

Scope of State in Legislation from Islamic Perspective

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Abstract

Islamic law is basically a part of a holistic system based primarily on the divine message enclosed in the Holy Qur'an and traditions of the Prophet (SAW), which are the main fundamental sources of Islamic law. After the demise of the Prophet (SAW), field of Ijتهād started development, which was already approved by the Prophet (SAW) in his life. The companions of the Prophet (SAW) developed the notion of Ijmā while early Muslim jurists discovered the Qiyās, Maslaha, Istislāh, Istehsān etc. Determining the location of authority and its scope in law-making has remained a complex situation for the western philosophers since long. As far as the case of Muslims is concerned, they are in the position to find solution of this situation as to where the authority dwells; enabling them to resolve many queries which seemed to be unanswered for the long time. It is important for the Muslims to comprehend the concept of Islamic institutions from the perspective of Islamic frame work and legal as well as constitutional history of Islamic history.

Keywords: Legislation, Islamic State, Fiqh, Islamic Jurisprudence

Introduction:

The theory of state is very old which dates back to the eras of Plato and Aristotle. Similarly, Rome and Greece are considered the oldest states of the world. But to determine the capacity of state, we have to search for its definition. According to Wilson (d.1924) state is:

"The State is the politically organized people of a particular land"¹

In another definition, state is defined:

"as groups of people which have acquired international recognition as an independent country and which have a population, a common language and a defined and distinct territory"²

The learned court of New York ruled the definition of state as "State is a body politic or a society of men. In a geographical sense, a State is that territory over which the particular body politic exercises sovereignty".³

As for as the case of Islamic point of view is concerned; the concept of state is different from the all above mentioned definitions because of its dissimilarity in context of its objectives, duties and sources of legislation. The Islamic state works as vicegerent to Almighty Allah and its sole objective is the maintenance of His commandments.⁴

To comprehend the concept of state from Islamic perspective, it is mandatory to resolve the status of man due to its prime significance. The Almighty Allah decided to create a vicegerent on the earth. The responsibility of the vicegerent was to represent his God and Creator in all His attributes and to fulfill His commandments as conveyed to him through revelations.⁵

Verses of Holy Qur'an explain this status of man:

*"It is He who has made you vicegerents of the earth and has raised you in ranks, some above others, so that He may test you in the gifts He has given to you."*⁶

*"We have destroyed generations before you when they did wrong, their messenger came with obvious signs, but did not believe. Thus we requite the criminals. Then We made you vicegerents in the earth after them to see how would you behave."*⁷

*"It is He who has made you vicegerents in the earth, now if someone (rejects the assignment and) disbelieves, His disbelief will be against himself. The disbelief of disbelievers will not add the sight of their Lord except condemnation".*⁸

*"Almighty Allah has promised to those among you who believe and work righteous deeds that He will surely grant them vicegerency in the earth as He has granted it to those before them and that He will surely establish them for their dīn, the one which He has chosen for them."*⁹

*"They (Believers) are those who, if we establish them with authority in the earth, (they will certainly) establish regular prayer and give regular charity, bid the right and forbid the wrong."*¹⁰

According to Holy Qur'an, the absolute right to rule, to decide and to judge, goes to Almighty Allah. Similarly, kingdom, ruler ship and emperor ship are His sole property, alone. No one is associated with Him in these feature, at all. This is evidently, repetitively and undeniably laid down in many verses of Holy Qur'an.¹¹In the same manner, the study of Holy Qur'an reveals that Almighty Allah confers upon His special approval to execute the authority on His behalf. The Holy Prophets has to execute this authority in accordance with *Shariah* contained in divine revelation and guidance. The Holy *Qur'an* frequently refers to authority conferred upon His messengers from time to time;

when a messenger passes away, the authority transfers to his followers, the community of believers as whole. Thus *ummah* of a Prophet assumes the responsibility as the legatee of divine mandate. The *ummah* as a whole cannot execute this authority; therefore it chooses a suitable individual for this distinguished job. This person represents the whole *ummah* and maintains the symbol of *ummah's* collective authority.

The Scope of Legislation

The development of Islamic law was carried out by the highly skilled professionals but, most of them worked in private capacity, individually or sometimes, in collectively.¹²

Whenever a new challenge arose, Muslim jurists and scholars used to start their efforts to discover certain rule of law in this situation while applying principles of *Ijتهād*, *Qiyās*,¹³ *Ihstihāsān*¹⁴ and *Istislāh*¹⁵. They used to give their arguments in defense of their conclusions which may vary from one scholar to another. The judge or *Qāzī* was responsible to select the soundest and rational conclusion for applying on the specific situation. In the early days of Islam, where the judge was himself a recognized, established and trustworthy scholar, himself take part in the process of law making. This was the procedure, through which the Islamic law developed and expanded, in a free atmosphere from the influence of rulers or government officials. No doubt, anyone having required knowledge and qualification could participate in the process of law making, and his arguments were acceptable if based on sound authentic sources and rationale. It was in this manner that all major juristic schools appeared in the history of Islamic legislation.

