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Closure of the gate of ijtihad

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Abstract

From fifth to eleventh century the division of Ijtihad started. Initially was divided into two main categories. Independent Ijtihad and Limited ijtihad. In the first two and a half century any scholar could find solutions to legal problems. In third to ninth century the idea began that Ijtihad could be practiced only by the great scholars of the past. This was the beginning of the closure of the gate of Ijtihad.

Generally the Islamic law can be divided in two spheres .The one is the fixed part of the law and the second is the growing area of the law and changes with the change of time and hence is subjected to Islamization. Similarly the fields like Cyber Laws, Traffic Laws, New Crimes, Income Tax requires fresh Ijtihad. The present day scholars failed to study the evolutionary growth of Islamic Legal system. Islamic Law has never stopped growing and allegation of Taqlid and Closing Gate of Ijtihad against the Jurists are based on superficial understanding of the nature of the law.

Islamic states today ,more than ever ,are in need of discovering and deriving the general principles found in the Quran and Sunnah, in the light of which they can develop their law. The methodology for finding these principles has been described in detail by Imam al-Ghazali. The role of the jurists and that of the rulers was clearly defined from the earliest days of Islamic law. The jurists focused on that part of the law that was derivable directly from the texts, because it was either explicitly stated in the texts or could be derived through strict methods of interpretation .The rulers generally dealt with new situation using the general principles of the shariah available in the Quran and Sunnah. Their were several theories developing the law within the domain of the jurists, and each of such theories was used to develop the law of a certain school. The new theory or ideas ,advocated by Imam Al-Ghazali were for the benefit of the rulers ,who were to derive general principles and apply the law to new situations in the ever –changing sphere.

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Ijtihad is a continuous process of development. It's a main instrument of interpreting the Devine message and relating it to the changing conditions of the Muslim community ,to attain justice, salvation and truth. The various sources of Islamic law next to the Quran and Sunnah are manifestations of Ijtihad.

Literally from root word Jahada means striving ,self exertion in activity entailing hardship.[1]**Juridically By Al baidawi** ; It is the Effort and juhd being made to find the Rulings of shariah. This comprises both the qati and zwani ahkam thus not a better one. **Al –Ghazali**;The effort made by the Mujtahid to get the knowledge of the rulings of shariah and to put all the efforts unless he can`t do so any more. this definition lacks as it is comprising both the Qati and zanni ahkam.**By Al-Amidi;** This is the effort made to get the probable zanni ahkam of the shariah and the effort is made to the level that one couldn`t do so anymore.[2]Is the effort made by jurist to infer with probability rules of shariah from the detailed evidence in the sources.It excludes a clear text ruling, asking a learned person or consulting relevant literature without one's own opinion and judgement. Excludes decesive rules of Shariah as imparts positive knowledge. The jurist must feel inability to exert himself further.Only a "Faqih" may practice ijtihad ,thus precludes a layman. Doesn 't apply to Aqli,Urfi,Hissi issues. Not exercised in createdness of universe ,existence of creator, sending of prophets, obligatory status of pillars of faith, hudood laws .Doesn't apply to Qatti al subut and Qatti al Dalala.Applies to Qathi al subuth with zanni al Dalala,Zanni al subuth and Qathi al dalala and Zanni al subuth and Zanni al Dalala.E.g the word "Quru"is Qathi al subuth and zanni al dallala." من كل خمس شاة " is Qathi al dalala as no zakath in less than five camels but is Zanni al subuth as the authenticity requires further investigation according to different principles. لا صلاة الا بفاتحه الكتاب' is Zanni al subuth and Zanni al Dallala.as the لا صلاة means invalid as well incomplete and khabar wahid needs authenticity in chain.Ijtihad is carried where no evidence found in nusus or ijma by way of qiyas,istihsan , maslahah.[3]

It is an activity ,a struggle,a process to discover the law from the texts and to apply it to the set of facts awaiting decision.It is the methodology of interpretation adopted by the jurist to discover the law from the texts.[4]

Value (Hukm) of Ijtihad;

It derives validity from revealed sources so is a religious duty.It's Fard Kafai(collective obligation) in non urgent issues.Becomes Fard Ayn (personel obligation) in urgent matters where fear of losing justice and truth.In absence of qualified mujtahid is Fard Aini as mujtahid not allowed to imitate .Is Mandub (Recommended) if no issue refered to him or absence of issue by way of theoretical construction.Is haram if contradicting decesive rules of Quran , Sunnah and Ijma.There is agreement that he is bound by his own ijtihad.Dalil is (47:24) أَفَلاَ يَتَدَبَّرُونَ يَا أَيُّهَا ٱلَّذِينَ آمَنُواْ أَطِيعُواْ ٱللَّهَ وَأَطِيعُواْ ٱلرَّسُولَ وَأُوْلِي ٱلأَمْرِ مِنْكُمْ فَإِن تَنَازَعْتُمْ (4:5).ٱلْقُرْآنَ أَمْ عَلَىٰ قُلُوبٍ أَقْفَالُهَآ فِي شَيْءٍ فَرُدُّوهُ إِلَى ٱللَّهِ وَٱلرَّسُولِ إِن كُنْتُمْ تُؤْمِنُونَ بِٱللَّهِ وَٱلْيَوْمِ ٱلآخِرِ ذَٰلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلاً.Thus the learned to investigate Quran`s teachings and sunnah.The companions made Ijtihad and then would not imitate.Ahl al-dhikr in Quran refers to those having capacity to investigate and find out.Mujtahid can set aside his ruling if affecting him only but cant so if affecting others or is a judgement.e.g the Hajariyyah decision of of umar bin al khatab as a woman left with husband ,mother ,two consanguine and two uterine brothers and the brothers given 1/3 of share but was not given by him the previous year.similarly the decision of Ali and Zaid were kept intact by umar as was a contradiction of ra`y only.However if decision is in violation of law then must be set aside .Umar bin al Khatab wrote to Abu musa al Ash ari to retract judgement if found

