

AN APPRAISAL TO THE HISTORY AND DEVELOPMENT OF FIQH

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Abstract

Technically, Fiqh refers to the science of deducing Islamic laws from evidence found in the sources of Islamic Law. By extension, it also means the body of Islamic laws so deduced from the sources of Islamic law. In this paper, an appraisal of the history and development of Fiqh, the term “Shari’ah law” would be used to mean the laws of Shari’ah. However, shari’ah refers to the sum total of Islamic laws which were revealed to the Prophet Muhammad (SAW), and which are recorded in the Qur’an as well as deducible from the Prophet’s divinely guided lifestyle (called the Sunnah). The basis of Fiqh in the early period consisted of the laws of Shari’ah (Qur’an’ and Sunnah). Fiqh during the rightly guided caliphs are Ijma, and Qiyas while during the successors of the companions Ijtihad served as deductive sources of Fiqh. During the era of stagnation their sources include, Ijma, Qiyas, Ijtihad and Urf, and the last phase of decline is the use of Taqleed. This era ended the dynamism and growth of Fiqh.

Introduction

Fiqh literally means the true-understanding of what is intended. An example of this usage can be found in the Prophet Muhammad (SAW)’s statement: “To whomsoever Allah wishes good He gives him the Fiqh (true understanding of the religion)” (Sahih Bukhari).

Technically, however, Fiqh refers to the science of deducing Islamic laws from evidence found in the sources of Islamic Law. By extension, it also means the body of Islamic laws so deduced. Shariah literally means, a waterhole where animals gather daily to drink, and technically means the straight path’ as in the Qur’an verse: “Then we put you on a straight path (Shari’ah,) in your affairs, so follow it and do not follow the desires of those who have no knowledge” (Q45V18).

However, shari’ah refers to the sum total of Islamic laws which were revealed to the Prophet Muhammad (SAW), and which are recorded in the Qur’an as well as deducible from the Prophet’s divinely guided lifestyle (called the Sunnah).

From the previous definitions, the following three differences may be deduced:

1. Shari’ah is the body of revealed laws both in the Qur’an and in the Sunnah, while Fiqh is a body of laws deduced from Shari’ah to cover specific situations not directly treated as Shari’ah law.
2. Shari’ah is fixed and unchangeable, whereas Fiqh changes according to the circumstances under which it is applied.
3. The laws of Shari’ah are, for most part, general. They lay down basic principles. In contrast, the laws of Fiqh tend to be specific. They demonstrate how the basic principles of Shari’ah should be applied in given circumstances.

In this paper, on the history and development of Fiqh (evolution of Fiqh), the term “Shari’ah law” would be used to mean the laws of Shari’ah and the laws deduced from the sources shariah.

They ask you about wine and gambling. Say, There is great evil in them as well as benefit

to man. But the evil is greater than the benefit” (Q2V217-219).

“They ask you about menses. Say, it is harm, so stay away from (sexual relations with) women during menses” (Q2V222).

A number of other verses were revealed due to particular incidents, which took place during the era of the Prophet (SAW). An example can be found in the case of Hilal Ibn Umayyah who came before Prophet (SAW) and accused his wife of adultery with another of the Prophet’s companions. The Prophet (SAW) said: “Either you will receive the fixed punishment (of eighty lashes) on your back”. Hilal said, “Oh Messenger of Allah! If any of us saw a man on top of his wife, would he go looking for Witnesses?” (Sahih Bukhari). However, the Prophet (SAW) repeated his demand for proof then angel Gabriel came and revealed to the Prophet (SAW) this verse:

as for those who accuse their wives and have no evidence but their own, their witness can be four declarations with oaths by Allah that they are truthful and a fifth invoking Allah Curse on themselves if they are lying. But the punishment will be avenged from the wife if she bears witness four times with oath by Allah that he is lying and a fifth oath invoking Allah ‘s curse on herself he is telling truth (Q12V6-9).

