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IJTIHAD: A PROMINENT AND VIBRANT TOOL OF SOCIAL CHANGE AND DEVELOPMENT

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Abstract

The human society is not a static one, and so is the law governing it. As a result of this, new cases arise regularly and they require legal solutions. This phenomenon is not alien to Shariah. The way to find solutions to new cases in Shariah is through the exercise of Ijtihad and thus, the thrust of this paper is to discuss the concept of Ijtihad. In doing this, the understanding of the term by both modern and classical scholars is examined then the concept is historically traced to the prophet and his companions, finding justification for it also in the sources of Shariah. Social changes in the human society are discussed to highlight the necessity of Ijtihad and at the same time reveal how Ijtihad responds to such changes, especially in a world that abounds with conflicts of laws. Because of the response of Ijtihad to social changes, it is then imperative to examine how such responses have brought about development in the different fields of human endeavour. Subsequently, how and when Ijtihad is technically exercised is discussed, then discussion of the qualification of a person to exercise Ijtihad follows. The paper finishes with the main recommendation that "strict-constructionism" in Shariah should be reviewed or relaxed through the use of Ijtihad considering the composite nature of Shariah as being both dynamic and flexible though conservative and rigid.

Key Words: Ijtihad (Legal Reasoning), Mujtahid (Jurist), Ahkam (Rules), Sahabah (Companions), Fiqh (Jurisprudence), Ummah (Nation/Community), Shar' (Legal)

1. Introduction

Ijtihad is defined as an activity, a struggle and a process to discover the law from the texts and to apply it to a particular set of facts awaiting a decision¹ it is the striving-hard exercise of a qualified jurist, a process through which he discovers the law from the primary sources (Qur'an and Sunnah), being the primary textual evidences of the Shariah, thereby applying same to a particular set of facts with which he has been confronted from a legally acceptable verdict. The task of the Mujtahid (jurist who

¹ Nyazee I.A.K., *Theories of Islamic Law* (Adam Publishers and Distributors, New Delhi, 2006), p. 287

embarks on Ijtihad and who is qualified to exercise same) is to examine the facts and look for the applicable law from the textual sources of Shariah (Qur'an and Sunnah). In so doing, the Mujtahid, after he might have discovered the law from the text will now determine the extent of the applicability of the law to the facts, and therefore apply the law to the facts to the extent of its applicability. It (Ijtihad) therefore involves seeking the knowledge of *ahkam* (rules) of Shariah through interpretation.²

Under the Shariah the Muslim life consist of no dictum as religion works as a complete code of life. In other words, in Islam, the concept of faith, morals, ethics, economy, politics, law and justice among others are fused together. As the focus here in relation to ordinance, law and justice are just some of the eternal features of the Islamic Law. Ijtihad as a concept encapsulates the whole gamut of Islamic jurisprudence by providing all necessary ingredients to make the law dynamic and to ensure no vacuum is left. Thus, it is expected that the fosse of this piece will give a detailed exposition of the relevance of the principle of Ijtihad in relation to the growth of the law as well as its efficiency in shaping and/or re-shaping the society.

Meaning of Ijtihad

According to lexicographers, Ijtihad is derived from the word '*juhd*' which means employment of effort or endeavour in performing a certain activity³. Ibn al-Kathir notes that it means an effort and endeavour undertaken for attaining some objective. He went on explaining that *juhd* means employing one's complete strength, and *jahd* means hardship and difficulty⁴. Ibn Manzur al-Misri described *juhd* and *jahd* as strength and power. While he says *jahd* is the hardship and difficulty, *juhd*, he says, gives the sense or the feeling of power and strength⁵. In the wordings of the Holy Prophet, Ijtihad was used in the same context as many scholars.

Pronounce benedictions over me and be diligent in prayer⁶ As to the prostration, be diligent (or insistent) in prayer, for that makes it worthy of acceptance⁷. The 'alim is superior to the Mujtahid by a hundred Degrees.⁸

The sahabahs too were also reported to have used the word Ijtihad to mean struggle and hardship in worship. Talhah ibn 'Ubayd Allah said:

² Al-khudriy S.M., *Usul al-Fiqh* (7th Ed. Dar al-Fikr, Cairo, 1981) p. 367

³ Muhammad Ibrahim Jannati, <http://www.al-islam.org/al-tawhid/al-ijtihad>, accessed on 20/9/2011

⁴ Al- Nihayah vol.1, p.219

⁵ Lisan al-Arab, vol.3, p.133

⁶ Sunan al-Nasai, *The chapter on the command to pronounce benedictions on the Prophet(saw)* vol.1, p.90

⁷ Sahih Muslim, *Kitab as-salat*, hadith 207; Musnad Ahmad Ibn Hanbal, vol.1, p.219

⁸ Muqaddima of Sunnan al-Darimi, vol.1, p.100

(There were) two men in the days of the Prophet one of whom surpassed the other in his Ijtihad (diligence in Worship). The diligent one participated in war and was martyred.⁹

Historical Background and Development of Ijtihad

Having observed Shariah to have covered all spheres of human life, it can be justified that it is more than a law viz-a-viz its development in Islamic jurisprudence. This is so because law is nothing more than the external texture of Islam. Thus the science which derives values and all laws from Shariah ordinance is called the science of *Fiqh* i.e. Jurisprudence.

