LEGISLATION IN ISLAM: METHODOLOGICAL AND CONCEPTUAL FOUNDATIONS

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Abstract

The foundations of Islamic legislation has continuously progressed in an evolutionary fashion. Contrary to the Western experience during the renaissance where legislation based on revelation was differentiated from legislation founded on individual views and interests, these two contrasting sources of legislation progressed in parallel and complementary to one another. The structure of Islamic law is divisible into two parts. First, The Holy Qoran and the Traditions of the Prophet that are collectively considered as the primary sources of legislation in Islam. Second, legislation based on arising discussions and theories of contemporary nature. A second source of legislation in Islam refers to consensus, deduction (according to Sunni interpretation and rationality according to Shia interpretation). A reliable reference to these sources of legislation is also inferred from the first primary source. As a result, the ultimate source of legislation in Islam is The Qoran and the Tradition of the Prophet of Islam. What truly legitimates teh methodological and conceptual foundations legislation in Islam is a vivid and direct inference from The Qoran and the Tradition of Prophet. After teh passing away of the Prophet of Islam (pbuh), the relationship between Islamic law and issues requiring legislation based on qualified interpretations and jurisprudence advanced and progressed on the basis of The Qoran and the Tradition as issues arose. As developments intensified, two other sources of legislation gradually gained validity. First, interpretations and religious decrees of Islamic scholars. Second, consultative bodies and views expressed on specializations. These two new sources provided dynamism and diversity to Islamic legislation. In this respect, Islamic scholars for the most part deal with issues such as marriage, divorce, ownership and other Islamic contracts. In contrast, consultative bodies based on specialized vviews and public desires in the context of overall Islamic laws deal with complex issues such as environment, pricing and educational system.

Prior to the advent of Islam, the unit of society was the tribe, the group of blood relatives who claimed descent from a common ancestor. It was to the tribe as a whole, not merely to its nominal

leader, that the individual owed allegiance, and it was from the tribe as a whole that he obtained the protection of his interests. The exile, or any person hapless enough to find himself outside the sphere of this collective responsibility and security, was an outlaw in the fullest sense of the term, his prospects of survival remote unless he succeeded in gaining admittance into a tribal group by a species of adoption or affiliation (Williams, 1904, pp. 284-293). To the tribe as a whole belonged the power to determine standards by which its members should live. But here the tribe is conceived not merely as the group of its present representatives but as a historical entity embracing past, present, and future generations. And this notion, of course, is the basis of the recognition of a customary law (Williams, 1904). The tribe was bound by the body of unwritten rules which had evolved along with the historical growth of the tribe itself as the manifestation of its spirit and character. Neither the tribal Sheikh nor any representative assembly had legislative power to interfere with this system (Ernest, 1952) . Modifications of the law, which naturally occurred with the passage of time, may have been initiated by individuals but their real source lay in the will of the whole community, for they could not form part of the tribal law unless and until they were generally accepted as such (Torrey, 1892). In the absence of any legislative authority it is not surprising that there did not exist any official organization for the administration of the law. Enforcement of the law was generally the responsibility of the private individual who had suffered injury (James, 1965). Tribal pride usually demanded that intertribal disputes be settled by force of arms, while within the tribe recourse would usually be to arbitration. But again this function was not exercised by appointed officials. A suitable ad hoc arbitrator was chosen by the parties to the dispute. The sole basis of law lay in its recognition as established customary practice (Schacht, 1986, p. 6).

It was in these circumstances that Islam emerged and the will of God as transmitted to the community by his Prophet Muhammad (S.A.W.) in the *Quranic* revelations came to supersede tribal customs in various respects. The injunctions revealed were all based on the necessities and good of the human nature created by God, as the *Quran* specifies:

"*Then set your face upright for religion in the right state __ the nature made by Allah in which He has made men; there is no altering of Allah's creation; that is the right religion, but most people do not know__ .*" (Rum, 30).

The *Quran* is also introduced as a book revealed by the Creator for the purpose of establishing equality among the human beings:

"*Certainly We sent Our apostles with clear arguments, and sent down with them the Book and the balance that men may conduct themselves with equity.*" (Hadid, 25).

In order to emphasize that the rules already in practice are not to be followed any longer and new laws are to be complied with, the *Quran* says:

"*And whoever did not judge by what Allah revealed, those are they that are the transgressors. You should judge between them by what Allah has revealed, and do not follow their low desires, and be cautious of them, lest they seduce you from part of what Allah has revealed to you.*" (Ana'm, 150).

The *Quran* specifies that its purpose is to introduce and establish new laws that should be followed:

"*We made for you a law, so follow it and not the fancies of those who have no knowledge.*" (Jathieh, 18).

Inevitably, therefore, the revealed law plays a crucial role in Muslim thinking. In this *Quranic* command lies the supreme innovation introduced by Islam into the social structure of society: the establishment of a novel authority possessing legislative power.

To Muslims, the *Quran,* being the very word of God, is the authority wherefrom emanates the very conception of legality and every legal obligation. Among the Muslims, there is no doubt that the only main lawgiver is God. Every other legislating

authority must base its legitimacy on revelation. The *Quran* repeatedly stresses it with an increasing emphasis:

"*The command is for none but God: He has commanded that you obey none but Him: that is the right path*" (Yusof, 40).

"*Follow the revelation given unto you from your Lord, and follow not, as guardians or protectors other than Him*" (Aara'f, 3).

Islamic scholars have long discussed the issue whether even the Prophet has the right to legislate or not. Some scholars are convinced that in legislating, the Prophet is only a messenger (Maududi, 1978, p. 9). They base their argument on the *Quranic* verse saying:

I am only a mortal like you, it is revealed to me" (Kahf, 110).

Even the time of revealing a specific injunction was set by God and the Prophet communicated the revelations at appropriate time set by God. The *Quran* says to the Prophet:

"*Do not make haste with the Quran before its revelation is made complete to you*" (Taha, 114).

Other scholars argue that the Prophet had the authority to legislate, referring to the *Quranic* verse saying:

"*Whoever obeys the Apostle, he indeed obeys Allah*" (Nesa, 80).

They also refer to the lifetime of the Prophet, when the Muslims obeyed the Prophet's, decrees uncritically. However, even this group of scholars admit that the legitimacy of the Prophet emanates from the will of God. They refer to the revelation saying :

"*Whatever the apostle gives you, accept it, and from whatever he forbids you, keep back*" (Hashr, 7).

The study of the injunctions of the *Quran* and the lifetime period of the holy Prophet leads us to the conclusion that the Prophet legislated in two ways. Firstly, he legislated on the basis of the revelations and thus his role as a lawgiver was only that of a messenger. This is stressed by the *Quranic* revelation saying:

"*Nor does he speak out of desire. It is naught but revelation that is revealed*" (Najm, 3).

We further read in the *Quran*:

"*O apostle! deliver what has been revealed to you from your lord*" (Maćdeh, 67).

