

Qur'anic Legislation in Modern Context

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Abstract

The present article is an attempt to analyze the unique and unmatched Qur'anic legislation in its modern context. This article throws light on the brilliant and genuine legislative characteristics and techniques of Qur'an. It aims to explore critically the Western intellectuals' impact regarding Islamic law and Qur'anic legislation. Islamic law and its system of legislation are being claimed as retard and impractical in the contemporary world. In fact, the Qur'anic legislation made by the Supreme Law-Giver is distinguished in many aspects from any other kind of man-made legislation. The modern techniques of legislation are incapable to compare with the variety of techniques and characteristics of Qur'anic legislation. Lastly, it concludes that that it was only due to stagnation of Islamic legislative function or ijthad for last few centuries that cause for such allegations from the scholars of modern world. Hence, it is need of time to re-interpret and re-construct social, economical and legal legislations according to the context based on the general principles of Qur'an and Sunnah through ijthad.

Introduction:

The Qur'an comprised of speeches of Allah, has been revealed to the last Prophet from the beginning of his prophet hood in the year 609 A.D., until shortly before his death. It is defined as Book of Allah revealed to his Apostle, Muhammad (peace be on him), written in *masahif* in Arabic language, transmitted to us through an authentic continuous narration without doubt.¹ This revelation is to be divided in to two parts, Meccan part and Medinese part. The earlier legislation of Qur'an was made in Mecca and concentrated on two subjects: First, it aimed to reform the corrupt beliefs of the people; and secondly, to implant an excellent morality and upright principles sanctioned by Islam. Here the Qur'anic legislation called the people to the unity of God. It discarded the idols worship and ensured that there is no submissiveness, humility, and worship to any one other than to Allah. This portion of revelation was consisted of the unity of God, stories of past nations, and the matters of reward in form of paradise and hell. The People, who denied accepting Qur'an from Allah, were challenged to bring any similar verse of Qur'an if they could. No legal enactment was made during that period; the only legal order which issued was about the obligation of prayer.² Medinese part started from the migration (Hijrah) of the Holy prophet and ended at his death in 632 A.D.

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¹ Al-Bazdawi, Abdul Aziz al-Bukhari, *Kashf-al Asrar 'an Usul al-Bazdaw* (Beirut: Dar I-Kutub al-'Ilmiyyah, 1997),1:22.

² Muhammad Shalabi, *Al-Madkhal fi al-T'arif bil-Fiqh al-Islami* (Beirut: Dar al-Nahdah al-'Arabiah, 1969), pp.51-56.

In that period the legislation was primarily concerned with the organization of Muslim state. Majority of social, economical and legal orders were revealed during this period. The last three pillars of Islam were revealed. The consumption of Pork, intoxicants, dead animals and blood were declared prohibited. The punishments for adultery, fornication, murder, theft, robbery were fixed. During the Meccan period, the Muslims were forbidden to take up arms against the Meccan people. The order to fight with the enemies of Islam was revealed in Medina. God declared: "And fight in the way of Allah with whom who fights with you, but transgress not the limits"³ The relationship between Makkian and Madinan legislation was that of the roots of a tree and its branches. Each piece of legislation had specific address and a central theme around which the content of the surah revolved. The legislation in Qur'an comprised of surahs which further divided in to sections, sub-sections and paragraphs; the connection has been created through various literary devices, like similes, comments, conditional statement, parenthetical statement, principal statement, warnings, question and their answers, not only these but have a conclusion of theme.⁴ Makkian legislation was prominent due to fundamental principles of Shari'ah while in Madinan legislation legal rules related to the human conduct were established. Several legislations were made in order to tackle the political, economical issues with Christians and Jews. Some legislation was made by Allah to expose the plots, conspiracy of hypocrites and warned them while others laid down the foundation for the laws concerning apostates.⁵ The main theme of Qur'anic legislation was particularly an appeal to faith and the human soul rather than a classification of legal prescriptions. It focused to establish only guiding and general principles of Shari'ah and left the detail to human agency to construct and to apply them according to the need of time and circumstances. Such prescriptions are comparatively limited and few in number. Regarding family law there are laid down seventy injunctions; civil law in also in seventy. Thirty provisions are relevant to penal laws; jurisdictional and procedural laws are thirteen. Only ten injunctions deal with constitutional law and twenty five are related to international law; economical and financial orders in ten.⁶

1. Modern techniques of Qur'anic legislation.

The Qur'an is characterized with a gradual revelation. The verses of the Qur'an were generally revealed to solve the problems which confronted Muslim Ummah. The Qur'anic legislation adopted rational and natural arguments concerning an issue and then reinforced them by historical and circumstantial examples. The aim of Qur'anic legislation was to reform the corrupt believe, standard of morality and the whole social order and custom prevailing in pre-Islamic Arabia. The Qur'anic legislation is comprised of a variety of techniques and characteristics which have been enjoined by

³ The Qur'an, 2:190; Muhammad Shalabi, *Al-Madkhal fi al-T'arif bil-Fiqh*, p.54.