In other words, it appears imperative to make a brief allusion to some distinctive features of Shariah. It is evident that Shariah is unique in its possession of seemingly self-contradictory but mutually re-enforcing qualities apparent in at least 3 different areas in relation to each development:

1. The Shariah combines the characteristics of both fixity where there is no ambiguity and flexibility as circumstances demand. The concept of flexibility and fixity are illustrated in the following Qur'an verse:

"Oh! You who believe fasting has been prescribed for you as it has been presented for those before you. Fasting for a fixed number of days..."

Qur'an 2 (Al-Baqarah) vs. 183-184.

The message in the above verse is clear. The duration has been fixed and there is no ambiguity on those on who fasting is incumbent. However, the concluding part of the verse goes thus:

And whosoever among you is ill or is on a journey should repeat the number of missed day for the other day. Allah intends ease with you and does not intent hardship for you.

This practically evidences flexibility as it requires that whosoever cannot fast due to any of the reasons above is a ransom, the feeding of an indigent in place of fasting is a clear indication of relaxation in the law and not a rigid declaration.

2. The Shariah is both conservative and dynamic. This means that Shariah is all encompassing. The above assertion addresses the fact that the intendment of

⁹ Sahih Muslim, Kitab al Itikaf, hadith 8; See also Sunnan Ibn Majah, Kitab al-Sawm, hadith 1767

the composition of the Qur'an is clear in the sense that its (Qur'an) provisions are unquestionable and always static in its application. Jurists are allowed to exercise independent legal reasoning or judicial activism (Ijtihad) within the context of the external provision in question to novel issues not apparent in the letter of the text but covered within the purpose and wisdom of text. Allah says:

And nothing have we left (Untouched) in this book.
Qur'an 6 (Al-An'am) vs. 36

It is due to this quality that the Qur'an which was revealed about 1400 years ago has remained unchanged in letter and intendment and in supreme and parallel relevance for all time. This point is entrenched by the third point,

3. The immutability and mutability of the sources of Shariah. Though this shall later be treated in detail, the first two sources of Shariah, Qur'an and Sunnah are the immutable sources which shall remain unchanged for all time. The other sources like Ijma' (consensus of Jurist), Qiyas (Juristic analogy) are as of necessity contextually relative to human existence at any particular period.

A new era may require a new analogical deduction from the immutable sources thereby rendering an earlier deduction a mere historical monument.

Lastly, a due consideration of the above postulations in Islamic jurisprudence will lead one to readily agree with the view that "the Shariah corresponds to a reality that transcends time and history. Rather each generation in Muslim society should seek to conform to its teachings and apply it anew to the condition it found itself. The creative process in each generation is not to make the law but to reform men and human society to conform to the law. In the Islamic perspective, religion should not be reformed to conform with every changing and imperfect nature of man but man should be reformed so as to live according to the tenets of revelation. So, it is the human that must conform to the divine and not the divine to the human.

The processes of Ijtihad are a progressive and effort driven one aimed at allowing man conform to the dictates of Shariah. Hence, due to the dynamicity of the life of man, deductive meanings had to be made from both primary and secondary sources of Shariah in order that he may remain in the path of God. Ijtihad is the active process by a qualified jurist to obtain the law and its appropriate applications from adequate and acceptable sources. These sources include the Qur'an, Sunnah, *Ijma'*, *Qiyas*, *Istihsan*, *Masalih Mursalah*, *Istihslah*, *Sad al-Dhara'i*, *Madhab al-Sahabi* and so on¹⁰.

The force of Ijtihad right from the time of *Tarshi* up till present was not a rosy ride as it evolved from a lot of criticisms and debates among scholars who were designated as *Mujtahidun* (sing. *Mujtahid*) due to their efforts towards the making of Islamic law¹¹. These efforts were free and independent, based and undertaken solely for the purpose of advancement of *Shariah*¹². It was done in an atmosphere of intense research and criticism.

The principle of ijtiḥād has its roots to a discussion which ensued between the Prophet and Muadh Ibn Jabal, a qadi, on his way to al-Yaman as judge. The Prophet asked him how he would decide matters coming up before him. "I will judge according to the Qur'an", said Muadh. "If the book of Allah contains nothing to guide me, I will act on the precedents of the Prophet of God, and if it is not in that either, I will make a personal effort (ijtiḥād) and judge according to that". The Prophet is said to have been most pleased at the reply¹³.

