

IJTIHAD AND ITS SCOPE AS SOURCE OF ISLAMIC SHARIAH: MEANING AND IMPORTANCE IN CONTEMPORARY LEGAL REQUIREMENT OF ISLAMIC SOCIETY

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Islam as religion claimed to be Deen and complete code of life for all times and all people. But human life keeps on changing. The aim of law is to address the issues raised by changes in human life. Keeping in view scope of Islam as religion, the structure of Islamic law provides Ijtihad as source of Islamic law and works where the teachings of Quran and Sunnah are quite. Ijtihad can be define as an effort or Exertion of Jurist studying intensively to find out the correct and sound opinion about a problem which is not clearly mentioned in Quran and Hadith but indicated somehow. Ijtihad holds a central position in Islamic law as it addresses the both actual and structural levels of Islamic shariah. Mujtahids are those expert scholars who can make fatwa based on Ijtihad. Experts of Islamic law describe four ranks of Mujtahid and their status accordingly. Opposite word for Ijtihad is Taqlid which is defined as a practice to follow others opinion blindly or without any knowledge. Ijtihad can only be done by the jurists qualified for conditions of Ijtihad. In cases in which the jurists have difference in opinion, the Mufti is to form his opinion according to the best of his judgment but in accordance with the majority's agreement. But if there are two different versions of the law and some authoritative jurists have pronounced one of them to be ' correct ' and the others, the other version, fatwa may be based on either view. Ijtihad is the essence of Islam and ability of personal reasoning (Ijtihad) is a magnificent favor of Allah. The exercising of this faculty is a virtue which brings ten times the reward from Almighty Allah when it is done correctly. Even if someone is mistaken in his Ijtihad, he still would receive one reward. All evil in the Muslim world today is due to a lack of Ijtihad or people clinging on to previous Ijtihad a phenomena also known as Taqlid. The door of Ijtihad is still opened for the jurists but the need is to be done by learned scholars only who have basic qualification of Ijtihad.

Key words: Ijtihad, Islamic Law, Source, Shariah, Taqlid.

Introduction:

Lives of human beings keep on changing through a vibrant process. The aim of law making process is to address the issues emerged by changing in human life. Islam is the only religion which provides guidance for all times and all people and as religion claims to be a complete code of life. Objective of Islamic code and its ideal cannot be achieved without addressing the issues raised by changes in human life. Keeping in view scope of Islam as

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religion the structure of Islamic law provides Ijtihad as source of Islamic law works where the teachings of Quran and Sunnah are quiet. With reference to the scope of Ijtihad, it is a matter of significant importance that we should consider the question whether additional juristic description and development of the Islamic law is conflicting with the principles of the system. For this purpose, we must endeavor to understand the precise scope of the rules relating to the credentials of a Mujtahid or jurist, and endeavor to determine the true position of the doctrine of Taqlid which describes the duty of adopting the exposition of law as made by the ancient jurists(1). The word Mujtahid means a person who can make Ijtihad (2). Figuratively word Ijtihad is defined as striving, exerting effort and terminologically defined as striving effort of lawyer (faqih) of all juristic to the contemplation of the authorities of description (that is, the Quran, the Traditions and the Ijma') with a vision to find out probability of the solution of a legal problem in Islamic law(3). According to Islamic terminology Ijtihad is the ability of a lawyer (faqih) to deduce the solution of current problem which has not been explained in Quran and Hadith(4). According to Mosoua (Arabic dictionary) Ijtihad is the effort and capacity of fiqh through which the solution of the problem can be found which is not clearly described in Quran and Sunnah(5). In Islamic terminology the word Ijtihad is the opinion of Mujtahid under the light of Quran and Hadith which he makes through his own effort (6). According to given definitions the word Ijtihad can be define as an effort or Exertion of Jurist studying intensively to find out the correct and sound opinion about a problem which is not clearly mentioned in Quran and Hadith but indicated somehow. Ijtihad holds a central position in Islamic law as it addresses both the actual and structural levels of Islamic shariah.

Qualifications of Mujtahid.

