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Sources of Islamic Law

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ABSTRACT

Shariah also spells out Shariah, the law, which is the basic religious concept of Islam. Islamic religious law is considered an expression of God's commandments to Muslims and, in its application, represents a system of obligations that all Muslims are obliged to do based on their religious beliefs. Known as Shariah (literally the "road leading to the drinking fountain"), this law sacredly guides Islam to the practical expression of religious beliefs in this world and the goal of God's grace in the coming world. It represents the path of action taken.

Within this paper, we shall explore the meaning and scope of Shariya. It will mostly be based in the Indian sub-continent, though; some excerpts shall be picked up from all over the world, particularly Saudi Arabia, as it is the birthplace of Islam. We shall explore the four major sources of the Sharia – Quran, Sunna or Hadis, Ijma and Qiyas. Furthermore, we will also explore the Hanafi explanations to other sources such as the (i) Isti Hasan - Juristic preference – Equity, (ii) Isti Salah – Public Interest, (iii) Ijtehad - Exercising one's own reasoning to deduce the rule of law (Shariat), (iv) Taqlid - Law of Precedents & (v) Fatwa's - Decisions of Muslim Judges.

Finally, we will cover ancient, medieval and contemporary applications of Islamic law, its evolution, particularly in the Indian sub-continent and the importance of this evolution.

We shall also learn the different views, consistencies and inconsistencies of each Muslim source of law among different scholars, as per their understandings and their followers'.

This research paper will cover vast sources from which we will trace the sources of Islamic laws and their importance, their scope and evolution. To conclude, we will discuss the state of Indian Islamic law and the usage of these sources within Indian courts.

I. INTRODUCTION

There are 3 kinds of sources – (i) Ancient Sources, (ii) Customary Sources & (iii) Modern Sources. The Sharia refers to Islamic Law that primarily follows the teaching of Prophet Muhammad and the Quran. There are four major sources of the Sharia – Quran, Sunna or Hadis, Ijma and Qiyas. The interpretation of the Quran and the Sunna are generally regarded as the same in all Islamic schools of Jurisprudence, meaning the Urfi Law. However, the

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interpretation of the Ijma and Qiyas is mainly dependent on which school of law is followed by the Muslim.

Among the Modern sources, we shall cover – (i) Isti Hasan - Juristic preference – Equity, (ii) Isti Salah – Public Interest, (iii) Ijtehad - Exercising one's own reasoning to deduce the rule of law (Shariat), (iv) Taqlid - Law of Precedents & (v) Fatwa's - Decisions of Muslim Judges.

Among the Sunni Muslims, the schools of Muslim Law are – Hanbali, Hanafi, Maliki and Shafi and the Isna Ashari or Ja-afari, Ismaili, and Zayadi are schools among the Shia Muslims. Within the Indian sub-continent, Hanafi Sunni Muslims are the dominant group. Therefore, when we talk about the latter two sources of law, we will be most inclined to their Hanafi interpretation.

II. QURAN

The Quran is the holy book of Muslims. This is the most important source of Muslim Law. It is widely recognized as the best work of classical Arabic literature. It is divided into 114 chapters of poetry. The Quran is not merely inspired by Muslims as sacred but is regarded as the very literal word of God.

“Mohammed didn't write it because he couldn't write. According to tradition, some of Mohammed's associates worked as scribes and recorded revelations. Shortly after the death of the Prophet, the Quran was edited by companions who wrote down or memorized some of it.”²

Islamic history claims that “after Mohammed emigrated to Medina to form an Independent Muslim Community that he would recite the Quran to many of his peers to learn and teach the laws revealed daily. Some of the Quraysh captured in the Battle of Badr were reported to have regained their freedom after teaching some Muslims a brief script of the time.”³

A group of Muslims was gradually formed. As first spoken, the Quran was recorded on the wide, flat edges of tablets, bones, and date palm leaves. Early because most of the Sula is mentioned in many proverbs from both Sunni and Shia sources related to the use of Muhammad's Quran as a method of calling, praying, and reading to Islam. They were used among the Muslims. However, when Muhammad died in 632, the Quran did not yet exist in the form of a book.