It is generally believed that the process of Ijtihad started with the companions of the Prophet. This occurred at periods of his absence and even continued as the issuing of fatwa during the time of Khulafa Rashidin¹⁴. It was also referred to as Ijtihad al Ra'y.

From the second century, Ijtihad which had been treated as the same entity with *al-ra'y* was dissociated from it. It was at that time referred to as *Ijtihad al ra'y*. Muhammad Ibn Idris Al-Shaafi (D.821), the founder of Shafi Fiqh School of jurisprudence was the first to make the break from *Ra'y*. He then adopted Ijtihad as a methodology synonymous with *Qiyas*¹⁴. Although, many judges did not recognize *Ijtihad al-ra'y* as being exclusively *Qiyas*; they, however, developed and accepted most of his ideas. This is evidenced in the acceptance of Istihsan (finding the good by one's own deliberation) and Istislah (determining what is in the interest of human welfare by one's own deliberation) as further categories under Ijtihad.

By the beginning of the fourth century, a number of outstanding Muslim lawyers had effectively completed the construction of a complete systematic legal thought. They had studied about five hundred verses in the Qur'an which had legal connotations including various Hadith, agreement of Sahabahs, Imams and *Qiyas*. This constituted the systemization and codification of *Shariah*. During this period, various schools of jurisprudence sprang up. Even with several conflicts, a lot was achieved notably by Imam Abu Hanifa (D. 767), Al-Shaafi (D. 820) and Ahmad B. Hanbal (D.855). Towards the 10th century, some jurists in Iraq tried to put a stop to Ijtihad claiming its

¹¹ Ibid

¹² Masood .S., *The concept of Ijtihad in the history of Islamic Jurisprudence*, <http://www.stevenmasood.org/articles/ijtiḥād.html> accessed on 20/09/2011

¹³ Glasse, *The concise encyclopaedia of Islam*, p.182

¹⁴ The concept of Ijtihad in the history of Islamic jurisprudence, <http://www.stevenmasood.org>

doors were closed. However, this was not the same in many other countries who were actively making and enacting laws as need may arise¹⁵.

Ijtihad later was restricted to exclude cases that have become the subject of consensus as they were referred to as being out of the scope of matters liable to juristic interpretations. In short, it was restricted to the grey area of law where textual certainty was absent but where human reasoning on the basis on the text may uncover the truth as intended by God.

For example, it is generally believed that theft be defined in the context that a particular object is being moved (usually under lock and key) from the owner to an illegal possessor bringing so much discomfort to the owner. If we were to apply this principle adequately, we could convict the fraudster, internet criminals and con men of theft, a crime with a definite punishment under Shariah.

Islamic banking is a very recent concept in many Islamic countries which originated out of the need for the Muslim to live in accordance to religion not shaping religion to his own bidding. These banks for example are mega corporations operating within and outside Arabia competing with other corporations who are not based on the Islamic concept of financial transactions. Even though Muslims may trade with non Muslims, it should be done following adequate guidelines based on the Islamic principles of trust, equity and forbiddance of *Riba* (Usury).

The bottom line is that we need people who would spend ample time and mental energy to draw very comprehensive guidelines as to a very important issue like banking, an institution which was at best crude at the time of the Holy Prophet. We should however be grateful to Allah for providing us with the everlasting guidance of all times.

Those who intended to restrict or put a stop to the process of Ijtihad had a reason in mind. They believed Islam has attained stability through emergence of orthodoxy and so we need to put a stop to conflict of opinions and doctrine. They also believed that we needed to protect Islam from innovators and anarchists¹⁶. This was because the process of Ijtihad was characterized by intense debates, arguments and criticisms. They felt the earlier scholars were purer and free from prejudice than we are. They believed every matter had been resolved and no need for more confusions. However, some say that such a decision pushed Muslim intellectual activity to a stagnation. Also, they complained that the Muslim is ever facing with contemporary issues needing exact and specific legal explanations.

15

Ibid

16

Murtadha .M., *The Principle of Ijtihad in Islam*, (translated by John Cooper), Vol.10, No. 1 <http://www.al-islam.org/al-seerat/Ijtihad.html>

This was what led to the division of source and form of Ijtihad into independent and the dependent ones. The independent was known as *Ijtihad fi'sh-Shar*. It is based on the jurisprudence of the Khulafa-Rashidin and the schools of the four Imams. The other one is the *Muntasib* which operates within a school of Fiqh producing new laws in accordance with the Imam of the school. This power was essentially granted to the disciples of the Imams.¹⁷

Ijtihad and its Response to Social Change

The Islamic Law being the only truly existing and validly subsisting divine law on earth today is unique in that it is fixed in sources. Its fixed sources notwithstanding, it is very dynamic in its application.

