

ISS 408
Advanced Study of Muslim Law

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ISS 408 Advanced Study of Muslim Law

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General Introduction and Course Objectives

Muslim law (Sharī'ah) is a way of life of every Muslim in the sense that his life, whether relating to human dealings (*mu'āmalāt*) or spiritual aspects (*Ibādāt*) is regulated by the Sharī'ah. The roles which it plays in his life are more than the roles blood and water play in the body. The Sharī'ah is like a manual attached to an electronic gadget. The manual guides the users on how he can use it successfully. If there is a problem, the manual also gives guidance on how to rectify the problem. In the same vein, the Sharī'ah guides not only all aspects of a Muslim's life, but also the society at large. This is because the manual sent by the Creator of this world to guide the inmates is the Sharī'ah. The Qur'ān which represents the will of Allah communicated to the Prophet through angel Jibril is the first primary source of Muslim Law. The Sunnah comes next only to the Qur'ān in relation to the Muslim law. Prophet Muhammad is the only authoritative representatives of the political and legal sovereignty of Allah on earth because he was the one who received the revelation. Therefore, all Muslims must accept his decisions and follow his commands without any reservation.

Advanced Muslim Law (ISS408) is to further the student's knowledge on Muslim Law. This course is written to prepare the students to acquire the skills needed for proper understanding of difficult areas in Muslim law. Efforts were made to simplify as much as possible the areas that normally give the students, the lecturers and the Sharī'ah scholars problems.

Hence, the course is specifically designed:

- to introduce you to legal injunctions contained in the Quran and the Sunnah: the two original sources of Muslim law
- to introduce you to contributions of early companions of the Prophet to legal knowledge.
- to expose you to the roles of *ijtihād* as the main tool used to interpret the divine message with a view to relating it to changing conditions, and to thereby making the Sharī'ah relevant for all times and eras since the Divine Revelation and the Sunnah ceased after the death of the Prophet.
- discuss the modern reforms introduced into Islamic ways of marriage, divorce and inheritance
- to explain *siyāsah shar'īyyah* (the government's authority to legislate), *takhayyur* (the freedom of a person to be guided by the law of other schools of Islamic jurisprudence) and *talfīq* (the fusion of juristic opinions of diverse mature); and their applications with regard to Muslim law
- to explain in-depth the three main categories of crimes in the Islamic penal system: *add*, *al-qīlā* and *al-ta'zīr*.
- to make known the efforts of Muslim towards the re-introduction of Muslim law in Muslim countries particularly in Nigeria
- expose you to the agitations of the modernists as regards the status of women and the Islamic perspective/solutions towards them; and to show you that all their agitations have already been taken care of in the Qur'ān and the Sunnah; and no religion except Islam accords women the recognition that befits them; suits their nature and protects them against disgraceful circumstances of life; and that in Islam there is no difference between

males and females; and that only excelling in virtue, piety, spiritual and ethical qualities can make people, males or females, stand out from one another.

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LECTURE ONE

Original Sources of Muslim Law

Introduction

In this lecture, I intend to introduce to you the original sources of Muslim Law. This is because at the root of every law lie certain religious sources. These sources give the directions on how a Muslim should live his life. Muslim Law is also based upon the codifications of injunctions outlined in them. They are required to base their total way of life on the teachings contained therein.

Objectives

At the end of this lecture, you should be able to:

1. explain the similarities and the dissimilarities between Muslim and Islam in relation to Islamic law.
2. explain how Islam is different from other religions
3. discuss the Qur'ān and its other names in relation to Muslim law
4. mention the first and the last revelations.
5. discuss the four stylistic devices contained in the legal injunctions in the Qur'ān.
6. mention some legal injunctions (at least 20) of the holy Qur'ān.

Pre-Test

1. Differentiate between Islam and Muslim
2. Explain how Islam is different from other religions.
3. What are the other names by which the Qur'ān is called?
4. Discuss the four stylistic devices in the legal injunctions of the Qur'ān.

CONTENT

A Muslim is he who believes in Allah and submits totally to His will (Q2:112) while law refers to the distilled essence of the civilization of the people. It must be mentioned that there must be basic religious beliefs and concepts which people hold to be true at the root of every great civilization. This is true of Muslim Law which is otherwise referred to as Sharī'ah. The religion of Islam was sent to mankind and taught by the Holy Prophet Muhammad. Those who believe in it and practise it are Muslims. They are not Muhammadans. The religion of Islam is not named after Prophet Muhammad because he was not its founder. It is the religion of Allah.

Allah says:

This day, I have perfected for you, your religion (Islam) and completed my favour on you and chosen for you Islam as a religion (Q. 5:3).

However, other religions were named after their founders. Buddhism was named after Gotama Budha of India; Zoroastrianism was named after Zoroaster; Confucianism was named after its founder, Confucius. It was at Antioch, hundreds of years after the death of Jesus Christ that the word Christianity was first pronounced as the religion of the followers of Jesus Christ. Islam was not named after any prophet (Ali, 1986). It was named by its Founder, Allah. The religion of Islam was given to mankind through Adam, the first Prophet of Allah on earth. Islam is a verbal noun derived from an Arabic word, “*aslama*” which means peace and total submission to the will of Almighty Allah. In the same vein, Muslim is *ismu al-fā’il* (a doer of an action) and is also derived from the Arabic word “*aslama*” meaning one who relates to others in peace and submits totally to the will of Allah. The name was first pronounced by Prophet Ibrahim (Q22:78). Therefore, both the religion’s name and the name given to its adherents preach peace and submission to the will of Allah. To put it differently and simply, we achieve peace in this world and eternal rest in the hereafter if we follow Muslim laws known as Sharī’ah.

The Original Sources of Muslim Law

The Qur’ān is one of the primary sources of Muslim Law. It represents the will of Allah communicated to the Prophet through angel Jibril. Its contents were treasured up in the memories of the Muslims and were also written down on various objects such as palm leaves, skins and shoulder bones of animals. The Qur’ān is the speech of God eternally existing with His essence. According to the majority of Muslims, it is divine in its meaning and language. It is a source of law to guide the practical life of man. It has remained the same for more than 1432 years ago. The Muslim Law differs from other man-made laws in that its source is Divine in nature. The source was communicated in its final form through a single human channel i.e. Prophet Muhammad. He, Allah has promised to protect this source of Muslim law from being corrupted by the people (Q15:9). It could be recalled that the earlier books were corrupted by their followers. The fountain-head for not only Islamic law but also the Religion of Islam enjoys the special protection of Allah. That is why it remains intact up till today. Allah says (Q15:9): *Innā naḥnu nazzalnā dhikra wa innā lahu lahāfiḥūn* (“Verily We: It is We Who have sent down the Dhikr (i.e. the Qur’ān) and surely, We will guard it (from corruption)”).

The Qur’ān is divided into 114 chapters and was revealed to the Prophet gradually, over approximately twenty-three years starting from 610 C.E. in Makkah and Madinah. The Qur’ān has various names and the names by which it is called are stated in the Qur’ān itself.

- ❖ It is *Al-ḥukm* (the judgement) because it provides directions to judgement. Allah says: ‘And thus have we revealed it as a clear judgement’ (Q13:37).
- ❖ It is *al-Furqān* (the Criterion ,Q25:1) in the sense that it is the instrument by which man can come to discriminate between truth and falsehood, to discern between the real and the unreal, the absolute and the relative, the good and the evil, the beautiful and the ugly.
- ❖ It is *Ummul Kitāb* (the mother of the book).
- ❖ It is a recitation in the sense that it is a means of concentration upon the truth.
- ❖ *Al-Kitābu* (the Book). It is a book that is complete in itself. “This is a perfect book; there is no doubt in it; It is a guidance for the righteous” (Q 2:2)
- ❖ *Adh-dhikr* (the Reminder). It is a book that reminds man of its duty to God and fellow mankind. “Verily, We ourself have sent down this exhortation, and most surely We will be its guardian” (Q15:9)

- ❖ *Al-Huda* (the Guidance). It is a book that guides one to the right way or to the correct judgement. And when we heard the call to guidance, we believed in it, and he who believes in his lord has no fear of loss or injustice. (Q72:13)

The first revelation

It was on the 15th night of Ramaḡān in the 41st year of the Prophet that the revelation of the Qur’ān began. The first revelation is contained in *suratul ‘alaq* (Q 96: 1-5):

اقْرَأْ بِاسْمِ رَبِّكَ الَّذِي خَلَقَ (1) خَلَقَ الْإِنْسَانَ مِنْ عَلَقٍ (2) اقْرَأْ وَرَبُّكَ الْأَكْرَمُ (3) الَّذِي عَلَّمَ بِالْقَلَمِ (4) عَلَّمَ الْإِنْسَانَ مَا لَمْ يَعْلَمْ (5)

“Read in the name of your Lord, Who created man from something that hangs. Read! And your Lord is the most bounteous, Who taught man the use of the pen; taught man what he knew not”

