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Open Road in the Shari'ah for Temporal Legislations.

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DYNAMIC APPROACH OF SHARI’AH: A CASE STUDY OF IJTIHAD 
AND ITS APPLICATION IN THE CONTEMPORARY SOCIETY 

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Abstract

The paper argues that *Shari'ah* is not fixed and immutable. The sources of *Shari'ah* are Qur'an, *Sunnah* and *ijtihad*. The first two are fixed and immutable, but the third principle is mutable. *Shari'ah* outlines the area within which Muslims life may develop, it conceded to the Muslim community an "open road" for temporal legislation which would cover the contingencies deliberately left untouched by the texts of Qur'an and *Sunnah*. The paper concludes that the jurists provided various legal theories in the light of the social reality of their respective time, but continuing process of social changes always necessitating adjustment.

Key words: *shari’ah, Qur’an, sunnah, Ijtihad, Qiyas, Ijma*

1. Introduction

If there is anything which is characteristics of and fundamental to Islam and Muslims, it is *Shari'ah*. *Shari'ah* or Islamic law as it is today, did not grow over night, but has been the result of historical developments over the centuries following the death of the prophet Muhammad who during his lifetime supplied additional details to enable some of its provisions become more operative.¹ It is reasonable to assume that the Law-Giver never intend the *shari’ah* to cover in detail all conceivable exigencies of live. he intended no more and no less than to stake out, as it were, the legal boundaries within which the community ought to develop, leaving the enormous multitude of possible legal situations to be decided from the case to case in accordance with the time and changing social conditions. Thus, the true *shari’ah* is far more concise and very much smaller in volume than the legal structure evolved through the *fiqh* (Islamic

jurisprudence) of various school of Islamic thought.\(^2\) The emergence of the schools of law affected the Shari’ah. Divergence from the direct adherence to the Shari’ah, was something that none of the classical jurists had intended. Their intention was in fact to help every Muslim to maintain, in every new issue, a living relation with the basic texts of the Shari’ah. Theirs was the role of interpreting, implementing and giving an opinion on the applicability of a particular text, giving individual opinions. To every Muslim, such authority is dependent, or should be dependent on its compliance with the Qur’anic and prophetic texts and on the fulfillment of their objectives.\(^3\)

Thus, the diversity of juristic opinion should be considered as an active sign of the flexibility of the Shar’ah, and not as a dogmatic seal on its applicability. But such flexibility can be conceived only if the study of the Shari’ah precedes the endless journey amidst the extensive works of the jurists. Even that is not enough. All through this endless journey, we should not lose sight of the simple fact that Islam, in the sense of binding law, was defined forever by the Qur’an and the Sunnah, and any claim to binding authority in the name of Islam has to be authenticated by them.\(^4\)

Therefore, a sharp line has to be drawn between Islamic law as introduced by its prophet (the Shari’ah), and all juristic achievements that came later, however rich and indispensable the latter may be. Their indispensability, however, goes only so far as it helps to verify the authenticity and applicability of the texts of the shari’ah, the latter being always the basic and the sole source of legal authority.

From all these facts, it is not true that Shari’ah is fixed and immutable. Because if the whole structure of Shari’ah is fixed and immutable that would have led to the rigidity

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\(^3\) Ibid., p. 11.

of its laws. But the fact is that, Shari’ah included within its fold three main principles, they are, the Qur’an, the Sunnah and ijtihad. The first two principles of the Shari’ah are certainly fixed and immutable, but the third principle is mutable. Thus the Qur’anic injunctions and prophet’s normative behavior together constitute the core of rules, principles and precepts generally known as the Shari’ah. The Shari’ah consists of immutable, eternal, ideal and unchanging principles in accordance with which the legal codes enacted. Therefore, the enactment of the Shari’ah in to legal codes necessitated the employment of what may be called the law-creating mechanism. The ijtihad was in fact, in its origin, law-creating mechanism. Once the Shari’ah is transformed in to law, it needs to be interpreted, applied and enforced. Therefore, the law-determining and law-enforcing agencies were required.\(^5\) It is crystal clear that Qur’anic principles and laws are general in nature intended to set up a fundamental framework suiting the needs of evolution in human society.\(^6\) This is an important fact which is generally overlooked.

The aim of this paper is thus, to expose the flexibilities aspect of Shari’ah and analyse the various methods of forming new laws that will suit this millennium challenges. To achieve this, the discussion would be done under the following subheads:

(a) Concept of ijtihad or independent reasoning
(b) Different methods of forming new laws
(c) Evolution of the Shari’ah
(d) Aspect of Flexibility of Shari’ah and
(e) Conclusion

\(^5\) Manzooruddin Ahmad, *Islamic political system in modern age* (New Delhi: Adam publishers & Distributors, 2006), 90.