It is boastfully stated that the level of dynamism displayed by the Shariah in response to the emerging socio-economic and legal realities has wonderfully surpassed all those laws being turned out by the parliaments day by day. The fixed textual sources of Shariah are readily available to cater for contingencies, emergencies and unanticipated circumstances. Therefore for Islamic Law, there is dynamism in fixity. We are convinced that Shariah, by its fixed textual sources, is ready to accommodate all situations whether contemporary or in future without needing to vary, alter, rewrite or manipulate its texts. Allah declares in the Qur'an;

*And We have neglected nothing in the book of Our decrees*¹⁸.

In the light of this verse, jurists have expressed opinion that the Shariah is all-encompassing and accommodating of all situations. Apparently convinced by the above verse, Imam Al- Shaafi' in the introduction to his famous book "Al- Risalah" writes:

*No problem will ever beset the Ummah unless there is guidance in the book of Allah to remedy the particular situation and to indicate the right way*¹⁹.

Unlike all other legal systems, where the parliament is bombarded with daunting societal issues, to which the parliament must respond as a matter of urgency, and in regards of which it needs to enact laws or formulate policies; the resultant effect in such situations is the need to re-enact, repeal, amend, alter or even abrogate the existing laws, or bring up new laws entirely.

¹⁷

Ibid

¹⁸

The English Translation of the Holy Qur'an, Translated by Maulana Sher Ali (Islamic Publication International Limited) Chapter 6 (Al An'am) verse 38

¹⁹

Muhammad .I.S., *Al-Risalah*, (Dar al-Fikr Cairo), p. 465

Unfortunately, these new enactments later become weak and ineffectual as they lack the wherewithal to accommodate the enormous challenges, thereby forcing the parliament to alter them and bring up new laws again. This is a manifestation of human failings. It is to be noted that the Shariah has two primary sources – the Qur'an and Sunnah.

These two sources are however inter-related, that is, one is not independent of the other and in the determination of any question of Islamic Law, specific reference must be made to these two sources. The assertion that Shariah has two (primary) sources is also in connection with numerical ranking and not evidential ranking. As far as the Shariah is concerned, there is only one source of Law; ALLAH.

While the Qur'an is the revelation of Allah to His Prophet through the most authentic and the strongest mode of revelation in a recurrent manner²⁰ the Sunnah entails the sayings, practices and tacit approvals of the Prophet. Interestingly, Allah declares that whatever the Prophet says or does or approves of, is of divine origin and has divine backing²¹. As a result of this, whatever is said or done on the authority of the Prophet is also said or done on the authority of Allah. However, caution must be exercised in the light of this blanket statement. A jurist deploying the Qur'an as a tool is pre-occupied with only one task – ensuring that the particular Quranic rule or text relates to the facts at hand.

However in the case of a jurist serving the Sunnah as his premise, his pre-occupation is greater than that of a jurist deploying the Qur'an as his premise, as he is to certify, first of all, that the Sunnah is authentic and traceable to the Prophet. This is owing to the fact that the evolution of the Sunnah had faced problems of authenticity.

When the Sunnah reaches this stage, it acquires the status of the Qur'an in the binding nature of its authority. The Sunnah is regarded as "*Al-wahy al-thani*", that is (the second revelation), the only difference between it and the Qur'an is that while the Qur'an is recited, the Sunnah is non-recited. Both are regarded as *Al-Dhikr* in the light of the Qur'an. Affirming this position, the Qur'an says:

*"And let those who disregard his (the Prophet's) authority be warned so that they may not enter into trouble or that a serious torment be brought to bear upon them."*²²

Allah says further:

²⁰ Al-Ameen .M.M., *Al-Tabsirah Fi Ulum al-Quran*, (3rd ed. Madinah, 1918), p. 4
²¹ There are several authorities both in Qur'an and Sunnah attesting to this position. See Qur'an 6 (Al-An'am) vs. 3-4; 53 (An-Najm) vs. 3-4; the Prophet was also reported to have said that; "verily I have been given the book and along with its like".
²² Qur'an 22 (Al-Hajj) vs. 63

"And whoever disobeys the Prophet after the guidance (of Allah) has been obviated to him, thereby following the way of non-believers, We shall leave him to his preferred choice, and thereafter cause him to hell-fire, and (hell-fire) is worst indeed an abode." ²³

The foregoing relates to the textual sources of Shariah. The other sources of Shariah, *Ijma'* and *Qiyas*, are inherent in *Ijtihad*. *Ijtihad* has to do with the extension of the limited sources of Shariah to accommodate the unlimited human endeavours that are not expressly within the texts, but which can be catered for by analogical extension of the express rules through interpretation by implication. No wonder, Allah allows the Ummah to make *Ijtihad*. *Ijtihad* has sanction in the textual authority of the Shariah. Allah declares in the Qur'an:

"And those who strive in Our course, We shall surely guide them our way." ²⁴

The popular Tradition of the Prophet when Muadh ibn Jabal was being sent to Yemen by the Prophet attests to this position. It was reported though criticized as being a weak Hadith. It was said that the Prophet said to Muadh ibn Jabal: with what will you judge among people? Muadh replied: of course with the Qur'an. The Prophet further asked: And if you couldn't find (an express authority) in the Qur'an? Muadh said: "Then with the Sunnah of the Prophet". The Prophet further asked: And if you couldn't find (an express authority) in the Sunnah – Muadh replied, "Then with my independent reasoning and opinion". The Prophet then thanked Allah Almighty for His guidance over the Ummah.²⁵

The effect of this narration is that the exercise of *Ijtihad* in interpreting the law is the guidance of Allah over the Ummah. The foregoing narration is an all season's authority on *Ijtihad*. The subject of *Usul al-Fiqh* (that deals with derivation of rules of Shariah from their specific sources) is a major tool of *Ijtihad*, and it plays a very prominent role in the exercise of *Ijtihad* because *Ijtihad* itself is rooted in *Usul al-Fiqh* which entails the knowledge of rules of Arabic language, knowledge of the rules of Shariah and knowledge of the general purposes and spirit of the Shariah. According to Ibn al-Hajib:

²³ *Ibid*, 4 (Al-Nisa'i) vs. 115

²⁴ *Ibid*, 29 (Al-Ankabut) vs. 6

²⁵ Hasan A., *English Translation of Sunan Abu Dawud* (Ashraf Press, Lahore, 1984) vol. III p.109.

Usul al-fiqh is the principle by the use of which the scholar derives the legal rules of conduct from the specific evidences²⁶.

It is therefore safe to postulate that Ijtihad has to do with the expression of the law of Allah, by the provisions of the law of Allah, within the confine of the law of Allah, and for the purpose of the law of Allah. The point is that, without Ijtihad, the rules of Islamic Law cannot be extended to cover new situations and they cannot be employed to meet new challenges.

Ijtihad and its Developmental Role

The dynamism of Islamic Law is inherent in Ijtihad and that is why the doctrine of *stare decisis* as obtained under the Common law is rejected under the Shariah. However Ijtihad as a tool of legal dynamism under the Shariah is not to be abused. Nyazee appraises that Shariah is defined as:

Communication from Allah, the Exalted, relating to the acts of the subjects through a demand or option, or through a declaration, therefore, the jurist who derives the law "hukm" from the text bears a grave responsibility, for he is not issuing opinion as it pleases his fancy, but he is deriving rules that will be considered the law of Allah²⁷.

This is because the jurist doesn't make this law; he derives it from the authoritative sources. It is a tenet that must be upheld at all times by the jurist that anytime he exercises Ijtihad, it is the intention of Allah that is being effected. Al-Shaafi' in his book, *al-Risalah* observes that:

The fundamental idea that haunts Islamic legal theory is that a rule of law, when expressed by a qualified jurist (MUJTAHID), is not to be taken merely as his opinion, but as the Hukm of Allah, a hukm that is sacred and is to be obeyed, even though it has been discovered by the jurist²⁸.

In *al-Tawdih*²⁹, the eminent scholar, Sadr al- Shari'ah maintains that each time a *Hukm* is found in the Qur'an, it is proved as the *Hukm* of Allah³⁰. He said the same thing of *Sunnah* and *Ijma'*. He however contends further that:

²⁶ Ibn. Al-Hajib, *Kitab Muntaha al Wusul Wa al-Amal Fi Ilmay al-Usul Wa al-Jadal* (Al-sa'adah Publishers, Cairo) vol. I, p.4.

²⁷ *Theories of Islam*, p.64

²⁸ *Al-Risalah*, p.145

²⁹ Ubayd Allah .M., *Al-Tawdih Fi Hall Jawamid Al-Tanqih*, (Karachi, 1979), p.43

³⁰ *Ibid*, 45

Qiyas is a source of law... each time "Qiyas" (analogy) is successfully used (through Ijtihad) to discover the law (from the Qur'an and Sunnah), a Hukm (ruling) of Allah is discovered or proved³¹.

Nevertheless, some jurists resolve that Ijtihad can only be resorted to when there is no explicit text on a subject. It has however been argued that whether the text is explicit or otherwise, Ijtihad is relevant in all situations of application of Islamic Law. It is believed under the Shariah that whenever Ijtihad is successfully exercised, then a *Hukm* of Allah is already discovered, and whenever the term *Hukm* "rule" is being mentioned under the Shariah, it must carry along the word *Shar'* (i.e. legal) for it to hold water. The justification is that a *Hukm* can only be recognized when it is tied to relevant textual sources from either the Qur'an or Sunnah or both. Ijtihad therefore compels the Mujtahid to be acquainted with all the general sources and principles of Islamic Law in both their explicit and implicit terms, for a purposeful expression and extension of the law of Allah since Allah has neglected nothing in the book of His decrees.