Another opinion with regard to the issue of the first revelation is Q74: 1 – 6. *Suratu al-Fātiḡah* is also regarded by some scholars to be the first revelation. Some scholars considered *basmallah* (In the Name of Allah, the Beneficent the Merciful) to be the first revelation. To reconcile all these opinions, the most reasonable opinion is Q96: 1 – 5 based on the Hadith of the Prophet as narrated by Aishah thus:

The angel came to him and asked him to read. The Prophet replied, ‘I do not know how to read’. The Prophet added, ‘The angel caught me and pressed me so hard that I could not bear it any more. He then released me and again asked me to read and I replied, ‘I do not know how to read’. Thereupon he caught me again and pressed me a second time till I could not bear it any more. Then he released me and again asked me to read, but again I replied, ‘I do not know how to read (What shall I read?). Thereupon he caught me for the third time and pressed me, and then released me and said: “Read in the name of your Lord, Who created man from something that hangs. Read! And your Lord is the most bounteous, Who taught man the use of the pen; taught man what he knew not (Q96:1-5)”

Based on this Hadith, the most reliable and acknowledged opinion by majority of Muslims is Q96: 1-5. As regards *suratul Mudaththir* (Q 74: 1-6), we could say that it was the first revelation with which Prophet Muhammad was made an apostle and messenger of Allah. *Suratu al-Fātiḡah* was the first revelation to the holy Prophet on the matter of *‘Ibādah* (worship). *Basmalah* was regarded to be the beginning of every Qur’ānic chapter except chapter 9.

The Last Revelation

The verse that is believed to be the last revelation is Q 2: 281. “And fear the Day when you shall be made to return to God; then shall every soul be paid in full what it has earned and they shall not be wronged”. This verse is regarded as the last revelation because Prophet Muhammad lived for only 9 days after its revelation and there was no any other revelation given to him afterwards. As regards Q 5:3, it is popularly believed to be the last revelation on the *‘ayātul ‘aḡkām* (legal

injunctions). However, it is not considered to be the last revelation on the ground that it was revealed during the farewell pilgrimage, and there was no doubt the Prophet lived for 81 days after the revelation of Q5:3. It could only be regarded as the last revelation as far as legal injunctions contained in the Qur'ān are concerned.

'Ayātul 'aḳām in the Qur'ān (Legal Injunctions of the Qur'ān)

They are the verses which contain the legal injunctions of Allah. These injunctions govern the conduct of every Muslim from birth to death. The verses are many in the Qur'ān and provide the touchstone to discriminate between the falsehood and the truth; to discern between the real and unreal; the good and the evil etc. Unlike the other man-made laws which are amendable from time to time, it is not amendable. Recently, in Nigeria, a constitution review committee of the National Assembly was constituted to review the Nigerian Constitution. This is with a view to deleting, adding and modifying some items in the constitution so as to match the present conditions of man. The Qur'ān is a book whose meanings are valid always because it concerns not a particular fact in the particular time but truths which being in the very nature of things are perennial or remain the same. It was revealed by God in piece-meal. The Medinese chapters which form one-third of the contents of the Qur'ān relate to the period of victory and power. They are rich in legislative materials. They deal with the institution of public prayers, fasting, pilgrimage, prohibition of wine, marriage, divorce, adultery, inheritance to mention but a few.

One of the teachings of the Holy Qur'ān is Allah's commandments. These commandments are the legal injunctions contained in the Qur'ān. One special feature of the Qur'ān is that its language is arranged in stylised patterns. Four stylistic devices are noted in the legal injunctions contained in the Qur'ān (Ahmed, 2004).

I'jāz (Brevity)

These are the legal injunctions in the Qur'ān whose details are not given. They are in the form of brevity. Brevity in the sense that fewer words obviate the need of more. To put it simply, it is where the words carry the meanings in full view. The holy Qur'ān does not give the detailed rules. The kernel of a rule is presented, and all subsidiary details are omitted. The subsidiary details are contained in the Hadith of the Prophet. Allah commands Muslims to observe salat without mentioning how and when to observe it. The number of rakah to be observed for each of the prayers, prerequisites of salat such as ablution, the kinds of salat, etc are not contained in the Qur'ān. It is Hadith that gives the details. In the same vein, the broad principles of some acts such as Zakah, Hajj and Sawm are given in the Qur'ān without mentioning their details.

'Aḳāmu al-Mujmal wa al-mufaḳḳal (Detail after Epitome)

The Qur'ān uses this stylistic device to give the summarization of some legal injunctions in brief while other verses give their details to some extent. Hadith and *Ijtihād* give the rest details. Qur'ānic injunctions on war, booty, relations with non-Muslims, etc are discussed briefly in the Qur'ān while their other details are given to some extent in other parts of the Qur'ān. The rest details are taken from the Hadith and *Ijtihād* (Usman, 2006; Doi, 1984).

'A *al-kāmu al-mufa* (Detail)

In the Qur'ān, there are verses that give full information as regards the commandments of Allah. These verses awaken people's conscience and inform them of Divine Law in their affairs. Qur'ānic verses that contain commandments of Allah on murder, *sariqah* (theft), *zinā* (fornication) etc fall under this category. This is because the details on how each of the above-mentioned cases should be handled and executed are contained in the Qur'ān.

Maqā'idu al – Sharī'ah (The aims of Sharī'ah) or *uqūqu Allah* (rights of Allah)

The objectives of the Sharī'ah in relation to man is to preserve his *dīn* (religion), *nafs* (life), *nasl* (progeny), *'aql* (intellect) and *māl* (property). The Qur'ānic injunctions directed towards the realization of these five objectives are called *Maqā'idu al – Sharī'ah* or *uqūqu Allah* (rights of Allah). This refers to everything that involves the benefit of the community at large. The objectives of Sharī'ah have been emphasised in the large number of texts of the Qur'ān. Some of the verses of the Qur'ān from which the objectives may be derived are: Q5: 32; Q2: 179 and Q4 :29. Therefore, *uqūqu Allah* corresponds with public rights or public policy in modern law. The requirement of the conformity of contract with the objectives of the Sharī'ah is similar to the requirement of modern law that an agreement should not be against public policy.

Some Legal Injunctions of the Holy Qur'ān

Adoption: It is not recognised in Islam i.e. Islamic law is against adoption. Q 33: 4-5

Adultery/Fornication: Adultery is prohibited Q17:32; Q25 : 68; Its punishment Q24:2;

Evidence required to prove it Q24:4; Adulterer marrying adulteress and idolaters Q24: 2; Rules of entering another person's houses to prevent adultery Q24: 27- 30 ; False accusation against one's wife and chaste women and their punishment Q 24: 4 – 10.;

Aggression: Law against aggression and permission of waging war. Q2: 190; Q22: 39 – 41.

Alcohol drinking: Law against drinking liquor Q2: 219; Q5: 90 – 91.

Backbiting: Law against backbiting Q49: 12

Breast feeding: Period of breast-feeding. Q2: 233.

Collateral Security: Law regarding collateral security. Q2: 283.

Contracts: Law of contracts Q2: 282. Fulfilment of all obligations Q5:1; Repudiation of contracts Q 8 :58.

Defamation: Law against defamatory speech Q 4: 148

Divorce: Rules of divorce Q2: 229 – 230. Rules of 'Iddah (waiting period) for widows, divorced women, pregnant women and others Q 65: 1; Q2: 234; Q2: 228; Q 65 : 4; Law of Revocable Divorce Q2: 230; Law of Irrevocable Divorce Q2: 230.

Custody after Divorce Q2: 233.

Other types of divorce:

- ❖ Ila – swearing Q2: 226 – 227
- ❖ Mutual imprecation (Li'ān Q24: 6 – 9).
- ❖ *ihār* Q 58 : 1 – 4

Evidence: Law of Evidence Q2: 282.

Family Law: Relationship of husband and wife. Q2: 187; Rights and obligations of husband and wife Q2: 228; Q4: 19. Confining women guilty of misbehavior Q 4: 16. Polygamy and its restrictions Q4: 3; Q4: 129. Law against marriage with idolaters Q 2: 221; Q60: 10 -11. Law prohibiting ill-treatment of a wife Q2: 237. Duties and rights of husband and wife Q4: 34; Q2: 228. The prohibited degrees of marriage Q4: 22 – 24. Widows and divorced women Q2: 232; 234, 235; Q2: 241; Q2: 236. Law against cohabitation during menstruation period Q2: 222

Food: Guidance for food Q5: 4. Lawful food Q2: 168; Q 16: 114; Q5: 93 Unlawful food Q2: 173; Q 5: 3; Q16: 115; Q6: 145; Q4: 5 – 6.

Gambling: Laws against gambling Q2: 219; Q5: 90 – 91.

Government/Constituted Authority: Obedience of those in authority Q 4: 59

Highway Robbery: Q5: 36 – 37.

Homicide: Law against homicide Q4: 92 – 93;

Hunting: Law of hunting Q 5:5

Infanticide: Law against infanticide Q 17: 31

Inheritance: Law of inheritance Q4: 7 – 12, 176; Q 4: 7 – 12; Q4 : 176.