erroneous.The practice of Companions led to the Maxim Ijtihad la Unqad bi mithlih (ijtihad may not be overruled by its equivalent.).[5]

Hujjiyyah (Proof) of Ijtihad:

Validated by Quran ,Sunnah and Aqal.In sunnah the Hadith of Muaz bin Jabal is authority and although Mursal is accepted by ummah and relied upon as specified by Al Ghazali.Another Hadith

الحاكم اذا اجتحد فاصاب فله اجران و ان اجتهد فاخطا فله اجر

اجتهدوا فكل ميسر لما خلق له

من يرد الله به خيراً يفقهه في الدين

طلب العلم فريضة علي كل مسلم و مسلمة

العلماء ورثة الانبياء

Last two Ahadith are relevant as Ijtihad is the main instrument of knowledge in islam.(29:69) The Aya narrates Subulana (our paths) i.e numerous paths towards the truth.The companions practiced ijtihad and is consensus upon it.The Rationale argument is that Nusus are limited and problems are unlimited so need of Ijtihad.[6]

Shuruth (Conditions) of Ijtihad:

Shall be a Muslim with Sound mind having attained level of intellectual competence to form independent judgement.

1.Knowledge of Arabic:

To have correct understanding of Quran and Sunnah.Complete command not the requirement although Al-Shatibi stresses that the average knowledge of Arabic can`t attain the highest level of Ijtihad.

2.Knowledge of Quran and Sunnah:

The Makki and Madani Ayats ,the asbab al-nazul,the abrogation and the Ayat al-ahkam to be grasped and not the whole of the Quran.Al-Ghazali,Ibn al-arabi,Al-razi considers legal ayats to 500.Al-Shawkani stresses the whole Quran.Tafsir al-qurtabi,ahkam al-Quran of Jasass are recommended.As per the sunnah those who think Ijtihad is Dvisible then only the related part of Sunnah is required .Those who think Ijtihad as indivisible,they require whole knowledge of sunnah specially Ahadith of Ahkam.To know the Abrogation,Aam and Khass ,Mutlaq and Muqayyad,Reliability of narrators but not to memorize narraters and to know sahih daif hasan etc.Sunnan Abi dawud,Sunan al-Baihaqi and Musnad Ibn Hanbal suffice.(1200 ahadith of ahkam).

3.To Know the Furu works;

As to have knowledge of consensus of companions ,Successors, leading imams and to have knowledge of the opposing view.

4.To know the Qiyas and Maqasid of Shariah;

The mujtahid to have adequate knowledge of the rules and procedures of Qiyas.Must also be knowing the Maqasid of Shariah i.e the protection of Life, Religion, Intellect, Lineage and Property.These are the Darruriyyat of the masalih as distinguished from Hajiyyat and Tahsiniyyat.

5.To know Maxims of Fiqh;

These are like Raf al –Haraj,certainity to prevail over doubt.The Mujtahid to distinguish genuine Masalih from whimsical desires and be able to achieve correct balance between values.Must be capable of distinguishing strength and weakness in reasoning and evidence.

6.Must be an upright Adil person;s

He must refrain from committing the sins and whose judgement the people could trust.[7]

Divisibility of Ijtihad;

Majority view; ijtihad is indivisible so once a mujtahid fulfills the conditions of ijtihad ,is qualified to practice in all areas of shariah.Intellectual ability can`t be devided into compartments.Thus can`t be mujtahid in Family laws and imitater in ibadat.As all branches are inter related so ignorance in one leads to error in another.Mujtahid can`t be muqallid at the same time as not allowed to follow others.Some ulema;In inheritance can be mujtahid alone as is not related to other branches.