Secondly, he legislated as the leader of the state for the purpose of running the various affairs of the society. This function of legislating can be deduced from the revelation saying:

"*The Prophet has a greater claim on the faithful than they have on themselves*" (Ahzab, 6).

The *Quran* further stresses this point saying:

"*Surely those who swear allegiance to you do but swear allegiance to Allah*" (Fath, 6).

This gives the Prophet the role of a lawgiver as that of a leader. In this context, although the Prophet legislated on the basis of expediency, welfare and prosperity of the society, his legitimacy was still derived from the will of God. Therefore in Islamic legislation, the legitimacy of laws is derived solely from God and the Prophet is ranked as the second main lawgiver after God. For this reason, the *Quran* and the *Sunna (Sharia)* establish the two fundamental pillars on which Islamic legislation rests. The structure of *Sharia* was consummated during the lifetime of the Prophet, in the *Quran* and the *Sunna*. This brings us to the recognition of an important fact which is generally overlooked. It is that the invariable basic rules of Islamic Law are only those prescribed in the *Sharia*.

Important features of legislation in the *Quran* and the *Sunna*

It has to be noted that the *Quran*, being basically a book of religious guidance, is not an easy reference for legal studies. It is more particularly an appeal to faith, human soul and Islamic worldview rather than a classification of legal prescriptions. Some Islamic scholars, however, have classified the *Quranic* legal prescriptions. Regarding family law, they are laid down in 70 injunctions; civil law in another 70; penal law in 30; jurisdiction and procedure in 13; constitutional law in 10; international relations in 25; and economic and financial order in 10 (Khallaf, 1956, pp. 34-35).

Such an enumeration, however, can only be approximate. For our purposes, however, the examination of the nature and features of Islamic legislation is of more importance. Probing the *Quran* and the *Sunna (Sharia)* leads us to the important and fundamental status of the legislation in Islam. The following illustrations can highlight the main features:

1- The *Sharia* has been formulated in a fashion whose application is easy for the Muslims and a Muslim will not have to suffer any hardship or meet any difficulties to implement the Islamic laws. The *Quran* specifies:

"*Allah does not impose upon any soul a duty but to the extent of its ability*" (Baqarah, 286).

The Prophet himself comments on *Sharia* saying:

"*I am the messenger of an easy religion*" (Hanbal).

"*This religion is not strict, thus you also go easy on other fellow human beings*" (Bokhari).

The best example is the regulations about fasting. Fasting which is incumbent on any Muslim can be abrogated for any Muslim who is sick or is travelling. The *Quran* specifies:

"... and whoever is sick or upon a journey, then *(he shall fast)* a *(like) number of other days: Allah desires ease for you, and he does not desire for you difficulty*" (Baqarah, 185).

Another example relates to the Islamic penal law. The Islamic penal law (hodud) is abrogated when there emerges any doubt regarding the conditions enforcing the law. The Prophet specifies:

"*Stop carrying out hodud (Islamic punishment) where there is any doubt or if an excuse can be found*" (Mosa, p. 129).

The Prophet further specifies that:

"*Forgiveness is better than punishment*" (Mosa).

2- They are basically inclined towards establishing general rules without indulging in much detail. As regards civil law, (Al-shatibi) the *Quran says*:

"*O ye who believe! Appropriate not one another's wealth among yourselves in falsehood, except it be as a trade by mutual consent*" (Ra'ad, 29).

This clause postulated in the seventh century[1], the principle of "mutual consent" as being enough to conclude a contract at a time when formalities were abounding in Roman Law. Nallino records that "it is well known that in the Hellenistic environment the purchase-sale is a "real" contract, whereas all the Muslim schools are unanimous in considering it a purely "consensual" contract, and this in neither by a return to the original Roman conception nor because they have always posed the problem of the distinction between "real" and "consensual" trade, but simply on the basis of a passage of the *Quran* (Nesa, 33), where it is ordained that commercial acts *(tijarat)* should take place in virtue of consensual contracts (tarazi: with mutual consent)" (Nallino). Schacht (1955) admits that the principle which this *Quranic* injunction introduced could be considered a complete abnormality in the history of old statutes. The Prophet Says:

"*Muslims have to abide by their conditions except one that makes the unlawful lawful or the lawful unlawful*" (Zarqa, p. 126).

This saying of the Prophet implies the principle of freedom of conditions upon concluding contracts within the public order. As regards criminal law, says the *Quran*:

"*Every soul is held in pledge for its own deeds*" (Moddather, 38).

"*Each soul earns only on its own account, nor does any laden bear another's load*" (Ana'm, 16).

These injunctions state a basic principle in criminal law, namely, the personal responsibility and punishment of the guilty thus suppressing all vicarious responsibility. As regards the constitutional law, The *Quran* says:

"*And those who answer the call of their Lord and establish worship, and whose affairs are decided by counsel among themselves*" (Shura, 3).

One of the attributes of the believers in such injunctions is that their affairs are settled by consultation. This includes the principle of representation in government. With respect to international law, The *Quran* declares:

"*O mankind! We have created you male and female, and have made you nations and tribes that ye may know one another (and be good to one another). The*

noblest of you with God is the best in conduct" (Hojora't, 13).

The injunction states clearly the oneness of mankind, the brotherhood of man, and the international peace which can be achieved only when nations come to know one another, be good to one another, rid themselves of all kinds of inferiority complexes as well as superiority complexes, and recall that the best in the eyes of God is the best in conduct. These are all principles without which no international law can exist (Hamidullah, p. 43).

3- *Sharia* teaches us that human beings all must be treated on the same footing and no privilege is assumed for any Muslim before the law. On this basis, race, nationality, social status. etc. pose no advantage or disadvantage for some Muslims against the others. This equality between the Muslims before *Sharia* is best reflected when Ali who was the Caliph of the Islamic society *(Kufa)* was summoned to the court (Al-Amini, 1987). When Ali appeared in court as the defendant, the judge addressed the plaintiff by his name while addressing Ali by his honorific title (konyeh). Ali stopped the process of judging protesting strongly at being called by his title as it could distort the administration of justice which is one of the main goals of *Sharia*. This equality of Muslims before the Islamic laws is based on the *Quranic* verses saying:

"*.... And He it is who has brought you (Mankind) into being from a single soul*" (Ana'm, 70). "*He it is who created you from a single being and of the same kind did He make his mate*" (Aara'f, 189).

Furthermore, the *Quran* stresses that all human beings enjoy the same honour and respect. It specifies:

"*And surely we have honoured all the children of Adam*" (Esra', 70).

4- *Sharia* deals with actual events. Presupposition was basically excluded from its philosophy of legislation thus differing from other codes of law which legislate upon the presumption and calculation of probabilities. This trend in Islamic Law is deliberate and not a matter of coincidence. The Prophet said:

"*God has enjoined certain enjoinments, so do not abandon them. He has imposed certain limits, so do not transgress them. He has prohibited certain things, so do not fall into them. He has remained silent about many things, out of mercy and delibe-rateness, as He never forgets, so do not ask me about them*" (Ibn al-Qayyim, pp. 11-12).