While it is also a rule that Ijtihad is not to be exercised where the text is explicit on a subject based on the principle, i.e. "*La Ijtihada ma'an nass*", it is submitted that the applicability of this principle is still part of Ijtihad. This is to postulate that every rule of Islamic Law is part of the entire corpus of Islamic Law, which is to be detected from it, and Ijtihad compels the Mujtahid to know the rules of Islamic Law in their entirety and not in isolation. A jurist can treat a particular situation as requiring no Ijtihad because the text is explicit on the subject, only if he himself is a qualified Mujtahid, being conversant with the entire corpus of the Islamic Law principles. Against this background, as he sets forth to derive a rule and apply it to a particular situation, a jurist must be aware of the fact that he is not issuing opinion as it pleases his fancies but to express opinion as it pleases Allah, the Law-giver. Hence, he is to cultivate in himself the fear of Allah, as no one ever sets to manipulate the law of Allah but that Allah sets to crush such a person. The jurist must fully be on the alert and must be so watchful to ensure that no interpretation goes beyond and against the corpus and purport of the textual sources of Shariah. It must be remembered, however, that Ijtihad starts by applying the explicit rules of Shariah.

Invariably, the rules guiding the exercise of Ijtihad are as follows:

- Where the rule is explicit in the text, then there is no need for Ijtihad, "*La Ijtihada ma'an nass*" – this is because in such a situation all the jurist need do is to apply the law as conveyed by the text.

- Where there is no explicit text, then the text admits of interpretation and it is the literal interpretation that must be followed first. That is the express literal meaning.
 - Where the express literal meaning doesn't solve the problem, then the implied literal meaning is adopted.
 - Where the implied literal meaning does not save the situation, then recourse will be made to "*Qiyas*" that is analogy.
- However, as pointed out by Imran Nyazee, the form of analogy required under the Shariah is strict *Qiyas* (*Qiyas al 'illah*) i.e. extension of the meaning to a new case from a simple provision of the Qur'an or Sunnah with a specific meaning on the basics of a common underlying cause³².
- If the problem remains unsolved, then the jurist considers the text collectively by looking at the spirit of the law and the general purposed of the law by referring such cases to *Maqasid al-Shariah* i.e. the general purposes of Shariah.

From the foregoing, it can be shown that there are three modes of Ijtihad; Literal, Analogical and Purposive.

These modes must be followed in consequential order of priority, that is, the first must be exhausted before the next. The first mode entails literal following of texts. Whereas, a text may lend itself to two or more meanings, the adoption of a meaning in a particular context and another of the same text in another context is part of literal Ijtihad. The second mode is the adoption of analogical meaning of texts to cover a situation not expressly covered by the literal meaning. The third is what is regarded as purposive Ijtihad. The legal reason in this third mode is undertaken more in line with the spirit of the law and its purpose rather than the confine of individual text³³.

According to Nyazee, this is done by applying the general principles of Shariah and by testing them against these purposes³⁴. Nevertheless, it must be appraised that, Ijtihad, by its various modes, is a single seamless process, as the activity of the jurist cannot be split up into separate modes, but the division into stages is for the purpose of simplification and ease of understanding³⁵.

Ijtihad is useful in deriving rules from principles of Shariah, and these principles are unlimited depending on the ingenuity and expertise of the jurist. Therefore, to cover the rapidly changing societal needs, Ijtihad must be limited to the general principle of

³² *Theories of Islam*, p. 287

³³ Nyazee I.A.K., *Islamic Jurisprudence*, (Adam Publishers and Distributors, New – Delhi, 2004), p.268

³⁴ *Ibid*, 287

³⁵ *Ibid*, 267

Shariah, and must be exercised within the spirit and purposes of Islamic Law³⁶. This basic principle can be summed up by the words of Caplih Umar to Abu Musa Al-Ash'ariy when he appointed him a judge thus:

*Judgment is to be passed on the basis of express Quranic imperatives or established Sunnah practices... make sure that you understand clearly every case that is brought to you for which there is no applicable text of the Qur'an or Sunnah. Yours then is a role of comparison and analogy, so as to distinguish similarities – in order to reach a judgment that seems nearest to justice and best in the sight of Allah.*³⁷

The role of Ijtihad in the development of Islamic law is enormous towards formulating and systemizing the development of Islamic law. And as a result of the ever changing conditions which characterize human society, the Muslims are left to define and organize their affairs within the general guidelines of the texts.

The main objective of these guidelines is to define the spirit of Islamic law, which aims at the establishment of social justice, the guarantee of freedom of belief and practice, and the provision for equal opportunity to all members of the society³⁸.