Maliki,Hanbali,Zahiri;

Ijtihad is divisible.Accordingly there is no objection to mujtahid and muqallid at the same time. Many of the great imams admitted lack of knowledge to particular issue.Imam Malik is known to have denied answer in different issues thirty-six times but still was a mujtahid.Those who support are Abu –hussain al-Basri,al-ghazali,ibn al-humam,ibn Taymiyya,Shawkani.Al Ghazali says that a person can be learned in Qiyas without being expert in hadith.The divisibility concept is in great hamony with research conditions in modern times.The concept of Mujtahid in a particular school and particular issue takes for granted that ijtihad is divisible.[8]

Procedure of Ijtihad;

First we look in the nusus of Quran and Sunnah,if there is no Nass found,we resort to Zahir of Quran and Hadith and interpret it while applying rules of Aam and Khas,Mutlaq and Muqayyad.If no manifest text we may resort to Fili and Taqriri Sunnah.Failing this we look for ruling of Ijma or Qiyas available in the works of the renowned jurists.In absence we attempt original ijtihad along the lines of Qiyas by resorting to quran Hadith Ijma for a precedent that has an Illa identical to that of the Far.In the absence of a textual basis on which anology could be founded,we may resort to the recognized methods of ijtihad as Istihsan,Maslaha mursala,istishab etc. [9]

The first method used by the jurists is the literal interpretation as the first mode of ijtihad.When the set of facts awaiting decisions is not covered by literal meanings and implications,the jurists undertakes anology.This is a strict anology in the name of Qiyas al-Illah.,entailing the extention of the meaning to a new case from a single text of the Quran and Sunnahwith a specific meaning on the basis of a common underlying cause.If the problem is not solved the jurist then takes the texts collectively,that is ,by looking at the spirit of the laws.The jurists uses the general principles of the law by reffering to the Maqassid al-shariah and checking them against these purposes.[10]

In the first mode of literal interpretation where the jurists stays as close to the meaning of the texts as is possible.The Hanafi theory based upon general principles provides greater flexibility even in this mode.In the second mode the jurists attempts to extend ,through anology or Qiyas,the laws derived during the first mode to new situations not expressly covered by the texts.In the third phase the jurist employs the theory of interpretation based upon the purposes of law that is conforming with the purposes of Shariah.The third mode has not been applied by the fuqaha very frequently as this mode of Ijtihad is meant to be exercised by the Imams,that is ,the rulers ,who deal mostly with public law rather than personal law,and who usually employ the general principles of the Shariah to frame the laws or to provide the relief.The imam means all law making institutions as well as the courts,because in Islamic law all Qadis derive their authority from the Imam and exercise it on his behalf.[11]

Ijtihad of the Prophet and the Companions;

Ulema are in agreement that the prophet made Ijtihad in temporal and military affairs.In Shari matters

Ibn Hazm ,Hanbali ,Shafis,are of the opinion that every speech of the prophet partakes in Wahy.Thus their was no Ijtihad from the Prophet.

The Majority of Ulema held that the Prophet practiced ijtihad as he was allowed to do so.The Quranic verses that invite the Prophet with believers to meditate in Quran and to think of creativity.As per the Ayah of Sura al Najam (53:3) the pronoun Huwa refers to the Quran itself.The Shan al- Nuzul was that the non believers claimed Quran the work of the Prophet and not wahy.The Prophet never postponed matters till Wahy.

A Minority view is that if Ijtihad allowed then disagreeing with him would be allowed which is forbidden by Quran itself.(4:14).

Another opinion of Al –Shafi,Al-Shawkani,Al-Ghazali,Al-Baqillani was that Ijtihad ,not only permissible for the Prophet but he could make errors ,being rectified by the Prophet himself or by the subsequent Wahy.Example;The prisoners of war of Badr were released on ransom but disapproved by the revelation.Similarly (9:43) exeption given to the non participants of Tabuk.Support from the Sunn

انما اقضي بينكم برائ فيما لم ينزل علئ فيه وحي

The Companions Ijtihad;

Majority View; Ijtihad was lawful for the companions wether in presence or absence of the Prophet.

IBn Hazam; Valid in matters other than Halal and Haram.

Al-Amidi And Alhajib;Does not establish a definitive ruling.

Others; Valid if took place in presence of the Prophet with his permission or approval.

Some Ulema ;Not a valid Ijtihad as they had direct access to the Prophet to get decesive ruling whereas Ijtihad is speculative.

This is a weak view as the companions did practice Ijtihad in the presence and absence of the Prophet.Hadith of Muaz ibn Jabal is Authority.Abubakar ,saad ibn Muaaz, Abu musa Ashari delivered Ijtihad in the absence of the Prophet. Saad ibn Muaaz rendered judgement against qurayzah in the presence of the Prophet and was approved.[12]

Truth And Fallacy of Ijtihad;

The Ulema are at agreement that in tawhid ,Risalah,Hereafter one who takes different view denounces Islam.In definitive texts ,Hudood,five pillars also there is no Ijtihad.Where no decesive ruling then according to Asharis and Mutazilla; Ijtihad is meritorious and truthful ,regardless of results.

The Four Imams; One of the several views may be true as same thing for the same person can not be unlawful and lawful at the same time.In the quranic text of David and Solomon God validated one.(21:78-79).The Companions admitted possibility of error in their judgements and critised one another.In the case of Kalalah abubakar did say that if correct from Allah and if wrong from me and satan.Umar replied to litigating parties that he doesn`t know if he has attained the truth but that he had strived at his best to do so.Wether a mujtahid right or wrong but is a commendable effort and worthy of reward. The Hadith clearly shows that mujtahid is either right or wrong and in both cases is rewarded so all can`t be right as is clear from the text.