Intoxicants/Alcohol drinking: Law against intoxicants Q 2:219; Q5: 90 – 91.

Justice: Law of justice Q5: 8; Q4: 135.

Judicial Determination of Disputes Q4: 65.

Law against obscenity and pornography: Q17: 32, Q 24: 30.

Loan: Rules of Debt Q2: 282; presence of witnesses Q2: 286

Monasticism: Law against monasticism Q57:27

Murder: Law against murder Q 17: 33; Q25: 68. Law of Retaliation Q2: 178.

Nicknames: Law against nicknames Q 49: 11

Orphans: Laws regarding treatment of orphans Q4: 127.

Penalty for misappropriation of property Q 4:10.

Polygamy: Rules of polygamy Q4: 3; Q4: 129. Property rites Q2: 188; Q4: 29.

Punishment for homicide Q4: 92

Punishment: Purpose of punishment Q 23: 76 – 77. Punishment for adultery Q24: 2

Punishment for culminating chaste woman Q24: 4; Punishment for theft Q5: 38

Riba Interest: Law against Riba Q2: 275 – 279; Q3: 130; Q30: 39.

Scandal Mongering: Law against scandal mongering. Q 24: 23 – 26.

Secondary Sources of Islam Law:

- ❖ *Ijmā'u* (Consensus) Q 4: 59, 115
- ❖ *Qiyās* (analogy) Q2: 227; Q59: 2
- ❖ *Ijtihād* Q 29: 69.

Sharī'ah: Purpose of Sharī'ah Q4: 28

Slander: Law against slander Q 104: 1; Q 24: 4, 23 – 26.

Sunnah (the second source of Muslim law): Q48: 9 – 10; Q 3: 31; Q4: 69; Q4: 65 etc;
Q24: 52; Q4: 80.

Theft: Law against theft and armed robbery. Q5: 38.

Treaties: Q9: 3, 6, 11 and 12

Trust: Q4: 35; Q8: 27

Vowing: Abstinence from wives and its punishment Q 2: 226 – 227.

Waiting period before remarriage: Q2: 222

Will : Making a will Q2: 180. Witness to a will Q 5: 106 – 108. Changing a will Q2: 181.

Correction of partiality made by a testator Q2:182

Zihār Q33: 4; Q58: 2 – 4

Summary

A Muslim is he who believes in Allah and submits totally to His will. The name 'Muslim' was first pronounced by Prophet Ibrahim. Islam is named by Allah (Q5:3). It is the religion of a Muslim. Both the religion's name and the name given to its adherents preach peace and submission to the will of Allah. *Al-ḥukm* (the judgement) and *al-Furqān* (the criterion) are some of the other names of the Qur'ān, Prophet Muhammad received the first revelation Q 96; 1 – 5 when he was forty years and the last revelation (Q2:281) when he was about 63 years. 'Ayātul 'aḥkām (the legal injunctions) in the Qur'ān are many and they provide the touchstone to discriminate between the falsehood and the truth. *I'jāz* (brevity) and *mufaṣṣal* (detail after epitome) are some of the stylistic devices used in the Qur'ān. Legal injunctions on adoptions, robbery, adultery etc are contained in the Qur'ān

Post –Test

1. Mention 20 of the legal injunctions in the first original source of Muslim law.
2. Four stylistic devices are noted in the legal injunctions of the Qur'ān. Discuss them.
3. Discuss the Qur'ān and its revelation in relation to Muslim law.
4. What are the similarities and dissimilarities between Islam and Muslim in relation to Islamic law?

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LECTURE TWO

The Sunnah as the Second Original Source of Muslim Law

Introduction

In this lecture, my focus is on the second original source of Muslim law i.e. the Sunnah. Sunnah refers to the conduct and practices of the Prophet. Hadith means the sayings and deeds of the Prophet. Both Hadith and the Sunnah were used almost interchangeably. Sunnah comes next only to the Qur'ān in relation to the Muslim law. The authority of the Prophet is expressed through Divine will as expressed in the Qur'ān.

Objectives

At the end of this lecture, you should be able to:

1. give literal and technical definitions of Sunnah.
2. explain the ways to show the importance of the Sunnah in relation to the Muslim law.
3. discuss the legislative power of the Prophet
4. outline and explain some verses of the Qur'ān which were explained by the Prophet.
5. list 6 works that are recognised as authoritative in relation to the Sunnah/Hadith.

Pre-Test

1. Define Sunnah literally and technically
2. What are the ways to show the importance of Sunnah in relation to the Islamic law?
3. Mention 6 works that are recognised as authoritative in relation to the Sunnah.

CONTENT

Sunnah along with Hadith is counted as a second source of Muslim Law. The Arabic word “*Sunnah*” and its plural “*Sunnan*” have been used sixteen times in the Qur'ān. Literally, *sunnah* means a way, course, rule, mode, or manner of acting or conduct of life while the Arabic word, *hadith*, literally refers to story, conversation, story etc. The word hadith has been used in the Qur'ān 23 times. It is used for religious communication, message or the Qur'ān (Q39: 23; Q 68: 44), story of a secular or general manner (Q6: 60), historical history (Q20: 9) to mention but a few.

Technically, the term is used in a very wide sense to include

- the precepts and decisions of the Prophet
- his conduct and practices

- pre-Islamic customs which had received the tacit approval of the Prophet.

These two words “Hadith and Sunnah” were used almost interchangeably though there is a difference between them.

The Importance of the Sunnah with regard to the Islamic Legislation

The authority of the Prophet comes next only to the Qur’ān. It should be mentioned that his authority is not derived through the community’s acceptance of the Prophet as a person of authority. His authority is expressed through Divine will as expressed in the Qur’ān. Allah has chosen Prophet Muhammad to explain the Qur’ān to the people. He is regarded as the expounder of the Qur’ān. Allah says:

بِالْبَيِّنَاتِ وَالزُّبُرِ وَأَنْزَلْنَا إِلَيْكَ الذِّكْرَ لِتُبَيِّنَ لِلنَّاسِ مَا نُزِّلَ إِلَيْهِمْ وَلَعَلَّهُمْ يَتَفَكَّرُونَ

“And we have revealed to you the Reminder so that you may explain to the people what was revealed to them” Q16: 44.

The Qur’ān commands Muslims to observe Salat (Prayer) but does not prescribe the details as regards the time, the number of rakahs; etc. It was the Prophet’s task to demonstrate the forms of prayer practically as well as orally. The Prophet is the only authoritative representative of the political and legal sovereignty of God on earth because he was the one who received the revelation. It is, therefore, a natural consequence of the acceptance of the first principle that the Messenger is entitled to the obedience of those who acknowledge Allah as their sovereign. The obedience to him is in obedience to Allah. Allah says:

مَنْ يُطِعِ الرَّسُولَ فَقَدْ أَطَاعَ اللَّهَ وَمَنْ تَوَلَّىٰ فَمَا أَرْسَلْنَاكَ عَلَيْهِمْ حَفِيظًا

Whoever obeys the Messenger, has indeed obeyed Allah... (Q4: 80).

But no, by your Lord, they can have no faith, until they make you (O Muhammad) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission. (4: 65). Q33: 36 and Q59: 7 are some of the other injunctions on the roles of the Prophet. Therefore, all Muslims must accept his decisions and follow his commands without any reservation.

Legislative Power of the Prophet

Allah, speaking about the legislative power of the Prophet, says:

الَّذِينَ يَتَّبِعُونَ الرَّسُولَ النَّبِيَّ الْأُمِّيَّ الَّذِي يَجِدُونَهُ مَكْتُوبًا عِنْدَهُمْ فِي التَّوْرَةِ وَالْإِنْجِيلِ يَأْمُرُهُمْ بِالْمَعْرُوفِ وَيَنْهَاهُمْ عَنِ الْمُنْكَرِ وَيُحِلُّ لَهُمُ الطَّيِّبَاتِ وَيُحَرِّمُ عَلَيْهِمُ الْخَبَائِثَ وَيَضَعُ عَنْهُمْ إِصْرَهُمْ وَالْأَغْلَالَ الَّتِي كَانَتْ عَلَيْهِمْ فَاَلَّذِينَ آمَنُوا بِهِ وَعَزَّرُوهُ وَنَصَرُوهُ وَاتَّبَعُوا النُّورَ الَّذِي أُنزِلَ مَعَهُ أُولَئِكَ هُمُ الْمُفْلِحُونَ

Those who follow the Messenger, the Prophet who can neither read nor write (i.e. Muhammad SAW) whom they find written with them in the Taurât (Torah) (Deut, xviii, 15) and the Injeel (Gospel) (John xiv, 16), - he commands them for *Al-Ma'rûf* (i.e. Islâmic Monotheism and all that Islâm has ordained); and forbids them from *Al-Munkar* (i.e. disbelief, polytheism of all kinds, and all that Islâm has forbidden); he allows them as lawful *At-Taiyibât* [(i.e. all good and lawful) as regards things, deeds, beliefs, persons, foods, etc.], and prohibits them as unlawful

Al-Khabâ'ith (i.e. all evil and unlawful as regards things, deeds, beliefs, persons, foods, etc.), he releases them from their heavy burdens (of Allâh's Covenant), and from the fetters (bindings) that were upon them. So those who believe in him (Muhammad SAW), honour him, help him, and follow the light (the Qur'ân) which has been sent down with him, it is they who will be successful (Q7:157).