The Qu'ran functions less as text prescribing what is wrong and more of a text describing the

² Donner, Fred. 2006. "The historical context." Pp. 31–33 in *The Cambridge Companion to the Qur'ān*, edited by J. D. McAuliffe. Cambridge University Press.

³ P.M. Holt, Ann K.S. Lambton and Bernard Lewis (1970). *The Cambridge history of Islam* (Reprint. ed.). Cambridge Univ. Press. p. 32.

divinity of God and the code of conduct that must be followed by a true Muslim. In the stricter sense, anyone who would do anything not prescribed or condemned in the Qu'ran would not be able to receive "Jannat" or heaven. In more drastic cases, that person would be termed as a non-believer or Kafir.

Anything written in the Quran is said and believed to be true as well as must be trusted by every true Muslim. "Since Muhammad was and is regarded as *Insan-e-Kamil*, i.e. "the one who has reached perfection", every man, woman and child following Islamic principles must do everything within their power to be like him."⁴

Islamic Penal Law, Hadud offences are stipulated in the Qu'ran. In a traditional Islamic framework, there were 7 Hadud offences – apostasy, revolt against a rightful Islamic ruler, theft, highway robbery, adultery, slander, and drinking alcohol. Among all Hadud offences, apostasy is the greatest crime that can only be punished by death. Today, these Haduds have evolved and morphed into Hadd crimes.

In today's scenario, the six Hadd crimes for which punishments are fixed are theft (amputation of the hand), illicit sexual relations (death by stoning or one hundred lashes), making unproven accusations of illicit sex (eighty lashes), drinking intoxicants (eighty lashes), apostasy (death or banishment), and highway robbery (death).

"The message of the Quran is at once sapiential and practical, legal and moral, concerned with everyday problems as well as the spiritual and intellectual life. The Sacred Text deals with every aspect of human concern, from the deepest intellectual questions and the most lot y spiritual issues to the mundane matters of ordinary life. It is at once therapeutic and didactic."⁵

III. HADITH & SUNNA

Hadith refers to the direct words of Prophet Muhammad, Islam's perfect man. These words have been preserved and protected by the followers of Islam since Muhammad's demise. It is the second most important source of Muslim law and is only second to the Qu'ran. Though used interchangeably, Hadith and Sunna mean different things. Hadith refers to the learnings by a conversation with Prophet Muhammad, as described by his disciples and followers. Therefore, Hadith refers to the narration of the sayings, doings or approvals (Taqrir) of Muhammad; however, the Sunna refers to the path followed by Prophet Muhammad in the way he led his life and set an example for the Muslims to follow, in a more "the ways of God"

⁴ Little, John T. "Al-Insan al-Kamil: the perfect man according to Ibn al-'Arabi." *Muslim World* 77.1 (1987): 43–54.

⁵ Nasr, S. H., *The Study Quran*, pp. 21

(Qur'an 33:37, 62).

“Avoid condemning the Muslim to Hudud whenever you can, and when you can find a way out for the Muslim, then release him for it. If the Imam errs, it is better that he errs in favour of innocence (pardon) than in favour of guilt (punishment).”⁶

“Were people to be given in accordance with their claim, men would claim the fortunes and lives of (other) people, but the onus of proof is on the claimant, and the taking of an oath is incumbent upon him who denies.”⁷

These excerpts are of the Hadiths are sayings by the Prophet documented by his disciples. These principles form the basis of Muslim Jurisprudence.

From a modern perspective, “The science of Hadith became the most pervasive due to the need displayed by each of these three sciences. The need hadith has for its science is apparent. As for Quranic exegesis, then the preferred manner of explaining the speech of God is by means of what has been accepted as a statement of Muhammad. The one looking at this is in need of distinguishing the acceptable from the unacceptable. Regarding jurisprudence, then the jurist is in need of citing as an evidence the acceptable to the exception of the later, something only possible utilizing the science of Hadith.”⁸