2. Concept of *ijtihad* or Individual reasoning

The word *ijtihad* is derived from the Arabic verb, *ijtihada*, which literally means "to exert oneself to the utmost or to the best of one's ability." In the course of time, this term has come to denote a large complex of juristic definitions. According to Nyazee, *ijtihad* means striving to the utmost to discover the law from the texts through all possible means of valid interpretation. It is cleared that *ijtihad* is exertion, or independent judgment in a legal or theological question, based on the interpretation and application of the texts respecting a doubtful and difficult point and it is translated as individual reasoning or exercise judgment. It is the third source from which the laws of Islam are drawn. The Qur'an does recognize revelation as a source of knowledge higher than reason, but at the same time admits that the truth of the principles established by revelation may be judged by reason, and hence it is that it repeatedly appeals to reason and denounces those who do not use their reasoning faculty. It also recognizes the necessity of the exercise of judgment in order to arrive at a decision:

> But if any news of security or fear comes to them, they spread it abroad. And if they had referred it to the messenger and to that in authority among them, those of them who can search out the knowledge of it would have known it.  

The word used for search out the knowledge in Arabic is *Yastanbitunahu* from *istanbat*; which is derived from *nabat al bi'ra*, meaning "he dug out a well and brought

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8 Ibid., p. 804.
10 Qur’an, 4:83
forth water. The *ista'bat* of jurists is derived from this, and it signifies the searching out of the hidden meaning by their *ijtihad* and is the same as *istikhraj* i.e. analogical deduction. Thus the verse recognizes the principles of the exercise of judgment which is the same as *ijtihad*, and though the occasion on which it is mentioned is a particular one, the principle recognized is general.

The first time *ijtihad* was used with a direct legal import was during the lifetime of the prophet in an authentic Tradition of Mu'adh Ibn Jabal. The latter was appointed by the prophet as a judge in *Yaman* on the eve of his departure to assume his office there, the prophet asked him:

According to what shall you judge? He replied: according to the Book of God”. And if you find nothing therein? According to the *sunnah* of the prophet of God. And if you find nothing therein? Then I will exert myself to form my own judgment. And there upon the prophet said:" praise is to God who has guided the messenger of His prophet to that which pleases His prophet.\(^\text{13}\)

The word" Then I will exert myself to form my judgment" according to the whole context of the Tradition is of a creative nature which functions in the absence of Qur'anic and prophetic texts. But there can be no exertion of own judgment without given scope of a free thought and independent opinion.\(^\text{14}\) This conception of individual opinion was clear aspect of the intellectual life of the earliest Muslim society.

3. **Different methods of formulating new laws**

\(^{11}\)Ibid., p. 939.

\(^{12}\)Ibid., p. 82

\(^{13}\)Ibn Abd al-Barr, *Jam'i Bayan al-Ilm wa-fadlih*, (Cairo: Tabu Munir al- Damashqi, 1965), 58.

\(^{14}\)Ibid., p.74-75
The four jurists who are accepted by the entire *sunni* world of Islam, are thus agreed in giving an important place in legislation to *ijtihad*. In fact, the sphere of *ijtihad* is a very wide one, since it seeks to fulfill all the requirements of the Muslim community which are not met with expressly in the Qur'an and the Tradition.\(^{15}\) Raihan Sherif states:

> When we talk of Islamic laws based on the Qur'an and the *sunnah*, we must remember the role the dynamic principle of *ijtihad* should play in reconstructing Islamic society. The prophet was also equally conscious of the fact that no rigid code, however comprehensive, could be expected to cover all situations of human life.\(^ {16}\)

The great jurists of Islam have endeavored to meet these demands by various methods, technically known as *Qiyas*, (analogical reasoning), *ijma* (consensus of opinion) *istihasa'an* (equity), *isticiah* (Public good), and *istidlal* (inference).

The most important of *ijtihad* methods, and the one which has almost a universal sanction, is *qiyas*, the word *Qiyas* literally means, measuring by or comparing with, or judging by comparing with, a thing.\(^ {17}\) While the jurists apply it to "a process of deduction by which the law of a text is applied to cases which, though not covered by the language, and are governed by the reason of the text.\(^ {18}\)

It may also be described as reasoning based on analogy. In the classical legal theory *Qiyas* comes last. It is recognized as the fourth principle, basis or source of law, like other source. In fact, it is a mode of legal reasoning (*ijtihad*) and not a source of law as the

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\(^{15}\) Ibid., p. 87

\(^{16}\) Ibid., p. 142.