The legislative authority is bestowed upon the Prophet. He introduced certain things which were sanctioned by Allah. An example is the practice of Adhan to which the Qur'ân refers (Q62: 9). The commands of Allah as well as the proven commands of the Prophet are binding on every Muslim. They must be obeyed. The life pattern of the Prophet is a model for every Muslim. Therefore, a Muslim should carry out his orders without any hesitation. The Sunnah was and still is, and will remain one of the original sources of Muslim Law, second only to the Qur'ân. An example is his Legislation against plucking of eyebrows and legislation against tattoo. "May Allah's curse be on the woman that pluck eyebrows and those who ask for their eyebrows to be plucked and those who tattoo. (Bukhari & Muslim).

The Sunnah explains the legal injunctions contained in the Qur'ân that are ambiguous (*mujmal*), general and absolute. To put it differently and simply, there are legal injunctions in the Qur'ân which are capable of so many interpretations, the Prophet clarified them. The injunctions that are general were clarified by the Prophet with a view to making them specific. The absolute injunctions were restricted.

The Holy Qur'ân says:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا تَكَالًا مِنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ

"Cut off the hand of the thief, male or female, as a recompense for that which they committed, a punishment by way of example from Allâh. And Allâh is All-Powerful, All-Wise" (Q5: 38).

It is the Sunnah that restricts the punishment to a thief that steals a quarter of dinar and above. The Prophet said: "A thief's hand should not be cut off except for a quarter of a Dinar and upwards. In a version by Ahmad is: "Cut off a thief's hand for a quarter of a Dinar, but do not for what is less than that". "The Prophet (PBOH) had (a thief's hand) cut off for a shield worth three Dirhams" (Bukhar and Muslim). He also explained that the thief's hand should be cut off from the wrist.

□ *ulm* in the general sense means every wrong even if it is small. However, it was explained by the Prophet to mean *shirk*. He used a verse of the Qur'ân (Q31: 13) to explain it. Verily, *shirk* is a great wrong?

وَإِذْ قَالَ لُقْمَانُ لِابْنِهِ وَهُوَ يَعِظُهُ يَا بُنَيَّ لَا تُشْرِكْ بِاللَّهِ إِنَّ الشِّرْكَ لَظُلْمٌ عَظِيمٌ

"And (remember) when Luqmân said to his son when he was advising him: "O my son! Join not in worship others with Allâh. Verily! Joining others in worship with Allâh is a great *Zûlm* (wrong) indeed" (Q31: 13).

Another example is: "And when you travel in the land, there is no sin on you if you shorten your prayer, if you fear that the disbelievers may attack you" (Q4: 101). The Prophet explained the compulsory prayers (Zuhr, Asr and Ishai) to be shortened. The allowance is made only for the four-rakah prayers. He also explained that it is not only when one is in a state of fear that one can shorten one's prayer, one can shorten it if one is also in a state of security. He said: This is a charity that Allah has expended to you, so take His charity" (Muslim).

Another example is: “Forbidden to you for food are dead animals, blood, the flesh of swine”. (Q5: 3; Q 6: 145). It is the Sunnah that explains that dead locusts and fish, as well as liver and spleen of blood are lawful. The Prophet said in his Hadith: Two types of deceased animals and two types of blood have been made lawful for us. Locust and sea fish (meaning all types of fish), and the livers and the spleen”. It is also the Prophet who forbade domesticated donkeys, predatory animals with fangs, birds with claws (Bukhari). Allah says:

قُلْ مَنْ حَرَّمَ زِينَةَ اللَّهِ الَّتِي أَخْرَجَ لِعِبَادِهِ وَالطَّيِّبَاتِ مِنَ الرِّزْقِ قُلْ هِيَ لِلَّذِينَ آمَنُوا فِي الْحَيَاةِ الدُّنْيَا خَالِصَةً يَوْمَ الْقِيَامَةِ كَذَلِكَ نُفَصِّلُ الْآيَاتِ لِقَوْمٍ يَعْلَمُونَ

“Say (O Muhammad SAW): "Who has forbidden the adoration with clothes given by Allâh, which He has produced for his slaves, and *At-Tayyibât* [all kinds of *Halâl* (lawful) things] of food?" Say: "They are, in the life of this world, for those who believe, (and) exclusively for them (believers) on the Day of Resurrection (the disbelievers will not share them)." Thus, We explain the *Ayât* (Islâmic laws) in detail for people who have knowledge” (Q7:32).

The Sunnah made a clarification of the adornments that are forbidden and to whom they are unlawful. The Prophet said gold is lawful for females but unlawful for males.

The importance of the Hadith in deriving Islamic laws is too obvious to be emphasised. Many Qur’ânic verses cannot be understood without the Sunnah. The Sunnah is contained in the six collections of Hadith and the Muwatta of Imam Malik. The 6 works that are recognised as authoritative in relation to Hadith are:

1. Sahih al – Bukhari by Imam al – Bukhari.
2. Sahih al – Muslim by Imam Muslim
3. Sunnan Abu Dawud by Abu Da’ud
4. Jami’u al – Tirmidh by Al – Tirmidhi
5. Sunnanu ibn Majah by Ibn Majah
6. Sunnanu al – Nasâi by Al – Nasâi.

Of all these, Sahih Bukhari and Sahih Muslim are believed by majority to be completely authentic. They are second to the Qur’ân as sources of the laws of Islam. In addition to these six books of Hadith, the Muwatta of Imam Malik is a good collection of *ahadith* in the sense of the legal traditions. It was put together by the founder of one of the four major schools of law in Islam.

Summary

In this lecture, I have discussed Sunnah, the second original source of Muslim Law. The term Sunnah is used to mean the precepts and decisions of the Prophet. It also includes pre-Islamic customs which had received the tacit approval of the Prophet. The authority of the Prophet is next to the Qur’ân. He was regarded as the expounder of the Qur’ân particularly the legal injunctions contained therein. Copious examples were given in my discursion. The legislative authority is bestowed upon the Prophet by Allah. He is the only authoritative representatives of the political and legal sovereignty of Allah on earth because he was the one who received the revelation. Therefore, all Muslims must accept his decisions and follow his commands without any reservation.

Post-Test

1. Discuss the ways to show the importance of Sunnah in relation to the Muslim Law.
2. Give literal and technical definitions of Sunnah with regard to Islamic legislation.
3. Discuss the legislative power of the Prophet. Give examples.

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LECTURE THREE

Contributions of Early Companions to Legal Knowledge

Introduction

The aim of this lecture is to introduce you to contributions of early companions of the Prophet to legal knowledge. They lived and associated themselves with the Prophet during his lifetime. They were well aware of the wisdom and purposes behind all his affairs. Therefore, they had better knowledge and knew the reasoning behind all his decisions and judgements.

Objectives

At the end of this lecture, you should be able to:

1. explain the meaning of *ṣaḥābah* and their roles.
2. discuss the roles played by Abubakar in the area of Zakah after the death of the Prophet
3. state the contributions of Abubakar to law of inheritance.
4. discuss how Umar handled the case of theft during the period of hunger
5. state some contributions of Uthman to the standardization of the Qur'ān.
state the three things Ali used to contribute to legal knowledge.
6. explain how Ali reached his decision of 80 lashes as punishment for alcohol-drinking.

Pre-Test

1. Explain *ṣaḥābah*
2. Why were the companions' contributions to legal knowledge regarded as authentic?
3. Explain the roles played by Abubakar in the area of Zakah and law of inheritance after the death of Prophet Muhammad
4. How did Abubakar handle some people that were engaging in homosexual practices?
5. State briefly some contributions of both Umar and Uthman to legal knowledge?
6. How did Ali reach his decision of 80 lashes as punishment for drinking alcohol?

CONTENT

The Prophet and his companions (*sahabah*)

ṣaḥābah means the Prophet's companions who lived and associated themselves with the Prophet during his lifetime. They witnessed Prophet's deeds. Those who were present informed

those who were absent of his sayings and deeds. People would come to the Prophet and asked him different questions and he would respond to them. Many cases were referred to him and he would pass his judgement. The Prophet would praise any companion whose actions are good with a view to making him do more and he would correct the erring ones. The companions understood the situation in which all his affairs, responses, judgments, corrections, pieces of advice and addresses took place. They were well aware of the wisdom and purposes behind all his affairs such as sayings, responses, judgments, mutual relations, personal conduct, various political and economic matters and other deeds because his decisions, his approval or disapproval of various deeds of his companions and others took place in their presence. Therefore, they had better knowledge and knew the reasoning behind all his decisions and judgments.