⁴ Amin Ahsan Islahi, *Tadabbur-i-Qur'an* (Lahore: Faran Foundation, 1983), 9:8.

⁵ Mannan al-Qattan, *Mabahith fi 'Ulum al-Qur'an* (Riyadh: Maktabah al-Ma'arif, 1981), pp.55-57.

⁶ Abdul Wahab Khallaf, *Ilm Usul al-Fiqh* (Cairo: Matb'a al-Salfiyah, 1966), pp.34-35; Sa'id Ramadan, *Islamic Law its Scope, and Equity* (N. p., 1970), p.43.

Ummah in every period of time. These characteristics hold all those qualities which any of modern legislative body possesses.

1.1 Legislation based on the general principles.

The laws created by Qur'an are based on wide and general principles. They do not contain so many details as to create difficulty for believers. These general principles are suitable for all times and in all circumstances. For example a general principle concerning moral values is: "O! Believe, fulfil your promises."⁷ To facilitate people in their business transaction, God said: "O! Believe do not eat up your properties among your selves unfairly, except you have trade by mutual understanding."⁸ Thus, for civil matters or contracts, the major concerned is given on the mutual consent of the parties, and this golden rule envisaged in the text of Qur'an which was never existed in any other law of the nation at that time.⁹ And this golden rule was considered a complete unprecedented in the history of the old statues.¹⁰ Basically the Qur'an and Sunnah are inclined towards establishing general principles which later provided a direction to the compilation of Islamic jurisprudence.¹¹ On the other hand Jurisprudence as formal science was developed in England by Hobbes, Bentham and Austin during nineteenth century. Gerty Bentham founded the English Analytical School. Austin (1750-8159) defines law as the command of supreme Law-making power in the state which does not need divine sanction.¹²

1.2 Legislation based on the Constitutional Law.

Constitutional law consisted of legal rules which define the powers and authorities of different organs of the government of a country.¹³ These are the manners through which a particular society constitutes and runs different organs of the state in the light of its constitutional characteristics. The Islamic constitutional law comprises of divine guidance. It is a composition of ideology, beliefs and basic principles for the structure and function of an Islamic state. God declares: "For every one among you, We have prescribed a law and code of conduct."¹⁴ The Islamic law of constitution is based on two foundational principles, the first is the complete rule of law and the second is representative form of government. These foundations were laid down by Qur'an fourteen hundred years ago when all around the divine rights of king and

⁷ The Qur'an, 5:1.

⁸ The Qur'an, 4:29.

⁹ Prof. Nallino, Influence of Roman law on Muslim Law, lectures translated by M. Hamidullah in the "Islamic Review", 1933, V. XXIXI, No, 9, sep, 1941, pp. 377-387.

¹⁰ Joseph Schacht, *The schools of Law and Later Development of Jurisprudence* (Washington: The Middle East Institute, 195), 1:58.

¹¹ Al-Shatibi, *Al-Muwafiqat*, 4:368.

¹² Mr., P.J. Phitzgerald, *Salmond's Jurisprudence*, pp.8-45.

¹³ M. Rafiq Butt, *The Constitution of Pakistan 1973* (Lahore: Mansoor Book House, 2004), p.4.

¹⁴ The Qur'an, 6:48.

dynastic rules prevailed.¹⁵ In the field of criminal law, Islam established the rule of personal liability, and does not recognize the rule of vicarious liability and states: “every one is held in pledge for what he has earned.”¹⁶

1.3 Provisions to provide delegated legislation

By describing only general principles, God blessed his believers by giving them authority to decide the detail of these guiding principles according to the needs of time and people. Islam left a wide field for human enactment and gave them choice to legislate and to enact by this delegated power of legislation. A wide area of human conduct has been declared permissible. It is this reason that bulk of questions is discouraged by Islam. God said: “O! Believe, do not ask about things which if made plain for you, will cause trouble for you.”¹⁷ Holy Prophet said: “The Muslims who committed the gravest offence against Muslims are those who asked about things which were not prohibited, but which became prohibited because of their questions.”¹⁸ Contrary to this, the concept of delegated legislation in Western legal system was introduced in eighteenth century. It was first welcomed on the ground that the Parliament was overloaded and by granting some of its powers to ministers and local governments, the Parliament was there by be able to deal with the issue of importance while the detailed could be settled departmentally.¹⁹