Minority View; No predetermined truth to Ijtihadi matters.Allah has not determined one solution to the exclusion of others.allah praised David and Solomon “to each we gave discretion and knowledge”.Had their been one truth Mujtahid shall not be bound by his own Ijtihad.Abu Bakr appointed Zaid as a judge although they did vary in their ijtihad`s .The Prophet declared the sahaba with stars ,had truth been unitary ,the

Prophet would have asked for some of the Sahaba to lead.[13]

The Closure of the Gate of Ijtihad;

From fifth to eleventh century the division of Ijtihad started .Initially was devided into two main categories.

Independent Ijtihad ;Deducing law from the evidence in the sources.

Limited ijtihad;The elaboration and implementation of the Law within the confines of a particular school

In the first two and a half century any scholar could find solutions to legal problems.In third to ninth century the idea began that Ijtihad could be practiced only by the great scholars of the past.This was the beginning of the closure of the gate of Ijtihad.

The above devision was developed into five and eventually into seven classes.

1.Full Mujtahid (mjtahid fi al shara);

They fulfilled all the requirements of Ijtihad by deducing ahkam from the sources and unrestricted by a particular Mazhab`s rules.The learned companions,successors like saeed ibn al musaib ,ibrahim al nakhai,four imams,muhammad al Baqir,Jafar al Sadiq ,Al awzai are considered as among the category.Its by their authority that Ijma,Qiyas ,Maslaha etc.were established as secondary proofs.The distinguishing feature of this class is their independent thought and originality.

If this is the case then those who are concurring their opinions with others can not be left out of this class because imam abu hanifa did agree with his teacher al nakha I on many occasions but was not because of imitation but of the occuracy of reasoning.

Hanbalis; Ijtihad of this kind and all of its forms are open.According to them the total extinction of Mujtahids at a given period or generation is an agreement on deviation from the obligatory duty of Ijtihad which is contradicting the Hadith لا تجتمع امتي على ضلالة .To consider Ijtihad wajib ayni or Kafai again creates contradiction.In another Hadith its narrated that a section of the ummah shall remain on the right path.Right path is not achievable without knowledge.The extinction of Mujtahidin again contradicts the theory of Ijma and that the rules of Qiyas which are the living proofs of the law.

Three Schools; Independent Ijtihad has discontinued.Abu Zahra objects as according to him some Hanafis consider Ibn Al Humam as Independent Mujtahid. Among the one`s convinced of the extinction of the Mujtahidin are Al-Amidi,Ibn al-Hajib,Ibn al-Humam,Ibn al Subki .

2.Mujtahid within the school;

Who expounded the law within the confines of a particular school adhering to principles laid down by their Imams.These mujtahidin although followed the doctrines of their respective schools,they held opinions opposed to that of their leading Imams.

3.Elucidated and applied the law in particular cases not settled by jurists of the first and second ranks by applying the established principles of their schools.they elaborated the law on fresh points not determined by the higher authorities.

These three classes were regarded as Mujtahidin and the rest four as Imitators.

4.Ashab al-Takhrij;

These ulema indicated as to which view was preferable in cases of ambiguity or suitability to prevailing conditions.

5.Ashab al tarjih;

Competent to make comparisons and distinguish between sahi ,rajah and mufta biha from the weak ones.

6.Ashab al-Tashih;

Who could distinguish between Zahir al-Riwayah and rare Al-nawadir views of the schools of their following.

7.Muqallidun or Imitators;

Comprises all who do not fall in any of the preceding classes.

The notion that at the beginning of the fourth century ulema reached consensus that further ijtihad was unnecessary is unconcieved and untenable.The rejection of such a theory by the Hanbali ulema and Shiah imamiyyah doesn`t correspond with the Ijma.Many authors through out the world advocated the continuity and revival of Ijtihad.Shawkani says "to say that god almighty bestowed the capacity for knowledge and Ijtihad on the bygone generationsand denied to the later generations.

Iqbal lahori says that closure of the gate of Ijtihad is a pure fiction,suggested by intellectual laziness ,specialy in periods of spiritual decay ,turns great thinkers into idols.[14]

Generally the Islamic law can be devided in two spheres .The one is the fixed part of the law i.e Quran ,Sunnah, Ibadat,Qiyas,Inheritence,Marriage,Divorce,Hudud.[15]The second is the growing area of the law and changes with the change of time and hence is subjected to Islamization e.g. Torts,Contracts,Taxation,Constitutional,Fundamental Rights,Buisiness Organization,Justice under Administrative Law,Labor Law,Granting of Governament Contracts.[16]Similarly the fields like Cyber Laws,Traffic Laws,New Crimes,Income Tax requires fresh Ijtihad.[17]

The present day scholars failed to study the evolutionary growth of Islamic Legal system.Islamic Law has never stopped growing and allegation of Taqlid and Closing Gate of Ijtihad against the Jurists are based on superficial understanding of the nature of the law.[18] The calls for Ijtihad if meant to alter the fixed laws of Shariah in Quran and sunnah,are futile.These fixed laws cover relatively small area of activity of the Modern state and the bulk of laws remain to be discovered.Thus the system continues to grow.[19]