Mujtahids are those expert scholars who can make fatwa based on Ijtihad. It is necessary to specify their qualifications in the language of the experts of Islamic Jurisprudence. According to Shatabi, Mujtahid must demonstrate the main qualities; first the understanding about the objectives of Islamic Shariah and second ability to derive the solution of the problem under these objectives (7). In the view of Bazdawia jurist must have understanding of the

Qur'an jointly with its significance, different interpretations of the traditions as well as the texts and the explanations of the experts, and of the regulations regarding the analogical deduction (8). The author of 'Jam'u'l-Jawami' describes the education of a jurist with authority of self-determining explanation in case of permanent Mujtahid : he must be foremost, passed of perceptive and of enough rational acuteness to be able to clutch the connotation of a language ; he must have average acquaintance, of the Arabic words, syntax and oratory, philosophy of Islamic law including its sources , that is, the Qur'an and the traditions ; he must be well versed in the main principles of the Shariah, or the legal code so as to be able to ascertain the intention of the lawgiver; he must know the repealing and the repealed texts, the circumstances in which the texts of the Qur'an were revealed, and the rules relating to the continuous and the isolated traditions, and be able to discriminate between authentic traditions and traditions of weak authority, and he must know the history of the narrators of traditions(9), but in this context it would be sufficient for a jurist in our days to refer to the authority of one of the Imams of tradition such as Ahmad, Bukhari and Muslim. Indeed the faqih(lawyer) is not necessarily required to have the knowledge of science of divinity rather over all basics of the law including its divisions of the regulations.(10). Women and slaves are accepted as jurist in Islam but a free pious man is preferred in making deductions from the law in Islam. In short Mujtahid is the one who has knowledge of Quran, Hadith, and Opinion of Jurists of four schools of law, Arabic linguistics, Shariah and its objectives.

Ranks of Mujtahideens: Experts of Islamic law describe four ranks of Mujtahid and their status accordingly.

1. Mujthid –e-Mustakil(Permanent Mujadahid).

The rank of Mujthid –e-Mustakil(Permanent Mujadahid) possesses highest rank in law making. These Mujatahid regulate the basic principles of school of Law. The responsibility of permanent Mujtahid is to observe what are necessary are and what are not. They confront new issues which have not yet been discussed and find out solutions in light of evidence (from the Quran and Sunnah).

2. Mujtahidun fi'sh-Shariah'.

Jurists who founded Schools of law, such as Abu Hanifa, Malik, Shafi'f and Ibn Hanbal, the founders of the four Sunni Schools. To them is conceded an absolute and independent power of descriptive law. That is to say, they were not hampered by any rules or limitations in the interpretation of a text of the Qur'an, or Tradition, or in deciding upon the authenticity of the later, and they formulated theories and principles of general applicability relating to interpretation and deductions. It is by the authority of these jurists that consensus of opinion, analogy, juristic preference, public good, custom and istidlal have been established as sources of law(11).

3. Mujtahidu'l-Madhhab.

Then there may be a jurist of a lower rank, namely, Mujtahidu'l-Madhhab that is, a jurist following a particular School of law. Mujtahidun fi'l-Madhhab jurists having authority to expound the law according to a particular School. They were the disciples of jurists- consultants of the first rank ; of these Abu Yusuf, Muhammad Zufar, Hasan ibn Ziyad are among the most prominent in the Hanafi School ; Nawawi, Ibnu's-Salah and Suyiiti in the Shafi'f ; Ibn 'Abdu'l-Barr and Abu Bakr Ibnu'l-'Arabi in the Maliki School. These Mujtahids followed the fundamental principles laid down by their respective masters, for instance, that a rule of law sanctioned by consensus of opinion is of absolutely binding authority or that a deduction of analogy cannot be opposed to a text of the Qur'an or Hadith. They did not, however, consider themselves bound to follow the masters in the application of general principles or in the arguments in particular cases, and they often profounded the views opposed to those of their masters. Such a jurist must be able to apply the principles laid down by the founder of his School to particular cases. These jurists are with a narrower sphere of exposition also called as Mujtahidunu'l-Futiya, that is, those who are competent to give fatwa or, in other words, to decide as to which of the conflicting views reported from the jurists of a higher rank is correct. But they will not blindly follow the opinion of jurists rather will accept the opinion of any jurist with logic and reasoning by shariah (12).

4. Mujtahidun fi'l-Masai'l .

Who were competent to expound the law on particular questions, which had not been settled by jurists of the first, second and third

ranks, however were not competent to oppose them on any matter of principle. But on fresh points and in cases which had not been clearly dealt with by a higher authority, a jurist of this rank was at liberty to lay down the law in conformity to the principles of his school. Among these include Khassaf, Tahawf, Sarakhsi, Karkhi, Bazdawi, Halwani and Qadi Khan attained this position. This rank of Mujtahid is lowest rank accepted in Hanafi School of law and then mujtahid is required to follow the opinion of any one of the experts of his school of thought on the basis of logic or reasoning (13). The Shafi'is and the Malikis also hold that there may be men whose qualifications as a Mujtahid are confined to certain special branches of the law such as the law of succession and inheritance but in all the four Sunni Schools, the jurists who lived after the age of the four Imams mostly, if not all, have mainly occupied themselves in developing the work of the founders of the four Schools, especially the Hanafi, the Shafi'i and the Maliki Schools. The division of their position is as followed in four categories.