1.4 Legislation to reform the existing laws

The Qur’an it self pronounces that it aims to reform human condition and society. Islam never tried to remove all existing laws of a society, rather than it aims to remove the evils of those laws and to make them beneficial for all.²⁰ The system of trade and business was reformed by certain Qur’anic legislation. For example, The Arab used to lend out money on interest on certain ratio and for a certain period and if that time lapsed and the borrower could not pay back money then the ratio of interest had to increase. This usury was known as Riba which led to unfair advantage for the lender. The Qur’an prohibited it by saying: “O you believe! Eat not riba . . .”²¹ And God declared: “Because of their saying that trade is like riba, whereas Allah has permitted trading and forbidden riba.”²²

¹⁵ Syed Riazul Hassan, *The Reconstruction of legal Thought in Islam*(Lahore: Idarah Tarjam al-Qur’an, 1992),p.87

¹⁶ The Qur’an, 74:38

¹⁷The Qur’an, 5:101.

¹⁸ Imam Muslim, b. Hajjaj Nisaburi, *Sahih Muslim*, Hadith no. 5821, (Beirut: Dar al-Ma’rifah, 1988), 4:1257.

¹⁹ P. F. Smith & S. H. Bailey, *The Modern English Legal System*(London: Sweet & Maxwell, 1984), p.186.

²⁰Shah Waliullah, Hujjat Allah Baligha (Karachi: Tijarah al-Kutub, 1978),), 1:83.

²¹ The Qur’an, 3:130.

²² The Qur’an, 2:275.

1.5 Legislation to adopt customary laws

Islam did not profess to repeal entire customary laws of Arab and to replace it with a code of new laws. The ground work of Islamic legal system, like that of other legal system is to be found in the customs and usages of the people among whom it grew and developed. For the development and protection of the family system, the Qur'an adopted customary laws relating to marriage, divorce, parentage, and inheritance through amendments. For example, ten types of marriage were customized at that time, but Islam sanctioned only one of them which is happened when one party, male or female, offers to second party to marry with him/her, if the second party accepts that offer then a contract of marriage is to be held and a certain amount or thing is specified by the husband as dower of his wife.²³ Fornication also declared forbidden by Qur'anic legislation due to its exploitation of women and destruction of family bonds. It was revealed: "Female adulterer and male adulterer punish each of them with hundred stripes."²⁴

1.6 Legislation based on the public utility.

The fundamental principle of Qur'anic legislation is to remove pain from the people and to ensure pleasure for them. This principle is based on the approval and disapproval of every action of human being. Its criteria have been established by the Law-Giver himself. To ensure it God said: "Allah does not burden a soul with more than it can bear."²⁵ And said: "Allah wishes to lighten your burden, for man was created weak."²⁶ Seeking utility and removing harm are the basic purposes at which the creation aims and the goodness of creation consists in realizing their goals. This means the preservation of the objectives of Shari'ah which consists of five things: preservation of religion, preservation of life, preservation of intellect, preservation of progeny and preservation of property. What ensures the preservation of these five principles is called utility and what ever fails to preserve them is called harm (mafsidah) and its removal is utility.²⁷

1.7 Legislation based on the doctrine of necessity

The Qur'an adopted the doctrine of necessity when other nations of the world were in dark regarding the legality of this doctrine. In case of necessity, a prohibited thing becomes permissible to the extent of removal of that necessity. For example, keeping fast of *Ramadan* is an obligation for Muslims, God declares: "O! Who believe, fasting has made compulsory for you as prescribed for those before you in order that you may be conscious of God."²⁸ But in case of necessity it may be postponed until

²³ Ibn Hammam, Muhammad b. 'Abdul-Wahid, Fatha al-Qadir (Egypt: Matb'a al-Halbi, 1970), 7:377-378.

²⁴The Qur'an, 24:2

²⁵ The Qur'an, 2:286.

²⁶ The Qur'an, 4:28.

²⁷ Al-Ghazzali, *Al-Mustasfa min 'Ilm al-Usul* (Misr: Al-Matb'a al-Amiriyah, 1326 A.H), 2:286-287.

