

Islamic Law And The Challenges Of Modern Times

Including A Review Of Al-Nihayah

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Due to a lack of full understanding of the Islamic legal , for many reasons, there is an erroneous view, both among some Muslims and non-Muslims, that the law is rigid, static and is facing problems in meeting the needs of changing times and circumstances and providing answers for new legal issues. Islamic law is a member of the family of religious laws, but unlike other religious legal systems, it presents itself as a law which is universal and for all times and places. It has therefore, made provisions to provide its law (fiqh) with its own jurisprudence (Usul) and with legal means, principles and approach. This has made it able to establish a legal system that can meet the challenges of changing circumstances. In this article we intend to explain that this is so, by showing how Islamic law has evolved from the beginning and is still developing to face these challenges and respond to new legal needs and issues.

Islam is a religion of ideals and realities, beliefs and actions, thought, testimony and practice (aqidaton wa Shari'ah). The ideals and ideological part ('aqaid) refers to principles, foundations, basics, roots, major and fundamentals (Usul (major)). The practices, and the code of behavior/way of life (af'al) refers to branches, and off shoots of Islam (furu'(minor)). It is not exactly clear when, how and who created and applied these two terms (usul and furu') first as both ideological and legal/jurisprudential terms. However, they seem to be fairly and accurately explaining the edifice of Islam. It is suggested that Mu'tazilah employed the term 'asl and usul and applied them to the principles of their school of thought and ideology (usul al khamsah), probably at the end of

3rd Islamic era. The division of Islam into ideals and realities and major and minor (usul and furu') seem to be accepted unanimously by almost all Muslim scholars. Later on in the history of Islamic law the terms usul and usuli were applied to the school of law that was developed on the basis of the authority of Ijtihad and human reasoning along with Qur'an and Sunnah as the sources of Islamic law, in contrast to the traditionists and traditionalist (Akhbaris) school who refused to recognize the authority of any sources other than Qur'an and Sunnah.. In this respect Shafi'i (the head of the Shafi'i school of law 157-209/767-819) and Sheikh Mufid (338-413/947-1022) the Shi'ah scholar seem to be the first to use the terms asl and usul as jurisprudential terms

An Islamic code of behavior was introduced by the Qur'an and the Prophet right from the beginning. It consisted of two distinct disciplines: the voluntary code of behavior, which later on made up the Islamic ethics ('ilm al-Akhlaq), and the code of mandatory, and discouraged behavior, which later on developed into the discipline of Islamic law. The latter later developed into two distinct disciplines too:

The discipline dealing with discovering and formulating the Islamic code of mandatory behaviour (fard), from their original sources. This was termed 'ilm al-fiqh.

The discipline dealing with the authority of the sources of fiqh and the principles on which the Islamic mandatory code of behaviour was based and explained. This discipline was later termed 'ilm al- Usul (Islamic jurisprudence)

Islamic jurisprudence in turn also helped the development of other related disciplines associated with the Shari'ah. The Qur'an was revealed to introduce the legal code of behavior, and as such was accepted as the major source of Islamic law and thus the discipline of studying and commenting on the Qur'an ('ilm al-tafsir) was created. The Prophet (puh) was introduced by the Qur'an as the supreme paradigm and the right model of behavior to be followed by Muslim individuals and communities. His code of behavior has thus become known as Sunnah. This led to the development of disciplines dealing with the words, deeds

and tacit approval of the Prophet ('ilm al-derayah) and the way that these were reported and the transmitters of the reports ('ilm al-rijal)

Any legal system, religious or secular, cannot survive if it is in conflict with ethics, human intellect and human primordial nature and reason. Human behavior cannot be controlled only by law and order. No matter how inclusive a legal system is, it still cannot cover all the fields of human behavior and intention. There are some areas which are the domain of ethics, human reason and human primordial nature. It is thus necessary for a legal system to respect these domains and issues and thus 'ilm al-akhlaq was developed. Shari'ah certainly covers both law and ethics. Some Muslim scholars have suggested that Islamic law (Fiqh) Islamic law also covers Islamic ethics (akhlaq), they are interrelated.

Being a behavioral religion, i.e. placing a great emphasis on correct conduct, the Islamic mandatory code of behavior (law) occupied an important place in the Muslim community and thus Islamic law and jurisprudence or Islamic legal discipline dealing systematically with the entire spectrum of human behavior (Shari'ah) occupied a very important position in Islamic education and learning. It was for this reason that the study of Shari'ah enjoyed priority over other Islamic disciplines (ulum or ma'arif al-Islami). It was developed before other disciplines. Muslim scholars took up the task of developing the disciplines associated with Shari'ah before other Islamic disciplines. Islamic schools of law established themselves before other Islamic schools, such as schools of philosophy, history and other disciplines. The foundation of the Islamic schools of law was laid as early as the first half of the first century of the Islamic era. Later on different schools of law (fiqh) and schools of jurisprudence (usul) came into existence.