\(^{17}\) Ibid., p.87.

\(^{18}\) Ibid., p.136.
classical quaternion theory depicts. It is neither a source of law, nor an authority by itself. It is a process of systematic reasoning to reveal the rule of law. It is dependent entirely on an authority which may be the Qur'an or the Sunnah. Sometimes it is based on ijma which also takes it sanction from either of these two sources. Thus these sources are interlinked and ultimately return to the Qur'an. Therefore, Qiyas is an extension of the law as met with in the Qur'an and Tradition, but it is not of equal authority with them, for no jurists has ever claimed infallibility for analogical deductions, or for decisions and laws which are based on Qiyas; and it is a recognized principle of ijtihad that the jurists may err in his judgement.

Another method of ijtihad, though is on a wider basis is ijma. The word ijma is derived from jam which means collecting or gathering together, and ijma carries the double significance of composing and setting a thing which has been unsettled and hence determining and resolving upon affair, and also agreeing or uniting in opinion. In the terminology of the Muslim jurists, it means consensus of opinion of the Muslim jurists, of a particular age on a question of law.

Ijma played a vital role in the integration of the Muslim community. In its early phase it manifested itself as a general average opinion, a common feeling of the community, and as a binding force of the body of law against unsuccessful and stray opinions. In the classical period it developed with its complex theory and ramifications. It became decisive authority in religious affairs.

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20 Ibid., p. 87.

21 Ibid., p. 136.

22 Ibid., p. 89.

Ijma in its early stages was parochial, i.e., the ijma of Medina, Kufa, Basra, and Syria. Al-Shafi‘i almost rejected the ijma of the scholars because of its parochial nature and because it involved personal opinion. He recognized only the ijma of the community on the essentials of religion. He substantiated his standpoint on the basis of some traditions that were adopted later by the jurists. It would thus be seen that it is a mistake to call ijma an independent source of the laws of Islam. It is essentially reasoning or exercise of judgment (ijtihad), with this distinction that is ijtihad on which all or the majority of the jurists of a certain generation are agreed.

It may be added here that the sense in which the word ijma is commonly used nowadays is quite erroneous, for it is taken to mean the opinion of the majority and it is generally thought that it is a sin on the part of a Muslim to differ with the views of the majority. But honest difference of opinion, instead of being a sin, is called a mercy by the prophet, who is reported to have said "The differences of my people are a mercy". Differences of opinion are called a mercy because it is only through encouraging it that the reasoning faculty is developed, and the truth ultimately discovered.

4. Evolution of Shari‘ah

The word evolution when used with Shari‘ah is likely to evoke different reactions. Those who feel that the Shari‘ah was laid down once and for all may reject the ideal of evolution in Islamic law. Their objections are partly justified. But, as Islamic law is meant to apply to every aspect of a Muslims life in all ages, it follows that it has to evolve and

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24 Ibid., p. vi.
25 Ibid., p.91.
26 Ibid., p.92.
27 Ibid., p. 111.
grow like any other legal system so that it may be able to cater to the demands of changing times.\textsuperscript{28} This is exactly what it does and is designed to do.

The Shari'ah may be fixed and immutable at its central core, as is claimed by some.\textsuperscript{29} But is not so in extensions. The truth is that Islamic law grew gradually to become a complete legal system. The law in the Qur'an and the Sunnah, it is true having been determined and fixed for all times to come.\textsuperscript{30} These comprise the core legal concepts, the genetic code, so to say. As Muhammad was the last of the prophets to bring laws, there is no chance of mutation in these laws. Calls for ijtihad in the present age, if they are meant to alter such fixed laws, are futile and unnecessary.\textsuperscript{31} These fixed laws however, cover a relatively small area of the activity of a modern state, and the bulk of the laws remain to be discovered. The system continues to grow.

Anybody who carefully studies the career of the Muslim community under the leadership of the Prophet Muhammad (peace be upon him), will appreciate the crucial role of ijtihad in the onward march of that community. Siddiqi observes:

> In the early part of the career of the Ummah what Allah willed of man was, generally speaking, confined to the basic moral values, the proper ends to be pursued in life and the norms of a decent life. Legal provision of the shari'ah followed later on. Equality and brotherhood, justice and honesty, compassion and kindness, priority of the social good over that of the individual, acceptance of the principle of rule by

\textsuperscript{28} AbdulKarim Zaidan, \textit{Al-Madkhal li-Dira'as at al-Shari'ah al-Islamiyya}, Alexandria: Da'ar Umar bin Khatab, 1969), 57.