Some rulers like *Haroon ur Rashid* [d. 809 AD] tried to convince *Imām Malik* [d. 179 H] to apply his master piece of work "*Mowatta*" in the courts of the Caliphate but *Imām Mālik* refused to confine and restrict the fields of Islamic legislation providing opportunities for the jurists to continue their *Ijتهād* based efforts freely and independently. The practice of whole of *ummah* remained on the same pattern for 1200 years after the *hijrah*. The first example of deviation from this pattern occurred in 1869 AD [1287 H] in Turkey when first ever codified piece of law known as *Majallah* was implemented in the courts of Ottoman Empire [1299-1922]. Actually, this was exodus from the tradition only in shape and manifestation and it was not a real exit in essence and spirit. However, it paved the way for a real deviation which the Muslim borne and then accepted under the tremendous pressure of western legal customs.

Role of State in the Process of Legislation

As far as the legislation in the sense of law-making using the modes of *Qiyās* and *Ijtehād* is concerned, it is purely the field of competent scholars and the qualified jurists. However, in case there is a valid and genuine difference of opinion among jurists based on sound arguments, the head of state using his authority may direct the courts of state to follow one of such conflicting view under the domains of *Ijtehād*, *MasālihMursala* and *Istehsān* etc. In such case the view preferred by authority will become law of the state and other juristic views will carry only academic value.

In case the head of state does not exercise this authority, it can be exercised by the judiciary. Therefore, if a competent court decides a case according to the view of a certain jurist, in matters related to the domain of *Ijtehād*, then the specific view will be considered as the law of this state. As a rule, the disagreement between jurists can be removed by the judgment of competent court. This is the way provided in the *Shariah* to annihilate the mutual disagreement which is inescapable. Therefore, if *Qāzī*, of whatever juristic school he may be, decides the case according to one of the views, his decision will be binding on all and the disagreement will be removed, and it will be considered as agreed law.

As far as the case of administrative orders for necessary management of the state's business is concerned, these orders should be within the boundaries of exigency or *Siyāsa Shariyyā* (administrative discretion of ruler according to *Shariah*).

The scope of state in shape of rulers' authority can be confined in four categories:

a. Rulers can give suitable order to give legal effect the commandments and injunctions of the Qur'an and the Sunnah with proper consultation of *Shu'ra* (the consultative body). The role of *Shu'ra* is assisting the ruler through giving proper consultations, its function is not legislative rather it is deliberative and supervisory.

b. The ruler, with consultation of *Shu'ra*, can issue suitable orders under the principles of *Fath-e-Dhar' iāh* (فتح الذرائع) and *Sadd-e-Dhar' iāh* (سد الذرائع). Literally, the word *dhar' iāh* means medium, instrument, means or device. *Dhar' iāh* include anything or action which becomes a means or serves as a source for the happening of another thing or leads to the commission of an act.

Hence, the former term means opening the sources or allowing a certain action to reach at another particular thing or action, while the latter term means vice versa. Applying this principle, the head of state or *Shu'ra* of state

can issue administrative order either prohibiting a lawful action which has become a source for the commission of a prohibited act or the occurrence of an unlawful thing. Similarly, he can direct to do a certain act or adopt certain procedure, though not mandatory in its original sense, which has become the only available source or means for the realization of an objective among objectives of *Shariah* or compliance of a commandment of *Shariah*.

c. The head of state can issue suitable administrative orders under the notion of *Daf-al-Darar* (دفع الضرر) or *Daf-al-Fasād* (دفع الفساد). Literally *Darar* (ضرر) means danger, harm, loss and injury and *Fasād* (فساد) means corruption, harm, decay, evil or scandalous action etc. It is one of the fundamental principles of the Islamic law that evil, harm or danger in whatever case and whatever degree and proportion may be, should be removed and eliminated as far as possible.

d. The head of state can issue orders concerned with the *Maslahāh* [مصلحة] (interest) or public weal, public good or public welfare. This principle explains that all actions and measures taken by head of state which have a binding force for the people in respect of their private and public rights must be based on the general good of community and its welfare.

Hence, every action or measure taken by the rulers against this *Maslahāh* which may lead to monopolization, despotism and autocracy or which may cause *Darar* or *Fasād* shall be unlawful.¹⁶

The prominent and important principles for the purpose of legislation under *Shariah* injunctions are, as under:

I. Confinement/Restriction of *Shariah* Guidelines to the Legislation:

The main objective of *Shariah's* commandments is to regulate the all aspects of human life and individual's personality. This is why the core sources *Shariah* consist of the guidelines and instructions which cover all actions of a human.

