Sources of Normative Islamic Law

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Abstract

Islamic law is derived from revelation, either in the form of the Qur'ān or the Sunnah. Despite differences in details of interpretations, Qur'ān and Sunnah are the primary sources of Islamic Law. Other sources of normative Islamic law include sources of normative judgments, such as customs, maṣlaha, as well as other judicial procedures like reasoning by analogy, consensus and ijtihād. A legal system is subject to serious questions posed by social change and customs. These newly emerging issues should be examined in the light of Sharī'ah along with its consequences in the conditions of its time and people. If it cannot be generalized, specific opinion should be given, as that would be more in conformity with the welfare of people, legal as well as rational. The determination of normative sources of Islamic law gives an understanding about the dynamism, practicability and adaptability in new circumstances, thus showing the flexible and pragmatic nature of Islamic law. With the increases in magnitude of social change, the jurists searched for principles within Islamic legal system that could bridge the gap between changing conditions and Divine laws without affecting the essence of Divine rulings. Islamic legal system use this interpretive strategy in order to extend the law to new situations that are not explicitly covered in Divine rulings, thus adapting the laws to changed circumstances.

Islamic Law has been diverse in its approach to provide guidance in all issues of life for following the way of Allah in daily affairs. It has regulations for individual as well as collective matters ranging from religious to public affairs.

Islamic Law provides direction to an individual to objective behavior, for mutual relationships and also on national and international matters of disagreement. Thus Islamic Law serves as a medium to resolve all civil, criminal and international matters.

Islamic Law draws its fundamental principles from basic sources of Quran and Sunnah. The four sources of Islamic Law are Qur'ān, *Sunnah*, *Ijmā'* and *Qiyās*. The fundamental elements are the Qur'ān

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and the Sunnah, i.e. the teachings of the Prophet Mohammad (ﷺ). Qur'ān contains the basic codes and the Sunnah is the explanation of Qur'ān in explicitly defining all the concepts regarding everyday life affairs.

Ijmā' is the third source of Islamic Law. It is based on the consensus of the jurists on a particular issue, about which there is no explicit rule present in Qur'ān and Sunnah. The *Ijmā'* of the jurists can be used for solving the new social problems and crimes in a modern society.[1] The concepts of *Ijmā'* can be applied in a much innovative manner by the judges, as it is based on their discretionary powers.

Qiyās is the methodology of Islamic Law in which the legal precedent is used, when there is no rule present in Qur'ān, Sunnah or *Ijmā'*, to decide a case law. A broad legal construct can be materialized for solving an issue. For example, cyber crimes or data theft can be related to the rulings in Islamic Law about theft in general, and then it is generalized on the basis of reason to apply it to a new law.[2] This is *Qiyās*.

The fifth element of Islamic Law consists of secondary body of sources termed as secondary laws that are used in civil and common law procedures by finding out a logic or reason that might be a norm or custom, for any current case to decide the issue before law.

Secondary sources and principles such as *maṣlaḥa, istiḥsān, istidlāl, 'urf, 'āda*, were also recognized later. Gradually however, 'four sources theory' came to dominate and other theories adjusted themselves accordingly. The four sources came to be recognized as primary while others were designated as secondary or supplementary. The validity of a source depends on its conformity with the texts (naṣṣ), (i.e. Qur'ān and Sunnah). If a source is not supported by the text or is contrary, it is not authoritative.[3]

1.1 Dynamics of Change in Islamic Law:

Any legal system is subject to serious questions posed by social change and customs. The legal experts have to deal with a wide range of questions while coping with a legal system that has a limited material foundation, not adaptable to the changing environment. A legal system that has its basis in constitution is prone to adapt to social changes by making amendments or making new laws, while a legal system that has a Divine basis, like Islamic Law, the source of legislation, i.e.

revelation of Quran has ended and the demise of Holy Prophet (ﷺ) closed the door of enlarging or changing the material sources. With the increases in magnitude of social change, that was influencing all fields of life, there was a quest for searching out a principle within Islamic legal system that could bridge the gap between changing conditions and

Divine laws without affecting the essence of Divine rulings.

Interpreting the law is a very useful technique in most of legal systems, in order to apply laws to new situations that are not directly covered by the text, thus the rule of law is either adapted to new circumstances or put aside being the exceptional cases in other legal systems. Islamic legal system use this interpretive strategy in order to extend the law to new situations that are not explicitly covered in Divine rulings, thus adapting the laws to changed circumstances.