- The first division includes those scholars occupied with the knowledge of portraying inferences and conclusions of Islamic laws called as Ashabu't-takhrij. These scholars used to lay down the interpretations given by the fundamental authorities includes Quran and sunnah. They also explain what had been left by previous jurists. Among them include Abu Bakru'r-Razi.
- Ashabu't-tarjih or those who were competent to discriminate between two conflicting opinions held by jurists of a higher rank and to pronounce that, 'this is better', 'this is most correct', 'this is agreeable to people', and so on. Qadurf and the author of 'Hedaya' have been assigned a place in this rank (14)
- Ashabu't-tashih or those who have authority to say whether a particular version of the law is strong or weak, namely, whether it is a manifest or rare version of the views of the Mujtahids of his School. There is a presumption in their favour that they do not embody in their books rejected or weak reports of the law. The great jurist Sadru'sh-Shari'at who was rightly called Abu Hanifa the second and the author of 'Al-Mukhtar' (not Durru'l-Mukhtar) and

according to some the author of 'Kanz' are given a place in this rank(15). In this context it is necessary to discuss the exact scope of the doctrine regarding Taqlid.

Meaning of Taqlid:By literal meaning word Taqlid is defined as a practice to follow others opinion blindly or without any knowledge .By Islamic terminology Taqlid is to follow the opinion of jurist if not explained by Quran ,sunnah and Ijma of companion of prophet Muhammad (SAW).In such cases the opinion of five jurists of five school of thought must be followed (17). It will be apparent from the definition of Taqlid that the doctrine applies only in the case of those who do not possess the qualifications of a jurist. In fact, if a jurist has formed an opinion of his own on a particular question it is forbidden (haram) to him to follow in preference the opinion of another jurist to the contrary. And even if a man who does not possess the qualifications of a jurist but is learned in the law ('Alim) holds a certain view on a particular question he ought to act upon it though the contrary view may have been sanctioned by a jurist(18).

Is ijtiḥād allowed for a layman ?

Ijtiḥād can only be done by the jurists qualified for conditions of Ijtiḥād. What should a lay man do if he does not find clear instructions in Quran and Hadith regarding any issue of life? So far as a layman ('Ami), that is one who has not made a study of law and religion is concerned, his duty is to follow the guidance of the learned, and it will be sufficient to absolve his conscience, if he consults and acts upon the opinion of the man most noted for his religious learning that may be available to him and, according to the Malikis and the Shafi'is and the earlier Hanafi jurists, even if the person whom, he consults happens to belong to a School of theology other than his own.(19) The proposition in its general aspect would seem to be selfevident, once it is granted that a juristic deduction has the force of law.

Is the Door of Ijtiḥād closed after Jurists of five schools of thoughts?

The really important question is, is there any law in the legislation or in the Sunni doctrines which precludes the status of recognition of any jurists, other than the ancient jurist to modern doctors. The answer to that must be decidedly in the lawyers negative. The Hanbalis go further and hold that there can be no age in which

there should not be a Mujtahid, though the other Sunni Schools do not deny such possibility(20). Imam Ghazali raises the question whether it is permissible to follow the opinion of a jurist who is dead, but no one who can claim any authority as a jurist has said that the law denies to a modern lawyer, although possessing the necessary qualifications, the authority of a jurist(21). There are no doubt some men who think that the age of independent juristic thought has come to an end, and some seem to have gone so far as to hold that there can be no further exposition and development of the doctrines even of a particular School. If the age of Ijtihad had come to an end with the four Imams, their disciples, and those that immediately followed them, one would have expected to find some mention of such an important doctrine in the books on Usul which is the science that deals, as we know, with the sources of law. On the other hand the question is how far it is current to follow the individual opinions of the Companions of the Prophet (SAW), and they decide that even their opinions stand on no better footing than those of other jurists. In this the Sunni jurists generally agree. It cannot then be suggested for a moment that the opinions of the founders of the different Schools should have a higher authority than those of the Companions and, if it were so, the writers on Usul would have been expected to mention such opinions as a distinct source of laws(22). But all this is mere fancy, and they cannot support it by argument and no reliance can be placed on their words. To them applies the saying of the Prophet(SAW): ' they pass opinions without knowledge and not only they themselves go wrong but lead others astray '. Their dictum (namely, that there can be no longer a Mujtahid of the first or even of the third degree amounts to an assertion with reference to one of the five things hidden in the womb of futurity, of which no one can have knowledge, except God. (23). Those who do not go so far, hold that, though it is not impossible that there should be Mujtahids in these days, it is highly improbable that there should be one. But the qualifications required of a Mujtahid would seem to be extremely moderate, and there can be no warrant for supposing that men of the present day are unfitted to acquire such qualifications. It has been seen that the law regarding Ijma' contemplates the possibility of there being jurists in every age, and similarly the elaborate discussion of the rules relating to analogy,