The distinguish between a state, in which legislation is based on *Shariah* and a state, in which legislation is not based on *Shariah*, is that the former one legislate a specific law based on principles of *Shariah* and this law has not the capacity of a brand new law rather it has been derived from the preset selected sources of *Shariah*. The later one, most often legislates a new law, which is not derived from preset sources.

The particular *Shariah* principles control the field of legislation and it is not free and open to every Jack, Tom and Harry. Therefore, the Islamic state has no authority to legislate against the punishments of heinous crimes such as

murder, theft and robbery etc. Similarly, the *Shariah* has not narrated all commandments related with social life of wife and husband, keeping relations with neighbor countries, dealing with minorities living with in state and those who have sought asylum or took refuge etc. Rather it has elaborated the limits of every command and appointed such principles which cover the requirements of present situations as well as newly emerged ones. The first principle of legislation within Islamic country is that Islamic state is not absolutely free to legislate a piece of law according to her wishes but it has to ponder in sources of *Shariah* and derive the new commands from these sources.

II. Obligation of Obeying the *Shariah* for the Head of State:

The instructions of *Shariah* direct the general public to obey the head of state in letter and spirits and do not go astray except the case where the head of state goes against the guidelines of *Shariah*.

It has been narrated on the authority of *Ibn-e-Umar* (RA) that the Prophet (SAW) said:

"It is obligatory upon a Muslim that he should listen (to the ruler appointed over him) and obey him whether he likes it or not, except that he is ordered to do a sinful thing. If he is ordered to do a sinful act, a Muslim should neither listen to him nor should he obey his orders".¹⁷

Therefore, the head of state is advised to bind himself to the principles of *Shariah* while legislating and issuing administrative orders in the state. His adherence to *Shariah* will make the public to follow his orders as a God's imposed duty otherwise they the right to reject such orders which are not in accordance with *Shariah*. This situation can lead to such type of government known as autocracy and dictatorship etc. which Islam does not support, principally.

III. Confining the Legislation Required for the Smooth Running of State's Business:

Legislation is done for the solution of issues or situations related with the actions of mankind, and it proves the authority of a specific command as mandatory, obligatory, important, commendable, optional undesirable, prohibited and nullified etc. The role of the head of state in this regard is to facilitate these actions through the procedure of *Ijتهād* endorsed by *Shariah*. This can be done in the areas of penal code's punishments where the head of state enjoys the right to increase or decrease the quantity of such punishment.

However, this feature requires a great deal of insight, wisdom and ability of judging the psychological condition of the culprit. Similarly, the head of state has no right to intervene in such situations in which Muslim jurist have been differed and related with the faith, doctrine and creed of the masses. The matters which can cause inconvenience or disturbance are out of his authority, also. Principally, the head of state does not intervene in the transactions and worships which carry diversity of Muslim jurists within them, in order to curb disturbance and disarray among Muslims (Khalidi, 1980). However, such matters are excepted from this principle which are necessary for the welfare and interest of public e.g. collection of zakat and announcement of moon of *Ramadhan* and *Eid*.

IV. Restricting the Procedural Law to the Specific Fields:

Procedural law is the mean to implement a particular order, rule or regulation for ensuring the establishment of wide spectrum *Shariah* law through acting upon or refraining the people from it as the case deem good in public's interest, provided that it should not against the preset instructions of *Shariah*. While looking for such *Shariah* laws which requires procedural law strategy for effective implementation, they can be of two types:

a. Establishment of those obligations which are known as *Farz-e-Kifāya* i.e. collectively obligated on Muslims (it means that if a group of people do an obligated job or fulfill a responsibility, the liability of whole of Muslim *ummah* is fulfilled e.g. offering prayer on a deceased person).

b. Organization of such activities which are required for the welfare and betterment of general public such as;

i. Prohibiting those actions or things which lead to harmful or unlawful results. This notion is based upon the tradition of Prophet (SAW):

"There should be neither harming nor reciprocating harm".¹⁸

ii. Organizing the rules and procedure for the protection of general public and state for smooth functioning and facilitation e.g. mines, rivers, meadows, forests, roads, designing of traffic plan and rules etc. This notion is supported by the act of *Hazrat Umar* (RA) when he restricted some meadows of state for government horses used in fighting (*jihad*), and that time a large number from Prophet's companions were witnessing this.¹⁹ It proves making of necessary laws in organizing the state and public's property.

iii. Necessary procedural, administrative and penal laws can be made for the Organization of state's business in a smooth way e.g. organization of army on a specified manner and introduction of ranks within it, forbidding

collectors of *zakat* and government dues from accepting gifts and presents from general public etc.