There is generally a difference between law and jurisprudence. Law applies to a body of rules and regulations, and in the case of Islam, to the entire code of mandatory behavior, which in certain areas can cover the ethical code of behavior, based upon fixed grounds, objectives and criteria outside time and space. This is assumed to be the case, especially of religious laws in general and Islamic law in particular. But further study of the Islamic legal system leads us to believe that the law is not really independent of jurisprudence. They are interrelated and interdependent. This is certainly true of the Islamic legal system.

The Qur'an introduces Islam and its Shari'ah as an inclusive, universal, permanent and beyond time and space . Islam therefore claims to be a religion of complete and perfect religion of both ideals and realities. This doctrine implies that Islam regards itself as an inclusive code of behavior for individuals and societies with a legal system, among others, covering all behavioral issues. It must therefore provide the kind of sources, systematic method of understanding it and legal and jurisprudential principles and means suitable to its inclusive, universal and permanent claim. It must introduce a legal system that is able to provide legal answers for all legal issues and questions universally throughout time and space. The doctrine of *ijtihad* can not be therefore confined to formulating legal rules and solving legal problems only by means of traditional sources. A qualified *mujtahid* is the one who is well squinted with the requirements and demands of time and space. *Avecina* (Ibn Cina, Abu Ali) and some contemporary scholars have made this point very clear and have produced good literature supporting this issue . New legal challenges need new legal answers. These challenges cannot be met individually. They must be answered systematically and collectively first. The textual and traditional sources do not cover all these areas and meet all these needs. Human life is changing constantly. There are many legal issues in modern times and human life that did not exist and were not thought of in the past and during the lifetime of the prophet. They have to have their legal rulings. They must therefore be dealt with, by any means, and if not by texts then by rational principles and human intellect

The Qur'an and Sunnah are not the only sources of Islamic law, though they enjoy priority. The consensus of opinion (*ijma'*), analogy (*qiyas*), human intellect (*'aql*), public opinion (*'urf*), common sense (*syrat al-'uqala*), (and a collection of legal principles, such as public interest (*istihsan*), juristic and public preference (*istislah*) etc., (*qawa'id al-usuliyah*) occupy an important place in the Islamic legal system and jurisprudence. Furthermore, the principle of continuous reasoning (*ijtihad*) has also contributed to the idea of the interdependence of the Islamic jurisprudence and the Islamic code of behavior (*law-fiqh*). Further more, Islamic law (*fiqh*) has its own general norms and maxims (*qawa'id al-fiqhiyyah*). What we are concerned with here is the rational

principles (qawa'id al-usuliyyah) and not the legal norms (qawa'id al-fiqhiyyah) as the last group of norms are just the norms concluded from the actual law (fiqh) itself., though not always. However, even some norms of the last type fully correspond with the first type of principles. For example, "Possession is a proof of ownership" (qa'idat al-yad).

The authority of human intellect in the field of belief and theology is certainly universally recognized by all Islamic schools of thought and ideology and sects. The authority of human intellect in areas where there are no clear and authentic texts and proofs is universally accepted by almost all schools of law too. This area is called the left out/free area (mantiqat al-firaq). The authority of human intellect as a secondary and auxiliary source aiding the understanding of texts is almost beyond question. Its authority in the areas where there is no text at all has been also recognized as a hadith of Mu'dh ibn Jabal explains. Its authority in areas which it produces its own definite and clear answer leading to certainty (qat') as against speculative (zanni) textual sources is also natural, for speculation (zann) cannot really challenge certainty (qat'). The authority of human intellect and rational principles to deal with new legal issues and solve new problems is also almost universally recognized. For example, smoking is forbidden, (haram) because it kills and organ transplant is allowed and even obligatory (wajib) because it saves life. Its authority against texts or in reinterpreting texts in the areas where definite and authentic text has been used as stating a way to discover a fact which is in the domain of science is also recognized. The authority of human intellect and human primordial nature in the areas where they independently come to the conclusion that something is definitely good and right, for example justice, order and security, and they therefore should be established or that something is definitely evil and wrong, such as betrayal of trust, telling lies and killing, including killing animals, just for the sake of killing, and it should therefore be stopped (mustaqilat al-'aqliyyah) is also recognized, particularly by the Usuli Shi'ite school of law.

In this area the texts and revelation are regarded as guides supporting natural and rational virtues and principles (irshad). Their authority is also recognized in area where implementation of something good and right or stopping something evil and wrong is dependent on

something which has to be done, (muqaddamat al-wajib) e.g. preparation of the grounds and prevention. In this case, the preparation and prevention also rationally become obligatory and forbidden. In all these cases the rulings by human intellect and human primordial nature become part of the Shari'ah. It is in the areas where human intellect is not able to produce certainty and is speculatively challenging speculative texts and also in the areas where definite and clear texts are in direct conflict with definite judgment of universal human intellect and reason, including definite scientific facts, that preference in favour of one is difficult .