Again, he instructed his followers to avoid asking his guidance on every issue. Said he:

"*Leave me as long as I remain silent.*" *Too much questioning brought only disaster upon people before you. Only if I forbid your doing anything, then do not do it, and if I order you to do something, then try to do whatever you can of it*" (Ibn al-Qayyim, pp. 71-72).

The Prophet even went so far as to hold blameworthy the one whose undue questioning was responsible for the prohibition of something which had been left unspecified before his question. He said:

"*The worst guilt of a Muslim against Muslims is that of him whose undue question caused the prohibition of what would have been left permitted had he not asked*" (Khallaf, 1956).

In all these sayings, Muhammad was only conveying and stressing the clear command of the *Quran*:

"*O you who believe! do not put questions about things which if declared to you may trouble you, and if you question about them when the Quran is being revealed, they shall be declared to you; Allah pardons this, and Allah is Forgiving, Forbearing. A people before you indeed asked such questions, and then became disbelievers on account of them*" (Ma'edeh, 101).

This *Quranic* text can be translated as "when the *Quran* is being revealed" or "when the *Quran* has been revealed." Thus, we can derive the interpretation that questions are allowed for more elaboration on a general rule which had been revealed, and it could also mean a warning against much asking during the time when the *Quran* was being revealed (Qayyim, p. 72). This method of

legislation, intended to legislate only for actual events and not upon presuppositions, is apt to minimize the definite limitations imposed on human dealings. We may call it a realistic method. The companions of Prophet Muhammad were characterized with this spirit of realism and often refrained from speculation on hypothetical issues. Ibn Ka'b, when once asked for his opinion on such an issue, asked: "Has it happened?" As the answer was "no", he said: "Then leave us at ease until it happens. When it does happen, we shall pass our judgment accordingly" (Qayyim, p. 64). This realistic nature of both the *Quran* and the *Sunna* is dominated by a basic tendency which is not usually associated with the term "religion": the repeatedly declared will of God to make things easier for man. Here are some quotations from the *Quran* which explicitly illustrate this tendency:

"God would not place an embarrassing burden upon you, but He would purify you and would perfect His grace upon you, that you may give thanks" (Ma'edeh, 6). *"God desires for you ease, He desires not hardship for you"* (Baqarah, 186). *"God takes not a soul beyond his capacity"* (Baqarah, 286). *"He has not laid upon you in religion any hardship"* (Hajj, 78).

When we read these injunctions within their proper contexts in the *Quran*, we see that they do not merely state theoretical rules. The first injunction, for example, comes immediately after the one relieving the sick and the traveller from the obligation of fasting until the sick recovers and the traveler returns home. Muhammad was the example of this tendency throughout his Prophetic career. His wife A'ishah said: "Whenever the choice was his, it was always the easier of two things that he chose, unless it would have been a sin; then he was far from it" (Al-Shatibi, p. 343). And he himself said:

"Behold, this religion is ease, and whoever goes against its nature and overdoes it, will be overwhelmed by it. So take the middle path, and approach perfection and be of good cheer".

5- That which is not prohibited is permissible. Islamic Law was not meant to paralyze people so that they might not move unless allowed to. Man, on the contrary, is repeatedly called upon by the *Quran* to consider the whole universe as a Divine grace meant for him, and to exhaust all his means of wisdom and energy to get the best results. Says the *Quran*:

"And God has made of service unto you whatever is in the heavens and whatsoever is in the earth; it is all from Him. So herein verily are portents for a people who reflect" (Jathieh, 13).

This characteristic is further represented in the following *Quranic* injunctions which prohibit certain items of food:

"Say: I do not find in that which has been revealed to me anything forbidden for an eater to eat of except that it be what has died of itself, or blood poured forth, or flesh of swine __ for that surely is unclean __ or that which is a transgression, other than (the name of) Allah having been invoked on it; but whoever is driven to necessity, not desiring nor exceeding the limit, then surely your Lord is Forgiving, Merciful" (Ana'm, 145).

The *Quran* also says:

"He has explained to you that which is forbidden to you, unless you are compelled thereto" (Ana'm, 119).

And again:

"He had made clear unto them what they should guard against" (Towbeh, 115).

On the other hand, the *Quran* blames those who had forbidden to themselves in the name of God what He had not forbidden, and about them it says:

"Then who does greater wrong than he who devises a lie concerning God?" (Ana'm, 144).

Further, the universe is described as an adornment of God meant for the enjoyment of His bondmen; thus, the more religious man is, the more alive and comprehensive his relation with the universe becomes. Says the *Quran*:

"Say (O Muhammad): Who has forbidden the adornment of God which He has brought forth for His bondmen, and the good things of His providing?" (Aara'f, 32).

This injunction is an answer to those who dare to prohibit what God has not prohibited (Ibn Kathir,

p. 211). As Islam discouraged rigorous practices, such as monastic life, it also prohibited questions relating to details on many points which would require this or that practice to be made obligatory, and much was left to individual will or the circumstances of the time and place. The exercise of judgment occupies a very important place in Islam and this gives ample scope to different nations and communities to frame laws for themselves to meet new and changed situations. The hadith shows that the Prophet also discouraged questions on details in which a Muslim could choose a way for himself (Mohammad Ali, p. 271).

6. The implementation of any articles of *Sharia* must not lead to loss or damage to another Muslim. This important feature was deduced from an incident which happened at the lifetime of the Prophet. A man who owned a house went to the Prophet complaining that another Muslim entered his house without permission to pick dates from a palm-tree which the man owned but was located in his house. The holy Prophet told the man who owned the palm-tree to sell his tree to the owner of the house. The man disagreed arguing that he owned the tree and so the right of ownership gave him the right to reach his tree even if it is located in somebody else's property. The man, therefore, continued trespassing on the house. The Holy Prophet, hearing the complaint for the third time, ordered that the tree must be removed or cut down (Ansari, 1982, p. 68). The judgement passed by the Prophet led to an important principle of the Islamic law which is now known as the important feature of not imposing losses or harm on a Muslim through implementing Islamic laws *(Asle-la'-Zarar)*. On this basis, no Muslim is allowed to cause harm to another Muslim arguing that he is implementing the law. In such cases the enforcement of the law must be ceased. This feature is also supported by the *Quranic* verses. When Muslims deal with each other in contracting a debt for a fixed time, the *Quran* advises that a witness should be called in to supervise the procedure; however, it further specifies that no harm should be done to the witness:

"When dealing with each other in contracting a debt, call in a witness and let no harm be done to the witness" (Baqarah, 282).

Another example is provided by the *Quran* when it advises mothers on suckling their babies. The *Quran* advises that although mothers should suckle their children but they are committed only to the extent of their capacity so that no harm can be caused to mothers:

"No soul shall have imposed upon it a duty but to the extent of its capacity, neither shall a mother be made to suffer harm on account of her child" (Baqarah, 233).