After his death, many affairs were referred to them and they were able to contribute heavily because of their association with the Prophet during his lifetime. They used *ijtihād* to solve so many problems successfully during the lifetime of the Prophet and after his demise because their close association with him had afforded them the real sense and the basic purposes behind the Qur'ānic rules. Those who came after them did not have this opportunity. Therefore, the companions particularly the four rightly guided caliphs were able to contribute to Islamic legal knowledge. Of the companions who contributed heavily to Islamic legal knowledge both during the lifetime of the Prophet and after his demise were Ali b. Abi Talib, Aishah, Umar b. al Khattab, Abdullah Ibn Umar, Abdullah Ibn Abbas, Zayd ibn Thabit and Abdullah Ibn 'Abbas. Those companions whose contributions were not heavy include Abubakr, Uthman Ibn Affan, Abu Hurayrah, Anas Ibn Malik and Mu'adh Ibn Jabal (Doi, 1984). Their method was to compare the particulars of events on which they wanted to give legal opinion with similar matters for which judgements had been given in the Qur'ān and the Sunnah. They examined critically all the relevant details surrounding an issue and deduced the legal implications of such an issue. Muslims rely heavily on the way the companions handled some areas particularly where the Sunnah and the Qur'ān are silent as regards the Muslim legal knowledge. This is because they had an excellent mastery of the Qur'ān and Hadith. When they learnt some verses they would not go further unless they knew their meanings properly and acted upon them. They took their time to master them very well. Their mastery of these two sources gives them upper hand when it comes to the interpretation of the Qur'ān. Some time they consulted one another and used *ijtihād* to arrive at a legal opinion that would satisfy them that they had cogitated their brain enough and consulted widely on an issue before reaching a conclusion. Our attention would be focused only on the rightly guided caliphs because they are widely acknowledged by all the Muslims.

Abubakār al – Siddiq's Contributions to Legal Knowledge

It is not possible to mention all his contributions to legal knowledge. But our attention would be on the ones that gave Muslims the ability to understand better some very important aspects of the teachings of Islam. In the area of Zakah, Abubakar interpreted the words of a Hadith on Zakah quoted differently. He was not satisfied with the literal meaning of the Hadith. It was Abubakar who used *ijtihād* and included Zakah as part of the reasons for waging war against people. He said: "Zakah is a part of it". The implication of this is that if Zakah is paid, people and the government would be liberated economically. Their *'imān* (faith in Allah) would also be protected. This is in line with the Hadith of the Prophet which says: "Poverty may lead to

unbelief” (Irfanul haqq, 1996). Zakah can alleviate or eliminate the likely means (i.e. poverty) to unbelief as indicated in the Hadith.

Umar mentioned the Prophet’s Hadith on Imān (belief) to Abubakr to tell him that he could only wage war against people based on their refusal to believe in Allah or if they committed offences of *udūd* such as murder and adultery. “I have been commanded to wage war against people until they say that there is no god but Allah. Then, if they say this, their blood and their wealth will be spared by me except where due by right (referring to offences of *udūd*)” (Bukhari).

When there was a disagreement about the word *Kalālah* used in the Qur’ān (Q4:176) in relation to inheritance, it was Abubakar that gave a legal opinion on it. Some people believed it refers to a person that dies leaving no lineal heirs, neither issue nor father or grandfather. Others believed it refers to a deceased without issue, regardless of whether succeeded by father or grandfather (Irfanul haqq, 1996).

Abubakar used his own *ijtihād* to pass legal opinion on the issue. He said that the verse indicates that the sister of the *Kalālah* is to receive a half of the inheritance; and if the father had been alive, the sister would not have inherited from *Kalālah* at all. But the Qur’ān does not specify the matter. Abubakar then concluded that the word *Kalālah* refers to one who dies leaving no lineal heirs in either direction when he said: “My opinion, if it is correct, then it is from Allah, and if it is wrong, then it is from me and from the Shaytan. The *Kalālah* is one who has neither ascendants nor descendants”.

When Fatimah, the daughter of the Prophet demanded for an inheritance from the holy Prophet’s property, Abubakr rejected the request based on the Hadith which the Prophet is reported to have said: “We prophets do not inherit nor leave an estate for an inheritance” (Bukhari).

Furthermore, when some people were engaging in homosexual practices, Abubakar consulted the Prophet’s companions as regards the action he should take. Ali advised him to burn the homosexualist to death. He based his judgement on what happened to the people of Lut who first practised homosexuality. Their punishment was that Allah destroyed them. Abubakr wrote back to Khalid, one of his generals who faced this challenge from the people under him, that they should be burnt to death. The action was carried out by Khalid.

In the area of appointment by means of *bay’ah*. He appointed Umar to be the Khalifah after him and he told other companions that the appointment could only be effective if they agreed to it which they did. It could be seen from our discursions that Abubakr used the Qur’ān, the Sunnah, the *Qiyās* and *Ijmā’* as his bases when passing judgement or contributing to legal knowledge on any issue.

Umar ibn Al-Khattāb and Some of his Contributions to Legal Knowledge.

Before passing a judgement on any issue, Umar would consult other companions and discuss the issue with them so as to reach the best judgements. Therefore, he was able to contribute a lot to legal knowledge. He used to relate the particular to the general, and could pursue the ramifications of an issue back to basic principles in order to see its wider implications.

Umar adopted the style of the Prophet by refraining from issuing an order to his people to do something good if he knew that such an order would subject them to difficulty and hardship. He also emulated the Prophet’s method of choosing the easier of the two things whenever he was

faced with a choice. He charged the scholars to discover the reasons behind the judgements in the primary texts i.e. the Qur'ān and the Sunnah with a view to applying them to new issues and challenges. He was able to enact laws on new developments. This step prevented his people from looking for legal rulings outside the Qur'ān and the Sunnah. He took into consideration the public interest when enacting legal rulings to prevent wrong doing, corruption and other vices. He discouraged people from quoting the Hadith which says: "Whoever says there is no god but Allah would enter Al- Jannah" because people may rely on that and make no further effort to do good deeds (Taha).

Umar suspended amputation as punishment for stealing because the enabling environment for honest living was not created. During the period of suspension, there was famine in Madinah. There was also temptation of stealing because of hunger. An example of the thieves caught and set free by Umar was Hatib ibn Abi Balta'a's two employees. They were caught stealing a she-camel of a man from Masnah tribe. They confessed that they had stolen the camel because of hunger. Their employer, Hatib could not pay them as and when due. When the matter was verified, Umar set them free and instructed the officials to bring their employer (Hatib) before him. The employer confirmed non-payment of their salary. Umar declared: "You employ these young men and you starve them. Now what is prohibited unto them has become permissible. By Allah! Since we cannot cut their hands I am going to make you pay a heavy fine". He then ordered the employer to pay double the price of the She-camel. This means jobs must be created for all. If it is not possible, a social security system must be put in place to cater for the less – privileged in society.

Uthman's Contributions to Legal Knowledge

Uthman who became Khalifah after Umar made a promise to work in line with the Qur'ān, the Sunnah and the precedent set by Abubakr and Umar. Through this promise, he got the casting vote of Abdu al-Raman and this made him the third Khalifah. Therefore, one of his contributions to legal knowledge was using the precedent set by the first two caliphs as another source of legislation. Uthman worked in line with the Qur'ān, the Sunnah and the precedents set by Abubakr and Umar to solve all legal matters he came across when he became the Khalifah (Philips,1990).

Another example is the standardization of the holy Qur'ān. He also formulated the *Ijtihād* that the compilers should follow the dialect of the Quraysh and that the Qur'ān should be read in line with the Zayd's way of recitation to remove disagreement.

Ali's Contributions to Legal Knowledge

Ali was the fourth and the last of the rightly guided Khulafā'. He made use of the Qur'ān, the Sunnah and *ijtihād*. He contributed to legal knowledge by means of *ijtihād*. He considered circumstances surrounding an issue before adducing a legal judgement (*istishāb*) and was fond of using juristic preference to pass legal judgements (Istishsaan).

Ali was always careful when he wanted to pass legal rulings. He used to link particular issues to general issues and took into consideration the welfare and well-being of his people (*Isti'lāh*) when passing legal rulings. Ali had deep understanding. Through the Prophet's prayer, he had a deep understanding of the Qur'ān and the Sunnah. The Prophet prayed for him, saying: "O Lord! Guide his heart and make him speak the truth." Through this prayer, he had a deep

understanding of the Qur'ān and the Sunnah and was regarded as the best judge in Madinah. He was able to resolve many difficult cases and thus contributed a lot to legal knowledge.

As regards his competence to pass legal rulings, he said: "By Allah, no verse of the Qur'ān was ever revealed except that I knew concerning what it was revealed, and where and why it was revealed. My Lord has bestowed upon me a heart that is understanding and a tongue that is articulate".