²⁸The Qur'an, 2:183

that necessity finished. It is declared: “(Observing fast) for a fixed number of days, but if nay of you is ill or on journey, then fulfill counting in later days.”²⁹ Similarly God permits to shorten prayer during journey. Moreover, God declares: “Forbidden to you dead animals, blood, pork, animals slaughtered in the name of others than Allah, animals killed by strangulation or a blow or a fall or by being gored...”³⁰ The consumption of these prohibited substances becomes permissible in case of grave necessity for sake of life. God announces: “But if any one is forced by hunger, with no inclination to transgression, Allah is indeed for giving most Merciful.”³¹

1.8 Direct answers to the questions

A number of Qur’anic verses are the direct answers to the questions raised by people of that era. Many of these begin with the phrase like ‘they ask?’ Some times Muslim and non-Muslims of the society had to ask different questions concerning the status or hukm of any matter. The Holy prophet did not answer them until he found some revelation or indication from Allah Almighty. Once, the people asked about fighting during the forbidden months. Allah Almighty revealed the following verse: “They ask you about fighting in the forbidden months. Say, fighting in them is a great offence, but blocking Allah’s path and denying Him is even graver in Allah’s sight.”³² On another occasion the people asked about the hukm of taking wine and other things. To answer them, God revealed: “They ask you about wine and gambling, Say! There is a great sin in them as well as benefit for men, but the sin of them is greater than their benefits.”³³

1.10 Legislation in case of emergency

There are number of legislative provisions related to the factual reality of a case or incident when happened. In pre-Arab society, different kinds of divorce were prevailed. One of them was *Zihar*, if a husband had to pronounce that his wife was to him like his mother’s back. It would become cause of separation between them. The Holy Prophet had accepted *Zihar* as valid form of divorce and in one case asked a female companion to accept it. However Allah declared it invalid by saying: “Allah has indeed heard the statement of the woman who disputed with you regarding her husband and carried her complaint to Allah, Allah hears yours discussion. Surely, Allah hears and sees all things. If any man amongst you declares their wives like their mothers, they can not be their mothers. None can be their mothers except those who gave birth to them. They use bad words and falsehood.”³⁴

²⁹ The Qur’an, 2:184

³⁰ The Qur’an, 5:3

³¹ The Qur’an, 5:4.

³² The Qur’an, 2:217.

³³ The Qur’an, 2:219.

³⁴ The Qur’an, 58:1-3; Imam Bukhari, Muhammad b. Isma’il, *Sahih al-Bukhari* (N. p., Dar al-Sha’b, 1988), 6:245-246

1.11 Legislation based on International Law.

International law means the law which governs the conduct of different states among themselves.³⁵ The international law of Islam is based on the text of Qur'an: "To each among you, We have prescribed a law and a clear way, . . . He may test you in what He has given you; so compete in good deeds. The return of you all is to Allah."³⁶ The idea of "Two Nation Theory" is also created by God Himself.³⁷ It is stated in Qur'an: "Who has created you; so some of you are non-believers and some of you are believers."³⁸ This text presents a clear definition of a nation, and according to which the Muslims of the whole world constituent one nation, while non-Muslims are another nation. The international relations of the Muslims being one with other nations of the world can be set up only by declaring the oneness of mankind on the basis of equality. In the human history, Muhammad b. Hassan Shaibani was the first who wrote a comprehensive book on this subject, named as "Kitab Siyar al-Saghir".³⁹ The term used by Muslim scholars for International law is "Siyar" which is the plural of 'sirah' means the attitude adopted by the ruler towards alien in the state of war and peace.⁴⁰ This is the principle without which no international law exists, for what is the use of international law if it does not aspire to cultivate harmony among nations.⁴¹ On the other hand, the International Charter of fundamental rights was introduced by UNO in 1948 for the first time in the constitutional and international history of the laws of the world.⁴²

1.12 Legislation based on fundamental rights

The principle of fundamental right means the basic rights of human being necessary for his survival in the world. It has been defined clearly by the Qur'an. It is stated: "O mankind! Be dutiful to your Lord, Who created you from a single person (Adam), and for him (Adam) created his wife, and from them both He created many men and women; and fear Allah through Whom you demand (your mutual rights)."⁴³ This text provides a basic and fundamental principle of equality of International law. It indicates that international relations can be set up and peace can be achieved and maintained only by becoming good to the other nations of the world, and removes all types of inferior and as well as superior complexes of the nations by declaring them the children of one parents. This rule provides a fundamental rule of equality of all

³⁵ P. J. Fitzgerald, *Salmond's Jurisprudence* (Lahore: Mansoor Book House, 1992), p.38.

³⁶ The Qur'an, 5:48.

³⁷ Syed Riaz al-Hassan, *The Reconstruction of legal Thought in Islam*, p.157.

³⁸ The Qur'an, 64:2.