The same was the case of Islamic legislation found in the Sunnah, much of which was either the result of answers to questions, or were pronouncement made at the time that incidents took place. For example, on one occasion, one of the Prophet’s companions asked him:

Oh Messenger of Allah! We sail the seas and if we make wudoo (ablutions) with our fresh water we will go thirsty, can we make wudoo with sea water? He replied, “Its

water is pure and its dead (sea creatures) are Halal (permissible to eat).

The reason for this method of legislation was to achieve gradation in the enactment of laws, because it made it easier for them to learn and understand the laws since the reason and context of the legislation would be known to them. Example of gradation in the enactment of individual laws in the early Makkan period. Sallaah initially twice per day, one in the morning and one at night, shortly before the migration to Madeenah, five daily prayer was enjoined on the believers.

Legal Content of the Qur’an

Islamic legislation in the Qur’an is comprised of a variety of acts which have been enjoined by divine decree on mankind. These acts may be grouped in two basic categories with regards to the parties involved in the acts.

A. Dealings between Allah and Men: These are the religious rites which are not valid without intentions. Some of them are purely religious form of worship, like prayer and fasting, while others are socio-economic forms of worship like Zakaat (compulsory charity), and yet others are socio-physical forms of worship, like Hajj. These acts of worship are considered the foundation of Islam after faith.

B. Dealing among Men: The laws governing these dealings may themselves be divided into four sub-sections relative to the subject matter of dealings:

a) Laws ensuring and defending the propagation of Islam. These are embodied in the codes of armed or unarmed struggle (Jihad).

b) Family laws for the development and protection of family structure; these include laws concerning marriage, divorce and inheritance.

- c) Criminal law specifying punishment and or compensation for various crimes.
- d) Trade laws governing business transactions, rental contracts etc.

The Basis of Legislation in the Qur'an

The Qur'an itself announces that, it was revealed to reform human conditions. Islam did not erase all pre-Islamic customs and practices. Instead, it removed every facet of corruption, and cancelled all customs which were harmful to the society. Consequently, Islamic legislation forbids interest because it takes unfair advantage of the less fortunate members of society. Fornication was forbidden due to its exploitation of women and the destruction of family bonds. And alcohol was prohibited because of the physical, psychological and spiritual damage. It inflicts on both the individual and the society as a whole. Trade practices were reformed by making the basis of trade mutual consent etc. because Islam did not come to destroy human civilization, morals and customs. It builds on it a new civilization with a new morals and customs. It looked at everything from the perspective of human welfare. What was harmful was removed and what was beneficial was confirmed. Allah says on the Qur'an: "It commands them to do righteousness and prohibits them from evil, and it makes allowable to them the good things and makes forbidden to them all filth" (Q7V157).

In order for Islamic legislation to achieve its goal of recognition, it has enacted a series of legal commandments and prohibitions, which came up from the rules of conduct governing the social system of Islam. However, in the enactment of laws, the Quranic revelations have taken into consideration the following four basic principles.

1. Removal of Difficulty

The system of Islam has been revealed for man's benefit. It provides him with guidance in all walks of life, in order to ensure for him a righteous lifestyle within a just society committed to the service of God. Islamic laws are not meant to be a burden, creating difficulties for man in order for him to grow spiritually, as some system may claim. They are designed to facilitate mankind's individual, and societal needs. As such, among the pillars on which Islam is based is the removal of unnecessary difficulties which are found through the Qur'an. The following verses from the Qur'an are only a few examples:

Allah does not burden a soul with more than it can bear" (Q2V286).

...Allah wishes for you ease and He does not wish difficulty for you" (Q2V185).

"He did not make any difficulty for you in the religion". Q22V78

Allah wishes to lighten .the burden for you, for man was created weak" (Q4V28).