Non-Islamic states but with dominant Muslim population like Nigeria can also follow suit by influencing the government through their leaders to refer certain social questions of social challenges to a body approved and recognized by the Muslim Council, to be controlled by eminent scholars of Islamic law and renowned analysts.

Prominent and supreme solutions to certain societal problems are best solved by Allah the Law-giver and this can be done by applying His laws. Questions of HIV/AIDS and other sexually transmitted diseases are best tackled by observing "abstinence" from illicit inter-course and sexual immoralities, as provided by the Qur'an.

For any contemporary issue to be declared evil, dangerous or outright a crime, it should have been proven to be a sin against Almighty Allah, or cause significant discomfort or distress to self, other individuals, communities or nations. Without this destruction, nuclear weaponry, violation of human rights, illegal and forceful land occupation, war crimes, rebellion, women and gender issues and a whole lot of issues. It would have been difficult to create Islamic opinions on these without the

³⁶ Theories of Islam, p.287

³⁷ http://www.usc.edu/dept/msa/law/alalwani-usul_al-fiqh_chi.html Accessed 15th May, 2009

³⁸ Bambale Y.Y., An Outline of Islamic Jurisprudence, (Malthouse Law books, 2007), p.93

efforts of jurists who seek active meanings and connotations to Islamic injunctions through Ijtihad.

Other social menace such as trafficking both in drug and in human, prostitution, child abuse, drug-addiction, pre-marital sex, robbery and brigandage, maiming and killing, corruption and so on like that are to be referred to Shariah.

It is my conviction that no societal question can graduate from the confine of the Law of Allah. Due exercise of Ijtihad by duly qualified / appointed people will provide guidance from the book of Allah and the Sunnah, and such exercise will be regarded as the sanction of Allah in so far the necessary precautions are observed.

It is important that we note the emergence of the Middle East in world economy. We should be quick to note that many at times financial issues involving Muslims and non Muslims alike may get to the courts needing urgent verdicts. Although many Islamic countries now have rigid and composite laws guiding transactions, conflicts still arise on the need for adequate technical application of the law. The composite financial laws of these nations were not obtained by accident; they were a result of active work of *Mujtahidun*.

Even though the principles of *Musharakah* can be linked directly to the Holy Prophet, the present principles of *Musharakah* and *Mudarabah* only conform to Prophetic philosophy that money should never be doubled without efforts of individuals³⁹. A study of the history of Islamic banking makes us see that many modifications were made during the time of Umar (R.A).

And even as at then they were applicable mostly to financing or basically what we believe to be central banking as he was the one who established the *Bait al-Mal* (Public Treasury)⁴⁰. Man-made laws are subject to human failings, weaknesses No surprise that the social problems persist and prevail. Much legislation have been killed and resuscitated, refined and modified, yet no improvement. For example in Nigeria, the Independent Corrupt Practices and other Related Offences Commission (ICPC) was set up to fight corruption, while not long after, the Economic and Financial Crimes Commission (EFCC) was also set up. The problem remains unabated. Yet the laws establishing these bodies are crying for amendments. Between the year 1999-2006, the principal law guiding elections, electoral and electorates in Nigeria, that is, the Electoral Act has passed through a series of amendments, yet crying for further amendments.

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Nawawi .R., 'Prohibition of Riba', in *Islamic Law on Commercial Transactions*, (CT Publications, Kuala Lumpur 1999), p.133

40

Ibid, p. 172

Qualification of Mujtahid

In the contemporary world of Islam, this has generated lots of arguments, that the door to Ijtihad is closed. That it will be practically difficult if not totally impossible to have an individual who will meet the requirement(s) of being a Mujtahid.

A Mujtahid must be a master of the Arabic language, theology, the verification of Sunnah, and the four schools of thought. He must be versed in the area of *Usul Al-Fiqh*, *Asbab Al-Nuzul*, *Asbab Al-Warud*, *Naskh Wal-Mansukh* etc. He must be a pious and practicing Muslim, he must know what part of the law have become subject to consensus i.e. knowledge of *Ijma'* and must always seek the Qur'an and Sunnah as the first sources of jurisprudence. He must not seek Ijtihad about the existence of God, Prophethood of Muhammad and authenticity of the Qur'an. He should never seek alternatives to matters already decided in the Qur'an and Sunnah⁴¹.

It has been argued that, as a would-be Mujtahid, he must have more than 50,000 but not less than 150,000 Ahadith (Prophetic Traditions) memorized, Quranic verses to be memorized, must be conversant with the general rules of Shariah, general rules of the Arabic Language and well grounded in the knowledge of the Qur'an - knowing the *Ayat-al-Ahkam* (verses with legal connotations in the Qur'an), *Nasikh wa Mansukh* {verses on abrogation in the Qur'an} among other things.

The above eventually led to the divisibility of Ijtihad and the notion that it is not possible to have an all-round scholar who would be qualified in all these fields. Thus, we can have a Mujtahid in a particular field and this amounts to encouraging specialty of Mujtahid rather than a total closure of its door.

