al-Wādīh fī Ushūl al-Fiqh (Oman: Dār as-Salām, 2004), p. 307,
The increase of *Fiqh* which is not followed by *Uṣūl* causes a gap between them. On legal source, for instance, *Uṣūl* listed `urf (custom) as a source, but all *Fiqh ibadat* rejected it as legal source by acclamation as stated “*al-ašlu fi al-`ibādat al-tahrīm*” which means all worships were not legal except based on the practice of Muhammad. The new form of worship without example from The Rasul, called *bid`ah*, should be rejected. On contrary, *Fiqh mu`āmalat* listed `urf (custom) as legal source following “*al-ashlu fi al-mu`āmalat al-ibāhat or al-`ādat muhakkamat*”. The gap also can be seen in legal subject, defined as *mukallaf*, a person by *Uṣūl*. *Uṣūl* never extent the meaning of *mukallaf* to be a corporation or institution, even though *Fiqh mu`āmalat* urgently need for it, because contemporary *mu`āmalat* has not only been acted by person, but also by corporation or institution.

To respond the *Fiqh* specialization and minimize the gap between *Uṣūl* and *Fiqh*, I try to locate this issue on a discussion of thematic *Uṣū al-Fiqh*, this discussion may be termed as *para-fiqh*. *Para-Fiqh* is a science connected *Uṣūl* to *Fiqh*, and the response of *Uṣūl* to specialization of *Fiqh*.

B. *Uṣū al-Fiqh* and Its Scope

The term of “*Uṣū al-Fiqh*” consists of two Arabic words: *Uṣūl* and *fiqh*. *Uṣūl* means the foundation or the origins. The word *Uṣū* is often interpreted as basis, or root. In its use, the word “*Uṣūl*” also means the general principle or the general legal status, such as “*al-ašlu fi al-
amr li al-wujūb, in which the word “al-aṣlu” means general principle. Meanwhile, the word “fiqh” means understanding or knowledge. The word “fiqh” definitively means an understanding of jurist on Islamic law. However, the word Fiqh substantively means the result of ijtihād performed by jurist. Fiqh mostly defined as an Islamic science which explain Islamic law in detail in order to be practicable, based on detail legal evidences. In other word, Uṣū al-Fiqh could be simply defined as the foundation or the principles of Fiqh.

The core of Uṣū al-Fiqh is the method or rule to understand legal evidences. As a method, Uṣū al-Fiqh is a procedure followed by fuqahā’ in understanding a legal evidence in order to produce the proper understanding. That is why Uṣū al-Fiqh contains textual and contextual principles needed in understanding the legal evidence. For instance, a legal evidence “aqim al-shalāt” supposedly states wājib as a legal status of prayer, because Uṣū al-Fiqh stipulates “al-aṣlu fi al-amr li al-wujūb”. Another example, “wa lā taqrabūz zinā” must state harām as a legal status of zinā (sexual intercourse of unmarried couple), because Uṣūl determines that “al-aṣl fi al-nahyi al-tahrīm”.

The Most of legal evidences are text, Qur’anic verse and hadith. Therefore, Uṣū al-Fiqh is dominated by textual principles to understand textual legal evidences, like principle of amr-nahy, `āmm –khāsh, muṭlaq-muqayyad, manṭūq-mafhūm etc.

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17 Abdul Hamid Hakim, Mabādi’ al-Auwaliyyah (Jakarta: Sa’diyah Putra, 1996), p. 8.
18 Hakim, Mabādi..., p. 6.
19 Bek, Ushul..., p. 13.
20 Hakim, Mabādi..., p. 6.
21 Hakim, Mabādi‘..., p. 8.
22 Bek, Ushul..., p. 119-122
Uṣū al-Fiqḥ is also defined as science of legal evidence to look at beyond the product of Islamic law. Several sources of Uṣū al-Fiqḥ are contain of some discussions on: law, law giver, legal reasoning, subject and object of law, hierarchy of legal source, legal evidence, finding legal question (ijtihād), method of ijtihād, principles to understand the legal evidences, the conflict of evidences, etc.23 The contents of Uṣūl mainly refer to one object, namely legal evidence. The law has been discussed in Uṣūl because it is the purpose of legal evidence. The law giver has been discussed because He is the source of legal evidences. The Uṣūliyyah principle has been discussed because it is needed to understand the legal evidences.

However, some of Uṣūl literatures stated that the object of Uṣūl is stipulation of legal evidences toward a legal status of an action. Its mean that the object of Uṣūl is “law and its legal evidences”,24 such as to determine “aqīm al-shalāt” for obligation of prayer, or “lā taqrabū al-zinā” for prohibition of zinā. But, in my opinion, the real object of Uṣū al-Fiqḥ is no other than legal evidences, or what so called by some literatures as al-dalīl al-samʿīy.25

Literatures of Uṣū al-Fiqḥ described various purposes of Uṣū al-Fiqḥ. Some Muslim scholars argued that the purpose is to determine legal status of action based on legal evidences, and other said to determine legal evidence for legal status of action, while other said to find law legal evidences by using proper principle. But, if the purpose is  