³⁹ Al-Sarakhsi, Muhammad b. Ahmad, *Kitabal-Mabsut* (Misr: Matb'a al-Sa'adah, 1327 A. H.), 456; Muhammad Hamidullah, *Muslim conduct of State* (Lahore: M. Ashraf, 1977), p.88.

⁴⁰ Ibid.

⁴¹ Muhammad Hamidullah, *Muslim Conduct of State*, p.43.

⁴² P. J. Fitzgerald, *Salmond's Jurisprudence*, p.42.

⁴³ The Qur'an, 4:1.

human beings irrespective of the race and religion, and color etc. Another text declares: "And mankind was not but one community, then they differed."⁴⁴ Article 25 of the constitution of Pakistan explains that all citizens are equal before law and entitled to equal protection of law. And there shall be no discrimination on the basis of sex.⁴⁵

Then Qur'an does not impose compulsion on the citizens of an Islamic state to adopt any religion. It is stated: "There is no compulsion in religion . . ."⁴⁶ The people are free to adopt any religion, but once they adopt Islam, they have to abide by its provision and then no escape from Islam. God said: "O you believe! Enter perfectly in Islam and follow not the footsteps of Satan. Verily, he is to you a plain enemy."⁴⁷

1.13 Legislation to provide Objectives of Shari'ah

The Shari'ah has been placed for the benefits of people. The identification of the interests of man has not been left to the reason and desires of human beings, rather than all the purposes seek to establish and maintain life in this world to serve the interest of the hereafter.⁴⁸ God declares: "We have not created Jin and Ins (human being) except that they should worship me."⁴⁹ And God said: "Do you think that We had created you useless and you would never brought back to me."⁵⁰ Thus the primary purpose of Shari'ah is to secure the interest of man that pertains to the hereafter. These purposes are further subdivided in to two types; that are worldly purposes and the purposes of the hereafter. For example, the preservation of life is dependent upon the prohibition of unfair murder and on permission of retaliation in case of murder. The preservation of progeny is dependent upon the permission of marriage and upon the prohibition of fornication.

1.13 Legislation to provide principle of abrogation

Qur'an has introduced the principle of abrogation. This principle based on the need of time and people. God may prescribe a law suitable to the people at the time of its enactment, or it may serve a particular limited period. However, if its purposes have been achieved or its suitability may later disappear. In such circumstances the needs for the laws cease to exist and its validity becomes uncertain.⁵¹ For example, in pre-Islamic Arab culture, the property of deceased person would only inherit if a bequest was made. thus in the early stage of Islam, God confirmed that law by saying: "It is prescribed that when death approaches any of you, if he leaves property behind, he has to make a bequest in favor of parents and next of kin, according to the custom,

⁴⁴ The Qur'an, 10:19.

⁴⁵ M. Rafiq Butt, *The Constitution of Pakistan*, p. 84.

⁴⁶ The Qur'an, 2:56.

⁴⁷ The Qur'an, 2:208.

⁴⁸ Imam Shatibi, Abu Ishaq Ibrahim b. Musa, *Al-Muwafiqat fi Usul al-Ahkam* (Misr: Al-Matb'a al-Salfiyyah, 1341 A. H.), 2:8.

⁴⁹ The Qur'an, 51:56.

⁵⁰ The Qur'an, 23:115. See for detail, 'Iz bin 'Abdus-Salam, *Qawa'id al-Ahkam fi Masaleh al-A'nam* (Damishq: Dar al-Taba' li al-Taba' wa al-Nashr, 1992), p.13.

⁵¹ Muhammad Shalabi, *al-Madkhal fi al-Ta'rif bil-Fiqh al-Islami*, pp.89-90.

this is due from the pious.”⁵² Later, this order was repealed by Allah almighty and a comprehensive and detailed policy of the shares of heirs was introduced. Similarly the widow's waiting period was one complete year. It was the duty of husband to make a bequest for maintenance in favor of his wife. God prescribed: “If any one of you die and leave widow behind, a bequest of a year's maintenance and residence should be made for his widows...”⁵³ Then by another enactment the waiting period was reduced to four months and ten days:” If any one of you die and leave widow behind, they shall wait regarding themselves four months and ten days.”⁵⁴