From another angle one can say that the fixed is the right of Allah,while the other is the flexible and changing.Thus ranging from Ibadat to penalties,Inheritence to zakat etc. comes in the first sphere.It also includes some of the institutions that relate to the right of individuals and have been determined in the Quran and relate to the first sphere as relates to rights explicitly granted by Allah.Thus marriage will always be a required institution ,which can not be replaced by common law marriages and child - care.Inheritence will always be distributed according to the Quranic Injunctions,and Riba will always remain prohibited.There is very little and no scope of further ijtihad in this area.The jurists devoted fourteen centuries to the development of the fixed part of the law and have developed it to its limits.They have always left the flexible and changing part that relates to the rights of the individuals as a community for the Imam to develop it and which is still waiting to be developed in accordance with the purposes of Islamic Law and its general principles.[20]

The jurists never closed the door of Ijtihad .The area left to the ruler was always wide open and still is.The rulers did develop some institutions ,but they apparently never established them on sound footings,or atleast in a manner that these institutions and laws could grow with each succeeding generation without depending upon individuals.It is ,therefore,possible that as governaments change the institutions collapsed with them.A sincere effort have been made in the Ottoman times ,that however was cut short by the Tanzimat reforms.In other regions like India ,the efforts like of Aurangzeb Alamgir were swept by Western Colonization.So we can`t blame the jurists for Taqlid and stagnation when they are not at fault and were not

responsible for establishing those institutions and laws that we need today.

The only way the law in the flexible sphere can be developed is through reasoning from general principles arising from the fixed part of the law.It is obvious that what is binding upon us is the fixed part of the law.Nothing is binding upon us from the flexible sphere ,that changes with time.If the rulers in the earlier ages chose to establish Mazalim courts,it is not binding upon us to do the same..We can possibly establish better and more effective institutions today,as long as the underlying principles are Islamic.[21]

Islamic states today ,more than ever ,are in need of discovering and deriving the general principles found in the Quran and Sunnah,in the light of which they can develop their law.The methodology for finding these principles has been described in detail by Imam al-ghazali.The role of the jurists and that of the rulers was clearly defined from the earliest days of Islamic law.The jurists focused on that part of the law that was derivable directly from the texts,because it was either explicitly stated in the texts or could be derived through strict methods of interpretation .The rulers generally dealt with new situation using the general principles of the shariah available in the Quran and Sunnah.The separation between the activity of the state and the writings of the jurists was intentional ,because of the structure of Islamic law and the design of the Islamic legal system ,and it was carried out under the principle of separation of function in a spirit of cooperation .Their were several theories developing the law within the domain of the jurists ,and each of such theories was used to develop the law of a certain school.The new theory or ideas ,advocated by Imam Al-Ghazali were for the benefit of the rulers ,who were to derive general principles and apply the law to new situations in the ever –changing sphere.[22]

According to Al-Ghazali principles are of three kinds.

1. Principles stated explicitly in the text;

These are the principles stated explicitly in the texts of the Quran and Sunnah example, “all sales are permitted ,except those bearing Riba”. “Liability for profit is based on liability for bearing loss”.Such principles are limited in number and they conform with the purposes of law.

2. Derived from underlying Hikmah of the text;

These principles are not explicitly stated in the text but derived from Hikmah related to the underlying cause (Illah) ,Example ,in case of minority a guardian is appointed because of the Illa of “Ajz” “Inability”.This was further extended to Insane as a generalized principle.This principle was further generalized on the basis of “necessity” “Darurah” to financial mismanagement,thus can justify appointment of receivers for Corporations in difficult straits.The generalization is done as based on Hikmah.The principles based on Hikmah are considered as binding laws and not mere explanations provided they conform with the purposes of law and shall not be clashing with the general practices of law.

3. Principles Introduced by the Jurists;

Such type of principles seeks its authenticity through the first and second principles provided.provided.(a).They conform with the purposes of law.i.e they are not Gharib to the law . (b). They are not clashing with the texts. (c). They are not altering the implications of the texts i.e.general propositions and principles.[23]

In the first mode of literal interpretation where the jurists stays as close to the meaning of the texts as is possible.The Hanafi theory based upon general principles provides greater flexibility even in this mode.In the second mode the jurists attempts to extend ,through anology or Qiyas,the laws derived during the first mode to new situations not expressly covered by the texts.In the third phase the jurist employs the

theory of interpretation based upon the purposes of law that is conforming with the purposes of Shariah.The third mode has not been applied by the fuqaha very frequently as this mode of Ijtihad is meant to be exercised by the Imams,that is ,the rulers ,who deal mostly with public law rather than personal law,and who usually employ the general principles of the Shariah to frame the laws or to provide the relief.The imam means all law making institutions as well as the courts,because in Islamic law all Qadis derive their authority from the Imam and exercise it on his behalf.[24]

These methods lay dormant during the colonial period ,but are today waiting to be employed,refined,and extended by muslim judges and lawyers.The modern state is required to regulate areas that were not even known to the earlier states.In short the need for flexible general principles is immense.[25]

Calls for Ijtihad ,therefore ,must focus upon the area of the law that falls within the domain of the rulers and this pertains to the bulk of the law.[26]

According to Syed Abu Al-Ala Mawdudi due to the elimination of difference between Nusus and Mubahat (permissible) ,and because the latter attaining the status of former ,the gate got closed .Mawdudi also directed the scope of Ijtihad to social issues.when he presented the constitution of the Jamat al- Islami in the 1950`s,he wrote in the tarjuma that what the Jamat had adopted were few forms and practices of the many forms and practices of Mubah,which it found suitable.He said that people shall not demand the nass for each and every thing.