23 Abu Bakar, al-Mahshūl..., p. 173, al-Asyqar, al-Wādhih..., p. 307, Abū al-Hasan `Alī bin `Umar al-Bagdādī, Muqaddimah Fī Ushūl al-Fiqh (Riyadh: Dār al-Maʿlamah, 1999), p. 424, al-Bazdawi, Uṣūl..., p. 388. Bek, Uṣūl..., p. 386, Muhammad Zakariyyah al-Bardisi, Uṣūl al-Fiqḥ (Cairo: Dār at-Tsaqafah, 1969), p. 478. Zuhaili, Uṣūl..., p. 717, Wahbah Zuhaili, Uṣūl al-Fiqḥ al-Islāmī, vol. 2 (Damascus: Dār al-Fikri, 1986), p. 1221.
24 Zuhaili, Uṣūl..., p. 8-9. Mardani, Uṣūl..., p. 7.
25 Bek, Uṣūl..., p. 15.
referred to its object, the substance of *Uṣūl*’s purposes is to understand legal evidence of Islamic law. In accordance with its purpose, *Uṣū al-Fiqh* constructs the necessary principles to understand the legal evidences.

Referring to its object (legal evidences) and purpose (to understand legal evidences), all scopes of discussion in *Uṣūl* are limited for: legal evidences and its understanding. Hence, the main scope of *Uṣū al-Fiqh* can be classified in to two classes: an introduction to Islamic law and a methodology. The classes could be seen as layers of *Uṣū al-Fiqh*. The first layer is the introduction to Islamic law, and the second is methodology in finding Islamic law.

As an introduction, the scope of *Uṣūl* comprises of definition of law, law giver, object and subject of law.26 Mohammad Rifa‘i, in his work entitled; *Fiqh*, started his book with discussion on legal source and method to find Islamic law before discussing ṭahārah (purity-purification), prayer, fasting and etc.27 In general, in two volumes of Indonesian literatures of *Uṣūl*, introduction to Islamic law revealed in the first volume.28

The second layer of *Uṣūl*, called the substantial *Uṣū al-Fiqh*, is methodology to find Islamic law. It focused on legal evidences and methods to understand them.29 Its scope consists of legal sources, legal evidences and its classification, principles of legal evidences such as amarnahy, manṭūq-mafhūm, āmm-khāsh, conflict of evidences,

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26 Ahmad Sholihin Siregar, *al-Madkhal fi Ushūl al-Fiqh* (Takengon: Shakura, 2017), p. 3.
27 H. Moh. Rifa‘i, *Ilmu Fiqh Islam Lengkap* (Semarang: Karya Tohaputra, 1978), p. 7-45.
28 Such as Beni Ahmad Saebani and H. Januri, *Fiqh Ushul Fiqh* (Bandung: Pustaka Setia, 2008), p. 9-etc Abdul Basiq Djalil, *Ilmu Ushul al-Fiqh Satu Dan Dua* (Jakarta: Kencana, 2010), p. vii-ix. Amir Syarifuddi, *Ushul Fiqh 1* (Jakarta: Kencana, 2008), ix. Chaerul Uman, *Ushul Fiqih 1* (Bandung: Pustaka Setia, 2000), p. 7-11.
29 Siregar, *al-Madkhal..*, p. 3.
and fiqhiyyah principles. Mostly, Arabic Literatures of Uṣūl al-Fiqh has been considered as substantial Uṣūl.30

C. *Fiqh* and Its Scope

*Fiqh*31 is defined as a science of practical Islamic law based on detailed legal evidences,32 of course as a result of *ijtihād*.33 *Fiqh* can also be seen as a systematic understanding of *fuqahā* (jurists) on legal evidences.

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30 Refer for instance to: al-Syawkānī, *Irsyāḍ…*, vol. 1, p. 615, Muhammad Ali al-Syawkānī, *Irsyāḍ al-Fuhūl*, vol. 2 (Riyadh: Dār al-Fadhilah, 2000), p. 1229, Ibn Qayyim al-Jauziyyah, *I’lām al-Muwaqqi`in `an Rabb al-`Alamin*, vol. 1-7 (Saudi Arabia: Dar Ibn Jauzi, 1423 H), p. 309, Ibn Qayyim al-Jauziyyah, *I’lām al-Muwaqqi`in `an Rabb al-`Alamin*, vol. 2 (Saudi Arabia: Dar Ibn Jauzi, 1423 H), p. 488. Ibn Qayyim al-Jauziyyah, *I’lām al-Muwaqqi`in ‘an Rabb al-`Alamin*, vol. 3 (Saudi Arabia: Dar Ibn Jauzi, 1423 H), p. 575. Ibn Qayyim al-Jauziyyah, *I’lām al-Muwaqqi`in ‘an Rabb al-`Alamin*, vol. 4 (Saudi Arabia: Dar Ibn Jauzi, 1423 H), p. 557. Ibn Hazm, *al-Ihkām fi Ushūl al-Ahkām*, vol. 1 (Beirut: Dār al-Afaq al-Jadīdah, 1979), p. 151. Ibn Hazm, *al-Ihkām fi Ushūl al-Ahkām*, vol. 2 (Beirut: Dār al-Afaq al-Jadīdah, 1979), p. 150. Ibn Hazm, *al-Ihkām fi Ushūl al-Ahkām*, vol. 3 (Beirut: Dār al-Afaq al-Jadīdah, 1979), p. 161. Ibn Hazm, *al-Ihkām fi Ushūl al-Ahkām*, vol. 4 (Beirut: Dār al-Afaq al-Jadīdah, 1979), p. 238. ‘Ali bin Muhammad al-Amidi, *al-Ihkām Fi Ushūl al-Ahkām*, vol. 1 (Riyadh: Dar as-Sham‘i, 2003), p. 373, Ali bin Muhammad al-Amidi, *al-Ihkām fi Ushūl al-Ahkām*, vol. 2 (Riyadh: Dār as-Sham‘i, 2003), p. 415, Abū al-Walid Sulaiman bin Khalf al-Bājī, *al-Iṣyārah fi Ma`rīfat al-Ushūl* (Tunis: Al-Iḥkām Fi Ushūl al-Ahkām), vol. 1, p. 1-84. Al-Syathībī, *al-I`tishām*, vol. 1, p. 517, al-Syathībī, *al-I`tishām, vol. 2*, p. 520, az-Zarkasyī, *al-Bahr al-Muhīth*, vol. 1 (Kuwait: Dār as-Shafwah, 1992), p. 481. az-Zarkasyī, *al-Bahr al-Muhīth*, juz. 2 (Kuwait: Dār as-Shafwah, 1992), p. 457. az-Zarkasyī, *al-Bahr al-Muhīth*, vol. 3 (Kuwait: Dār as-Shafwah, 1992), p. 505. Al-Kalwadzani, *at-Tamhīd fi Ushūl al-Fiqh*, vol. 3 (Saudi Arabia: Dar al-Madani, 1958), p. 475, Al-Kalwadzani, *at-Tamhīd fi Ushūl al-Fiqh*, vol. 4 (Saudi Arabia: Dar al-Madani, 1958), p. 481 Abu al-Muzaffar Manshūr, *Qawāthī al-Adillah fi Ushūl*, vol. 1 (Beirut: Dār al-Kutub al-Ilmiyyah, 1997), p. 491. Al-Bagdādī, *Muqaddimah…*, p. 424-431.