1.14 Provisions to provide second source of legislation

The Qur'anic legislation provides a second source of legislative process that is Sunnah. The Holy Prophet (peace be on him) was assigned the duty to convey the final message of God to human being and to legislate laws according to circumstances and given situation of a case. The term Sunnah means the saying and actions of Holy Prophet as well as His tacit approval and actions of His companions which did not meet His disapproval are also considered part of Sunnah.⁵⁵ God declares:” He (Holy Prophet) does not speak from his desires. Verily, it is inspiration which has been revealed.”⁵⁶ The Holy Prophet performed this function in different ways. Some time he had to just explain the Qur'anic text by making a statement. At other time he would explain the text by his action before people, for example God declares the oblation of prayer but with out its details and did not described the how prayer should be performed. It did not state the time and numbers of prayers. So the Holy Prophet elaborated every ambiguity related to prayer and prayed among his followers and said: “Pray as you have seen me pray.”⁵⁷ Some times Qur'anic text give a general law only, then Sunnah clarify its generality and specify its intended meanings and lays down some additional rule that is not mentioned in the text. God declares:” He made lawful for them the good (pure) things and forbade them the bad (impure) things.”⁵⁸ This is a general principle given by Law Giver regarding pure and impure things. The Holy Prophet clarifies it by prohibiting the eating of the flesh of monkey.⁵⁹ Some times a rule is laid down by Sunnah which is a quite new rule. It is neither an explanation of an ambiguous text nor a specification of general rule, and nor a qualification of an absolute rule. For example, God declares:” The hunt of the sea has been made lawful for you and its good.”⁶⁰ The carrion remained unexplained by the Qur'anic text. The Holy prophet solved this problem by saying:” Its water is

⁵²The Qur'an, 2:180.

⁵³ The Qur'an, 2:240.

⁵⁴ The Qur'an, 2:234.

⁵⁵ Al-Shatibi, *Al-Muwafiqat*, 4: 56.

⁵⁶ The Qur'an, 53:3-4.

⁵⁷ Imam Bukhari, *Sahih al-Bukhari*, no. 604, 1:345.

⁵⁸ The Qur'an, 7:157.

⁵⁹ *Sahih Muslim*, no. 4778, 3:1072.

⁶⁰ The Qur'an, 5:96.

pure, its dead are permissible.”⁶¹In this way the Holy Prophet performed the function of legislation as chief judge and legislator. However, he left the task of legislation of worldly affairs to the disposal of his companions. He said, ” I am a human being. So when I tell you to do some thing pertaining to the religion accept it, but when I tell you something from my personal opinion, keep in mind that I am a human being. Then he added, ” You have better knowledge in the affairs of this world.”⁶² Similarly, His performance as judge with regard to the dispute brought before Him has no binding force. It is reported from Umm-e-Salma that Allah’s Messenger said: ” I am only a human being and you brought your disputes tome. Perhaps some of you are more eloquent in their plea than others, and I judge in their favor according to what I hear from them. So whatever I rule in any one’s favor, which belongs to his brother, he should not take any of it, because I have only granted him a piece of Hell.”⁶³ To sum-up, the characteristics and technique of Qur’anic legislations bear not only all the attributes which may tribute to any up-dated and modern legislative body but also they have amazing capacity to be modified and constructed according to the needs of time to solve the contemporary issues of Muslim Ummah. No other legislation has this capacity to accommodate changes of every time.

2. Misconceptions regarding Qur’anic legislation and Islamic law

The claim for the divine nature of Islamic law has created some misunderstanding among Western-European scholars whereby the specific terms of the law came to be expressed as the irrevocable Will of God.

It is fact that the divine concept of Islamic law has made the Western-European scholars confused who studied Islamic law just as the set of religious duties pure and simple.

A major study of Western-European scholars about Islamic legal system contends that after a brief and brilliant career, lasting about two centuries Islamic law fell into a decadence and intellectual paralysis from which it never recovered. The further development of Islamic law came to a halt with the creation of four authoritative schools of law and the gates of free interpretation were closed, as the Muslims themselves were supposed to have put it.⁶⁴For example, N. J. Coulson, a Western scholar studied Islamic law as an isolated and impractical law irrelevant to the worldly affairs. He argues:

“Islamic law was and remained merely theoretical structure. The Muslim jurists desired to disassociate themselves from the corrupt of the system and they were not agreed to put it into practice. For them Shari’ah represented a religious ideal, to be studied for its own sake rather than applied as a practical system of law.”⁶⁵

⁶¹ Al-Shatibi, *Al-Muwafiqat*, 3:23-34.

⁶² Imam Muslim, *Sahih Muslim*, no. 5831, 4:1259.

⁶³ Abu-Dawud, Suleman b. Ash’ath, *Sunnan Abi Dawud*, no. 3576(Misr: Mustafa Bab al-Halbi, 1952), 3:2017.

⁶⁴ J. Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964) p.10.

⁶⁵ N. J. Coulson, *Islamic Law and Legal Theory*, ed. Ian Edge (Aldershot: Dartmouth, 1996), pp.425-440.