IV. IJMA

Ijma in Arabic directly translates to “consensus” or “agreement”. It is the laws that are made by the consensus of the Muslim community. “Some argue that only the opinions of scholars are relevant. Others contend that Ijma includes the consensus of the laity. Most agree that the consensus of Muhammad’s Companions, the people of Medina, or the family of the Prophet is authoritative. Once an ijma is established, it serves as a precedent”.⁹

Ijma is a secondary source of Islamic Law since it cannot override the Quran, Hadith and Sunna. The Ijma is often confused with the Ijtihad. “The difference between ijma and ijtihad is that ijma is (Islam) the consensus of the Muslim community while ijtihad is (Islam) the process of Muslim jurists making a legal decision by independent interpretation of the Qur’an and the sunna; such a jurist is a mujtahid.”¹⁰ Ijma is of two types, (i) Express Ijma or Ijma Qawli. (ii) Tacit Ijma or Ijma Sakuti. Scholars of the Jurisprudence have been different, and therefore, the

⁶ M. Cherif Bassiouni, *Islamic Law - The Shariah*, available at: <https://www.mei.edu/publications/islamic-law-shariah>

⁷ Ibid

⁸ Ibn Hajar, A., *Al Nukad al Kitab ibn al-Salah*, vol. 1, pp. 90, Maqtabah al-Farqan

⁹ "Ijma." In *The Oxford Dictionary of Islam*. Ed. John L. Esposito. *Oxford Islamic Studies*.

¹⁰ Ben Davis, *What is ijma and its examples?*, available at: <https://www.mvorganizing.org/what-is-ijma-and-its-examples/>

Ijma has too.

The understanding of an Ijma becomes different as different scholars have varied views on the basic definition of the Ijma. “According to Iraqi academic Majid Khadduri, Al-Shafi’i held the view that religiously binding consensus had to include all of the Muslim community in every part of the world, both the religiously learned and the layman.”¹¹ Similarly, “Abu Hanifa, Ahmad ibn Hanbal and Dawud al-Zahiri, on the other hand, considered this consensus to only include the companions of Muhammad, excluding all generations which followed them, in Medina and elsewhere.”¹²

The basic understanding of the Sunni schools is followed mainly as what is said to be as per the makers of that school. Therefore, in the Indian sub-continent, where we follow the Hanafi School of Jurisprudence for Muslims, we follow Imam Abu Hanifa’s definition. In India, it is followed as long as it is in accordance with the legal precedents of the Republic of India.

For the Shi’a, the interpretation remains mainly ambiguous and is dependent on the religious head of the school and the area.

V. QIYAS

The Qiyas are a process of deductive analogy which is comparing and contrasts the Quran and Hadith. A “nass” (injunction) is applied to a new circumstance that causes the formation of a new injunction. As in the case of the Ijma, Qiyas is a secondary source of Islamic Law.

The need for Qiyas developed shortly after Muhammad’s death when the expanding Islamic state came into contact with societies and situations beyond the Quran and Sunnah. In some cases, Ijma justified the solution or solved the problem. However, Qiyas is often used to infer new beliefs and customs based on similarities to past customs and beliefs.

Qiyas are a fundamental instrument of interpretation, not a means of modifying existing law, but can only be used to find legal principles according to the Quran.

Like the Ijma’s views contrast depending on the sect and school of Islamic law, the same is the case with regards to Qiyas. “Among Sunni traditions, there is still a range of attitudes regarding the validity of analogy as a method of jurisprudence. Imam Bukhari, Ahmad ibn Hanbal, and Dawud al-Zahiri, for example, rejected the use of analogical reason outright, arguing that to rely on personal opinion in law-making would mean that each individual would ultimately

¹¹ Mansoor Moaddel, *Islamic Modernism, Nationalism, and Fundamentalism: Episode and Discourse*, pg. 32. Chicago: University of Chicago Press, 2005.

¹² Muhammad Muslehuddin, *Philosophy of Islamic Law and Orientalists*, Kazi Publications, 1985, p. 81.

form their own subjective conclusions.”¹³

The human reason should not be exercised independently but according to the will of God appearing in the Quran.