\textsuperscript{29} Ibid., p.111.

\textsuperscript{30} Ibid., p.14.

\textsuperscript{31} Ibid., p.111.
consent and decision through mutual consultation, the sanctity of the family, and that sex relations shall be based on contracts, emphasis on co-operative living and recognition of the right of the society to private wealth are some of the values and the rules prescribed in the Mecca chapters of the Qur’an.32

For example Allah says:

And come not nigh to the orphan’s property, except to improve it, until he attain the age of full strength; give measure and weight with (full) justice; no burden do we place on any soul, but that which it can bear; whenever ye speak, speak justly, even if a near relative is concerned; and fulfill the covenant of God: thus doth He command you, that ye may remember.33

And God has made for you mates (and companion) of your own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best: will they then believe in vain things, and be ungrateful for God’s favours?34

Give full measure when ye measure, and weigh with a balance that is straight: that is the most fitting and the most advantageous in the Final determination. And pursue not that of which thou hast no knowledge; for every act of hearing, or of seeing or of (feeling in) the heart will be enquired into (on the Day of Reckoning). Nor walk on the earth with insolence: for thou canst not rend the earth asunder, nor reach the

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32 Ibid., p.9.
33 Qur’an, 6:152.
34 Qur’an, 16:72.
mountain in height. Of all such things the evil is hateful in the sight of thy Lord.

And swell not thy cheek (for pride) at men, nor walk in insolence through the earth; for God loveth not any arrogant boaster. And be moderate in thy pace, and lower thy voice; for the harshest of sounds without doubt is the braying of the ass.

It was natural, in this situation, for men to exercise their judgement as to know how to realize these values in practice and how to modify them or replace them by new ones in the existing social institution in the light of the revealed rules of conduct.

In the body of Islamic law known to us today, there is a considerable contribution of this third principle and it needs reconsideration for being applied in circumstance which has so considerably altered. And one overall dynamic principle that has given the Islamic civilization and its tradition a moving force has been *ijtihad* (or an independent judgment on a legal question. That is what hinted in the Qur'anic dictum: ... *and those who strive in our (cause), we will certainly guide them to our paths*.

For centuries independent thinking and exercise of judgement have been discouraged and the reason has been denied any except a minimal role in religious living quite contrary to what actually required. The inadequacy of the use of this principle in the background of the relative intellectual indolence and love of personal extravagance

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35 Qur’an, 17: 35-38.
36 Qur’an, 31:18-19.
37 Ibid., p.9.
38 Qur’an, 29: 69.
had in fact brought about the situation of stagnation and downward trend of decadence in Islamic civilization.\(^{40}\)

In the name of commitment to Allah, the actual emphasis has been on following the example of certain group of human beings and accepting their opinions on all matters requiring deliberation and judgement cultural imitation of the "pious" among the forefathers has become the highest value in religious living, depriving man of the freedom he actually enjoys in these matters within the framework of the Shari'ah.\(^{41}\) As a result, empiricism and the use of the faculties of observation, inference and reasoning generally have hardly any place in the mind of the contemporary Muslim. Creativity has hardly any role and knowledge is reduced to the learning of the already know. Religious behavior has become synonymous with behaviors regulated by authority.\(^{42}\)

The aspect of flexibility of the Shari'ah through the application of rational judgement or \textit{ijtihad} as forming the most distinctive characteristics of its genius that made the civilization a word force in the past and is likely to restore its dynamism progressively in future, provided, \textit{ijtihad} is given its due place in our contemporary thought towards shaping the future. Allah says: "For every one of you we have ordained a divine Law and an open road"\(^{43}\).

This is to say that, while the Shari'ah outlines the area within which Muslims life may develop, the Law giver has conceded to the Muslim community this area, an "open road" (\textit{Minhaj}) for temporal legislation which would cover the contingencies deliberately left untouched by the texts of Qur'an and Sunnah. A rediscovery of the open road of Islam is urgently required, as we are in the midst of a rapidly changing world. For example, in

\(^{40}\) Ibid., p.141.

\(^{41}\) Ibid., p.16.