Consequently, this main feature of *Sharia* that Islamic laws should not be enforced to the detriment of Muslims is even complied with by *foqaha* today.

7- As regards the prohibitive laws, the *Quran* sometimes uses a method which could gradually meet a growing readiness in the society where the revealed enjoinments are to be implemented (Ibn Khathir, pp. 255-256). A good example is the prohibition of intoxicants. It was gradually prohibited, first with the *Quranic* words:

"They question thee about intoxicants and games of chance. Say: In both is great sin and some utility for men, but the sin of them is greater than their utility" (Baqarah, 219).

There is not, in this text, a definite prohibition of intoxicants. Then were revealed the words of the *Quran*:

"O you who believe! Draw not near unto prayer when ye are drunken, till you know that which you utter" (Nesa, 43).

Prohibition in this clause is only from praying while drunk. Then were revealed the verses:

"O you who believe! Intoxicants and games of chance and sacrificing to stones set up and divining by arrows are only uncleanness, the devil's work; so shun it that you may succeed." "The Satan only desires to cause enmity and hatred to spring in your midst by means of intoxicants and games of chance, and to keep you off from the remembrance of Allah and from

prayer. Will you then desist?" (Maedeh, 90-91).

A probing of these texts reveals that all the *Quranic* texts about intoxicants had been heading towards their prohibition. The first text stresses their evil as against their utility in order to stimulate a moral deterrent. The second text stigmatizes intoxicants as spoiling prayer, and forbids drinkers from praying until they are sober, thus backing the moral deterrent by the inescapable necessity of avoiding drunkenness in order to be able to perform the five obligatory daily prayers at the proper times. In the third text, the *Quran* describes intoxicants as "the devil's work" together with their prohibition. The Muslim society had been gradually prepared for such a prohibition; so well prepared that when the Prophet's messenger announced that the text forbidding intoxicants had been revealed, the Muslims poured forth on the ground all the intoxicants which they had stored. History records that on the very day of its prohibition, wine flowed in the streets of Medina (Al-Bukhari, pp. 20-46). There is not, so far as we know, such a precedent in the history of legislation of a people complying so swiftly with the law especially in the case of the prohibiting of drinking, which was a deep-rooted habit of Arab society, glamoured by its poets and affecting its trade.

These documents have led distinguished scholars to refer to Islamic Law as the main component of Islam. Gibb referring to the concept of the Islamic Movement while considering it to be the main characteristic of the entire Islamic structure states that: "The kind of society that a community builds for itself depends fundamentally upon its belief as to the nature and purpose of the Universe and the place of the human soul within it. This is a familiar enough doctrine and is reiterated from Christian pulpits week after week. But Islam possibly is the only religion which has constantly aimed to build up a society on this principle. The prime instrument of this purpose was law" (Gibb, 86-87). Furthermore, Schacht (1955) also emphasizes that: "Islamic Law is the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself" (p. 28).

The Evolution of Islamic Legislation

It is clear, then, that the two main lawgivers in Islam are God and the Prophet. As long as the Prophet was alive, legal issues were settled by him as the ideal person with the function of interpreting and explaining the provisions of the divine revelation. After the demise of the Prophet, there was no longer such a trusted authority available. Nevertheless, the fact remained that the relationship between law and a people's actual affairs is a permanent and evolutionary one. For this reason and in response to the everchanging requirements of social life, the Prophet set a path to fill this gap. He did this on the basis of the *Quranic* injunction revealed to him:

"*And it does not beseem the believers that they should go forth all together; why should not then a company from every party from among them go forth that they may apply themselves to obtain understanding in religion, and that they may warn their people when they come back to them that they may be cautious?*" (Towbeh, 122).

Furthermore, the *Quran* encourages Muslims to acquire knowledge:

"*Allah will exalt those of you who believe, and those who are given knowledge, in high degrees; and Allah is Aware of what you do*" (Mojadeleh, 11).

The Prophet incessantly urged the Muslims to learn and seek knowledge to the extent that he made it incumbent on every Muslim. The Prophet said:

"*Seeking knowledge is incumbent on every Muslim. Be aware that God likes those who seek knowledge*" (Koleini, 1985, p. 31).

The Prophet further stipulates:

"*The evolution of religion takes place in the light of knowledge*" (Koleini, 1985, p. 39).

That was on the basis of these texts of encouragements that the first steps were taken, even during the lifetime of the Prophet himself, to recognize *fiqh* (Islamic jurisprudence). After the Prophet passed away, it took decades for *fiqh* to be established as a specialized and distinctive branch of

knowledge. Ibn Khaldun defines fiqh as the knowledge of the classification of the laws of God, which concern the actions of all responsible Muslims, as obligatory, forbidden, recommendable, disliked, or permissible. These laws are derived from the *Quran* and the *Sunna*, and from the evidence the lawgiver (Muham-mad) has established for knowledge of the laws. The laws evolved from the whole of this evidence are called "jurisprudence" *(fiqh)* (Ibn Khaldun, 1958, p. 3).

Those who specialized in fiqh were referred to as *foqaha* (Mujtahedin). In the second century, the distinguished Islamic jurists were addressed as Imams. The four great jurists who are recognized as the founders of the main schools of fiqh are Abu Hanifa (the founder of Hanafi school), Malik Bin Anas (the founder of Maliki school), al-Shafi'i (the founder of Shafi'i school) and Ahmad bin Hanbal (the founder of Hanbali school). This reflects the transformation of the ancient schools of law into personal schools, which perpetuated not the living tradition of a city but the doctrine of a master and of his disciples, which was completed about the middle of the third century of the *Hijra*. It was the logical outcome of a process which had started within the ancient schools themselves but was precipitated by the activity of Shafi'i.

As regards the *Shia*, there are twelve infallible Imams who are recognized as the successors of the Prophet (Nettleton, 1979, pp. 97-101). The twelve *Shia* Imams and the four Sunni Imams are ranked the highest authorities as lawgivers after the Prophet. The *Shia* believe that the twelfth impeccable Imam was hidden from the eyes and therefore *foqaha* have been trusted to be the successors of the hidden Imam to perform their duties as lawgivers. On this basis in the *Shia* society, the one who is distinguished among *foqaha* is regarded as Mujtahid *A'alam* (the most knowledgeable) and people regard him as the main lawgiver (Martin, 1987, pp. 47-94). *Mujtahid A'alam* usually has a published reference book everybody refers to as the book of guidance *(Risalah)*. The equivalent rank of *Mujtahid A'alam* in Sunni school is called Mufti A'azam who enjoys the same authorities.