While extending any law by using interpretive technique, jurists have to affirm to the divine will and assure that new ruling is not harming the essence of Divine law. This legal certainty can be achieved by ascertain the procedure to be logical, sound and have a very limited chance of subjectivity and arbitrariness. Secondly, the extended rule should accord with the philosophy of law and closer to Divine implications. This affirmation of any extended ruling in conformity with Divine law is also necessary as following that rule is affecting not only a believer's worldly life, but also life in the Hereafter.[4]

The normative shift in dimension of legal change in Islamic Law is also reflected in inseparable construct of two mediums, i.e. *Ift* ' and *Ijtih d*. In Islamic law *fatw* still remains the primary medium of extending *Ijtih d* towards the society. It creates and extends new legal norms to the level of law that works in a particular social construct.[5]

1.2 Development of Custom as a normative source of Islamic Law:
A legal system has got flexibility and adaptability to adjust to work in changing situations, issues emerging due to ongoing progress. Accordingly, law not only influence and shape society, but it is itself influenced and adapted by social changes too. Thus *fiqh* is defined as a science that has changed and adapted with the change of circumstances, without end or interruption.[6]

Social customs, economic and other practices act as an impelling force either to incorporate these customary practices into the legal framework urge normative systems or to discard them. According to Anwar Zahid and Rohimi Shapiee (2010) "the Islamic Arabic term for custom is *'urf* (originating from *'arafa*), which literally means something that is known.[7] In Islamic law in general this term is used to mean general practices of people, which are not in conflict with *Shar* 'ah. It took a long while for it to have a legal source status in Islam. The pre-classical period (until 9th century) did not admit custom (*'urf*) as a formal source of law." [8]

Almost every legal system finds it necessary to deal with customs extraneous to its normative framework, whether antiquated customs that predate the development of the system itself or new customs that

emerges after its consolidation. Islamic law technically calls custom, as *'urf* or *'⅂da,* which was not considered a source of law in its formative period.[9]

Custom reflects human behavior; custom plays a vital role in almost every legal system as a source for the development, secondly the practice of the Muslim community was a prevailing factor in shaping legal norms and plays a role to the development of Islamic law.[10] Custom, having its roots in the Quran and *Sunnah* of the Prophet, has to fulfil some conditions to become a law. According to ⅂ub⊦i Ma⊦mas⅂ni those conditions are acceptability, frequency, prevalence, subordination to written stipulation, compatibility with *shar⅃'ah*.[11]

With the passage of time, the status of custom as a source of law in Islamic Law was debated, as the acceptability, prevalence and practice of these customs stressed on recognizing it as a formal source of law and this trend succeeded in the late post-classical era. ⌐anafi school of thought accepts it as an independent source; Ibn Nujaym emphasized that frequent appeal to custom had made it an independent legal source.[12]

The development of custom as a normative source of Islamic law may be summarized as follows:

1. Initially customs were incorporated in Sunnah and some jurists regard customs as *Ijm⅂'* because of not clearly identifying between the two of them, during pre-classical and classical periods.
2. A transitional phase, perhaps concurrent in part with the first stage, during which traces may be detected in the doctrinal law books.
3. In the classical period customs were interpreted as a material source and were judged in the light of other sources like *isti⊦s⅂n*, thus it was not an independent source, rather dependent on other sources.
4. Al-Sarkhasi's work, in eleventh century showed a tendency to give custom the force of a written stipulation. This was approved by the fact that a law based on customs is equivalent to something dictated by a written t e x t - a principle found in classical literature. Hanafi jurists also adopted customs as part of the *Fiqh* literature and incorporated them smoothly.
5. In the post-classical period, all the legal rulings relating to custom were collected thus recognizing custom as a formal source of law. The trend continues and now it has been an established normative source of Islamic Law.[13]

1.3 Development of Ma⅄la⊦a as a normative source of Islamic Law:

Jurists have faced the challenge of adapting to legal changes without

abandonment of divine origin of Islamic Law. They have to make out for a balance between reason and revelation for this purpose. A certain amount of human reasoning is needed to extend and adapt the revealed law to changed circumstances and to retain its relevance to Islamic Society. One successful approach is the concept of *maṣlaḥa*. *Maṣlaḥa* literally means a cause or source of something good and beneficial; in English it is frequently translated as 'public interest' although it is much closer in meaning to well-being, welfare and social weal. *Maṣlaḥa* in its rational sense means a cause, a means, an occasion, or a goal which is good. The sentence *fil-amri maṣlaḥa* is used to say: "in the affair there is that which is good [or the cause of good]."[14] *Istiṣlāḥ*, the tenth form, means to seek *maṣlaḥa*. The concept of *maṣlaḥa* is the embodiment of the spirit of Islamic law that can be used as a vehicle for legal change.