It should be pointed out that non-textual sources of Islamic law and ijtiḥad also derive their validity from texts and revelation in one way or another. Their use as sources of Islamic law is sanctioned by revelation and texts. The various roots and sources of Islamic law that feature next to the Qur'an and Sunnah derive their legitimacy from them. In this sense, sources of Islamic law are monolithic. The doctrine of Islamic absolute monotheism (tawḥid) has left its impact on the Islamic legal system. But at the same time the authority of the transmitted, traditional, textual sources can only be justified rationally too. There is therefore a kind of interdependency and close relationship between the so called transmitted sources (al-adilat al-naqliyyah) and rational sources (al adilat al-'aqliyyah). The harmony between these two different sources has provided answers to many questions. There are several rational proofs and sources (al-adilat al-'aqliyyah) including Istihsan (equity), Istislah (public interest and juristic preference), Istishab (presumption of continuity), Isalat al-Ibaha (principle of freedom from obligation, restriction and prohibition), Isalat al-bara'ah (presumption of freedom from liability). Istihsan, for example, is one of the minor principle sources of Islamic law. It has been recognized as similar to equity in Islamic law. Although Istihsan and equity derive their legitimacy from different sources, in practice they produce the same result. Equity is grounded on the concept of natural right and justice. Istihsan derives its authority from Shari'ah. However, they both are inspired by the principle of fairness and conscience and both authorize departure from the rule of positive law when its enforcement leads to an unfair result. Istihsan is appealed to when the implementation of the text of the law challenges justice, the

objectives and spirit of law and order and the intention of the Law-giver (Allah). However, we have explained in our book *Islam and Natural law*, that the Islamic legal system and natural law are compatible. The minor difference between Istihsan and equity need not be over emphasized if one bears in mind the convergence of values between Shari'ah and Natural Law. Notwithstanding their different approaches to the question of right and wrong, for example, the values upheld by natural law and the divine law of Islam are substantially concurrent and their practical use produces the same result (ibid). They both support the concept of absolute value of right and wrong and safeguard it from relative convenience for individuals. (The issue of harmony of natural law and Islamic law has been dealt with in detail by the author of this article in his book *Islam and Natural Law* pub. by ICAS. London. 2004). Of course there are many different definitions of istihsan. Istislah (public interest) can be treated in the same way as istihsan has been. They both enjoy the same authority and have a similar history. It has to be pointed out here that rational principles, such as istihsan and istislah, should not be thought of as hermeneutic features of Islamic jurisprudence. They should not be regarded as means of free and irresponsible interpretation of the spirit of law and the intention of the Lawgiver (Allah). These rational principles amongst others are recognized as proof and sources of law even by the Sunni schools of law. The Shi'ite school of law recognizes the authority of human intellect (hujjiyyat al-'aql) as a self evident, obvious and natural source of law (dhati), a kind of umbrella source covering all rational principles.

Human intellect and qualified rational principles as sources of law derive their authority and validity from their own nature. This is because they can lead the jurists and lawyers to certainty. The authority of certainty is natural and self-evident (Hujjiyat al-qat', Dhati). Also, the authority of both human intellect and ijtiḥad has been supported by divine revelation and texts. There are quite a few Qur'anic verses and traditions supporting their authority. There are also a number of traditions supporting the authority of ijtiḥad by the prophet. (The famous ḥadith by Mu'adh ibn Jabal has been regarded as a ḥadith with a broken chain of transmitters (Mursal) by some Shi'ite scholars). However, the Shi'i school of law provides quite a few traditions of their own in support of the authority of ijtiḥad and human intellect. There are quite a number of

Qur'anic verses quoted in support of human intellect. However, neither human intellect nor ijtiḥād should be regarded as a license for an irresponsible approach to Islamic Law. They should be used only by qualified mujtahids and their use must also meet all the required conditions and right circumstances. Besides, there are quite a few different or even conflicting definitions of human intellect or reason as a source of law, of ijtiḥād as the approach and process to Islamic Law and also of rational legal principles as legal norms for making rules of law .