31 The arabic word “al-fiqh” means understanding. See Louis Ma`luf, *al-Munjīd fi al-Lughah wa al-A`lām* (Beirut: Dār Aswar, 1982), p. 32Manshūr, *Qawāthī…*, p. 9. Sa`īd Faudah, *Rūh al-Ushūl fi Ilm Ushūl al-Fiqh* (t.t), p. 4

33 *Ijtiḥād* means effort to unveil Islamic law. Mardani, *Ushūl...*, p. 353.
Numbers of evidences are crucial in its understanding. Single understanding of legal evidence can not be considered as *fiqh*, because to achieve a systematic understanding, one had to refer the whole legal evidences on certain theme. For example, “fasting is obligated for *mukallaf*” which merely derives from “*kutiba*’*alaikumus şiyām*” is not *fiqh*. Only a systematic comprehension on fasting consisted of *rukn*, *syarṭ*, *mubtil*, produced from whole legal evidences on fasting are called *fiqh*. The term “practical” refers to a detailed explanation on how to conduct a legal action. In another word, *Fiqh* is an instruction of how to practice legal action.

The object of *Fiqh* is *mukallaf*’s action in accordance with Islamic law. The legal action forms various scope; an action in relation with god, humans, animals, plants, environment like land or ocean, or even with himself. The vastness scope of legal action leads *fuqahā’* to limit his *Fiqh* on certain theme. This later contributes to specialization of *Fiqh* or known as thematic *Fiqh*. Thematic *fiqh* focused on one theme of Islamic law such as worship, marriage, inheritance, modernity, environment, women, and minority.

The early tradition of scientific literature had started this specialization when *fuqahā’* divided his discussion into several chapters. In this period, the term of thematic *Fiqh* or *Fiqh* specialization had not been introduced. Al-*Umm*, for instance, explaining Islamic worship, marriage, finance, state matter, war and politics was yet not

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34 Zuhaili, *Ushūl...*, p. 8-9. Mardani, *Ushul...*, p. 7.
35 Muhammad bin Idrīs al-Syāfī’ī, *al-Umm*, vol. 2 (Pakistan: Dār al-Wafā’, 2001), p. 668-678.
36 Muhammad bin Idrīs al-Syāfī’ī, *al-Umm*, vol. 6 (Pakistan: Dār al-Wafā’, 2001), p. 753-762.
37 Muhammad bin Idrīs al-Syāfī’ī, *al-Umm*, vol. 4 (Pakistan: Dār al-Wafā’, 2001), p. 545-554.
considered as thematic *Fiqh* (*fiqh* `ibādat, *fiqh* munākahat, *fiqh* mu`āmalat, *fiqh* siyāsat). It is simply called *Fiqh* though each volume discussed special theme. Other examples such as *al-Hāwī al-Kabīr* explained special theme in each volume - like ṭahārah (purity), salāt, ḥajj -or Mughni al-Muhtāj explained only worship in first volume and wealth in second volume and so did *al-Dzakhīrah*. Specialization of *Fiqh* was raised due to escalation of *Fiqh* after the period of the four great imams. Al-Mawardī, for instance, wrote *al-Ahkām as-Sulṭaniyat*, a *Fiqh* which explained only a theme of state. Yusuf al-Qaradhawi published *Fiqh al-Zakāt* focused on zakāt, and *Fiqh of minorities* on minority legal action. So wasal-Kunūz al-Māliyah oral-Mawārits which can be considered as *Fiqh* mawārits. Mushṭafā al-Adawī wrote about ṭahārah-