Because of this principle, Allah has enacted along with divine laws, a variety of legal concession like the permission to break the fast, and shorten and join prayers during travel. Prophet (SAW), who was the prime example of how Islamic law was to be implemented, was himself described as always choosing the easier path whenever a choice was given to him between two possible path, as long as the easier path was not sinful. He was also reported to have said to some of his followers on the occasion of their departure as Governors of Yemen, "make things easy (for the people) and do not make them difficult".

Islamic scholars unanimously consider this concept an indisputable fundamental principle followed by God in the enactment

of laws. Consequently, in their implementation of the divine laws, they have deduced many secondary laws on this basis.

2. The Reduction of Religious Obligations

Accordingly, the prohibited acts and substances in Islamic legislation are quite few in comparison to those which are allowed by direct command by the absence of any command of prohibition. This principle can be clearly seen in the method by which the Qur'an deals with prohibitions and permissions. For example, in regards to women with whom marriage is prohibited, Allah (SAW) states:

Prohibited to you are your mothers, your daughters, your sisters and your aunts... (Q4V23).

After completing the prohibited categories, Allah says,

...Except for these, all others are lawful, provided you seek them in marriage with a dowry and not for fornication... (Q4V23).

As for the goods, the forbidden categories are also listed in detail. The Qur'an states:

Forbidden to you are: animals which die of themselves, blood, pork, animals slaughtered in the name of others besides Allah, animals killed by strangulation, or a blow or fall or being gored... (Q5V3).

On the other hand, in regard to the permissible foods, Allah states:

Of this day all good things are made lawful for you. The good of the people of the Book is lawful to you and your food is lawful to them... (Q5V5).

Furthermore, in spite of the fact that, the things which have been forbidden are quite few in comparison to those which have been permitted, the sin of one who is forced to take forbidden substance has also been lifted. Allah states this concession in a number of places in the Qur'an. For example:

But if anyone is forced by necessity; without willful disobedience, no transgressing due limits, there is no sin on him, for Allah is oft-forgiving, most merciful.

A good example of limitation of detail can be found in the Qur'an treatment of business transaction. The laws in this regard have not at all been detailed. Instead, general precepts suitable for all circumstances have been legislated. For example: Allah states:

Oh you, who believe, fulfill our covenant...." ...Allah has made trade lawful and prohibited interest ... (Q2V275).

"Oh you, who believe, do not eat up your properties amongst yourselves unfairly, but there should be trade by mutual good will (Q4V29).

3. Realization of Public Welfare

Because the laws of Islam were primarily enacted for general good of all mankind, the Prophet (SAW) was a universal Prophet sent to all people till the end of time. Allah stated that in the Qur'an:

We have not sent you but as a universal messenger to mankind, giving them glad tidings and warning them (against sin), but most people do not realize it Say, 'oh mankind, I am the Messenger of Allah to all. of you" (Q7V158).

The existence of abrogated (Naskh) within Islamic legislation is among the manifestations of human welfare's consideration in Islamic legislation. Allah (SWT) may prescribe a law suitable to people at the time of its enactment. However, its suitability may later disappear or its unique purpose may have been achieved. In such circumstances, the need of the law ceases to exist and its validity becomes cancelled. For example:

A. Bequest (Waseeyah): In pre-Islamic Arab culture his inherited the

property of the decease, and parents would only inherit if a bequest was made. Thus, in the early stages of Islam, Allah made the writing of bequest for parents and relatives compulsory, in order to teach the new community the importance of family rights with regards to their wealth. Allah says:

It is prescribed that when death approaches any of you, he leaves behind any goods, that he makes a bequest to parents and next of kin, according to what is reasonable. This is due from the pious. However, after the community willingly accepted this law and they began to strictly put it into practice.

Allah replaced it by revealing in the Qur'an a clearly defined system of inheritance laws. And the Prophet (SAW) further confirmed the abrogation of the old laws by stating "Surely Allah has given everyone with a right (to inheritance) his right, so there should be no bequest of inheritance".