There is another principle associated with *istislah*. It is the principle of *masalih al-mursalah* which is the consideration of valid interests and preventing harm which are simultaneously harmonious with the spirit of Islam and the objectives (*maqasid/’ilal*) of Shari’ah and the nature of it (*falsafat al-tashri’ wa al-ahkam*). It is almost unanimously accepted by all Muslim jurists that Sharia’h was introduced to achieve and secure certain objectives. Ibn ‘Ashur suggests that the main objective of Shari’ah has been explained in the Qur’anic verse as “Allah enjoins justice and kindness and helping and providing for kinsfolk and, forbids lewdness and abomination and wickedness. He exhorts you in order that you may take heed.” Ibn Qayyem, suggests that the main objective of the Shari’ah is to provide mankind with happiness and salvation in this world and in the Hereafter. Al-Ghazali introduces these objectives as the five major objectives of Shari’ah. They are protecting the five essential values namely life(*al-nafs*), religion and faith(*iman*), intellect and reason(*’aql*), lineage(*nasl*) and property(*mal*). All legal rules and any legal system must secure these values and all measures that secure these values and interests fall within the scope of *maslaha* and anything which violates them is *mafsadah* (evil, corrupt). Securing the interests of and preventing harm (*jalb al-maslaha* and *daf’ al-mafsadah*) of the public, human society, the Muslim community, the faith and religion of Islam comes under *maslaha*. As the interests and harms take many forms and shapes so do new rational and legal principles and measures to secure society and protect it. They vary according to circumstances and conditions and time and space. It is the responsibility of jurists and lawyers to formulate norms, precedents, and make provisions and rules that can fulfill these objectives and fulfill this purpose. This has made Islam dynamic and provides it with

properties that enable it to meet the challenges of time and space and circumstances. This point has been supported by many other norms and maxims of the Islamic legal system which have been expressed by Qur'anic injunctions. Included in these norms are those derived from the well quoted tradition stating that "no harm shall be inflicted or reciprocated by Islam" (*la darara wa la derara fi al-Islam, qa'idato la darar* (Islamic law should not lead to harm, loss and damage to individuals and society and does not allow individuals to cause them to each other)), the norm expressing that "hardship, difficulty, arduous conditions and confusion ('*usr, haraj , qa'idato raf'e al-'usr wa al-haraj*) are not allowed to be inflicted by Islam and Islamic law. "He (Allah) has not laid upon you in religion any hardship". "Allah does not intend to (would not) place a burden on you". The several and various sources, norms and principle of Islamic law that feature next to Qur'an and Sunnah are all manifestations of the authority of *ijtihad* and human reasoning. Some of these maxims and principles have been explained here as examples, the authority of which is fully sanctioned by Qur'an and Sunnah .

The Shi'ah recognize the doctrine of the authority of human intellect as a source of law and the authority of *ijtihad* as its approach as a kind of umbrella doctrine covering all recognized rational principles, proofs and legal maxims. The essential unity and dynamism of Shari'ah lies in the degree of unity between textual sources and rational ones, between revelation and reason, and harmony between '*aql* and *naql*. This issue has a long history in Islamic studies. Ibn Rushd (Averroes. 520-595/1126-1198) dealt with it in his famous treatise under the title *Fasl al-Maqal fi ma bain al-Shariat wa al-Hikmat men al-Itisal*. (The Decisive and final discourse on the issue of the harmony between philosophy (*hikmah*) and the Shariah). He also dealt with this issue in his other book *Manahij al-Adillah* (Examination of the method and proofs concerning the doctrines of religion), and also in *Badayat al-Mujtahid*. (Qualifications of *Ijtihad* and *mujtahids*). This issue has attracted the attention of jurists ever since. Even Ibn Taymiyyah, the recognized head of the traditionist school of law dealt with this issue in his book *Muwafaqato sarih al-ma'qul le sahih al-manqul*. (The harmony and agreement of explicit and conclusive rational norms and principles with clear authentic texts (Sunnah).

A legal system cannot meet the challenges of time and space unless it is in full harmony with human intellect, ('aql) human primordial nature (fitrah), human rights, human physical, mental, psychological, ethical, moral and spiritual needs of the individuals and society. I believe that the Islamic legal system is able to meet these challenges provided Islamic legal thought and approaches are reconstructed and revised according to new challenges and requirements. This is how the Islamic legal system can and may keep its dynamic character in the future as it has done in the past .

Islamic law has thus a clear history. It began with the revelation and the teaching of the Prophet (puh) and was developed as a system early in the history of Islamic studies and has been developing ever since. Muslim jurists and lawyers regard the Islamic legal system dealing with legal issues, rules and subjects as they were, as they have been, as they are and as they ought to be. It is true that Muslim lawyers regard it as a divine order and system, as the revealed will of Allah, given in the form of a message to His Messenger to be presented to the human community. However, the lawyers at the same time suggested that included in the spirit of the message are provisions and instruction to develop it into a system that would make it able to meet the challenges and needs of the entire human community worldwide in time and space. Contrary to what is proposed by some scholars, the Islamic legal system is not static. The pioneers of the system were followed by the founders of the schools of law and the jurists later expanded on the schools and developed them further. It is true that the majority of the scholars of some schools of law supported the idea of the closure of the gate of ijtiḥad, but some Sunni jurists and the Shi'ite schools of law kept the process of continuous development of the legal system throughout the history of Islamic law. As ijtiḥad itself has been validated by Qur'an and Sunnah the idea of the closure of its door (insidad bab al-ijtiḥad) has been challenged, one way or another, throughout the history of Islamic law. There have been considerable efforts recently to revive the process of ijtiḥad.. There are many fresh initiatives and new movements that are engaged in promoting a fresh approach to ijtiḥad. Some have even proposed the introduction of Neo-ijtiḥad . (This issue deserves to be dealt with in a separate article).