The Western scholars studied Islamic law as authoritarian to the last degree. For them the Islamic law can not be other than the will of God, revealed through the prophet. It can not be separated in conception from duty, and never became fully self-conscious. The Shari'ah just remained as a discussion on the duties of Muslims."⁶⁶

Another theory of misconception regarding Islamic law is that due to its extremely religious nature, a deep cleavage came into being between the Muslim jurists and the states, with each sides going its own way. The state disregarded in practice what came from the pen of the jurists, and the latter developed an attitude of extreme contempt towards the state and the world of the social reality in its entirety. It is claimed that the works of *Fiqh* are full of disparaging judgments on conditions of the present day. What the people cling to as usage and custom is abuse and evil in the eyes of God The administration of justice everywhere is nothing but a public mockery of the divine laws referring to it. All that came there after was imitation and Islamic law became immutable in all its details⁶⁷

The view of Western-European scholars concerning the powers of a Muslim judge is that the qadi or Muslim judge had great and unguided discretion and he depended simply on his own whim and wish for the equities or he acted on his own prejudicial opinions of the matters. For them, there is no general concept of tort and contract in Islamic law around which judges and scholars could refine their conceptual categories as logic or concrete examples.⁶⁸

Not even this but the Muslim Jurists were being criticized for their style and way of judgments even by Western-American judges.⁶⁹ Justice Felix Frankfurter once remarked that the United States Supreme court "is not a tribunal unbounded by rules. We do not sit like a Kadi under a tree dispensing justice according to the consideration of individual expediency."⁷⁰

This blind study of Islamic legal system led the Western-European scholars to characterize Islamic law as opposed to Anglo-American common law, European civil law and Roman-Canon law as lacking rigorous set of logical links among the various aspects of over all the body of the law. They have generally remarked on the doctrinal rigor and the presence of inordinate discretion. For them Islamic law unstructured, run more by intuition, directed at best by culture or mores than by rigorous reasoning.

For instance, the fundamental tenet of Rosen's theory is based on the diametrical difference between the Islamic law and Western law. Thus, he says for example:

⁶⁶ H. A. R. Gibb, *Mohammedanism* (N. p., 1968), pp.67-68.

⁶⁷ C.H. Bousquet and J. Schacht, eds., *Selected Works of C. Snouck Hurgronje* (Lei den: E.J. Brill, 1957), pp.265-270.

⁶⁸ *Ibid.* p.267.

⁶⁹ Haim Gerber, *Islamic Law and Culture, 1600-1840* (Lei den: Koninkliki Brill, 1999) p.10

⁷⁰ Lawrence Rosen, *Anthropology of Justice: Law as Culture in Islam* (Cambridge: Cambridge University Press, 1989), p.58.

“The common law of England could employ a specifically artificial reason in order to separate the courts further from the executive power of the state, and by thus mystifying the law various social groups, including the bench and bar, could further the role of law as a protection against state intrusion on their on proprietary interests. In Islamic law by contrast, the courts have long operated not as a counterbalance to the state but as a stabilizing device among contending persons, an instrument by which the individual, within broad doctrines developed by the law, could seek the rough equivalence of unimpeded bargaining stance through a court that helped to ensure this vision of the individual personality.”⁷¹

Rosen’s theory has been heavily criticized for its omission of the world of written Islam. No doubt, Islamic law has its origin in divine Shari’ah but it does not mean that any future legislation in Islamic legal system is neither required nor possible.

A view regarding Islamic law is that in contrast with legal systems based upon human reason such a divine law possesses two major distinctive characteristics. Firstly: it is a rigid immutable system, embodying norms of an absolute and eternal validity, which can not be susceptible to modification by any legislative authority; Secondly, for many different people who constitute the world of Islam, the divinely ordained Shari’ah represents the standard of uniformity as against the variety of legal systems which would be the inevitable result if law were the product of human reason based upon the local circumstances and the particulars needs of the given community.⁷²

This view show that Shari’ah contains no law in the modern sense of a flexible law when measured in terms of the rigidity and uniformity and that the Shari’ah has no place for arguments and difference of opinion, hence can not be applicable to different people of different localities and places. Contrary to these views, Shari’ah is a mixture of rigidity and flexibility. It has a wide area of flexibility to adjust and to cope with different circumstances in different localities. The legislative portion of Qur’an presents a principle of ijtihad for amendments and legislation to accommodate new issues based on public interest for the sake of Ummah. In Islamic legal system, law and religion works together and can not be separated in any sphere of life. Law in modern sense is not different from the concept of Islamic law. Islamic law consisted of all qualities of law as considered in the Western-European legal system. Some Western scholars claimed that many Muslim states are forced to cast set aside Shari’ah and to adopt Western laws on social and economical grounds. According to this view, Islamic jurisprudence may successfully tackle the problems of law and society if it is freed from the notion of religious law expressed in the totalitarian and uncompromising terms. For law to be a living force must reflect the soul of society.⁷³

In fact, the development of Islamic law and society had four stages of social evolution:

⁷¹ Haim Gerber, *State Society and Law in Islam: Ottoman Law in Comparative Perspective*, This theory was presented by Max Weber regarding Islamic Law and criticized by Gerber, (Albany: State University of New York Press, 1994), p.2-4.