They shall not unnecessariliy insist that what was not done at the time of the Caliphs,should not be done now,or what was done in their time must be done now.This is because the forms and practices adopted by the caliphs in their times was also Ijtihad.Out of many choices of mubahat they chose a few of them.It is incumbent that their should be consultation in all matters.The nature ,type ,duration of the consultation are matters of expediency.[27]

Their should be Amir relied upon and obeyed.However the parameters of his powers and prerogatives ,the nature and condition of the obedience due to him,ascertainment of his reliability etc.are matters,that will have to be determined according to times and within the sphere of permissibility.According to him Ijtihad can be made in the issues where there are no specific rulings,or where the Shariah is silent.Where the Fuqaha made istinbat and conditions have changed.One can also make Ijtihad in the Nussus that is to determine the objective and spirit of the text.[28]

As discussed earlier in the sphere of Ijtihad ,the stress of Imran Ahsan Kahan Nyazee was the development of the sphere of the ruler that is the government policies in the state affairs,known as Siyasah al-shariyyah.This is the discretionary measures taken by the ruler in the interest of the good government,provided no substantial principle of shariah is violated and that there is no specific ruling found in the shariah.All measures to insure good management of public affairs fall within the Ambit of Siyasah al-Shariyah.The only restriction is that it must not contravene shariah.

Hazrat umar Ibn Al Khatab stopped paying Muallafatal qulub as he did n`t thougt it right in the prevailing circumstances.Similarly he declared the utterence of talaq three times once as three to stop the prevailing practice of the same.This was actually the requirement of the changing circumstances.

The main theme behind is to protect life,religion,mind ,lineage and property.In implementing the such laws ,the ruler shall observe moderation,that is neither severity nor laxity.In the appointment of the Offiials ,the ruler must keep in mind the concept of “Amanah” described by the Quran And Sunnah.Thus the official must be Amin and strengthful in the partiuler field.Last of all the official must not be asking for his

appointment as is forbidden by the prophet peace be upon him.

As far as the Implementation of penalties is concerned the ruler to take the course of 'Tazir'.In enacting new laws through legislative bodies ,the aim shall be to open the doors of mercy and beneficence to people based on Maslaha.The concept of Ijtihad to be re-seen on new grounds for legislation.New rules can be framed by existing principles through re interpretation of of original sources to changing circumstances.The closing gate of Ijtihad is erroneous and anomalous to the teachings of Islam.In the words of Ibn al-Qayyim " to facilitate benefit to the people in this world and the next is the essence of shariahAnything that leads to corruption (Mafsadah) has nothing to do with the shariah.,even if made to appear as a part of it."Imam Al-Shafi changed many of his Fatwas after his arrival to Egypt as was the demand of the then circumstances.The concept of Saad al-Zariyah is also important means to improve conditions of the community that is to stop even the mubahat if leading to criminality.[29]

Summary and conclusions 239 First, the soundness and persuasiveness of the lines of reasoning sustaining the opinion, and second, the degree to which the opinion succeeded in appealing to the community of jurists. Ultimately, these two considerations were not unrelated, and they did not stand wholly apart from yet other considerations. To be sure, widespread acceptance did not allude to any democratic principle, for the issue, in the final analysis, was an epistemological one. The soundness or persuasiveness of an opinion was put to the test of ijmA c ic review, although, technically speaking, the authority of ijmA c was never explicitly invoked in the context of operative terminology. But an underlying notion of this authority was constantly at play, nonetheless. Our two considerations therefore collapse into one larger, all-encompassing criterion. However, a third consideration might also be subsumed under this criterion, namely, the degree to which an opinion was applied in the world of judicial practice. Again, the degree is ultimately adjudged as an epistemological matter, epistemology here having several dimensions, not excluding, for instance, sheer necessity as a ground for the dominant application, and therefore proclamation of an opinion as possessing supreme authority. Operative terminology therefore served the interests of taqlCd in the sense – or rather in accordance with the multi-layered meanings – we have demonstrated. It reduced legal pluralism; it increased determinacy and predictability; and, above all, it promoted legal continuity and doctrinal– systemic stability. Operative terminology, which flourished after the formative period, permeated legal discourse and became a quintessential attribute of the system. And in view of the varied technical connotations of this terminology, no student of legal manuals can afford to gloss over such terms uncritically. In terms of modern research and methodology, operative terminology constitutes, without any exaggeration, one of the keys to unraveling the complexities that engulf the doctrinal history of Islamic law. It may seem a curiosity that operative terminology served the interests of as well as working so well as a tool of legal change. To put it differently, operative terminology as a mechanism of taqlCd also functioned as a tool for legitimizing and formalizing new developments in the law. Logically, this entails what may seem an astonishing but valid proposition, namely, that taqlCd embodied in itself the ability to accommodate legal change. But we need not restrict ourselves to drawing logical conclusions, for the evidence of our sources amply proves this much. In the extensive discourse of articulating operative terminology, and thereby in the very act of declaring certain opinions as authoritative, legal change was effected, insofar as this was needed. It should come as no surprise then that taqlCd functioned as a vehicle of legal change to the same extent as did, if not more so. More, because

ijtihAd meant the introduction of new opinions which often lacked, ipso facto, an intimate, symbiotic relationship with the ongoing tradition. But through operative terminology, and therefore through familiar opinions once considered weak or relatively less authoritative had a better chance of rising to an authoritative position in the hierarchy of school doctrine.