V. Consultation with the Experts from Muslim Ummah and State's Accountability Bureau:

The teaching of *Shariah* underlines the adoption of proper course of consultation in every important situation generally, and in legislation, especially. The Holy Qur'an directs in this regard

;"and (O' Prophet) consult them (Muslims) in the affair"²⁰

Hazrat Umar (RA), similarly, issued a great ruling regarding the lands of *khirāj*²¹ with the consultation of Prophet's companions.²² Therefore, consultation is required to investigate and search all aspects of the law for ensuring minimum flaw within it.

VI. Preference to *Qazā Al-Sharī* over the right of State's Head for legislation:

Islam guarantees the supremacy of judiciary over the state's head whenever he goes astray against the guidelines of *Shariah*. The Holy Qur'an instructs the believers;

"O you, who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result"²³

The referring to God and His Apostle means to present the situation upon the Book of ALLAH and *Sunnah* of His Prophet (SAW). This supremacy protects the state from autocracy, dictatorship and exploiting the right of legislation.

Conclusion:

State is the ancient institution which is envisaged by Plato and Aristotle and existed in the Greek and Roman civilizations. A state is the means of rule over a defined or "sovereign" territory. It is comprised of an executive, a bureaucracy, courts and other institutions. A state is more than a government;

that is clear. Governments change, but states endure. Concept of Islamic state is different from western thinkers. Islamic state works as vicegerent of God and cares for the welfare of public at all costs. Necessary guidelines have been provided in Islamic teaching about state and its running of its various departments in detail. Competent authority in Islamic state has some discretionary powers of legislation in administrative matters for the sake of the public interest with consultation of the experts and scholars provided they are not contrary to Shariah guidelines. At the same time, Islamic instructions refrain authority to act as dictator or autocrat.



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- ⁴Ashqar, Sulaiman (2002) *Nahw Saqafa Islamia*, Dar un Nafais, Beirut, Lebanon, p.349
- ⁵Qur'ān (02:30-39)
- ⁶ Qur'ān (06:165)
- ⁷ Qur'ān (10:13-14)
- ⁸ Qur'ān (35:39)
- ⁹ Qur'ān (24:55)
- ¹⁰ Qur'ān (22:41)
- ¹¹ Qur'ān (06:57, 06:62, 12:40, 12:62, 28:70, 28:78, 03:189, 05:17-18, 17:111, 25:02, 35:13, 67:01)
- ¹²Ghazi, Mahmood Ahmad (2006) *State and Legislation*, Shariah Academy, IIU, Islamabad, p.111¹²
- ¹³*Qiyās* is a method that uses analogy and comparison to derive Islamic legal rulings for new developments. *Qiyās* can be defined as taking an established ruling from Islamic law and applying it to a new box, in virtue of the fact that the new box shares the same essential reason for all which the original ruling was applied.

"*Usul fiqh: the rule of qiyas: its meaning, justification, types, scope, application, feasibility and reform proposals*". *Islamic Jurisprudence - The Collection of articles for Islamic Jurisprudence II, LLM- Administration Of Islamic Law, International Islamic Universiti of Malaysia. session 2007/2008. February 10, 2008. retrieved on January 30,2013).*

¹⁴*Istehsān* is an Arabic term for juristic "preference". In its literal sense it means "to Consider Something good". Muslim Scholars may use it to express preference for a particular judgment is solely for in Islamic law over other possibilities. It is one of the underlying principles of personal legal Interpretation thought or reason.

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¹⁵ *Istislāh* is a method employed by Muslim jurists to solve problems that find no clear answer in sacred religious texts. It is related to the term مصلحة *Maslaha*, or "public interest.

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²⁰ Al-Qur'ān : (03:159)

²¹It is "tax" imposed by the Imam of the Muslims on the productive lands of foreign countries. There are two kinds of such land; firstly, the land which Muslims have gained thorough reconciliation and the people enter into an agreement with Muslims for paying a specific amount each year. This land belongs to their masters, and they have the right to sell, mortgage and donate this land. If the masters of land embrace Islam, they will be exempted from paying this tax. Secondly, the lands which are conquered by Muslims forcibly with power will not be divided between fighters but will remain in the custody of their master in the exchange a tax will be collected from them every year. If the masters of such land embrace Islam or the land transfer to Muslims, the tax will be collected in addition to the "*ushar*" [The zakat of

crops is with the ratio of 1/10] (<http://fatwa.islamweb.net/fatwa>, retrieved Jan 23, 2013)

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²³Al-Qur'ān :(04:59)