Islamic law is the lawyers' and jurists' law rather than the court and judges' law. But this characteristic of Islamic law has not deprived it of being a dynamic and practical law based on Islamic ideals. On the contrary, this concept makes it flexible and developing. Muslim jurists rather than judges took up this task. The greater parts of Fiqh consist of rules that are made through the process of reasoning and *ijtihad*. *Ijtihad* can take a variety of forms and interpretations of the sources which aim at correct understanding of the spirit of Islam and discovering the intention of the Lawgiver (Allah). This is to meet the legal needs of individuals and the society. Interpretation of texts and understanding of legal principles is primarily the approach of discovering the legal facts and forming legal opinions in the area and of issues which are not self evident either rationally or otherwise. Thus the object of interpretation of sources in Islamic law, as in other legal system, is to discover the intention of the Lawgiver and ascertain the fulfillment of the objectives of the law with regard to what has been left undealt with and unexpressed (or rationally obvious which did not need to be expressed as a matter of necessary inference from the surrounding circumstances). In the same way that religious texts can be classified as clear, obvious, unambiguous, manifest (*zahir*), and explicit (*nass*) and unclear, ambiguous- and vague, legal issues and subjects also can be classified as such. Even where the text is clear and absolute the jurists may abandon their primary and obvious meanings in favor of different meanings as the context and circumstances may require. This whole approach is thus rational reasoning which can vary according to the conditions of the time and space and circumstances.

Another step which can help Islamic law to meet the new challenges of modern times, contrary to what some may think, is the issue of reviving and strengthening the old harmony between Islamic law and Islamic spirituality and Islamic ethics. Issues such as human rights, justice, equality, truth, right and wrong, good and bad cannot be dealt with just by law or just by ethics. Some well developed civil societies have developed their legal system at the cost of ethical values or have tried to deal with ethical issues through legal measures. But they have experienced moral and ethical and even legal problems. For example, the institution of marriage and family is being challenged in the West, which has created serious social problems. This challenge has led to many problems, such as different forms of cohabitation, sexual relations,

homosexual relationships, Western style polygamy, sexual abuse, child sexual abuse and incest; (there is even talk about legalizing incest currently taking place in Germany because incest cases have been discovered) pornography, adultery, fornication, pedophilia crime, promiscuity, rape; single parent children, children with unknown father, abandoned and neglected children and families with many different children from different relationships, leading to loneliness, depression, juvenile problems, under-age sexual relations, under-age pregnancy, teenage problems and juvenile delinquency; the spread of addiction, prostitution, multiple killing of prostitutes by individuals, physical and psychological abuse of each other by married couples and partners and the refusal and reluctance of men and women either by choice or without choice to commit themselves to marriage. Unfaithfulness of partners, breakdown of trust, respect and commitment between spouses, wife swapping, divorces, desertion, separations and domestic violence are common and hence many different forms of shelters have had to be set up. We see an increasing number of abortions, a greater number of abandoned children, single parents, fostered children, children in care and rejected children. There is a great increase in the number of cases of cruelty to children and hence the formation of National Society of Prevention of Cruelty to Children (NSPCC). Teenage drug and alcohol addiction, promiscuity, stealing and other crimes to feed their addictions, the spread of sexually transmitted diseases and AIDS among both adults and teenagers, of cases of underage pregnancy and related suicides have all increased dramatically. These result partly from family problems and all forms and shapes of social and psychological problems associated with the breakdown of family foundation, some directly or indirectly associated with the breakdown of the institution of marriage. These problems which have affected Western societies directly are also slowly but surely creeping into Muslim societies, especially those societies which are influenced by Western culture and way of life. An understanding of the concept of marriage in Islam would help to address these problems, most of which are caused by the divorce between law and ethics, law and religion. Neither law nor ethics alone can solve all human problems: there has to be a harmony and mutual co-operation between the two. The efforts that some secular civil societies have made to deal with some

problems and issues that used to be regarded as ethical, such as making legal provisions for providing social, medical and financial help and security for the needy, the disabled, unemployed and elderly; through the process of law and legislation are certainly a step in the right direction. However many problems that some societies are still suffering from are left unresolved. It just shows that neither law nor ethics is able to meet all the challenges and the needs of individuals and human society on its own and without the support of the other. Law and ethics are interdependent and must work as mutual partners to meet the new challenges and changes of complex modern societies.