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38 Muhammad bin Idrīs al-Syāfī`ī, *al-Umm*, vol. 5 (Pakistan: Dār al-Wafā’, 2001), p. 723-733.
39 Abū al-Ḥasan `Ali al-Mawardī, *al-Hāwī al-Kabīr*, vol. 1 (Beirut: Dār al-Kutub al-`Ilmiyyah, 1994), p. 449-455.
40 Abū al-Ḥasan `Ali al-Mawardī, *al-Hāwī al-Kabīr*, vol. 2 (Beirut: Dār al-Kutub al-`Ilmiyyah, 1994), p. 531-535.
41 Abū al-Ḥasan `Ali al-Mawardī, *al-Hāwī al-Kabīr*, vol. 4 (Beirut: Dār al-Kutub al-`Ilmiyyah, 1994), p. 385-392.
42 Syamsuddīn al-Syarbaynī, *Mughnī al-Muhtāj*, vol. 1 (Beirut: Dār al-Maʿrifah, 1997), p. 781-782.
43 Syamsuddīn al-Syarbaynī, Mughnī al-Muhtāj, vol. 2 (Beirut: Dār al-Maʿrifah, 1997), p. 563-564.
44 The first volume of the book only discussed *thahārah*. Syihābuddīn al-Qarāfī, *al-Dzakhīrah*, vol. 1 (Beirut: Dār al-Gharb al-Islāmi, 1994), p. 397-424. The second volume only discussed prayer and fasting. Syihābuddīn al-Qarāfī, *al-Dzakhīrah*, vol. 2 (Beirut: Dār al-Gharb al-Islāmi, 1994), p. 535-590.
45 Abū al-Ḥasan `Ali al-Mawardī, *al-Ahkām al-Sulṭāniyah wal Wilāyat al-Diniyyah* (Kuwait: Maktbah Dār Ibn Qutaibah, 1989), p. 131.
46 Yusuf al-Qaradhawi, *Hukum Zakat*, terj. *Fiqh az-Zakah* (Jakarta: Lintera Antar Nusa, 2017), iv.
47 Abdul Aziz Muhammad as-Salmān, *al-Kunūz al-Māliyah* (Saudi Arabia, 1421), p. 339-344
48 Maryam Ahmad ad-Dāgestānī, *al-Mawārist fi al-Syari`ah* (Cairo: al-Mustahfā, 2001), p. 158-165.
corpse, sustenance-giving-hajj, marriage-divorce, trading-qisāsh-jihād only in relation with women in *Ahkām al-Nisā’*.

**D. Para-Fiqh: Ontology**

As explained above, object of *Fiqh* is *mukallaf’s* legal action. Therefore, *Fiqh* has a vast scope as seen in encyclopedic literatures of *Fiqh* such as *al-Umm, al-Hāwī al-Kabīr*, *Mughni al-Muhtāj*, *Rauḍat al-Ṭālibīn*, *al-Wasīṭ fi al-Madzhab* or *al-Sharh al-Kabīr* or *al-Dzakhirah* or *al-Muntaqā* or *al-Kāfî* or *al-Mughni* or *Badā’ al-Šanā`i*.

49 Mushthafā Adawi, *Jāmi` Ahkām an-Nisā’*, vol. 1 (Saudi Arabia: Dār as-Sunnah, 1992), p. 585-599.

50 Mushthafā Adawi, *Jāmi` Ahkām an-Nisā’*, vol. 2 (Saudi Arabia: Dār as-Sunnah, 1992), p. 599-616.

51 Mushthafā Adawi, *Jāmi` Ahkām an-Nisā’*, vol. 3 (Saudi Arabia: Dār as-Sunnah, 1992), p. 557-576.

52 Mushthafā Adawi, *Jāmi` Ahkām an-Nisā’*, vol. 4 (Saudi Arabia: Dār as-Sunnah, 1992), p. 685-716.

53 Abū al-Hasan al-Mawardī, *al-Hāwī al-Kabīr*, vol. 18 (Beirut: Dār al-Kutub al-`Ilmiyyah, 1994), p. 323-328. This book contains of 18 volumes.

54 Al-Syarbaini, *Mughni…*, vol. 4, p. 721-722, this book contains of 8 volumes.

55 Abū Zakariya an-Nawawī, *Raudhat at-Thālibīn*, vol. 8 (Saudi Arabia: Dār ʿAlam al-Kutub, 2003), p. 559-566. This book contains of 8 volumes.

56 Muhammad bin Muhammad al-Ghazālī, *al-Wasīṭ fi al-Madzhab*, vol. 7 (Cairo: Dār as-Salām, 1997), p. 547-590. This book contains of 7 volumes.

57 Abū al-Qāsim ar-Rafi`i al-Qazwīnī, *as-Syārīh al-Kabīr*, vol. 13 (Beirut: Dār al-Kutub al-`Ilmiyyah, 1993), p. 597-598. This book contains of 13 volumes.

58 Syihābuddīn al-Qarāfī, *al-Dzakhīrah*, vol. 14 (Beirut: Dār al-Gharb al-İslāmî, 1994), p. 1. This book contains of 14 volumes.

59 Abū al-Walid Sulaimān al-Bājī, *al-Muntaqa` Syarh Muwaththa’ Mālik*, vol. 9 (Beirut: Dār al-Kutub al-İlmiyyah, 1999), p. 523-527.