VI. ISTI HASAN - JURISTIC PREFERENCE – EQUITY

Imam Abu Hanifa adopted the principles of Isti Hasan. It literally means liberal construction, legal preference, or what we now call fairness. The term is used to describe the required rules and the freedom to establish the specific circumstances so required. The objection is that it leaves little control over the discretion in interpreting the law. A well-known example of the usage of Isti Hasan is that “Abu Hanifah stated that the one who eats out of forgetfulness whilst fasting should repeat the fast - however, he moves away from this by the evidence of a narration that allows the fast to stand.”¹⁴

VII. ISTI SALAH (ISTIHALAH) – PUBLIC INTEREST

“Istihalah is an Arabic word which is derived from the root word (ح ل و ح) (that means to change (Ibn Manzur 1990; Wehr 1974); it is synonymous with the word (انقلب) (and transformation (رتغى) (al-Razi 1997), thus istihalah literally means transformation and conversion (Wahbah 1997). According to Qal’ahji in Mu’jam Lughah al-Fuqaha’, istihalah of a substance from one form to another without the possibility of a return to the original forms (Qal’ahji 1996). This viewpoint is in line with Sa’di Abu Jayyib’s opinion, where istihalah is said to hold when a substance has undergone complete changes (Abu Jayyib 1988). For example, the seeds grow, and changes to a tree or a transformation of filth become dust (Al-‘Ayid n.d.).”¹⁵

Imam Malik approved the introduction of Isti Salah (public interest) in preference to Isti Hasan.

He laid down that ordinarily, the analogy was used to expand the law, but if it appears that a rule indicated by analogy is opposed to general utility, then Isti Salah (principles of public interest) should be reported to.

¹³ Mansoor Moaddel, *Islamic Modernism, Nationalism, and Fundamentalism: Episode and Discourse*, pg. 32. Chicago: University of Chicago Press, 2005.

¹⁴ Abd al-Aziz al-Bukhari, *Kash al-Asrar*, Vol 4,7

¹⁵ Jamaluddin, M.A., Ramli, M.A., Hashim, D.M., Rahman, S.A., *Fiqh Istihalah: Integration of Science and Islamic Law, Revelation and Science* Vol. 02, No.02 (1434H/2012) 117-123

VIII. IJTEHAD - EXERCISING ONE'S OWN REASONING TO DEDUCE THE RULE OF LAW (SHARIAT)

Ijtihad was born when the Quran and Hadith did not reveal the exact line. Ijtihad means the exercise of an individual's independent judgment or rational opinion or your own deliberations to derive the rules of Shari'a law.

“In the complete procedure of Islamic legislation, Ijtihad plays an important role and has a central position in the whole process because Islamic law has two levels; essential and existential. The first level of Islamic law, being the actual spirit, is related to the progress and development of human life, while the second level, which is a structural form of Islamic law's aims to give it discipline and structure. The demands of life are going to change day by day, and human life also comes under the influence of these changes. In this changeable phenomenon, it becomes necessary to take on the structural review of Islamic laws, but it must be kept in mind that the spirit and discipline of Islamic law must be alive and does not clash with the aspects of the evolution of human life. Their mutual clash and disagreement have to make it possible to describe the vitality and development of life into nonproductive and inactivate state attain to organize and association become far from possible. In the process of law-making, the achievement of this responsibility is proved by Ijtihad. In the changing situation of every period, this process of Ijtihad is very effective in Islamic law.”¹⁶

Ijtihad was a privilege of great scholars and musicians. The Mujtahids qualification consists of complete knowledge of the Quran. With the end of Mujtahide, the door of Ijtihad no longer remains open. This is known as the closure of the Golden Gate of Ijtihad.

“Federal Shariat court directly consults the Quran and Sunnah and gives the judgment according to the injunctions of the primary sources of Islam. In the case of the protection of women, federal Shariat court also consults with the Muslim Family Law Ordinance.”¹⁷

“Taqlid is mentioned in Holy Quran. Verses in which Taqlid is stated are mentioned here. Allah Almighty stated in Holy Quran:¹⁸

“Believers!