In this respect, one of the main features of Islamic law is its harmony with ethics. As both law and ethics are regarded as a code of behaviour with shared sources, objectives, foundation, philosophy and rewards, they both enjoy the same respect and attention in Islam. In the long run they both support the principle of leading the society and human community to what it ought to be and do. Islamic law in this sense is idealistic because it has to adhere to the basic ideals that a Muslim society must follow, ie the spiritual and ethical guidelines expressed by the spirit of Islam and the unity of God, the Creator of man as a whole, without conflict between his different faculties. But to call Muslim jurisprudence idealistic (and in full harmony with ethics) is not to suggest that the terms of the law itself lack practical considerations realistically related to the needs of society, as has been pointed out by some Western scholars of the history of Islamic law. What is intended here is to point out that lawyers, Jurists, courts, judges and also the general public do not see any conflict between the spirit of the law and ethics in whatever they do and make .

It is interesting to know that the Arabic term for truth, justice, 'wisdom' (the foundation of ethics) and judgment, the final objective of law, are the same; that is, the term *hkm*, from the root *hakama*, meaning to exercise authority (*hukuma*), to govern, to judge, (all in one way or another related to the concept of law). *Hikma* also means wisdom. A Qur'anic verse explains that the main task and responsibility of the prophet is to teach man and lead him to the Book, (the source of law), and to wisdom, (*hikma*), the foundation of good behavior and ethics. Allah is the source of justice (*Hakim*), the objective of law. He is the perfect judge and will judge the behavior and intentions of His creation according to the

code of behavior revealed to the Prophet and transmitted to them, which covers both law and ethics. Allah is just and has revealed his message so that justice can be established. Reliable justice can be understood and established by human beings when man has been refined by the virtues of modesty, fairness, courage, wisdom, respect for others, consideration, good intention, equity etc.(ethics). One of the major attributes of Allah is also al-Adil (the All Just). The essence of justice and equity is a quality of the Creator, Allah. To understand the perfection of Divine justice, we need to understand unity and harmony at all levels, that is, at the levels of both law and ethics. That is balance, justice, harmony and unity of the sources, objectives, rewards and punishment encompassed by the entire code of behavior, which covers both law and ethics, the code of what man ought to do and according to which he ought to behave. This is to show that there is a solid relationship and harmony between law and ethics in Islam.

Another major issue regarding the harmony of law and ethics is the encouragement and implementation and establishment of justice, order, security along with truth, right, values, virtues, correct manner, behaviour and respect for people's culture, tradition, custom, moral and ethical principles as objectives of both law and ethics. Islam introduces Allah as the source of absolute truth (Al-Haqq). Haqq is from the root haqqa: to be true, just, valid, absolute and permanent. Haqiqah is truth, and reality. From the absolute truth (Haqq-Allah) emanates varieties of realities, manifestations and experiences in many forms. From the absolute source of truth (Allah) emanates the expression of truth in the form of what ought to be expressed, implemented and done in the form of both law and ethics. Al-haqq enables us and guides us to understand, distinguish at the same time between both right and wrong (the subject of law) and good and bad (the subject of ethics). As far as the question of harmony of law and ethics is concerned, it is interesting to know that certain fundamental objectives and principles of law, such as the establishment of truth, justice, equity, fairness, right and wrong, good and bad are at the same time objectives and fundamental principles of ethics too. This is very true of Islamic terms for these principles, such as 'adl, haqq, 'adl and qist. One of the major attributes of Allah is al-muqsit, (the

all-equitable). It is from the root *qasata*, to act justly or equitably. *Qist* is an equitable portion. Allah is introduced as the original source of *qist*, and *‘adl* that is balance, harmony, order, justice and equity. Allah is the perfect source and applier of all these, which are the objectives and principles of both law and ethics at the same time.

An example of the continuous growth of Islamic law according to circumstances and conditions of time and space due to the continuous use of reasoning, human intellect and rational principles as a source of law is the case and history of the establishment and development of the Shi’ite Islamic school of law. It has been suggested that the history and evaluation of Shari’ah law falls into the three main stages of growth, the inception, prominence and decline of the classic concept of law, and that the last stage took place between the 10th and the 20th centuries. This suggestion certainly does not apply to the Shi’ite school of law, which has been growing non-stop since its establishment. There are some major and special features of the Shi’ite school of law as follows:

The continuous growth of the school, mainly due to the continuous process of legal reasoning (*ijtihad*). This doctrine is termed *Iftitah bab al-Ijtihad* or the continuity of the process of legal reasoning.