⁷² N. J. Coulson, *A History of Islamic Law*, pp. 5-6.

⁷³ Coulson, *A History of Islamic Law*, p. 225.

- (i) At Firststage Divinelegislation intended to civilize the culture and social attitude of the people. There were primitive societies which were not yet civil and lived in the forests or mountains. At this stage the purpose of divine legislation was to reform their existed laws and not to confound the people with new things with which they are not familiar;
- (ii) Second stage started when they begin to form a civil society;
- (iii) The third stage evolved when the people founded a new state, conflicts appeared and the people needed for an authority to administer and to settle their disputes;
- (iv) The fourth stage started when disputes rose among different units of the state and the people realized a need for a ruler to regulate the affairs among different cities of the state.⁷⁴

There are some distinguished characteristics of Qur'anic legislation which cause some fundamental differences between Islamic legislative process and legislation under Western legal system:

- (i) Western legislation considersthe religion as a private affair between man and God. Islamic law is not entirely a private affair. It is ruled by a code of law which is binding on all. There is no sanctity in a man or a class of men regarding the relationship between men and God;
- (ii) The most important distinction of Islamic legislation is that an Islamic Government has no power to legislate arbitrarily. It must legislate according to the limits prescribed by Shari'ah. In matters where there is room for ijthad and legislation, it has a right to legislate, but not in such manners as to against the spirit of Shari'ah.In the Western legislative system, the will of the majority whatever it will, becomes law.
- (iii) In Western legal system, the law is too flexible to apt to develop with the development of the affairs of the society and to change in response to the ever-changing requirements of social life. It is not possible for law to remain static, while the life which controls it is always on the move. On the other hand the Islamic law is based on certain universal fundamental principles of religion which are not dependent upon the wishes and trends of people. Islamic law can be changed with the changes of life and time but within the sphere of objectives of Shari'ah. The diversity of juristic opinion should be considered as an active sign of the flexibility of Islamic law.
- (iv) The existence of the doctrine of stare decisis or binding precedent in English law refers to the fact that the courts are bound by the previous decisions of the courts equal to or above them in the court hierarchy. The precedents lead to uncertainty; fixity; and constitutionality. In practice judges avoid precedent through either overruling or distinguishing them. Only the House of Lords can over rule its own previous rules, while the court of Appeal can not;⁷⁵ Contrary to this the rule of stare decisis is not appreciated by Muslim jurists. There are number of examples in the history of Islamic law where judge decided the matter according to the need of the case and overruled the decisions made by earlier judges.

⁷⁴ Shah Waliullah, Hujjat Allah Baligha, 1:82

⁷⁵ Slapper and Kelly, *The English Legal System*, pp.107-108.

(v) The method of Islamic legislation was based on the factual realities not on the presuppositions and hypothetical issues. Once a companion of the Prophet, Ubbie bin K'ab was asked his opinion on a hypothetical case. He asked: "Has it happened?" The person replied: "no" He then said: "Leave us at ease, until it happens. When it does happen, we shall pass our judgment accordingly."⁷⁶ This realistic approach means that Shari'ah wants to make the thing easier and flexible for the people not to create hardship for them.

Conclusion:

To conclude this article, it is suggested that it was only due to stagnation of Islamic legislative function or ijihad for last few centuries that scholars of other nations claimed Islamic law in contrast with modern legal systems and declared it a rigid immutable system which can not be susceptible to modification by any legislative authority and which has no flexibility to produce law based upon human reason in the context of the local circumstances and the particulars needs of the given community. We should not ignore the fact that Islamic law as living law can become much more effective and patronized in modern framework through legislative process of ijihad. Islamic law has been developed through a continuous process of ijihad. Hence there is need to re-interpret existing laws which cause hardship for Ummah in the light of the general principles of Qur'an and Sunnah, so that the Muslim Ummah particularly and other nations generally avail this unique process of legislation.

⁷⁶ Ibn al-Qayyam, I'lam al-Muwqa'in (1:64.