As a result of the requirements of being a Mujtahid including the very wide scope it entails, Sunnis have been documented to have ranked jurist in order of the ability to practice Ijtihad. This occurred around the 11th and 12th century. Generally, we have the following⁴²:

- *Mujtahid Mutlaq*: This category is also known as the absolutely independent in legislation. It includes the first four caliphs and the great masters of the first four schools. Other includes the *Zahiri* School who held their own largely differing opinions. However, Mohammad Ibn Jarir Al-Tabari (D.922) a well renowned historian was regarded by some as the last of the *Mutlaqis*.
- *Mujtahid Muntasib*: This is a jurist who operates within a given school, obey the rules of the school but however, provides new solutions for newer problems in accordance with the philosophy of the school. This is especially granted to the disciples of the great Imams. They elaborated the views of

⁴¹ Coulson, *A History of Islamic Law*, p.176 as cited in Masood Steven, *Ijtihad and its History* <http://www.stevenmasood.org/articles/Ijtihad.html>

⁴² *Ijtihad and its History* <http://www.stevenmasood.org/articles/Ijtihad.html>

their Imams and added their own opinions. Examples are the Hanafi jurists, Imam Al-Haramyn Al-Juwaym, Abu Hamid Al-Ghazali and Ibn Al-Sabbagh.

- *Mujtahid Muqalid*: He is a jurist who merely follows the rulings of the earlier *Mujtahidun*. However, in cases where he does not find an opinion of the founder, he may exercise his own. This is also referred to as *Ijtihad al-Fatwa*.

It is thereby submitted that, the latter view to my mind stands most apposite in addressing the contemporary challenges being faced by the Islamic law in areas of novel matters which were not contemplated by the earlier Jurists. This is the only way for emerging issues to be tackled, by allowing Ijtihad to flourish⁴³. This was the view of Jamal al-Din Afghani (d. 1893), his disciple Muhammad Abduh, (d. 1905) Shaykh Rashid Ridda (d.1935), and so on.

They claimed that to perceive the true essence of Islam one needs to free oneself from imitation (*Taqlid*) and the traditional interpretations of the four schools and return to the religion of the fore fathers.⁴⁴

In view of the above, various academies of Fiqh (Islamic Jurisprudence) came into existence as collective Ijtihad (*Al-Ijtihad al-Jimaa'i*). Today, there are about four to five (4-5) such bodies in the Islamic world, among which are; *Majma'u-l- Fiqh Al-Hind* (India Fiqh Academy), *Majma'u-l- Fiqh Al - Islami* (Islamic International Fiqh Academy).

These academies are an army of the Organisation of Islamic Conference (O.I.C) with its Headquarters formerly in Jeddah, Saudi Arabia and later moved to Qudus. *Majma'u-l-Fiqh Al- Sudani* (Sudan Fiqh Academy) which happens to be the only one in Africa, *Majma'u-l-Fiqh Al-Islami* (International Islamic Fiqh Academy) which has its Headquarters in Makkah, Saudi Arabia. There is also the European Council for *Iftah*, with Yusuf Al-Qardawi among its facilitators.

Conclusion / Recommendations

Ijtihad represents the law of Allah as Allah approves of it. The only vehicle through which the limited sources of Islamic Law can accommodate the unending and emerging social problems is Ijtihad, without which the Shariah would have become dormant in the light of the contemporary challenges. It is common place that he who has the power to initiate also has the power to terminate. Allah knows what He has created, and it is He (Allah) that can take care of whatever problem befalls His creatures. Allowing Ijtihad to take its full course in our present day society is tantamount to allowing Allah to prevail over the affairs of His subjects which is best

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Ibid

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Ibid

for the subjects, and which is a good sign on societal change and development, as same will only carry the society to a greater height and to positivity.

Among other things, therefore, it is recommended that certain social questions should be referred to the law of Allah through qualified jurists. Since the Shariah law is Allah's, it is strongly opined that the law of Allah can adequately take care of the situation.

However, without prejudice to the above recommendation, the Shariah can only take care of this situation when Ijtihad is fully and duly exercised without any hindrance. The liberalism in the construction of texts of the Qur'an and Sunnah is afforded by Ijtihad, though not without a limit. Therefore, the idea of "strict constructionism" under the Shariah must be reviewed or relaxed, or say, re-defined so as not to put a clog in the wheel of the development of Islamic Law.

Ijtihad should be appreciated considering its all encompassing roles in the development of law, due to the fact that it is agreed that Islamic law is dynamic in nature, and it is through Ijtihad that its dynamisms can better be appreciated even though it is believed to be conservative as well. The flexibility of Islamic law is better acknowledged via the concept of Ijtihad as it ensures and guarantees the relevance of the law in meeting the challenges of the contemporary period.