In the development of Islamic legal traditions, *'urf* and *ʿāda* (custom) and local traditions of the understanding of Qurʾān and Sunnah serve as a source for courts. *Maṣlaḥa* is the fundamental principle underlying all rulings in the Quran and Hadith. It may not be explicitly supported by a text but the overall meaning of the textual rulings support it proving it to be a universal and reliable principle than a principle of deductive reasoning.[15] According to al-Shāṭibi, the welfare and betterment of people is the prime objective of the Lawgiver. The obligation in *Sharīʿah* concerns the protection of the *maqāṣid* of the *Sharīʿah* which in turn aims to protect the *maṣālih* of the people. Thus *maqāṣid* and *maṣlaḥa* become interchangeable in reference to obligation.[16]

The degree, to which a jurist employs formal or substantive legal rationality in deciding legal matters, by use of *maṣlaḥa* to bring about change, determines the role of reason and revelation in interpreting the law.[17] The relation between law and the human intellect demonstrated by the interpretations of *maṣlaḥa* shows that Islamic Law was capable of functioning in a modern state. Ignaz Goldziher maintained that *Istiṣlāḥ* depends upon an objective method and removes the rigidity of law in consideration of general human interest (*maṣlaḥa*).[18]

Jurists found *maṣlaḥa* as a means to deal with newly emerging issues because of scientific, social, and political developments. Some emphasizes on changing the methodology of Islamic law to achieve the desired extendibility and adaptability while others apply different interpretive strategies, enlarging the scope of the texts to extend and adapt Islamic Law to the newly burn needs. Thus different interpretations of *maṣlaḥa* show that it has many facets and may be used for different purposes in shaping the legal sphere.

1.4 Development of Ijtihād as a normative source of Islamic Law:

Ijtihād is an Arabic word, which literally means "strive" to exert, or struggle". While in the terminology of *Sharī'ah*, it means to deduce *a ḥkām* in matters of law, for the situations that have no explicit rule determined by *Ijmā'* (consensus by jurists).[19] *Ijtihād* is also termed as rethinking, or independent reasoning.[20] *Taqlid* is the term used for opposite of *Ijtihād*, that means, to accept the opinion or rule regarding a situation without having acquaintance of its basis. *Ijtihād* has been variously defined by scholars; Edward Sell describes *Ijtihād* as "the attaining to certain degree of authority in searching into the principles of jurisprudence".[21] The technical implications signify the thorough struggle of jurists to find the solution of a juristic issue for betterment of Muslim community.[22]

In the first century Hijra, the legal system had not been developed completely and systemized to integrate the variety of social, customary and juristic norms in the fold of law. In formative period, *ijtihād* was considered as a means to give opinion *ra'y* in the capacity of Law and was linked therewith. Ijtihad was separated and given an identity of independent methodology by Muhammad bin Idrīs al-Shāfi'i (d.812).[23] Till eighth century *Ijtihād* was presumed to be an effort to review the issue by way judgment. In technical or legal terminology, *Ijtihād* was limited to the dominion of likelihood. When the rule is clear and without any ambiguity in the sacred text, or the issue on which there had been consensus of jurists is also not the dominion of *Ijtihād* as *Ijtihād* is meant to render the judgments of such that are not focus of juristic interpretation.[24]

1.5 Development of *Ijmā'* as a normative source of Islamic Law:

Ijmā' or consensus is the fourth source of Islamic law. *Ijmā'* is a verbal noun that means, to decide upon. It also means that people reach on a unanimous agreement. The second meaning of *Ijmā'* often subsumes the first, in that whenever there is a unanimous agreement on something, there is also a decision on that matter.[25] The two fundamental sources of Islamic jurisprudence are Qur'ān and Sunnah while the secondary sources are *Ijmā'* and *Qiyās*. Classical Muslim methodology (*uṣūl*) submits to the primary textual sources and methods for finding solutions to everyday problems. The secondary sources include *Ijtihād* which is the use of human reason or *'aql* in elucidation and interpretation of the *Sharī'ah* and the *Qiyās* (analogy).[26] According to Imām Shāfi'i, a specific matter cannot be decided unless based on certain legal knowledge of the Qur'ān and the Sunnah, or derived from *Ijmā'* (consensus) and *Qiyās*.[27]

Ijmā ' manifested itself as a binding force of the community against divergent opinions, and served as a key to socio-religious unity. It developed as a result of complex discourse of jurists for being an effective tool to standardize the religious doctrines. The rejection of *Ijmā* ' is sometimes deemed as tantamount to unbelief.[28] *Ijmā* ' is basically a rational and binding proof.[29]

Several methodologies of *fiqh* played a crucial role in the development of *Sharī* 'ah, and from dogmas to norms to codes, *Ijmā* ' served as an important instrument of conservatism preserving the heritage of the past. The organization of *fiqh* is the consequence of a long process of *Ijtihā d* and *Ijmā* '.[30] *Ijmā* ' enhances the authority of rules that are of speculative origin as they become definitive and binding, once they got a decision of *Ijmā* ' in their favor.

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custom; and a similarly entitled work by Abu al-Faⱶl al-Suyⱶⱶi al-Khudayri (d. 911/1505), Al-Ashbⱶh wa'l-Naⱶⱶ'ir fi Qawⱶ`id wa-Furⱶ' al-Shⱶfi`iyya (Cairo, 1242/1826)

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