One example of his contributions to legal knowledge was on alcoholic drinking. There is no fixed punishment for alcohol drinking. This led to the disagreement about the number of lashes to be inflicted on the offender. It was reported that the first caliph, Abubakr used to impose forty lashes upon the person who drank. Umar, the second Khalifah did likewise during the first few years of his caliphate. However, when the number of alcoholic drinkers increased astronomically, Umar consulted the companions as regards the problem. Ali suggested that the punishment for alcohol-drinking should be increased to 80 lashes i.e. it should be parallel with the punishment for slander (*qadhf*). This was because he believed that drunkenness could lead a person to make a false accusation. Through this comparison, he passed a legal ruling on alcohol drinking to be 80 lashes (Irfanul haqq, 1996).

Another example is his judgement on joint murder. When Umar consulted Ali as regards the punishment he should inflict on a group of people jointly killed a person, Ali advised him to inflict the punishment on each of them. He said: O Commander of the Faithful (Umar)! If a group of people joined together in stealing, would you not cut one hand off of each of them? When Umar replied in the affirmative, Ali said, "Then the same applies in this case". Umar then ordered the killing of them said, "If all the citizens of Sana'a were to join together in murdering one man, I would execute them all".

Ali was bold, fearless and assertive when he wanted to pass his judgement. On one occasion, his advice was sought as regards a pregnant woman whose husband was away on military expedition and was receiving strangers in her home. The woman was invited by Umar. But on her way to him, she miscarried the child for fear of being invited by the Khalifah. When other Khulafah were giving reasons in favour of Umar, Ali gave his candid opinion that he should pay compensation for the child because she lost the child for fear of him

Summary

Where the Qur'ān and the Sunnah are silent as regards the Muslim legal knowledge, the contributions of Sahabah are taken as models to be followed. This is because they were well aware of the wisdom behind the Prophet's sayings, deeds and judgements. They examined critically all the relevant details surrounding an issue and deduced the legal implications of such an issue. For instance, Abubakar contributed in the areas of Zakah, law of inheritance homosexual practices etc. Ali reached his decision of 80 lashes as punishment for alcohol drinking by comparing it with the punishment for slander. He said the common feature between them is false accusation.

Post-Test

1. Mention three of the caliphs and state the roles played by each of them to legal knowledge.
2. What are the reasons for considering the contributions made by Sahabah to legal knowledge as authentic.

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LECTURE FOUR

Ijtihād and Mujtahid

Introduction

This lecture focuses on *Ijtihād* and *Mujtahid*. *Ijtihād* means the ability to interpret Divine Text by inferring new rulings in order to relate it to new situations. I shall show that Sharī‘ah is relevant for all times and eras through the use of *Ijtihād*. A person who endeavours to understand deep meanings of the Qur’ān and Hadith is called *Mujtahid*. Before a person can be qualified to be called a *mujtahid*, he must have some qualifications. I shall discuss all the required qualifications of *mujtahid* and their classifications.

Objectives

At the end of the lecture, you should be able to:

1. define *Ijtihād* and *mujtahid* literally and technically.
2. give evidences from the Qur’ān and Hadith for validating *ijtihād* as a source of Muslim law.
3. highlight the qualifications of *mujtahid*
4. outline and explain the classification of *mujtahid*.
5. state clearly the features of *ijtihād*.

Pre-Test

1. What is *Ijtihād*?
2. Give and explain briefly 5 of the qualifications of *mujtahid*.
3. Highlight classification of *mujtahid*.
4. Mention the features of *Ijtihād*?

CONTENT

Derivation and literal mean of the word.

Ijtihād is derived from the five – letter Arabic verb “*Ajhada*” i.e. *Alif* , *jīm* , *tā’* , *hā’* , and *dāl* .This is in turn derived from the three – letter Arabic verbal root of *jīm* , *hā’* and *dāl* . According to the lexicographers, the word is derived from ‘*juhd*’ which means employment of effort.

The use of *Juhd* and *Jahd* in relation to *Ijtihād*

Many definitions of the term *ijtihād* have been given by jurists. “*Jahd*” and “*juhd*” mean power and strength. To some scholars, *jahd* means hardship and difficulty while *juhd* gives the meaning

of power and strength (Ibn Mansur al – Misr). The latter relates to the Qur’ānic verse wherein Allah says:

الَّذِينَ يَلْمِزُونَ الْمُطَّوِّعِينَ مِنَ الْمُؤْمِنِينَ فِي الصَّدَقَاتِ وَالَّذِينَ لَا يَجِدُونَ إِلَّا جُهْدَهُمْ فَيَسْخَرُونَ مِنْهُمْ سَخِرَ اللَّهُ مِنْهُمْ وَلَهُمْ عَذَابٌ أَلِيمٌ

Those who defame such of the believers who give charity (in Allāh's Cause) voluntarily, and those who could not find to give charity (in Allāh's Cause) except what is available to them, so they mock at them (believers), Allāh will throw back their mockery on them, and they shall have a painful torment (Q9:79).

To Ibn Al – Athir, *juhd* means employing one’s complete strength, and *jahd* means hardship and difficulty. Many definitions of *ijtihād* have been given by jurists. The common feature of these meanings is that they stress the point that *ijtihād* involves exertion of mental energy.

Technical Meaning of *Ijtihād*

Technically, *ijtihād* means the ability to interpret Divine Text by inferring new rulings, in order to relate it to changing conditions, and to thereby make the Sharī’ah relevant for all times and eras. Some renowned scholars define *ijtihād* as follows:

- Endeavour of qualified jurist to ascertain Sharī’ah ruling on a legal issue through utmost intellectual exertion.
- *Ijtihād* is exerting oneself and a technical term in Islamic law (Schacht)
- It is exerting oneself to form an opinion on a legal matter by applying analogy to the Qur’ān and Sunnah (Macnold).
- *Ijtihād* is the maximum effort made by a jurist to master *usūl al- fiqh* (legal theory) and then to apply those rules and principles in order to discover God’s law (Hallaq)
- *Ijtihad* refers to the utmost of a trained jurist to discover a rule or law for a particular human situation by applying the principles of jurisprudence to the Qur’ān and the Sunnah.
- *Ijtihād* is the maximum effort expended mentally by the jurist to master and apply the principles and rules of *usūl – fiqh* for the purpose of discovering God’s law. When *Ijtihād* is being used, it is independent of any school (*Madhhab*) of jurisprudence. The jurists using *ijtihād* make a decision in Islamic law through personal efforts.
- *Ijtihād* is the effort (on the part of the Mujtahid) and employment of one’s utmost powers to extract a command (*hukm*). To put it differently, he says; *Ijtihād* in its complete sense is to make utmost effort in achieving a goal so that it is not possible for one to do anything more (al-Ghazali).
- *Ijtihād* is the effort made by a *faqīh* (jurist) for acquiring the knowledge of the ahkaam of the Sharī’ah (Khidri Bek).
- *Ijtihād* means deduction of the ahkam of the Sharī’ah from their elaborate adillah found in the Sharī’ah. (Al-Zarqa).
- *Ijtihād* is a capacity (*malakah*) by means of which one obtains the power of deducing the ahkam of the Sharī’ah (Abd Samad)

Some other scholars have also defined *Ijtihād* in different words that are close in meaning to these definitions. In the light of the definitions given, it can be concluded that *Ijtihād* means employment of effort and endeavour to one’s utmost capacity to interpret Divine Text by

inferring new rulings, in order to relate it to changing conditions, and to thereby make the Sharī'ah relevant for all times and era. It does not make any difference or matter whether it is derived from *juhd* or *jahd*. This is because effort and endeavour are not without strain and toil. Both accompany each other. In addition, the common feature of these meanings is that they stress the point that *ijtihad* involves exertion of mental energy in the search for a legal opinion to the extent.

Validity of *Ijtihad*.

Ijtihad in the Qur'ān and the Sunnah

Ijtihad is confirmed by the Qur'ān and the Sunnah. Evidence for validating *ijtihad* as a source of Muslim Law or Islamic Law is found in the following Qur'ānic verses:

وَالَّذِينَ جَاهَدُوا فِينَا لَنَهْدِيَنَّهُمْ سُبُلَنَا وَإِنَّ اللَّهَ لَمَعَ الْمُحْسِنِينَ
يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ
فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا
وَإِذَا جَاءَهُمْ أَمْرٌ مِنَ الْأَمْنِ أَوْ الْخَوْفِ أَذَاعُوا بِهِ وَلَوْ رَدُّوهُ إِلَى الرَّسُولِ وَإِلَى أُولِي الْأَمْرِ مِنْهُمْ
لَعَلِمَهُ الَّذِينَ يَسْتَنْبِطُونَهُ مِنْهُمْ وَلَوْ أَنَّا فَضَّلْنَا اللَّهُ عَلَيْكُمْ وَرَحْمَتُهُ لَاتَّبَعْتُمُ الشَّيْطَانَ إِلَّا قَلِيلًا
وَمَا أَرْسَلْنَا قَبْلَكَ إِلَّا رِجَالًا نُوْحِي إِلَيْهِمْ فَاسْأَلُوا أَهْلَ الذِّكْرِ إِنْ كُنْتُمْ لَا تَعْلَمُونَ

“As for those who strive hard in us (i.e. our cause), we will surely guide them to our paths (i.e. Allah’s Religion – Islamic Monotheism). And verily, Allah is with the Muhsinun (good doers) (Q29: 69). O you who believe! Obey Allah and obey the Messenger (Muhammad PBUH) and those of you who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allah and His Messenger (PBUH), if you believe in Allah and in the Last Day. That is better and more suitable for final determination (Q4: 59). When there comes to them some matter touching (public) safety or fear, they make it known (among the people), if only they had referred it to the Messenger or to those charged with authority among them, the proper investigators would have understood it from them (directly). Had it not been for the Grace and Mercy of Allah upon you, you would have followed Satan, save a few of you”. Q 4: 83. And we sent not before you (O Muhammad PBUH) but men to whom we inspired, so ask the people of the Reminder if you do not know (Q 21:7)”.