which is to be found in the books on Usul, proceeds on the assumption that it is a living source of law. It is not pretended that there is anything in the Qur'anic or traditional texts which countenances the above impression. On the other hand, the very Qur'anic text, which is the principal authority for juristic deductions, namely, 'And return the matters towards Allah and His Prophet (Muhammad S.A.W) and those who have knowledge (24)'. Another verse of Quran supports that there must be a group of believers who have understanding in Deen (25). These proofs of Quran contemplate the existence of learned men at all times. Nor can it be said that there is anything in support of the conception in the writings of men who according to those that believe in Taqlid in its extreme form belonged to one of the recognized ranks of jurists.

It is, therefore, difficult to understand how men who do not claim to be jurists themselves could lay down a doctrine the effect of which if rigidly interpreted would be to seal up, as it were, the two most important sources of the law, namely, Ijma' and juristic deduction. And as the possibility of further revelation is denied, the result of this would be to reduce things to an impasse.

It may also be observed that, considering the number of sects holding all shades of possible and impossible opinions, which arose during that period and subsequently disappeared, it is not to be wondered at that the Muslims, having deliberately made their choice out of such a variety of doctrines and their teachers feel at the present day that the last word has been said on the main principles of interpretation of their religion. It may further be justly said that within the limits of the four Schools there is ample scope for expansion and development of the law.

As regards the second question, it would appear that the more bigoted spirits among the Sunnis, Muqallids and Ghairu Muqallids especially among the Hanafis, require that a Muslim, if he is not to be regarded as outside the pale of Sunni orthodoxy, should attach himself to one or other of the four Schools. Such men have placed themselves in violent opposition to a number of men amongst the Sunnis, the followers of Imam Abu Hanifa, and to whom they therefore, describe by the name of Ghairu Muqallids, or 'men who do not follow' distinguishing themselves as Muqallids, or 'those who follow.'

There is another group called Ghairu Muqallids or Ahlu-l- Hadith do not follow any traditions of five jurists rather prefer to adopt direct instructions of Quran and sunnah of prophet Muhammad (SAW)(26) Ijma of companions of prophet Muhammad (SAW) (27) as the genuine sources of law. This group is somehow inclined toward the Hanbali school of thought, but they would not deduce in favor of any of the four teachers or of any other jurists, however distinguished to accept the opinion of any one of the four jurists in accordance with a proper interpretation of the Qur'anic or authentic traditionary texts; nor would they reject a tradition as of doubtful authority because one of the four Imams did not chose to rely upon it. They do not deny that the opinions of the Imams and the jurists of the orthodox Schools are entitled to respect, and often speak of Ijma' as an authority, but on particular questions they consider themselves entitled to hold a view in opposition to one on which all the four Sunni Schools have agreed(28).

No doubt the four teachers had each his own followers and these men, as time progressed, devoted themselves more and more to the task of developing the particular doctrines of their respective masters until we arrive at the age of the writers on Usul, when the labors of these jurists who devoted themselves to the separate systematization of the principles laid down by the early teachers must have accelerated the tendency to form into distinct Schools. But even in their time the question of difference of opinion among the masters was regarded as a matter for discussion and controversy.