The authority of human intellect (*‘aql*) as one of the four major sources of Islamic law along with the *Qur’an*, *Sunnah* and *Ijma’*’. As human reason does not stop growing and functioning, its authority as a source of law does not stop either and cannot be confined to a limited time and space.

Human intellect is the only source of knowledge in the field of Islamic ideology, ideals and beliefs. In this field the *Qur’an* and *Sunnah* are regarded as the source and means of guidance. This is because one cannot prove the doctrine of the unity of Allah (*tawhid*), for example, as the cornerstone of the whole Islamic belief system by *Qur’an* and *Sunnah*.

The authority of human intellect in the field of law is the cornerstone of the authority of the other sources of law and other legal rational principles, maxims and norms. This is because even the authority of *Qur’an* and *Sunnah* is fundamentally proved by human intellect in the first place and they may be understood and interpreted only in the light of

human intellect. This is also the case with rational principles. The basic principle in the field of law and human behaviour is the principle of freedom of action, freedom from liability (Isalat al-Ibaha and isalat al-Bara'ah) until proven otherwise. To prove otherwise one needs solid reliable sources. Human intellect thus is as authoritative in the field of law as in the field of ideology. Shi'a lawyers, jurists and scholars from the very beginning of the history of the Shi'ite school of law have supported the idea of the authority of human intellect as the source of law along with its authority as the source of Islamic ideology. Pioneers in this field , such as Sheikh Mufid (334-413 A.H.), Seyyed Mortada (355-436 A.H.), Sheikh Tusi and others have initiated the doctrine that classic traditional sources and texts such as Qur'an and Sunnah, have to be explained in the light of human intellect and even to be understood, explained and interpreted this way so that they can be compatible and in harmony with human intellect (taviil). The absolute authority of text (nass) in the field of rituals is a different issue (la ijthada fi muqabile al-nass). In this field human intellect regards text as the only source. This is because only Allah himself has the right to tell us how he should be worshipped.

As far as human behaviour in general (non-ritual) is concerned, not only human intellect frees man from obligation (Isalat al-ibaha) and provides him with freedom from responsibility (Isalat al-bara'a), but at the same time Islamic texts also provide him with the same freedom. An accepted report (maqbulah) transmitted by Omar ibn Hanzalah explains this point as follows: worldly affairs are of three types: a) those which are clearly and obviously right and good. They must be fulfilled. b) Those which are clearly harmful and bad. They must be avoided, and c) those the state of which is not clear. They should be evaluated and referred to Allah

The detailed evidence found in the texts (Qur'an and Sunnah) are divided into four categories as follows:

Evidence which is decisive and definite in respect of both authenticity and meaning (qat'i al-sudur wa al-dalalah)

.Evidence which is authentic but speculative in meaning (qat'i al-sudur, Zanni al-dalalah)

Evidence which is of doubtful authenticity but definite in meaning (zanni al-sudur, qat'I al-dalalh)

Evidence which is speculative in respect of both authenticity and meaning (zanni alsudur , zanni al-dalalh)

In the light of the strong Qur'anic warning against speculation and presumption(zann) , in the light of Qur'anic injunctions to follow only certainty and definite and decisive sources(qat') , and in the light of the fact that sources and texts which are decisive both in respect of authenticity and meaning are limited but the legal needs and circumstances are unlimited and that these needs must be met and cannot be left without legal rulings; and in the light of the fact that human intellect is able to meet the challenge and is encouraged by Qur'an to make definite (qat'i)decisions and provide decisive conclusions; and in the light of the fact that communities cannot live in legal vacuum and chaos, the community and jurists are left with no choice but to resort and appeal to human intellect to solve legal problems and deal with legal issues of the society. The Qur'an suggests that the main objective of the revealed religions is the establishment and maintenance of justice(qist). This naturally requires the making and keeping of law, order, security, and peace. If texts and speculative sources are absent or unable to do so, the ummah in general and the lawyers and jurists in particular have the responsibility to make provisions to do so and solve legal problems, and meet legal challenges and needs. Added to all these is the fact that modern life and times have brought with them new legal issues, complications, challenges needs and requirements which must be dealt with. Some old legal issues, such as slavery, have disappeared and some new ones such as the issue of human rights such as the right of minorities in general (and not only the right of the minority of 'people of the book' (ahl al-kitab)) have come into being. Again, there are many large Muslim minorities, and sometime very large ones, who live amongst non-Muslim majorities.

They have their own specific legal problems and legal requirements. These and many more issues lead us to believe that there is

an urgent need for the reconstruction of legal thought, and revision of legal approach in the field of Islamic law. This can only be done through the revision of sources of law and the introduction of new ones, such as legislation, and reintroduction of human intellect as the source of law .