Both the *Shia* and the Sunni hold the view that in every century a great Islamic scholar appears who renovates Islam (Hakimi, 1975, p. 12). Ghazali is the first scholar known to have claimed that he was chosen by God to revive the religion of Islam. Subki also presented Ghazali as the renovator of the sixth/twelfth century who had perfected the science of legal theory, "renewed" the *fiqh* of the Shafi'i school, and molded the science of *khilaf* (legal differences) (Subki, p. 112). There was no doubt in Ghazali's mind that *ijtihad* is attainable through diligent study, intellectual exercise, and immersion in scholarly disputations. He admitted the extinction of independent *mujtahids* who were able to establish their own school of law, but he certainly did not imply the same for those jurists who could lead the community and revive the *Sharia* when this need arose.

To Ghazali, only two kinds of *mujtahids* were known, the independent *(mutlaq)* and the limited *(muqayyad)* (Laoust, 1976, pp. 77-78). The latter's activity remains within the limits of his school. Before the fifth/eleventh century no trace could be found of any attempt to classify *ijtihad* or *mujtahids* into categories of excellence. This does not mean, however, that the concept of excellence had not yet been known, but its systematic application to *mujtahids* occurred only at a later period, perhaps during the fifth/eleventh century[1]. About two centuries later, the number of ranks reached five, the first of which was assumed to be extinct. The second and the third were ranks of *mujtahids* who could perform *ijtihad* on two different levels, the third being more limited in scope (Beg, p. 181-192). The fourth rank included jurists highly proficient in the doctrines of their school and in the evidence upon which these doctrines were based, although they were not fully qualified to practice *ijtihad*. The fifth rank consisted of various kinds of *muqallids*.

By the tenth/sixteenth century, seven ranks of jurists could be discerned (Abidin, 1911, pp. 330-331). The top three remained as they were on

the previous scale of five, that is they were ranks of *mujtahids* of various degrees. But the lower four were in reality a redivision of the lower two on the scale of five (Beg, pp. 206-214). In the sixth/twelfth and seventh/thirteenth centuries, for example, the lowest (fifth) rank of jurists included muqallids who "memorized" the doctrine of the school and understood its details but were incapable of mastering the methodology that their eponym and older teachers applied in order to reach their legal rulings (Nouvi, 1961, pp. 73-74). On the other hand, the tenth/sixteenth century description of the lowest (seventh) rank was entirely different. The increase in the number of ranks of *mujthahids* chiefly contributed to the augmentation of new ranks of *muqallids* that in theory did not exist before, while maintaining at the same time the old ranks of *mujtahids* without change. In a later period, these seven ranks were each applied to a specific group of jurists. The first rank thus was assigned to the fathers of the four schools (Ibn Abidin, p. 11).

In Islamic legal theory, *ijtihad* was reckoned indispensable in legal matters because it was the only means by which Muslims could determine to what degree their acts were acceptable to God. To facilitate the practice of *ijtihad*, minimal legal knowledge was required, and each *mujtahid* who exerted himself to formulate legal decisions was entitled to a heavenly reward irrespective of whether the result of his *ijtihad* was right or wrong. Ijtihad and *mujtahids* were employed in the domain of law and were required in the higher ranks of government[2]. That *ijtihad* constituted the backbone of the Islamic legal doctrine was manifest in the exclusion from the scene of all groups that spurned this legal principle. The controversy about *ijtihad* and the existence of *mujtahids* started, in its primitive form, only in the beginning of the sixth/twelfth century (Hamid, 1981). Throughout the following centuries, differences among jurists, encouraged by ambiguities in legal terminology, made any consensus on the nonexistence of *mujtahids*. Consensus was thwarted by three additional principal factors: First, and most important, is the continual existence of renowned *mujtahids* up to the tenth/sixteenth century. Though the number of *mujtahids* drastically diminished after this period, the call for *ijtihad* was vigorously resumed by promodern reformists. Second is the Muslim practice of choosing a *mujaddid* at the turn of each century. Though this practice may have not had the full support of the entire community of jurists, it proved that at least one *mujtahid* was in existence each century. Third, the opposition of the Hanbali school which was supported by influential Shafi'i jurists who, by their support, not only added substantial weight to the Hanbali claim that *mujtahids* existed at all times but also weakened the coalition in which Hanafis and Malikis took part (Hamid, 1981). The continuity of *ijtihad* throughout Islamic history suggests that developments in positive law, legal theory, and the judiciary have indeed taken place.

The Methodology of Islamic Legislation

The science of the principles of Islamic jurisprudence *(Usul-al-fiqh)* is one of the greatest, most important and most useful disciplines of the religious law (Ibn Khaldun, 1958, p. 23). The early Muslims could dispense with it. Nothing more than the linguistic habit they possessed was needed for deriving ideas from words. The early Muslims themselves also were the source for most of the norms needed in special cases for deriving laws. They had no need to study the chains of transmitters, because they were close to the transmitters in time and had personal knowledge and experience of them. Then the early Muslims died, and the first period of Islam was over. All the sciences became technical (Ibn Khaldun, 1958, p. 23). Jurists and religious scholars of independent judgement now had to acquire these norms and basic rules, in order to be able to derive the laws from the evidence. They wrote them down as a discipline in its own right and called it "principles of jurisprudence." The first scholar to write on the subject was al-Shafi'i. He dictated his famous Risalah on the subject. In it, he discussed

commands and prohibitions, syntax and style, traditions, abrogations, and the position of ratio legis indicated in a text in relation to analogy (Ibn Khaldun, 1958, p. 23).

Later on, Hanafite jurists wrote on the subject. They verified the basic rules and discussed them extensively. The speculative theologians also wrote on the subject. However treatment by jurists is more germane to jurisprudence and more suited for (practical application to) special cases, (than treatment of the subject by speculative theologians), because (juridical works) mention many examples and cases and base their problems on legal points. The theologians, on the other hand, present these problems in their bare outlines, without reference to jurisprudence, and are inclined to use (abstract) logical deduction as much as possible, since that is their scholarly approach and required by their method (Ibn Khaldun, 1958, p. 30).

In Islamic legal theory, discovering the law of God has always been of crucial significance, for it is the law that informs man of the conduct acceptable to *Allah*. It is exactly for the purpose of finding the rulings decreed by God that the methodology of usul *al-fiqh* was established. The *Quran* and the *Sunna* of the Prophet do not, as a rule, specify the law as it might be stated in specialized law manuals, but only contain rulings and indications that lead to the causes of these rulings. On the basis of these indications and causes the *mujtahid* may attempt, by employing the procedure of qiyas to discover the judgement of an unprecedented case. But before embarking on this original task, he must first search for the judgement in the works of renowned jurists. If he fails to find a precedent in these works he may look for a similar case in which legal acts are different but legal facts are the same[3]. Failing this, he must turn to the *Quran*, the *Sunna*, or *ijma* (consensus) for a precedent. When this is reached he is to apply the principles of qiyas in order to reach the rulings of the case in question. This ruling may be one of the following: the obligatory *(wajib)*, the forbidden *(mahzur)*, the recommended *(mandub)*, the permissible *(mubah)*, or the disapproved *(makruh)* (Al Shirazi, 1908, pp. 83-84).