60 Ibn Qudāmah, *al-Kāfî*, vol. 6 (Pakistan: Dār Hijr, 1997), p. 632-615. This book contains of 6 volumes.

61 Ibn Qudāmah, *al-Mughni*, vol. 14 (Riyadh: Dar ʿAlam al-Kutub, 1997), p. 609-672. This book contains of 14 volumes.
This vastness led to specialization of *Fiqh* on certain legal theme like *Fiqh munākahat, muʿāmalat, mawārits, ʿibādat, zakāt, shalāt*, etc.

*Fuqahāʾ*’s limitedness in time and resources to cover whole *mukallaf* legal actions also contributed to this process. The various object of *Fiqh*, cannot possibly covered in 60 years of human life time. A scholar could begin his scientific writing in range 25-35 years of his age, while 6-25 years of his age used to attend formal elementary to postgraduate educations. This might be the reason behind the disappearance of encyclopedic literatures of *Fiqh* during the modern age. Other factors that might also affect this trend of *Fiqh* are such as linearism in Indonesian education system, and the economic level causing scholars spend his time not only to write *Fiqh*, but also to seek sustenance.

Each legal theme discussed in *Fiqh*: *muʿāmalat, jināyat, mawārits, siyāsat, ʿibādat* etc. refers to *Uṣū al-Fiqh*. Unfortunately, this *Uṣū al-Fiqh* had only a single model in which discussed the methods of understanding legal evidences and *fiqhiyyah* principles. This is the single model that has been taught generally for Indonesian Islamic students. This can be proofed by literatures of *Uṣū al-Fiqh* written by Indonesian scholars. The same thing also can be found in Arabic literature of *Uṣū al-Fiqh*. This means

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62 Alauddin Abū Bakar al-Kasānī, *Badāʾi al-Sanāʾīʾ*, vol. 10 (Beirut: Dār al-Kutub al-Ilmiyyah, 2002), p. 603-605. This book contains of 10 volumes.

63 Compare with: Syaibani, *Fiqh...*, p. 9, Mardani, *Ushul...*, p. vii-ix, Abd Rahman Dahlan, *Ushul Fiqh* (Jakarta: Amzah, 2011) p. viii-xiii, A. Syafi’I Karim, *Fiqh Ushul Fiqih* (Bandung: Pustaka Setia, 2006), p. 7-9, Syarifuddin, *Ushul...,* p. ix-xiii, Uman, *Ushul...,* p. 5-11, Chaerul Uman, *Ushul Fiqh 2* (Bandung: Pustaka Setia, 1998), p. 7-10. Djalil, *Ilmu...,* p. vii-ix.

64 Compare for instance with: Muhammad bin Shalih al-Utsaimin, *al-Ushul min Ilmi al-Ushūl* (Saudi Arabia: Dar Ibn al-Jauzi, 1426), p. 101-103, Muhammad Husein Abdullah, *al-Wādīhī fū Ushul al-Fiqh* (Beirut: Dar al-Bayāriq, 1995), p. 405-416. Muhammad Sulaimān
that Fiqh specialization is not properly responded by Uṣū al-Fiqh. Both muʿāmalat and jināyah scholars together refer to single model of Uṣū al-Fiqh.

Uṣū al-Fiqh itself never presents the legal evidences required by Fiqh. Uṣū al-Fiqh only provides slight description of legal evidences by determining the source both Quran and Sunnah, or other legal source debated by scholars. Each candidate of fuqahā’ of muʿāmalat, jināyah and siyāsat has never revealed complete understanding about the amount of legal evidences related to their themes that they need to refer in their study.

In order to explain the Uṣūliyyah principles, Uṣū al-Fiqh ignored various legal themes. In explaining al-amr, for instance, it often used example “aqīmūṣ ṣhalāt”, or “kuntu nahaytukum `an ziyāratil qabr, fazūrūḥā” to explain “al-amr ba’da nahy yadullu al-ibāhah”, even though both examples were completely irrelevant with jināyah or mawārits.

Besides, some discussions in Uṣū al-Fiqh are irrelevant with other legal themes. The urf (custom), for instance, is rejected as legal source for fiqh ibādah, but undoubtedly accepted as legal source of fiqh muāmalah. Still, urf always appears in Uṣūl discussion, either for fiqh ibādat ormuʿāmalat. The same thing so did by some fiqhiyyah principles, such as “al-aṣlu fil ibādat al-buṭlān”.

Abdullāh al-Asyqar, al-Wādhiḥ fi Ushūl al-Fiqh (Kuwait: Dār as-Salām, 2004), p. 307-310, Bek, Ushūl., p. 386-391. Al-Bardīsī, Ushūl., p. 480-483, Zuhaili, Ushūl., p. 1221-1230, Zuhaili, Ushūl., p. 717-728, Wahbah Zuhaili, al-Wajīz fi Ushūl al-Fiqh (Beirut: Dar al-Fikr, 1999), p. 7-12, Muhammad bin Husain al-Jaizānī, Maʿālim Ushūl al-Fiqh (Saudi Arabia: Dar Ibn al-Jauziy, 1996), p. 685-692.

65 All uṣhūl literature cited in this paper, non of them presented whole thematic legal evidences.

66 Muhammad bin Shalih al-Utsaimin, al-Qawāʿid al-Fiqhiyyah (Iskandariyah: Dār al-Bashirah, t.t.), p. 27, Abdul Mujb, Kaidah-Kaidah Ilmu Fiqh (Jakarta: Kalam Mulia, 2005), p. 27, Hakim, Mabadi’…, p. 27.
which is irrelevant to mu`āmalat, or “al-aşlu fi al-mu`āmalat al-ibāhat”⁶⁷ which is irrelevant for fiqh ibādah. The candidate of Fiqh scholars wasted their time to learn Uṣū al-Fiqh which is sometime irrelevant with their study. Those factsexplained, lead us to conclude that Uṣū al-Fiqh had to respond the specialization of Fiqh.