\(^{42}\) Ibid., p. 16

\(^{43}\) Qur’an, 5:48.
matters of government, technology, economic legislation, and so forth, the Shari’ah does not stipulate any detailed laws, but either lays down general principles only or refrains from making any legal enactment.\footnote{Ibid., p.15.} And this is where the application of rational judgement or \textit{ijtihad} rightfully comes in. Central in this scheme should be the aim of creating men who think for themselves, exercise their judgement, and make their choice. They must be emancipated from the mental slavery and cultural imitation of other human beings, even their own forefathers, so as to bring into fullest play their own creative genius.\footnote{Siddiqi, (2005), 15.} They must be brought into direct intellectual contact with the Qur’an and \textit{Sunnah} to legislate for their contemporary issues.

In zakat for example, when the Qur’an prescribes the categories to whom zakat is payable, it does not prescribe any particular method of calculation. Prophet Muhammad prescribed different ratios on different kinds of incomes and assets. Zakat is imposed at a levy of 2.5 per cent or (1/40th portion) on all idle assets (with very few exceptions) including cash in hand, deposits with banks, silver, gold and other jewellery; and on net earnings from transactions and at a levy of 10 per cent on returns from investment (i.e. after allowing for depreciation).\footnote{Salahuddin Ahmad , Islamic Banking Finance and Insurance, (Kuala Lumpur: A. S. Noordeen, 20060, 9.} For each kind of income and wealth, there is a minimum exemption called \textit{nisab}. In the case of gold, it is approximately three ounces; in the case of silver 21 ounces. In the case of other forms of income and wealth, the \textit{nisab} is judged by their value in silver. Here \textit{ijtihad} may be very fruitfully exercised. Silver and gold are the two commodities which man has always loved to hoard, and beside this these are the two precious metals which are the basis of the currencies of the world.\footnote{Qurdawi, Yusuf, \textit{Fiqh a-Zakat}, (Cairo: Maktabat Wahabah, 1994), Vol. 1, 260.}
various currencies value of 20 Dinar or 200 Dirham has to be found based on the
generally accepted opinion of Muslim Scholars of every country and current evaluation is
needed because of the instability of the value of local currencies in many Islamic country
especial outside the Gulf Arabian.

The parameter for working out the Nisab of Zakat should be the amount of income
necessary to provide a family of a certain size, suggested to be a husband and wife with a
child or house helper with minimum essentials of food, clothing and shelter for a period
of a year.\textsuperscript{48} A series of research projects need be planned to (i) select the material relevant
to various subject matters (ii) to analyse and understand the temporal context of various
legal theories (iii) to identify the areas where \textit{ijtihad} is needed and (iv), to seek \textit{ijtihad} of
competent scholars in various areas.\textsuperscript{49} Islam is not a static system of rules and rituals. It is
rather a dynamic process in which man himself actively participates. With this clear and
simple synthesis, we may quote and fully subscribe to Iqbal's suggestion where he says:

The transfer of the power of \textit{ijtihad} – individual representatives
of schools to a Muslim legislative assembly which in view of
the growth of opposing sects is the only possible form \textit{ijma} can
take in modern times; will secure contributions to legal
discussions from laymen who happen to possess a keen insight
into affairs. In this way alone we can stir into activity the


\textsuperscript{49} Muhammad Akram Khan, 'Islamic Economics: The state of the Art' in Syed Omar Syed Agil et al (Eds),
\textit{Reading in the concept and Methodology of Islamic Economics}, (Kuala Lumpur: Cert Publication, 2005),
150.
dormant spirit of life in Islamic legal system and give it an
 evolutional outlook.⁵⁰

This is to say that the Shari’ah included within its fold three main principles, two
 immutable and one mutable. The immutable principles are the Qur’an and the practice of
 the Prophet the (Sunnah). The mutable factor is the interpretation of these principles,
 which have been arrived by human reason to apply them to the changing needs of
 humanity in different conditions. It is wrong therefore to say that the Shari‘ah is entirely
 immutable. The first two principles of it certainly are immutable but the third principle
 which is so necessary for the application of the Islamic principles to our own lives must
 necessarily be progressive.

5. Conclusion

Many centuries ago, the jurists provided various legal theories in the light of the social
 reality of their respective time, but the continuing process social changes always
 necessitating adjustment. The communities are confronted with the challenging task of
 all-round reconstruction and development. This can be achieved only if the Muslim
 Scholars are capable of utilizing ijtihad through Qiyas and ijma in the sphere of
 legislation. But we must state that while rapid modernization may lead to a complete
 break with the past, at the same time, extreme traditionalism may be a serious handicap in
 the process of reconstruction and development. What is needed today is a thorough re-
 examination of the legal thought of Islam in the modern context. The task may be
 challenging but it is not impossible.

⁵⁰ Iqbal, Sir Muhammad, the Reconstruction of Religious Thought in Islam,(Lahore: Ashraf Press, 1951),
 174.