It is through *ijtihad* that one would be able to know what steps to take when one confronts new problems whose solutions cannot be found directly from the Qur'ān and the Sunnah. An order is given in the verses quoted to seek the opinion of those who can use *ijtihad* to deduce

laws from the primary sources of the Sharī‘ah. The understanding in the verses quoted above is that *ijtihād* is an exercise undertaken to deduce a conclusion as to the effectiveness of a legal precept in Islam.

Ijtihād is evident in the Hadith of the Prophet when he was sending Muadh b. Jabal to Yemen. :

Muadh Ibn Jabal on the eve of his departure to Yemen where he was being sent by the Holy Prophet as their Judge and Governor was asked by the Holy Prophet on the basis of what he (Muadh) would judge upon being confronted with a problem. Muadh replied that he would judge on the basis of the contents of the Qur’ān. The Prophet asked him again: Assuming that you did not find it in the Qur’ān, on what basis would you adjudicate? Muadh said he would judge on the basis of the Sunnah of the Prophet. The Prophet further asked him “Assuming you do not find it in both the Qur’ān and the Sunnah of the Prophet, on what basis would you adjudicate? Muadh replied that he would use his own individual judgement. And Prophet Muhammad (PBUH) was very happy to hear this statement.”

The Prophet is also reported to have said: “When a judge exercises *ijtihād* and gives a right judgement, he will have two rewards, but if he errs in his judgement, he will still have earned one reward (Bukhari and Muslim). “Strive and endeavour (*Ijtahidū*), for everyone is ordained to accomplish that which he is created for” (Bukhari). The understanding of this Hadith is that whatever the result, *ijtihād* never partakes in sin. The quotations also show that *ijtihād* is not blameworthy. Rather, it attracts rewards.

Mujtahid

Mujtahid is the person who endeavours to understand deep meanings of the Qur’ān and Hadith with the sole purpose of finding out the exact instruction from Allah and gives decision on that basis. To put it simply and differently, *Mujtahid* is he who possesses the capacity of *ijtihād*. *Mujtahid* is he who infers details of Islamic practices from the primary sources. Before a person can be qualified to be called a *mujtahid*, he must have some qualifications. The following qualities are expected of a *mujtahid* though the list is not exhaustive. Some of the pre-requisites of *ijtihād* are mentioned below.

Qualifications of al – Mujtahid

- He must be competent in Arabic language for this gives him a correct understanding of the Qur’ān and the Sunnah. These two sources are in Arabic. If a *mujtahid* is not competent in Arabic, he would rely more on the translations of others which may not be correct. Therefore, he will not be able to draw accurate deductions from the two sources.
- He must be righteous, honest, upright, pious and reliable so that people can trust his judgement.
- Adequate knowledge of the Qur’ān is required of a *mujtahid*. He should know the events surrounding its revelation (*Asbābu al – nuzūl*), its legal contents and the classical

commentaries on the 'ayātul 'Aqām which they are about 500 verses. While noting these commentaries, priority should be given to the sunnah and the views of the companions as they relate to the legal issues at hand. He must be versed in the rules of abrogation (*nāsikh wal mansūkh*) as they relate to the legal issues. In addition, the use of narratives and parables must be understood by a *mujtahid* to deduce legal rules from such narratives and parables.

- He must be knowledgeable in the Sunnah as related to the legal issues. As regards the Sunnah, he must be able to establish the reliability of the narrators of the Hadith with a view to distinguishing between the general and the specific as related to the legal issues.
- *Al – Mujtahid* must be a practising Muslim, male or female and must be emotionally stable. He must possess high level of intellectual competence that the job requires.
- He must be aware of the *Ijtihād* carried out by previous scholars and how they reached their decision as related to the issue.
- The *Mujtahid* is expected to understand the issue on which *Ijtihād* is being done. This is because if he does not understand the issue, he is likely to give a wrong legal ruling on it. The *Mujtahid* is expected to consult experts in the field with a view to getting full information on the issue. This will assist him to pass a correct legal ruling on it.
- He must know the objectives of Sharī'ah (*Maqā'idu al – Sharī'ah*) as related to the issue at his hand particularly when the issue relates to the removal of hardship. To put it simply, he must be quite knowledgeable about the ultimate goals of *Sharī'ah* rulings, their objectives as well as the common interest of people in his time.
- He must have a razor- sharp mind and analytical mind that the jobs demand.

Classification of Mujtahid

Mujtahidun have been classified into the following categories by some scholars according to their understanding.

1. Mujtahid al-Mu'laq (Absolute Mujtahid).

These are the mujtahids that made their own rules of *ijtihād* and did comprehensive *Ijtihād* to extract the 'Aqām (rules). Founders of various schools of Islamic fiqh such as

- i. Imām Abu Hanīfah Nu'mān bin Thābit (Abu Hanifah)
- ii. Imām Malik bin Anas.
- iii. Imām Muhammad Idris al-Shāfi ' i
- iv. Imām Ahmad bin Muhammad bin Hanbal etc are in this group.

2. Mujtahid fi al – Madhhab.

They are the mujtahid who derived their rulings from the *usūl – al – fiqh* set by the *Mujtahid mu'laq* to extract the *aqām* (rules) i.e. they followed the guidelines of their respective schools to extract rulings. For instance, Imām Abu Yūsuf used Imām Abu Hanīfah's methodology to extract rules. However, they might have different ways in the implementation of particular issues.

3. *Mujtahid fil masā'il*

They deal with new issues of law not legislated on. The scholars in this category include Kashshāf, Tahawī, Halwani etc. They derive rulings on issues in which there is no known opinion or ruling by any Imam such as Imam Abu Hanifah. They followed Imam Abu Hanifah in his derivative rulings, using his *usūl* on issues in which there is no known opinion or ruling by Imām Abu Hanifah. The present day Mujtahids are in this group.

4. *Al – Mujtahid fi Sharī'ah.*

These were those who did *ijtihād* in the matter of Sharī'ah. The companions of the Prophet were in this category. *Ijtihād* that aims to deduce the law from the evidence in the sources, i.e. the Qur'ān and the Hadith, often is called independent *ijtihād* while the one that mainly elaborates and implements the law within the confines of a particular school, say Maliki school of law is known as limited *ijtihād*.

Features of *Ijtihād*

- ❖ *Ijtihād* is the most important source of Islamic law after the Qur'ān and the Sunnah.
- ❖ It is a continuous process of development since the Divine Revelation and the Sunnah stopped or ceased after the death of the Prophet.
- ❖ *Ijtihād* is the main tool or instrument used to interpret the divine message.
- ❖ It is also used to relate the divine message to the changing conditions of the Muslim community.
- ❖ All other sources of Islamic law such as *Ijmā'*, *qiyās istishāb*, *istiḥsān* and '*urf*' beside the Qur'ān and the Sunnah are under the umbrella of *Ijtihād*. They are its manifestations.
- ❖ *Ijtihād* is regarded as *farḥu al-Kifāyah* i.e. the actions that are compulsory for every Muslim but their observance can be taken over by some other Muslims. If this is done, others are relieved of the acts. It means the action i.e. *Ijtihād* can be delegated to others (Q9: 122; Q9: 122). "And it is not (proper) for the believers to go out to fight (Jihad) all together. Of every troop of them, a party only should go forth, that they (who are left behind) may get instructions in (Islamic) religion, and they may warn their people when they return to them, so that they may beware (of evil)".
- ❖ When there is a fear that justice may not be done on an issue, then *ijtihād* becomes compulsory for every Muslim (*farḥu 'ayn*) with a view to finding correct solution to the problem.
- ❖ *Ijtihād* is praiseworthy and attracts reward whether *al-Mujtahid* is correct or not.
- ❖ Whenever a clear rule is available in the Qur'ān and the sunnah, *ijtihād* is not applicable.
- ❖ It is a duty of the scholars. If an issue is urgent, it is compulsory on each competent scholar. If it is not urgent, it is a collective obligation.
- ❖ *Mujtahid* legislates law while *faqīh* does not. The latter uses existing framework to issue verdicts like a judge.