To linkbetween Uṣūl and Fiqh, it is necessary to construct new science to facilitate the candidates of fuqahā’ in maximizing their potential. The new science studies legal evidences focused on a special legal theme and methods to understand them. Regarding the science studying the thematic legal evidences and methods, it can substantially be considered as part of Uṣū al-Fiqh, but just more thematic. It only focused on one legal theme such as jināyat, siyāsat mu`āmalat, mawārits, munākahat, `ibādat and other legal themes. Therefore, we may call the science as Uṣūl mu`āmalat as it connects the fiqh mu`āmalah to Uṣū al-Fiqh, or may call Uṣū al-jināyah or Uṣū mawārits or Uṣū ibādah. Those are the science this article tries to propose as a new term called para-fiqh. It seems not appropriate to create another term “Para-Uṣūl” for two reasons; its position which is located in the middle of Uṣūl and Fiqh, and the contemporary of Fiqh which is more thematic than Uṣūl.

The term “para” means beside or not same with, close to,⁶⁸ such as “paramedic or paragliding”. The term “para-fiqh” means beside Fiqh or near to Fiqh but not same with it. Para-Fiqh studies whole legal evidences on certain theme but it is only focused on methods to understand them, not to explain them to be practical as Fiqh does. Both para-Fiqh and Fiqh share similarities in their details on legal

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⁶⁷Ibid.
⁶⁸ Tim Penulis, Kamus Besar Bahasa Indonesia (Jakarta: Balai Pustaka, 2005), p.
evidences. However, they are different in purpose; *Fiqh* studies legal evidences to explain legal action for implementation, while *para-Fiqh* explains methods to understand them.

To sum up, *para-Fiqh* can be defined as science of legal evidences on certain theme and methodology to understand them. The current trend indicates the emergence of this *para-fiqh* that can be seen in some new literatures, such as Muhammad Mufid who wrote *Uṣū al-Fiqh Ekonomi* or Abdiansyah Linge who wrote “Ayat-Ayat Ekonomi” as small part of *para-fiqh* mu‘āmalat, or Abdul-Azeem Badawi who wrote “The Concise Presentation of Fiqh of the Sunnah and the Noble Book.”

E. **Para-Fiqh: An Epistemology**

1. **Border of Uṣūl and Fiqh**

*Para-Fiqh* shares a same object of study with *Fiqh*, which is legal evidence on the same theme. Both *para-fiqh* jināyat (*Uṣūljināyat*) and *fiqh* jināyat studied legal evidences of jināyateither from Qur’an or hadith, or other legal sources. However, *para-Fiqh* presents only thematic legal evidences together with methodology to understand them. While *Fiqh*, on the contrary, explains its content in order to unveil Islamic law. *Fiqh* is not

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69 Mohammad Mufid, *Ushul Fiqh Ekonomi dan Keuangan Kontemporer*, Dari Teori ke Aplikasi (Jakarta: Kencana, 2016), p. vi-ix.
70 Abdiansyah Linge, *Ayat-Ayat Ekonomi* (Tangerang: Mahara Publishing, 2017), p. iv.
71 Abdul-Azeem Badawi, *The Concise Presentation of The Fiqh of The Sunnah and the Noble Book*, translated by. Jamall Al-Din M. Zarabozo, (Riyadh: International Islamic Publishing House, 2007), p. 687-702.
72 There is no objection that the object of uṣhūlfiqh is legal evidences. All of uṣhūl fiqh literature which discussed the object of uṣhūl must listed legal evidences as object.
73 See for instance Nurul Irfan and Masyrofa, *Fiqh Jinayat* (Jakarta: Amzah, 2014), p. 18-20.
obliged to explain its methods, because this explanation refers to *para-fiqh*.

While *para-fiqh* explicates the methodology used to understand legal evidences, *Fiqh* attempts to define the legal action contained in legal evidences presented by *para-fiqh*, either in *taklīfī* or *wadhīʿ*.

So, determining the legal status of *zina* (sexual intercourse of un-married couple in Islam), classifying it into two classes, explaining its proofing system, and implementing its penalty are the task of *Fiqh* and cannot be interfered by *para-Fiqh* (*Uṣūl al-jināyāt*).

Either *para-fiqh* or *Fiqh* possibly defines the legal theme they studied. Both *para-fiqh jināyat* and *fiqh jināyat*, could define “jināyat”. Defining the legal theme either in *para-Fiqh* or in *Fiqh* is certainly required to establish definite equal perspective of *para-Fiqh* and *Fiqh*.

2. **Object and Purpose**

As we have mentioned, the object of *para-Fiqh* is thematic legal evidences, such as evidences of *jināyat* or *ʿāmalat*, etc and methods to understand these thematic legal evidences. These legal evidences may originate from Qurʾan, hadith, community tradition, state constitution, the practice of ṣahābat, and etc. The sources of legal evidences may be different from a theme to other themes. Worship, for instance, its legal evidences only originated from Qurʾan and hadith, no other sources. While legal evidences of *muʿāmalat* may be derived from Qurʾan, Sunnah, custom or tradition and state constitution.