B. Fornication: Originally, the punishment for the crime of fornication and adultery, as well as other sex crimes like homosexuality, was confinement and punishment of offenders in their homes until that became repentant and sought to reform them. Qur'an says:

If any of your women are guilty of sex crimes, take the evidence of your witness from amongst you against them. And if they test, confine them to house until death claim them, or Allah ordain for them another way, if two men among you are guilty of sex crimes, punish them both, but if they repent and make amends, leave them alone. For Allah is oft-returning, most merciful" (Q4V15-16).

This law was later abrogated in the Qur'an by the setting of a particular punishment:

Flog the woman and man guilty of fornication one hundred lashes. And if you believe in Allah and the last day, do not let compassion move you in their case for it is matter decided by Allah. And let a group of the believers witness the punishment (Q24V2).

Furthermore, the Prophet (SAW) applied the punishment of stoning to death for those who have once married guilty of adultery.

4. THE REALIZATION OF UNIVERSAL JUSTICE

Islamic legislation considers all humans the same with regards to their obligation to submit to the divine laws and in their responsibility for breaking them. The laws mentioned in the Qur'an are general, making no distinction between one group or another.

Allah enjoined justice and righteousness..." (Q16V90).

"Allah commands you to return your trusts to whom they are due, and when you judge between one man and another, that you judge justly.

Source of Islamic Law

Islamic law during stage of foundation was derived from revelation, either in the form of the Qur'an or the Sunnah. Qur'an says:

He does not speak from his desires. Verily it is inspiration which has been revealed" (Q53V3-4).

And he was also given the responsibility of clearing God's intent in the message:

We have revealed the Reminder (Qur'an) to you, in order that you explain to mankind what was revealed

to them, that perhaps they may reflect" (Q16V44).

Thus, the Sunnah was an exposition of the Qur'an by which its generalities were clarified and its intended meanings specified. Sunnah is addressed in the Qur'an either by inference or by direct reference.

Whatever the Messenger gives you, takes it, and whatever he forbids you, leaves it.

The address of the Qur'an may indicate general principles from which the Prophet (SAW) may deduce rulings and a time he may not give verdict until a particular verse is revealed. Among the example of deduced rulings which were not confirmed is that of the Dhihaar divorce. Khawlar Bint Tha'labah said, "My husband, Aws Ibn Assaamit, pronounced the words: You are to me like my mother's back. So I came to Allah's Messenger to complain. However, the Messenger of Allah disagreed with me and said, "Fear Allah, He is your cousin" I continued complaining, until the verse was revealed:

Allah has indeed heard the statement of the woman who disputed with you concerning her husband and carried her complaint to Allah, and Allah hears and seen all things, if any men among you declare their wives like their mothers (Dhihaar.), they cannot be their mothers. None can be their mothers except those who gave birth to them. They use bad words and falsehood..." (Q58V1-2).

The Era of the Prophet's Companions

This stage represents the era of the righteous Caliphs and the companions of the Prophet. It extends from the Caliphate of Abubakar (612 — 634CE). With expansion of the territories, thus, came up with new system, cultures and pattern of behaviour, for which no provisions can be found in the major source of law. To deal with these problems, the rightly guided Caliph replied

heavily on Ijma (consensus) and Qiyas (legal reasoning) in which they have been trained by the Prophet (SAW).

The authorization to employ *tjtihad* in arriving at religious judgments was given by the Prophet himself. When the Holy Prophet (SAW) sent his companion Mu'adh Ibn Jabal to Yemen as Judge, he asked him, "How will you judge whom you're presented with a case?" Mu'adh said: "I will judge by the Book of Allah". He said: "And if you don't find (it) in the Book of Allah?" He said: "Then (I will judge) by the Sunnah of the Messenger of Allah". He said and "if you don't find it in the Sunnah of the Messenger of Allah?" He said: "Then I will exert my mind. And I won't be negligent. Then the Prophet patted him on his chest, and then said: "All praise is due to Allah who has guided the Messenger of Allah and what pleases the Messenger."