Rules for accepting Ijtihad in cases of difference of Opinion:

When jurists of the first and the second degree have not expressed any view on a particular question but the jurists of the third degree have expressed an opinion, such opinion should be accepted. And if they differ in opinion, the majority should be followed. In cases in which the jurists even of the third degree have expressed no opinion, the Mufti is to form his opinion according to the best of his judgment. Certain doctors of the fourth, fifth and sixth grade indicate their preference or the adoption by the lawyers of which doctors a particular view of the law by certain phrases of ' which the following are the most common : On this fatwa is given . On this is reliance based the opinions practice ',This is the practice of the people considered correct or most correct and apparent, most

likely, stronger in reason and accepted. Some of the mentioned expressions are stronger and more emphatic than the others. Fatwa ' is stronger than ' Correct ', ' Most correct ', ' most likely ' ; and ' On this is fatwa ' are more emphatic than ' On this fatwa is given ' ; and ' this is most correct ' is stronger than ' this is correct '. The author of ' Raddu'l-Muhtar ' points out that sometimes a particular view is stated to be correct or most correct, but fatwa is based on an opposite view, because it is found to be more agreeable to the people and more in accordance with their habits of life. Hence he says the expressions ' We hold by this ', ' On this is the practice ', and ' On this is the practice of the Muslims ', are as emphatic, as if the jurist had said ' On this is the fatwa '. The expression ' on this is the practice of Muslims ' indicates Ijma' or consensus of opinion. (29) But if there are two different versions of the law and some authoritative jurists have pronounced one of them to be ' correct ' and the others, the other version, fatwa may be based on either view. (30) If a certain view of the law is expressed to be in accordance with analogy and the opposite view is in accordance with isistsihsan or juristic equity, the latter is to be accepted, because it is of the very essence of a valid juridical preference that it overrides a rule of analogy. If a rule of law is stated to be in accordance with zahiru'r-riwayat, or manifest report, it should be accepted because it means that this is what the founder of the School and his disciples have laid down.

Of the law books some are mutun or textbooks in which the law is concisely but authoritatively laid down, such as ' Quduri ', ' Hedaya ', ' Kanz ' and ' Viqaya ' ; some are commentaries (Shuruh), such as ' Fathu'l-Qadir ', ' Bahru'r-Ka'iq ' and the like ; some are glosses or annotations on the commentaries such as ' Kaddu'l-Muhtar ' and some are Fatawa or collections of juristic opinions such as ' Fatawa Qadi Khan ' and ' Fatawa 'Alarngirf '. Textbooks supplemented by the commentaries and glosses are more to be relied upon than Fatawa, because the law is systematically discussed and explained in the former, while the latter generally speaking are merely a collection of opinions.

Findings:

Further, though the theory of Taqlid may at first sight appear to be narrow and rigid, the rules which have been formulated in this regard if properly understood would seem to contemplate the result

.The lawyers who gave legal tender to the doctrine, in fact, categorically lay down that on questions which have not been clearly marked upon by Mujtahids of the first three degrees especially the first and the second the Mufti and the Qadi in applying the law must have regard to the change in the circumstances of society, indeed is in accordance with the vital principles of the system. If this be kept in mind along with the fact that the questions on which Abu Hanifa and his disciples agree are but few, and that they or the later jurists of recognized authority the last of whom lived in the fourteenth century, could not have anticipated most of the questions which now a day arise under different combinations of circumstances, and that the doctors who devoted themselves to the task of collecting and searching command of the ancient jurists disagree among themselves as to which of the various conflicting versions of their views is correct, the doctrine of Taqlid should not stand in the way of substantial justice or of the progress of laws in accordance with the requirements of an advanced society. It can be truly said that the Islamic legal system has been stationary since the days of Abu Hanifa and his disciples or even of Qadi Khan, the author of ' Hedaya ' and ' Sadru'sh-Shari'at.' For instance, the modern Hanafi lawyers have recognized the validity of rules for the limitation of suits though, according to the strict theory of Hanifa law, the court cannot refuse to entertain a suit for the enforcement of rights merely on the ground of lapse of time. Similarly the modern Sunni lawyers have sanctioned forms of punishment in accordance with the ideas of the present day by application of the principle of ta'zir

Conclusion: Ijtihad is the essence of Islam and ability of personal reasoning (ijtihad) is a magnificent favor of Allah. The exercising of this faculty is a virtue which brings ten times the reward from Almighty Allah when it is done correctly. Even if someone is mistaken in his ijtihad, he still would receive one reward. All evil in the Muslim world today is due to a lack of Ijtihad or people clinging on to previous ijithad a phenomena also known as Taqlid. When ijtihad is done by learned scholars to change the law than in that case they must give their proofs to whoever might demand of them. Ijtihad is a process by which a scholar armed with the knowledge of the Quran and the knowledge of the critical

interpretations of the past in tandem with human reason strives to resolve matters pertaining to the present and the future. The process based upon taqlid that is in practice today is to rely upon the previous interpretations which the four schools of thought ever so lovingly inform the common masses for implementation in their lives. Such an approach creates much confusion in our lives as the law and logic are miles apart.

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