*Para-fiqh* has two main purposes: presenting whole thematic legal evidences and explaining the methods or principles needed to understand them.
However, the most challenging task of *para-Fiqh* lies in the first. Some scholars had begun the task, like Abdiansyah on “Ayat-Ayat Ekonomi” who presented legal evidences of *mu’āmalat* contained in Qur’an, Ahmad Sholihin Siregar on “Āyāt al-Ahkām”, a compilation of selected all legal evidences contained in Qur’an, classified them into legal themes. Other than Qur’an, it seems *para-fiqh* required more time to classify whole legal evidences from hadith. Some efforts in presenting and classifying them had begun by *muhadditsin* in their *Sunan*, just like what Abū Dāūd, al-Tirmīdzī, Ibnu Mājah, and al-Nasā’ī did. They had compiled whole hadith (legal evidences) and classified into several legal themes. However, modern legal theme of *fiqh* which had rapidly growth has more variation compared to legal themes found in these *Sunans*. Therefore, *para-Fiqh* needs to reclassify the hadith into new legal themes in responding to current themes of *Fiqh*. So did *Para-Fiqh* to other sources of legal evidences, such as community tradition, state constitution, the practice of *ṣahābat* and other sources.

The second purpose seems to be easier part to fulfill, because *Uṣū al-Fiqh* itself had contained methods like *amr-nahy*, *manthūq-mafhūm*, ‘āmm-khāsh, the hierarchy of legal sources, the conflict of evidences, etc. In this case, *para-fiqh* necessitates an advanced effort to select and redirect the explanation in order to have more relevant theme, such as explaining *al-nahy* using “lā taqrabūz zinā” for jināyah, and “lā taqrabū ṣalāt wa

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74 Ahmad Sholihin Siregar, *Ayatul Ahkam, vol. 1: Dasar Seleksi dan Konstruksi* (Tangerang: Mahara Publishing, 2018), p. 431, or refer to Ahmad Sholihin Siregar “The Construction of Ayatul Ahkam: Constructing the Selection Bases of Ayatul Ahkam” in *Ahkam Jurnal Ilmu Syariah UIN Syarif Hidayatullah Jakarta*, vol. 18, no. 1, Januari 2018, p. 233-250.
However, the most challenging task of para-Fiqh lies in the first. Some scholars had begun the task, like Abdiansyah on “Ayat-Ayat Ekonomi” who presented legal evidences of mu`āmalat contained in Qur’an, Ahmad Sholihin Siregar on “Āyāt al-Ahkām”, a compilation of selected all legal evidences contained in Qur’an, classified them into legal themes. Other than Qur’an, it seems para-fiqh required more time to classify whole legal evidences from hadith. Some efforts in presenting and classifying them had begun by muhaddītīn in their Sunan, just like what Abū Dāūd, al-Tirmīdzī, Ibnu Mājah, and al-Nasā’ī did. They had compiled whole hadith (legal evidences) and classified into several legal themes. However, modern legal theme of fiqh which had rapidly growth has more variation compared to legal themes found in these Sunans. Therefore, para-Fiqh needs to reclassify the hadith into new legal themes in responding to current themes of Fiqh. So did Para-Fiqh to other sources of legal evidences, such as community tradition, state constitution, the practice of ṣahābat and other sources.

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3. **Scope of Study**

Para-Fiqh studies more specific scope compared to Uṣūl or Fiqh in accordance with its definition, object and purpose. The scope of para-Fiqh must refer to its two purposes: presenting whole thematic legal evidences and explaining the methods to understand them. To fulfill the two purposes, the scope of para-Fiqh should consist:

1. Definition.
   These comprises definitions of legal themes, such as jināyat, mu`āmalat, munākahat, etc., and definitions of other terms such as: Uṣūl, fiqh, and Uṣū al-Fiqh jināyat or para-fiqh jināyat.

2. Legal source.
   Legal sources required further discourse because the sources may be truly different among para-fiqh or legal themes. Due to these sources, para-Fiqh ought to explain the hierarchy of legal sources and the conflict of evidences.

3. Legal Evidence
   Para-fiqh must provide whole thematic legal evidences, either from Qur’an or hadith or other sources. Most part of para-fiqh studies is these legal evidences. Para-fiqh has to select and compile
the thematic legal evidences from Qur’an, hadith, custom, state constitution, etc.

4. *Uṣūliyyah* Principle

*Uṣū al-Fiqh* has been explaining a lot of *Uṣūliyyah* principles. The task of *para-fiqh*, in this case, is to explain the principles related to its theme using thematic legal evidences as its example. Besides, *para-Fiqh* also should construct a new *Uṣūliyyah* principles related to new legal sources such as state constitution.

5. Relevant *Fiqhiyyah* Principle

*Para-Fiqh* selects and provides only relevant thematic *fiqhiyyah* principles, and ignores irrelevant ones. For example, *Al-ashl fī al-`ibādat al-tahrīm*” should be removed from *para-fiqh jināyat*, and listed in *para-fiqh`ibādat*. Some para-*fiqhes* may share same principles, like “*al-umūru bi maqāṣidihā*” which is relevant to worship, *jināyat*, *munākahat* etc.

6. Other studies of *Uṣul*

*Para-Fiqh* should discuss some studies of *Uṣul* which are different from general *Uṣū al-Fiqh*. The definition of Islamic law is certainly unnecessary, because the same definition may be applied for all legal themes. As well as the definition of law giver, which means no ne of law giver except Allah. However, for certain themes, legal subject may be dissimilar, as the subject of *mu`āmalat* is not barely limited to *mukallaf* but also legal institution or corporation that is never been discussed by general *Uṣū al-Fiqh*.