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Summary and conclusions 239 First, the soundness and persuasiveness of the lines of reasoning sustaining the opinion, and second, the degree to which the opinion succeeded in appealing to the community of jurists. Ultimately, these two considerations were not unrelated, and they did not stand wholly apart from yet other considerations. To be sure, widespread acceptance did not allude to any democratic principle, for the issue, in the final analysis, was an epistemological one. The soundness or persuasiveness of an opinion was put to the test of ijmA c ic review, although, technically speaking, the authority of ijmA c was never explicitly invoked in the context of operative terminology. But an underlying notion of this authority was constantly at play, nonetheless. Our two considerations therefore collapse into one larger, all-encompassing criterion. However, a third consideration might also be subsumed under this criterion, namely, the degree to which an opinion was applied in the world of judicial practice. Again, the degree is ultimately adjudged as an epistemological matter, epistemology here having several dimensions, not excluding, for instance, sheer necessity as a ground for the dominant application, and therefore proclamation of an opinion as possessing supreme authority. Operative terminology therefore served the interests of taqlCd in the sense – or rather in accordance with the multi-layered meanings – we have demonstrated. It reduced legal pluralism; it increased determinacy and predictability; and, above all, it promoted legal continuity and doctrinal– systemic stability. Operative terminology, which flourished after the formative period, permeated legal discourse and became a quintessential attribute of the system. And in view of the varied technical connotations of this terminology, no student of legal manuals can afford to gloss over such terms uncritically. In terms of modern research and methodology, operative terminology constitutes, without any exaggeration, one of the keys to unraveling the complexities that engulf the doctrinal history of Islamic law. It may seem a curiosity that operative terminology served the interests of as well as working so well as a tool of legal change. To put it differently, operative terminology as a mechanism of taqlCd also functioned as a tool for legitimizing and formalizing new developments in the law. Logically, this entails what may seem an astonishing but valid proposition, namely, that taqlCd embodied in itself the ability to accommodate legal change. But we need not restrict ourselves to drawing logical conclusions, for the evidence of our sources amply proves this much. In the extensive discourse of articulating operative terminology, and thereby in the very act of declaring certain opinions as authoritative, legal change was effected, insofar as this was needed. It should come as no surprise then that taqlCd functioned as a vehicle of legal change to the same extent as did, if not more so. More, because ijtihAd meant the introduction of new opinions which often lacked, ipso facto, an intimate, symbiotic relationship with the ongoing tradition. But through operative terminology, and therefore through familiar opinions once considered weak or relatively less authoritative had a better chance of rising to an authoritative position in the hierarchy of school doctrine.

Operative terminology and the discourse that surrounded it compel another conclusion, namely, that if this terminology was an integral part of Islamic law and its workings, then the mechanisms for accommodating legal change were structural features of that law. In other words, legal change did not occur only in an ad hoc manner, as it were, but was rather embedded in processes built into the very structure of the law. And since it was a structural feature, the jurists effected it as a matter of course. This inevitably suggests that the much-debated issue of whether change ever occurred in Islamic law is a product of our own imagination. For no medieval jurist lost much sleep over deciding in a given case that what had hitherto been considered by his predecessors a weak opinion had in fact much to recommend it as the most authoritative opinion in his school. One of the conclusions reached in the course of this study was that the structural modalities of legal change lay with the jurisconsult and no less so with the author– jurist. It was, in other words, within the normal purview of these two offices or roles to modulate legal change, and this they did by means of articulating and legitimizing those aspects of general legal practice in which change was implicit. Through his fatwA, the jurisconsult created a discursive link between the realities of judicial practice and legal doctrine. Because the jurisconsult, by the nature of his function, was an agent in the creation of legal norms of universal applicability, his opinions were deemed to constitute law proper and as such were incorporated into the law manuals which were either collections or commentarial texts. In addition to fatwAs, the latter also included both the authoritative, traditional doctrine and the prevalent practices of the day. Both types of texts, as we have shown, possessed an authoritative doctrinal standing in the schools. Texts produced by the jurisconsult and the author– jurist were authoritative in the sense that they provided contemporary and later jurists – whether notaries, judges, jurisconsults, or author–jurists – with normative rules that were advocated as standard doctrine. These texts, therefore, not only perpetuated the legal tradition but were also, at the same time, instrumental in legitimizing and formalizing legal change. It was the continual substitution of cases and opinions in the successive legal manuals and commentaries that reflected the fluidity of doctrine and thus the adaptability of the law. Positive legal principles persisted no doubt, but their case-by-case exemplification was in a state of constant flux. This phenomenon in turn reflects both the cumulative relevance of the doctrine to later jurists and the diachronic significance of authoritative citations: The later the jurist, the more recent his authorities are, and the less his reliance on earlier doctrines. Yet, the latter doctrines – especially those of the so-called founders – never faded away, and continued to serve not so much as a reservoir of positive rulings but rather as an axis of doctrinal authority and as archetypes for hermeneutically principled arguments that had generated these rulings. While the jurisconsult's function in mediating legal change was central, the author– jurist, to some significant extent, determined which were to be included in his text and which not. This authorial determination constituted,