An example would help to explain the point we have been trying to make. Some Muslim countries, Iran, Turkey and Egypt, in particular have been using a new and fresh approach to *ijtihad* and a fresh understanding of the spirit of *Shari'ah* and its sources and principles. As a result, they are developing, for example, personal and family law to meet the challenges of the changing times. There is a tradition which has been recognized as a legal principle and norm(*qa'idah fiqhiyyah*) stating that "the Muslims/believers are bound by their promises and commitments." There are also a few Qur'anic verses expressing the same point. By appealing to this principle, the jurists and legislators have produced provisions for the legal validity of mutual pre-nuptial agreement between spouses, e.g. that the spouses may draw a pre-nuptial contract including conditions, terms and phrases as they wish. For example, it may include the right of the wife to work or not to work, the choice of residence and so on. This tradition which we have just mentioned, is inclusive. Not only does it provide the jurists, lawyers and legislators with the power to initiate absolutely new contracts to meet the legal needs of modern times, but it also allows all people involved in contracts to make the contracts conditional according to the terms they wish, provided the terms attached to a contract are not in conflict with the nature of the contract concerned. For example, the idea of 'open marriage' would not be allowed. And in the case of a sale of a property, the two sides could not stipulate a condition forbidding the purchaser to reside in the property or to re-sell it, for this would challenge the nature of a sale contract. Another tradition (*hadith*) that has been recognized as a legal principle states that "People have full authority over themselves and their belongings "

This principle also provides jurists and legislators with the opportunity to make legal provisions to meet new legal needs and challenges. In this short article reference has been made just to some of the principles of Islamic law. These and many more have provided the

Islamic legal system with the resilience, dynamism and quality to meet the challenges of time and space. They have helped the Muslim jurists and legislators to put forward the idea of Neo ijtihad .

It should be pointed out that the Prophet(pbuh) did not establish the Islamic legal system and the Islamic schools of law. He simply introduced and explained, besides the Islamic rituals, general guidelines of behaviour, and certain basic principles of relationships for the newly established Muslim community. The Qur'an and the Sunnah of the Prophet (his words, deeds and approval) dealt essentially with the basic principles of Islam and the bare foundations and guidelines of Islam as a religion. The Islamic legal system and Islamic schools of law were established, developed and introduced by Muslim lawyers, jurists and scholars. They are to be credited with formulating the principles and the framework and introducing Islamic legal system and establishing Islamic schools of law. They were the pioneers in this field. One of the major pioneers of Islamic law in general and Shi'ite Islamic law is Sheikh al-Tusi. He produced quite a few books in this field one of which is *Al-Nihayah fi Mujarrad al-Fiqh wa al-Fatawa*. A Concise Description of Islamic Law and Legal Opinions

The author, Mohammad ibn Hasan ibn Ali ibn al-Hasan, known as Abu Ja'jfar, has been given the honorific title 'Sheikh al-Tai'fat al-Imamiyyah' (the Head of the Twelver Shi'ite School of Law and Thought) by the Shi'ite community and school and is also referred to as Sheikh al-Tusi (the grand scholar/master from Tus). He was born in Ramadan 385AH/995AD in the city of Tus in Khorasan, the north eastern province of modern Iran. He died on Sunday night of the 22nd of the month of Muharram in the year 460Ah/1066AD in the city of Najaf, the city in south eastern Iraq where Imam Ali (as) is buried .

He left Tus and Khorasan in 408/1017 for Baghdad at the age of twenty-three for further education after exhausting all means of education in his home town. He studied in Baghdad, Karkh, under the then head of the Shi'ite community and school, Mohammad ibn Nu'man, known as al-Sheikh al-Mufid, and remained as a close favourite student and disciple of him until his master died in 413/1022. Sheikh al-Tusi then became a close associate and student of Sharif al-Murtada, 'Alam al-Huda who took over the leadership of the Shi'ite community from Sheikh al-Mufid after his

death until his death in 438/1044. . Sheikh al-Tusi became the head of the Shi'ite community and school of law after the death of Sharief al-Murtada .

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- ¹ Professor A.Ezzati, MA, Ph.D, the translator of *Al-Nihayah* from Arabic to English,. was born in 1932 in Iran. He graduated from the University of Tehran. He obtained his higher degrees from the University of Tehran and London. He worked at the University of

Tehran as a full time Professor for some years. He has taught at centres of advanced studies in the UK and USA and worked as research associate at the University of Reading, England and at the University of Harvard, USA. Dr. Ezzati has written books on various aspects of Islam in English, Persian and Arabic. Some of his works have been translated into other languages such as Turkish, Hausa, Spanish, Russian and Arabic.

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I would like to draw the attention of those who are interested in following this point further to the book written by the author of this article under the title of *Islam and Natural Law*, pub. ICAS. In this book the author explains the harmony between Islamic Law and Natural Law and thus the harmony of Islamic Law and ethics, or at least Islamic ethics.

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