The primary objective of legal theory, therefore, was to lay down a coherent system of principles through which a qualified jurist could extract rulings for novel cases. From the third/ninth century onwards this was universally recognized by jurists to be the sacred purpose of *Usul-al-fiqh* (Shirazi, 1985, p. 6).

Legal theory in all its parts is sanctioned by divine authority, that is, it derives its authority from revealed sources. It is partly for this reason and partly for the reason of man's duty to worship his Creator in accordance with divine law that the practice of *ijtihad* was declared to be a religious duty incumbent upon all qualified jurists whenever a new case should appear. Until *ijtihad* is performed by at least one *mujtahid*, the Muslim community remains under the spell of this unfulfilled duty. Legal theory has played a rather significant role in favor of *ijtihad*. Thus, the practice of *ijtihad* was the primary objective of the methodology and theory of *Usul-al-fiqh* throughout Islamic history (Hamid, 1981, p. 78). *Shia* theory on the sources of the law and on the nature of the law provides a more dynamic form of law. By elevating *aql* (reason) to the status of a source of the law, they have given deductive reasoning a more important place than it occupies in Sunni theory (Coulson, p. 105). For the *Shia*, *qiyas* is rejected as unreliable if not false. However, the *Shia* definition of the *Sunna* and of *ijma'* differ from the Sunni definition. In the case of the *Sunna*, the *Shia* accept only those hadith transmitted through one or more of the twelve impeccable Imams, and some believe that traditions of the Holy Prophet should be accepted through the channel of narrations by the people of the Holy Prophet's Progeny (Kashif al-Ghita, 1985, p. 139). The *Shia* concept of aql is closely linked to *ijtihad*, since the *Shia* jurist uses aql, usually supported by the other three sources of the law (Kashif al-Ghita, 1985, p. 186). The rationale behind the concept of aql is that although God is the sole creator and provider of the law, He has furnished man with reason and the power of reasoning so that he may

properly identify the terms of the law. Any ruling derived by the use of reason from the *Quran* and the *Sunna* cannot be in contradiction with any ruling reached through the application of rational principles. This line of argument leads effectively to the *Shia* definition of *ijma*, which means the unanimous view of the *foqaha* on a particular issue (Iambton, 1981, p. 228).

The theory set out briefly above is essentially that of the *usuli* school and was largely in place by the sixteenth century. However, an opposing school, the *akhbari* (traditionalist), rose to prominence and doctrinal development paused until the controversy between the two was finally resolved in favour of the *usulis* towards the end of the eighteenth century. In essence, akhbari theory rejected the rationalist basis of the usuli view in favour of heavy reliance upon the *Quran* and the *Sunna* as explained by the Imams and upon a much larger corpus of *hadith* than that accepted as valid by the usulis. It follows that the akhbaris rejected the usuli linkage between the sources of the law and rational principles and they equally reject *ijtihad* in favour of taqlid__ but a restricted form of *taqlid* in which it is the Hidden Imam who must be emulated (Momen, pp. 185-6). The usuli victory was followed by a resurgence of theoretical development, with the main contribution coming from Sheikh Murtaza Ansari in his definition of the principles to be followed in reaching a decision in cases where there was doubt. In such cases, he argued, the principles to be applied were:

Al-bara'a (freedom from obligation or liability in the absence of proof); *al-takhir* (freedom to select the opinion of other jurists or even other schools if these seem more suitable); *al-istishab* (the continuation of any state of affairs in existence or legal decisions already accepted unless the contrary can be proved); and *al-ihtiyat* (prudent caution whenever in doubt) (Momen, p. 187).

Juristic reasoning is never final, whether it be reasoning on the implications of the primary texts, or reasoning pertaining to occurrences in the absence of a directly applicable text. Gibb says: "The *Quran* and the Tradition are not, as it is often said, the basis of Islamic legal speculation but only its sources" (Gibb, 1975). This statement presents a basic fact regarding the course of evolu-tion in the applicability of the *Sharia*. It emphasizes the role of human thought, as called upon, urged and directed by the legal authority of *Quran* and *Sunna*. Legal speculation for an ever-changing world has been left undetermined except for the authority of the *Sharia*. None of the recorded works by the distinguished Islamic jurists suggest a monopoly of interpretation or finality. The imputation of finality to the findings of the schools of law is contrary to the creative spirit of the *Quran* specifying:

"This is a Book that we have revealed to thee abounding in good, that they may ponder over its verses, and that men of understanding may mind" (Sa'd, 29).

Iqbal, in his *Reconstruction of Religious Thought in Islam,* states: "Turning to the groundwork of legal principles in the *Quran*, it is perfectly clear that far from leaving no scope for human thought and legislative activity, the intensive breadth of these principles virtually acts as an awakener of human thought. Our early doctors of law taking their clue mainly from this ground-work evolved a number of legal system; and the student of Muhammadan history knows very well that nearly half the triumphs of Islam as a social and political power were due to the legal acuteness of these doctors. The teaching of the *Quran* that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems" (Iqbal, 1951).

The Role of the Consultative Assembly *(Majlis-al-Shura)*

It is now clear, then, that the main lawgivers are God, the Prophet and the *foqaha*. However the question may be asked whether there is a fourth lawgiver in addition to the above cited. This question assumes critical importance when the following arguments are considered:

1. The concept of obligatory preliminary

The *foqaha* define a preliminary as the precondition of an act. They have numerous ways for dividing such preconditions. One is to divide them into internal and external, the internal being the inherent or essential components of an act, and the external being the outside factor causing or facilitating the performance of an act (Muhammad, 1977, p. 154). As always, such divisions are rather abstract, and sometimes extremely difficult to differentiate. But the division which is of interest to us is that between a preliminary which is explicitly required by the *Sharia* (such as ablution for prayer), and one which is not so but can become obligatory if another obligatory act depends on it. For instance, horse-racing and arrow-throwing are normally permissible or recommended practices, but if it becomes necessary for Muslims to wage jihad (holy war), the same acts become obligatory by implication. In the same way the adoption of a constitution becomes obligatory for Muslims when it is a precondition of their welfare, security or progress (Na'ini, 1979, pp. 74-75). It is interesting to note that the Sunnis usually arrive at the same conclusion from a different premise - that of maslahah, literally welfare, which means that public interest should always prevail over the preference of jurisconsults. But since the *Shia* refute maslahah (Muhammad, pp. 164-170), the concept of obligatory preliminary is also a device to circumvent any objection to law-making for which there is no specific canonical license.

2. The concept of apparent secondary rules

The rules of conduct in the *Sharia* are of two categories: the "primary real rules" which explain the eternal and abstract tenets of the religion, and "the secondary apparent rules" which govern accidental and concrete details concerning their application to worldly affairs. The latter category itself has numerous subdivisions depending on their subject-matter, and the conditions of persons affected by them. Although the *foqaha* are the only people qualified to interpret the first category, and even to lay down the general principles concerning the second, deciding the subjectmatter of the second kind is only the task of lay experts. Just as if two qualified physicians prescribe wine to a patient, wine-drinking which is otherwise a sin becomes permissible for him, so too if doctors of politics, who in this case are none other than the elected representatives *(Majlis-al-Shura)*, deliberate on matters of state interest within their competence, their decisions must be binding even without the approval of the *foqaha* (Kasravi, pp. 371-2).