Obey Allah and obey the Messenger (blessings and peace be upon him) and those (men of

¹⁶Tahir-ul-Qadri, M., *Ijtihad and its meanings, applications and scopes*, Minhaj-ul-Quran Publications, Lahore

¹⁷ Pakeeza, S, Fatima, F, *Ijtihad as a legislative function: Role of Ijtihad, Ifta and Taqleed in Legislative Process*, Journal of Islamic & Religious Studies, Jan-Jun 2016, I:I

¹⁸ Ibid

Truth) who hold command among you."¹⁹

IX. TAQLID - LAW OF PRECEDENTS

"The term taqlīd has been derived from the Arabic word "al-qaladah", which means to put something into the neck of someone. Taqlid literally means to follow the opinion of another person without knowledge of the authority of such an opinion (Ibn Manzur, 1988). In a technical sense, it is defined as to follow the opinion/ fatwa of a jurist blindly without knowing its reality, source and evidence upon which the fatwa is based (Muhammad Ali alSais, 1986)."²⁰ After Ijtihad, or when the gates of Ijtihad were closed, the parallel doctrine of Taqlid (the law of precedent) arose. Under Taqlid (literally imitating), it means following the opinions of others.

"In the constitution of Pakistan, article 189 and 201 are related to Taqlid. Article 189 and 201 makes the decisions of the Supreme Court binding on all courts and the High court judgments binding on all subordinate courts. The institutionalized forms of Taqlid are the doctrine of precedent. The opinions of the High court are followed by lower courts. This is considered as Taqlid. Common people accept the decisions of judges in their legal problems. Similarly, the statements of witnesses accept by the court unless their truth is challenged. Likewise, the opinions of experts in routine matters are followed by people. It can be concluded that Taqlid is an essential principle of our daily lives based upon the division of labour where some people specialize in a specific field and become experts. Likewise, the Mufti or the Faqih are the persons who are experts in their areas, and there is no need to hesitate in accepting their opinions by the people who are common people in their field of specialization."²¹

X. FATWA'S - DECISIONS OF MUSLIM JUDGES

The opinions of Islamic lawyers have always been appreciated. Eventually, even ordinary Muslims turned to such lawyers and sought his opinion. Such an opinion of a Muslim lawyer is called a fatwa. However, fatwas are not a legal source of information. Many fatwas have been known to target a single individual, such as in the cases of Muhammad al-Gaddafi, Salman Rushdie, Geert Wilders, Jerry Falwell, Taslima Nasreen, Mariwan Halabjee, Ulil Abshar Abdulla, Farag Foda and Isioma Daniel. There are various societies that regulate the validity and sanctioning of fatwas - Fatwa Council (United Arab Emirates) Provides online

¹⁹ Al Quran 4:59

²⁰ Razi, N., Taqlid A Dilmma for Muslim Intellect: An Analysis in the Light of Contemporary Issues of Muslim Ummah, Pg. 17, International Islamic University, Islamabad, 2014

²¹ Nyazee, Imran Ahsan Khan. Nyazee on the Secrets of Usul Al- Fiqh: Following a Madhhab and Rules for Issuing Fatwas. Advanced Legal Studies (ALS), p. 27.

fatwas, Islamic schools and branches, Islam QA Provides online fatwas, Madhhab, Permanent Committee for Scholarly Research and Ifta Provides online fatwas, Schools of Islamic theology and Fatwa on Religious Pluralism, Liberalism, and Secularism

XI. CONCLUSION

The step by step understanding of the sources of Muslim law has been covered within this paper; therefore, it is imperative to explore the various reasons and methods of such evolution. The Islamic framework has been introduced in a large scope all over the world, making it more and more adoptive. We understand from this that even though the law is ever-evolving, Muslim law is mainly and primarily already developed. Muslim law governs each and every practising Muslim within the territory of India. However, the jurisdiction to override law within the country is not given to religions, including Islam. In India, Muslim Law does not override real law as it varies in different areas. More importantly, the law must not restrict the fundamental rights of the Indian citizens, and therefore, Indian courts work as remedial courts where there are conflicts among Indian and Muslim Law. Furthermore, we see a vast improvement in the situation of women when we apply *lex terrae*.