The Approaches of Individual Sahabah to Ijtihad

In the first place, Sahaba who were in the decision making positions made it clear that their deductions were not necessarily as Allah intended. For example, when Ibn Mas'ud was questioned about the inheritance rights of a woman who had married without defined *maht* (dowry), he said, "I am giving my opinion about her, if it is correct, then it is from Allah, but if it is incorrect then it is from Satan". Secondly, if they made different rulings on a problem in their individual capacities (Hadeeth) on the subject, they would immediately accept it dropping all differences. For example, after the Prophet's (SAW) death, the Sahabas held different opinions as to where he should be buried. When Abubakar related to them that he heard the Prophet (SAW) said that, Prophets are buried in the spot where they die, they dropped their differences and dug his grave beneath his wife's (Aisha) room.

Finally, when neither authentic proof nor unanimous decision could be arrived at the companions used to respect the opinions of each other and would not force other Sahabah to follow any individual opinion. The only exception to this rule was if they found people following practices, which were formally accepted but later became forbidden by the time of the Prophet's death, some of the Sahabas were unaware of the prohibition and, thus, continue to practise temporary marriage during Abubakar's (RA) caliphate and the first half of Umar's (RA) caliphate. When Abubakar became aware of the practice of Mut'ah, he forbade it and prescribed a severe punishment for the offenders.

Characteristics of Fiqh During this Period First, we discern that, the outstanding characteristic of Fiqh during the period of rightly guided caliphs was its realism. That is, it was based on actual problems rather than a hypothetical for imaginary ones. This realistic form of Fiqh was later referred to in Arabic as Fiqh al-wafi'ee (realistic Fiqh).

Secondly, although the righteous caliphs lent to follow certain procedures to achieve legal rulings, neither they nor the Sahabah as a whole prescribed set procedure to be followed throughout the Islamic nation, nor did they make a record of the laws resulting from their legal rulings. This open mindedness in areas not clearly defined by Shari'ah reflects, in the first place, the Sahabas' respect for freedom of opinion in such matters. Such an attitude contrasts strongly with the appearance of rigidity on the part of certain later Sahabas. In the second place, it was in keeping with the Sahabas' policy of recommending for the masses the careful study of the Qur'an without the destruction of legal rulings on matters not defined therein.

The third characteristic of Fiqh in this period relate to the use of personal opinion in making legal rulings. The majority of the Sahabas preferred to stick closely to the literal meanings of texts of the Qur'an and the Sunnah. As a general practice, they avoided giving personal interpretation. Ibn Umar, one of the leading Jurists among Sahabah, who remained in Madinah, followed this practice. On the other hand, there were other Sahabah who favored the wide use of personal opinion in areas undefined by the Qur'an and Sunnah. Abdullahi Ibn Mas'ud represents this school of thought.

The fourth characteristic of Fiqh in the period of rightly guided caliphs concerns the modification of some laws of Shari'ah, owing to some factors, which may be due to the disappearance of the reason for the laws' existence, or a change in social conditions. An example of the first is the prohibition by caliph Umar of the practice of giving cash gifts from the central treasury to newly converted Muslims. Umar reasoned that the practice had been followed by the Prophet in the early stage of Islam, when there was urgent need for all possible supporters.

Therefore, the basis of the Fiqh, during this period, are Ijma' and Qiyas and during this period legal rulings became increasingly necessary but the companions avoid hard and fast ruling.

Conclusion

The basis of Fiqh in the early period consisted of the laws of Shari'ah (Qur'an' and Sunnah), while the basis is deductive. Fiqh, during the rightly guided caliphs, are Ijma, and Qiyas while during the successors of the companions, Ijtihad served as deductive source of Fiqh. During the era of stagnation, their sources include Ijma, Qiyas, Istihsan and Urf, and the last phase of decline is the use of Taqleed. Unfortunately,

this stagnation and decline era ended the dynamism and growth of Fiqh.

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