on the one hand, a device which checked the extent of the jurisconsult's contribution

to the legal text, and sanctioned, on the other, those that were incorporated, whether or not the opinion expressed in them was subject to the author– jurist's approval. But the relationship between the jurisconsult jurisconsult and the author– jurist was also dialectical: The incorporated in the author– jurist's text themselves bestowed authority on the positive legal principles that they were intended to explicate in the first place. It is remarkable that the author– jurist was not subject to the control of other juristic or otherwise judicial functions and roles, and it is this fact that makes him, not necessarily a "law-maker" – as the jurisconsult was – but the chief legitimizer and formalizer of legal doctrine and legal change. His epistemic preeminence is furthermore enforced by his authorial dominance, manifested in his mastery of selective citations and juxtaposition of various authorities and of generating therefrom arguments through his own subtle interpolations, counter-arguments, and qualifications. The author– jurist therefore constantly adduced new arguments from old materials, without transcending the limits of discourse set by his school. This is not to say, however, that the author– jurist's determination set the final seal on authoritative doctrines, for the system, as we have seen, was thoroughly pluralistic. Judges, jurisconsults, and the author– jurists themselves always had an array of opinions at their disposal. The author– jurist's legitimization did not therefore sanction rules as irrevocably authoritative, but was conducive to increasing determinacy in the diverse body of these rules. In a system that was and remained thoroughly pluralistic, this was no mean feat indeed. At the end of the day, the solution to the very problematic created by the multiplicity of opinion in the formative and even post-formative periods turned out to be itself the salvation of the legal system during the later stages of its development. Without this multiplicity, therefore, legal change and adaptability would not have been possible. The old adage that in juristic disagreement there lies a divine blessing is not an empty aphorism, since critical scrutiny of its juristic significance proves it to be unquestionably true.

In early Islam *ijtihad,* along with terms such as *al-ra_y, qiyas,*and *zann* referred to sound and balanced personal reasoning.By the third century of Islam, however, prophetic traditions replaced these terms as the primary indicators of the law afterthe Qur_an. The term *qiyas* remained operative but wasseverely curtailed by jurists of all schools. *Ijtihad,* however,was universally embraced by all jurists and theologians, including those who, in all other matters, held strongly opposing views. This was perhaps due to *ijtihad*'s authority residing

Ikhwan al-MusliminI s l a m and the Muslim World 345in a prophetic tradition, but more likely it was because theactual definition of the term varied from jurist to jurist. Al-Shafi_i, for instance, when asked, replied that *ijtihad* and *qiyas*are two names for the same process. Ibn Hazm, in contrast,denounced *qiyas* but not *ijtihad*: The former, he maintained,referred to baseless speculation, and the latter, to the individual'sattempts at unraveling the truth by textual corroboration.All nonetheless used *ijtihad* to refer to no more than the

search for the legal norm (*hukm*) in Islam's *corpus sancta*without much regard for context.

In contrast, postcolonial Islamic thinkers used *ijtihad* asshorthand for intellectual and social reform, and as a breakfrom *taqlid* or blind imitation of past legal rulings. The Indian

poet/ philosopher, Muhammad Iqbal, for instance, saw *ijtihad*as the catalyst for Islam's intellectual resurgence, whereas thegrand mufti of Egypt, Muhammad _Abduh, considered it a
break from traditional scholarship, and Maududi as the key toestablishing an Islamic political order. The relationship between*taqlid* and *ijtihad* during this period became less juridical
and more symbolic: The former now referred to thegeneral deterioration of everything Islamic and the latter toits reformation. In general, *ijtihad* served to validate the reformist's efforts to subordinate the sacred texts to theexigencies of a modern context.
While *ijtihad* was warmly received, no methodology forreasoning by *ijtihad* was established, as was the case with *qiyas,*for instance. Jurists spoke of the four essential constituents of
qiyas, and its various forms, but in the case of *ijtihad,* spokeonly of the qualifications of the *mujtahid*s who do *ijtihad,* and of their rankings within particular schools of law. More
importantly, they spoke of the closing of the doors of *ijtihad.* The Crusades, the rise of regional dynasties subsequent to the collapse of the Abbasid empire, and the Mongol invasions
were seen as threats to Islamic intellectualism in general. Coupled with this, attacks by rationalists and philosophers on Muslim orthodox thinking convinced jurists that any further
ijtihad posed a great danger to orthodoxy itself. The doors of *ijtihad* were thus closed in the fourth Islamic century, and along period of *taqlid* followed. Recent scholarship has challenged
this view based on evidence that *mujtahid*s existed wellinto the sixteenth century, and that several prominent pre modern scholars denied the closure of the doors of *ijtihad.*

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