3. The principle of *Mantaqah-al-Feraq*

Wherever evidence or guidance is not available from the *Quran*, or the *Sunna*, it would be taken to mean that God has left us free to legislate on those points according to our best lights. In such cases, therefore, the legislature can formulate laws without restriction, provided such legislation is not in contravention of the spirit of the *Sharia* ___ the principle herein being that whatever has not been disallowed is allowed. The Prophet says:

"*whatever God has allowed in His book is permissible (halal) and whatever has been prohibited is forbidden (haram), and whatever God has been silent about, He has left you free. Thus be aware that God has not been forgetful of anything*" (Nouvi, p. 2).

4. The principle of Consultation

Islamic way of life requires that the principle of consultation should be applicable to every small or big collective affair. The *Quran*, as the very primary source of Islamic legislation, stipulates that all the collective affairs must be performed by mutual consultation. In the context it occurs, it is evidently not merely a statement of fact but an injunction and an order.

"*They manage their affairs by mutual consultation*" (Shura, 37).

The following is quoted from Caliph Ali:

"*I said O, Messenger of Allah! What should we do, if after your demise we are confronted with a problem about which we neither find anything in the Quran nor have anything from you. He replied: Get together the obedient (to God and His law) people from amongst my followers and place the matter before them for consultation. Do not make decisions on the*

basis of the opinion of any single person" (Khatib-al-Baqdadi, 1961, pp. 15-21).

When the Medinese Muslims swore allegiance with the Prophet, the Prophet asked them to introduce twelve representatives. The Muslims elected nine representatives from Khazraj tribe and three from Ows tribe (A'tef-al-Zane, 1991, p. 56). The Prophet held consultations with these twelve representatives to run the affairs of the society. Another example is the case when the Mecca Muslims migrated to Medina, Prophet ordered that seven representatives be elected from the Mecca Muslims and seven others from the Medina Muslims (A'tef-al-Zane, 1991). The Prophet incessantly consulted with these representatives.

In the Battle of Uhud, the companions of the Prophet had recommended that it is better that they defend against the enemies coming from Mecca while keeping themselves in Medina. But Hamza, the uncle of the Prophet and other young men were of the opinion that they should bravely go out of Medina and fight the incoming enemies. After viewing their opinions the Prophet resolved to go out of Medina and fight. Later the elderly companions persuaded the young men to withdraw their suggestion. The young men went to the Prophet and with repentance withdrew their opinion but the Prophet said that now after weighing the viewpoints in the consultation he had already resolved and it would be against the prophetic mission to go back on the final resolution (Fathal-Bari, 1977, pp. 71-80).

Mutual consultation is, therefore, one of the great qualities that a Muslim has to cultivate in himself. It is ordained by*Allah*h in *Quran*: "*It is part of the Mercy of Allah that you do deal gently with them, were you severe or harsh hearted, they would have broken away from about you: So pass over their faults and ask for Allah's forgiveness for them, and consult them in affairs. Then when you have taken a decision, put your trust in Allah*" (Shura, 159).

Muslim Jurists have said that when mutual consultation was made necessary for the Prophet himself to follow, it really becomes incumbent upon his followers to resort to Shura in all our activities whether individual, social or political matters. The Messenger of *Allah* used to receive revelation from *Allah*, hence, seemingly he was not in need of mutual consultation but still he was asked to do so through divine commandment. It is on this basis that the leader has no other option but to resort to Shura since *Allah* had commanded his Prophet to do so. All others, therefore, have a special need for mutual consultation.

The other fine example to show how the Caliphs depended on the mutual consultations of the public is that of caliph Umar who was of the opinion that after the conquest of Iraq and Syria the land should not be divided among the warriors as booty but should be made the property of the state so that through its produce and income the essential works of public welfare can be carried out. But some companions opposed the view of the Caliph. When they could not find any solution through mutual consultation, the Caliph called a public meeting in the prophetic mosque for general consultation and addressed the public in the following words: "I have not just gathered you here and given you the trouble for nothing. The reason for inviting you is that you should also participate in the trust of the caliphate which has been trust upon me by you. Undoubtedly, I am an ordinary human being like you. I want that those who have opposed my point of view and those who have favoured it should declare it openly. I do not wish that you should follow my point of view because you all possess the Book of *Allah* (from which you may derive guidance to resolve the issue)" (Kashif-al-Ghita, 1985, p. 143).

Therefore, the following three features are deduced from the *Quranic* verses and the traditions of the Holy Prophet and the Orthodox Caliphs cited above:

(1) As no collective affair of the Muslims should be conducted without consulting the people concerned.

(2) All the people concerned should be consulted directly or through their trusted representatives.

(3) The consultation should be free, impartial and genuine. Any consultation held under duress or temptation is in reality no consultation at all.

Thus, these three principles of the *Sharia* must be observed, and no loophole should be left whereby anyone gets the opportunity at any time to make public decisions without consulting the people or their accredited representatives. As regards the mode of consultation, it has been very wisely left to the discretion of Muslims. Islam does not prescribe any definite form for the formation of the consultative body or bodies for the simple reason that it is a universal religion meant for all times and all climes. It does not, therefore, lay down whether the people should be consulted directly or through their representatives; whether the representatives should be elected in general elections or through electoral colleges; whether the consultative body should have one house or two houses, etc. Obviously, these are matters of detail and can vary with different societies and cultures existing under different conditions. That is why the *Sharia* leaves these problems open for solution according to the needs of the time. These stipulations bring us to a very crucial fact. The fact is that an Islamic society in modern times need a fourth legislating authority which should be based on consultation and in the direction of realizing the goals of Islam and the needs of the modern sophisticated society. The question, then, arises that, this being so, what is the function and scope of a Legislature in Islam? The function of the Legislature in an Islamic State is manifold:

1)Where the explicit Directives of God and His Prophet exist, the legislature, though it cannot alter or amend them, will alone be competent to make rules and regulations within their framework, for the purpose of enforcing them.

2) Where the directives of the *Quran* and the *Sunna* are capable of more than one interpretation, the legislature would decide which of these interpretations should be placed on the Statute Book. To this end, it is indispensable that the legislature should consist of a body of such learned men who have the ability and the capacity to interpret *Quranic* injunctions and who, in giving decisions, would not take liberties with the spirit of the *Sharia*. Fundamentally, it will have to be accepted that for the purposes of legislation, a legislature has the authority to accord preference to one or the other of the various interpretations and to enact the one preferred, provided always that it is only an interpretation and not a misinterpretation.

3)Wherever there are no explicit laws, the function of the legislature would be to enact laws, of course always keeping in view the general spirit of Islam, and where previously enacted laws are traceable in the Islamic book of Jurisprudence, to adopt any one of them.