We might include the whole scope of *Uṣū al-Fiqh* in *para-fiqh*, but it could later lead us to futility and disappearances of *Uṣū al-Fiqh*. If this
situation occurred, we would have had “an orphaned” para-Fiqh from the “mother science: Uṣū al-Fiqh”.

F. Para-Fiqh: An Axiology

Para-Fiqh is constructed to help candidates of fuqaha’ focused on certain legal themes, especially in particular study program like jināyat, mu`āmalat, ahwāl syakhshiyyah, etc. It eases them to explore and master Uṣū al-Fiqh with their theme. Hence, the scholar of mu`āmalat would not be halted on general Uṣūl explaining general legal evidences and methods to understand them, which are occasionally irrelevant with their study. Therefore, all candidates shall have more opportunities to deepen their study. Scholar of jināyat, for instance, may refer to Uṣūl jināyat which provides him all jināyat legal evidences and methods, and then contribute to a new original thought. On the other hand, they would not be distressed from seeking thematic legal evidences and wasting times for classifying them.

Another advantage offered by para-Fiqh is the progress of Uṣūl and Fiqh, as para-Fiqh develops new principles of Uṣūlliyyah and fiqhiyyah. Fiqhiyyah principles of jināyah and siyāsah for instance, are faintly touched by Uṣū al-Fiqh compared to ibādat or munākahat.

Para-Fiqh also may offer solutions for contemporary debate of Islamic law, which is Uṣūl cannot offer. Long Debate on Qanun Jinayat, for instance, whether it is part of Islamic law or Indonesian legal system; either complies to Islamic law or Indonesian constitution. Some scholars, such as Natangsa Surbakti, Jum Anggraini, and

75 Natangsa Surbakti, “Penegakan Hukum Pidana Islam (Jinayah) Di Provinsi Nanggroe Aceh Darussalam” in Jurnal Media Hukum, vol. 17 Number2nd December 2010, p. 200.
Amsori-Jailani concluded that Qanun Jinayat is a combination of Islamic law and Indonesian penal law. Para-Fiqh could affirm the conclusion in perspective of Islamic law as it stipulates state constitution as legal source of jināyat under Qur’an and Sunnah.

For theme of worship, Para-Fiqh also can settle the conflict on legal status of wirid whether it is bid`ah or not, as Para-Fiqh (Uṣūlibādat) only legalizes Qur’an and Sunnah, and rejects `Urf (custom) as legal source.

Recently, I myself have been asked “whether a legal institution like Syariah Mandiri bank could possibly carry Islamic immolation on behalf of its name or not” by chief of Immolation committee in STAIN Gajah Putih. The extension of legal subject to mukallaf (person) and legal institution, Para-Fiqh could easily answer the question.

G. Conclusion

The vastness of Fiqh scope, limitedness of lifespan, and stagnancy of Uṣū al-Fiqh create a gap between Fiqh and Uṣūl. Various thematic Fiqh refers to only one model of Uṣū al-Fiqh. This led to the need of science bridging thematic Fiqh to Uṣūl, namely para-fiqh.

Para-fiqh is science of whole thematic legal evidences and methods to understand them. Besides, I determined para-Fiqh here is a paradigm to understand the dynamic interplay between Fiqh and Uṣū al-Fiqh discussions.

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76 Jum Anggraini, “Kedudukan Qanun Dalam Sistem Pemerintahan Daerah dan Mekanisme Pengawasannya” in Jurnal Hukum, vol. 3, number 18th July 20011, p. 333-334.
77 Amsori and Jailani, “Legislati Qanun Jinayat Aceh Dalam Sistem Hukum Nasional” in Jurnal Ar-Raniry, vol. 4, Number. 2nd December 2017., p. 221-256.
78 Refer for instance to Idham Hamid, Tradisi Ma’baca Yasin di Makam Annangguru Maddapungan Santri Pondok Pesantren Salafiyyah Parappe Kec. Camplagian Kab. Polewalimandar, (Makassar: UIN Alauddin Makassar, 2017), p. 103.
Because of para-*Fiqh* studies thematic legal evidences and its methods, therefore, it can be considered as part of *Uṣūl*, and not considered as *Fiqh*.

Para-*Fiqh* presents the thematic legal evidences together with methods to explain them. Para-*fiqh* does not discuss explanation of legal actions contained in legal evidences, as it is an authority of *Fiqh*.

The object of para-*Fiqh* is thematic legal evidences, such as *jināyat* or *mu`āmalat* or *munākahat* legal evidences. *Para- fiq* has two main purposes: First, presenting the whole thematic legal evidences, and second, explaining methods to understand them.

The scope of para-*Fiqh* consisted of definition of terms (*Fiqh*, *Uṣū al-Fiqh*, para-*fiqh*, legal theme), legal sources, thematic legal evidences, *Uṣūliyyah* and *fiqhiyyah* thematic principles, and other different *Uṣūl* studies.

*Para-Fiqh* is urgently constructed to facilitate *fuqaha’* in developing *Uṣūl* and *Fiqh*, to deepen *Uṣūl* –mainly in *Uṣūliyyah* and *fiqhiyyah* thematic principles– and *Fiqh* studies.
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