4) Where a pressing necessity arises, what the *Quran* and the *Sunna* have prohibited becomes permissible. This has been reiterated throughout the *Quran*:

"But he who is driven by necessity, neither craving nor transgressing, it is not sin for him" (Baqarah, 172).

"But who so is compelled (Thereto), neither craving nor transgressing: (for him) lo! thy Lord is Forgiving, Merciful" (Ana'm, 145).

"Whoever is forced by hunger, not by will, to sin: (for him) surely God is Forgiving, Merciful" (Nahl, 115).

It is a generally accepted rule among jurists that "necessity renders the forbidden permissible." Intoxicants, for instance, are allowed to the thirsty when water is not available, and to the sick for treatment. Carrion is allowed to the hungry who cannot get anything else to eat.

It is now clear, then, that four main lawgivers can be recognized in an Islamic system. The first two have created *Sharia* which is immutable and eternal. The other two the *foqaha* and the Consultative Assembly are those legislative authorities giving the Islamic legislative system a dynamic feature. *foqaha* are mostly engaged in discovering the required laws such as family, inheritance, property laws, etc. from *Sharia*. *Majlis-al- Shura* must mostly deal with complicated daily problems and needs of the society such as environmental, pricing, educational and

policymaking issues which require expert skill and specialization not specified in the *Sharia*. This reasoning is supported by the *hadith* from the Holy Prophet:

"*I am only a mortal like you. In matters revealed to me by God you must obey my instructions. But you know more about your own worldly affairs than I do. So my advice in these matters is not binding*" (Maududi, 1982, p. 186).

Sadiq al Mahdi elaborates on this citing Abu Ja'far al Naqib:

"*The Companions of the Prophet recognized that the spiritual message of Islam is fixed. To that they were faithfully committed. The social message of Islam is, however, flexible. Their experience amply demonstrated that flexibility*" (Sadiq and Mahdi, p. 233).

These two legislative authorities are always functioning in a process of changing situations and thus they legislate on the basis of necessities of each generation. If the affairs are related to, a clan, a tribe, a whole village, or an entire town or city so that it is not possible to take counsel with everybody, then the decisions should be taken by an Assembly of trusted representatives of the people, who are selected or elected according to an agreed method and set procedure. Thus unlike some incorrect impressions that Islam is against the establishment of a Consultative Assembly we, conversely, come to the important conclusion that Islam strongly encourages the establishment of a Consultative Assembly body *(Majlis-al-Shura)*. This is actually not only recommended by *Sharia* but also emphasized in the *Quran* in the form of injunctions. The only difference between the Consultative Assembly recommended by Islamic *Sharia* and those operating in other countries is that whereas in other countries the *Majlis-al-Shura* operates within the framework of a certain Constitution, in Islamic communities, as well as the Constitution, there exists a supreme Constitution (*Sharia*) contrary to which no laws should be enacted.

Conclusion

The theoretical foundations of an Islamic legislation system has been subject to an evolutionary process. However, the evolution process in Islam has been different from that in the West. The most important point of distinction lies in the fact that in Islam the disputes over the question of whether the foundation of legislation is based on the divine authority or the popular will have had a parallel trend. In other words the two trends have never been disconnected while in the West, at the time of renaissance, the divine will as the foundation of government was substituted by the will of the people. For example, while people do elect their representatives in the parliament but the very same representatives must conform to the overall principles of Islam.

The Islamic legal system is divided into two distinctive parts. The first part comprises the *Quran* and the *Sunna* which together establish the primary sources of law in Islam. The secondary sources are those which lend themselves to debates and argument among Muslims. The most important secondary sources are *ijma, qiyas, aql* and *ijtihad*. The contents of these sources are derived from the legal injunctions of the Quarn and the *Sunna* of the Prophet. Thus, the ultimate sanction for all intellectual activities regarding the development of *Sharia* is derived only from the *Quran* and the *Sunna* of the Prophet. No secondary source can be considered as authentic if it goes contrary to the primary sources.

Four main lawgivers can be recognized in an Islamic system. The first two have created the *Sharia* which is immutable and eternal. After the demise of the Prophet, the fact remained that the relationship between law and a people's actual affair is a permanent and evolutionary one. For this reason and in response to the ever-changing requirements of social life the path set by the Prophet led to the recognition of two other sources of law ie. the *foqaha* and the Consultative Assembly. The "*foqaha*" and the "Consultative Assembly" are those legislative authorities which

give the Islamic legislative system a dynamic feature. *foqaha* are mostly engaged in discovering the required laws such as family, inheritance, property laws, etc. from *Sharia*. *Majlis-al-Shura* must mostly deal with complicated daily problems and needs of the society such as environmental, pricing, educational and policy-making issues which require expert skill and specialization not specified in the *Sharia*.

Footnotes

[1] The eleventh century tabaqat works seem to have been the earliest works that Subki could find as sources for his biographical dictionary.

When discussing the requirements of *ijtihad*, Ghazali (d. 505/1111) maintained that in order to reach the rank of *mujtahid* the jurist must. 1) Know the 500 verses needed in law; committing them to memory is not a prerequisite. 2) Know the way to relevant *hadith* literature; he needs only to maintain a reliable copy of Abu Dawud's or Bayhaqi's collections rather than memorize their contents. 3) Know the substance of furu works and the points subject to *ijma*, so that he does not deviate from the established laws. If he cannot meet this requirement he must ensure that the legal opinion he has arrived at does not contradict any opinion of a renowned jurist. 4) Know the methods by which legal evidence is derived from the texts. 5) Know the Arabic language; complete mastery of its principles is not a prerequisite. 6) Know the rules governing the doctrine of abrogation. However, the jurist need not be thoroughly familiar with the details of this doctrine; it suffices to show that the verse or the *hadith* in question had not been repealed. 7) Investigate the authenticity of *hadith*. If the *hadith* has been accepted by Muslims as reliable, it may not be questioned. If a transmitter was known for probity, all *hadiths* related through him are to be accepted. Full knowledge of the science of al-tadil wal-tajrih (*hadith* criticism) is not required. (Mustasfa, Vol. 2, pp. 350-354).

[3] From about the middle of the third century of the *hijra* the idea began to gain ground that only the great scholars of the past who could not be equalled, and not the epigones, had the right to independent reasoning. By this time the term *ijtihad* had been separated from its old connexion with the free use of personal opinion *ra'y*, and restricted to the drawing of valid conclusions from the Quran, the Sunna of the Prophet, and the consensus, by analogy *qiyas* or systematic reasoning. Shafi'i had been instrumental in bringing about this change, but he did not hesitate to affirm the duty of individual scholars to use their own judgement in drawing these conclusions. By the beginning of the fourth century of the *hijra*, however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all. This amounted to the demand for *taqlid*, a term which had originally denoted the kind of reference to Companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities. A person entitled to *ijtihad* is called *mujtahid*, and a person bound to practice *taqlid*, *muqallid*.

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