- ❖ A *Mujtahid* becomes a *Marja Taqlīd* when his views are endorsed and followed by prominent religious persons in religious matters.
- ❖ *Fatwa* is a decision or a conclusion a *Mujtahid* reached on an issue or a predicament after much endeavour and struggle. The authenticity of the *fatwa* passed can only be confirmed if it is based on the Qur'ān, the Sunnah and Ijmā'.
- ❖ *Ijtihād* provides solutions to contingent issues of life and fulfils the needs of changing items and the requirements of new phenomena of human civilization
- ❖ While the Qur'ān and the Sunnah came to an end at the time of death of the Prophet, *Ijtihād*, however, continues. This is because Islamic law is able to adapt to new situations and has capacity to tackle all new issues and problems through *ijtihād*.
- ❖ Propriety of *Ijtihād* is measured by its harmony with the Qur'ān and the Sunnah.

Summary

In this lecture, we gave various definitions of *Ijtihād* with a view to showing the importance of *Ijtihād* and its relevance to our contemporary world. In the course of the lecture, we have examined the qualifications and classification of *mujtahid*. The features of *ijtihād* were also discussed.

Post-Test

1. What are the evidences from the Qur'ān and Hadith to show the lawfulness of *Ijtihād*?
2. Give and explain briefly 5 of the various definitions of *Ijtihād*.
3. Highlight and explain the various qualifications and classification of *mujtahid*.
4. What are the features of *Ijtihād*?

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LECTURE FIVE

The Closing of the gate of Ijtihād (*Insidād bābu al – Ijtihād*) and *Taqlīd*

Introduction

This lecture is designed to make you understand the concept of *insidād babul Ijtihād* (the closure of the gate of Ijtihād. It was assumed by some scholars to have ceased while some believed the gate is still open. The arguments of the two sides will be analysed with a view to making our stand. I will also introduce you to the concept of *taqlīd* (complying with edicts of a jurist) and its applications.

Objectives

At the end of this lecture, you should be able to:

1. state the assumptions of some scholars who believed that the gate of *Ijtihād* has been closed.
2. know the views of the proponents of *Ijtihād*.
3. understand *taqlīd* and its applications to one's worldly and spiritual lives.
4. know the framework of Muslim law in relation to a Muslim's actions.

Pre-Test

1. Explain the concept of *insidād bābul Ijtihād*.
2. State the opposing-views on anti-*Ijtihād* groups.
3. Explain *taqlīd* and how it can be applied to our worldly and spiritual lives

CONTENT

About third/ninth century, the gate of *ijtihād* was assumed to have ceased. It was believed that the gate had been closed and it would never be opened. The assumptions were based on the following grounds:

- All the essential questions had been answered; and that no one had the necessary qualifications because independent Muslim jurisprudence had been exhausted.
- All the explanations, applications and interpretations on ground would cover all the future activities.
- The closure of the door was due to fear by scholars that the unscrupulous rulers might misuse *ijtihād* to support their ill motives and personal interests at the expense of the Ummah.

- The *ijtihād* of the earliest scholars, particularly, the four Imams (Malik Hanbal, Hanafi and Shafi) should be recognised, and it was believed that the caliber of the Imams would be impossible or at least difficult to find.
- No changes should be made to their *ijtihād* and no opinions contrary to theirs were accepted.
- Therefore, their decisions should be followed and creativity should be limited to explaining their views.

The anti-*ijtihād* groups who were from the lines of the people of Hadith rejected vehemently the principle of *qiyās* – analogical deduction – the backbone of *ijtihād*. Their concern was only the sources of Hadith and the literal interpretation of Hadith text. Human reason and free investigation were not given any place in the process of legal reasoning. These beliefs were captured vividly in the Joseph Schacht's report.

By the beginning of the fourth century of the hijra (about A.D. 900), however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all. The closing of the door of ijtihād, as it was called, amounted to the demand for taqlid, a term which had originally denoted the kind of reference to companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities. A person entitled to ijtihād is called dmujtahid, and a person bound to practice taqlid is Muqallid.

The Opposing- view on anti-*ijtihād* groups

The proponents of *ijtihād* believed that no one at any time has demanded that the practice of *ijtihād* be suspended. To them, *insidād bābu al- ijtihād* does not convey an idea as to who had actually closed the gate. Contrary to the belief that the gate had been closed, there is no where the phrase is mentioned. It was not closed in theory and practices. A waive of writing in favour of *ijtihād* was generated and the following arguments were put forward in its favour and against anti-*ijtihād*.

Ijtihād is always relevant and indispensable in legal theory because the jurists are able to reach the judicial judgements through it. Jurists capable of *ijtihād* exist at nearly all times. As regards those who are anti-*ijtihād*, no judgeship should be entrusted to them because they would apply the methods of jurisprudence insufficiently. It was believed that the anti-*ijtihād* group has been extinct as a result of disapproval of their doctrines and adherents by the great mass of Muslims (the Sunnis and the Shiites). It is only *mujtahid* that could express highly original view on law. There are questions relating to other issues which the Qur'ān cannot give express answers. Muslim scholars should provide solutions to their answers.

Therefore, for one to say that the door of *ijtihād* was closed, it means many issues would remain unsettled for life because it is through *ijtihād* that we can provide answer to them. The gate can never be closed. It was even the Prophet who opened the gate by himself as can be seen from the Hadith quoted above in relation to Muadh b Jabal.

The scholars need to work hard and exert their mentality to understand the texts of the original sources of Islam from the linguistic and religious points of view. This can be achieved through *ijtihād*. New cases are endless; and the only way for a jurist to encompass all branches of law, including the cases which may or may not have been previously solved is to master the science of *usūl*. It is through *qiyās* and *ijtihād* that Shari‘ah can cope with the needs of Muslim society. *Ijtiḥād* was indispensable to the political institution in which the ulama played a prominent role.

Jawyn, Ghazali and Ibn Aqil opposed *taqlīd* in favour of *ijtihād*. They were qualified mujtahids and were accepted by others as mujtahids of the highest caliber. To rule efficiently, a caliph or a leader must possess knowledge of law and of the means i.e. *ijtihād* by which new problems can be solved. New matters which crop up or did not exist during the time of the Prophet, his companions and the ancient Muslims need new religious injunctions. For instance, new firms, the income of professionals like doctors, engineers, lecturers, lawyers, buildings for rent, plants, machine and equipment, animal products (such as milk, silk), rental proceeds from fixed and current assets such as ships, cars, planes, hotels etc. are examples of new matters that need new religious injunctions which are not expressly stated in the original sources of Muslim law to determine their Zakatability or otherwise. If they are zakatable, we need to know the percentage of Zakaah on them. When should the Zakah be paid on them? What is the evidence of such permissibility in Shari‘ah? It is through *ijtihād* that answers to these questions or novel cases can be found.

If *Ijtiḥād* is prohibited, Islamic *fiqh* would have suffered from inertia, stagnation and passivity vis-à-vis the demands of the times, of life and its manifestation. Islamic *fiqh* is dynamic and progressive as a result of *Ijtiḥād* which has been the force with which the boundaries of *fiqh* with respect to its applications has been constantly developing and expanding.

If the gate of *Ijtiḥād* had been closed, *fiqh* would have been rendered ineffective and incapable of providing answers to emergent and contingent issues of life. Closing the gate would lead to the improper attitude towards new ideas, the issuing of baseless and irrational *fatawā*. Another bad consequence is that people would have the feeling that Islamic *fiqh* cannot fulfil the demands of the modern civilization. People would then prefer western laws (man-made laws) to the laws of Islam. It must be mentioned that the Shari‘ah *fiqh* has been keeping the gates of *Ijtiḥād* open throughout the course of history. This has given it outstanding achievements over other schools.

The corollary that can be drawn from this is that *ijtihād* plays the role of an evolutionary and dynamic force in legal issues (studies). It provides solutions to contingent issues of life and fulfils the needs of changing times and the requirements of new phenomena of human civilization. *Ijtiḥād* assists man to perform his role in accordance with divine law. Man is able to do his *ibādah* (duties to Allah) and to take the right steps whenever he is confronted with new cases. To assist man to undertake it is, therefore, the duty of every Muslim community to perform *ijtihād* with a view to assisting other Muslims on the steps to be taken whenever a new case arises. In this situation, *ijtihād* is regarded as *farḥ ‘ayn* i.e. it becomes a personal obligation

of the *mujtahid*. This is particularly so when there is a fear that justice may be tampered with or may not be done.

But when it is being performed by a jurist or jurists, it is no more an obligation on every Muslim. It becomes *farḥ kifāyah* (the collective bargaining). There is an urgent need for *ijtihād* in this current age to solve political, economical, medial, social and educational problems. There is also the need for collective *ijtihād* i.e. jurists would come together and exert their mental energy with a view to finding solutions to complex issues such as Islamic banking and finance, bio-medical issues, political issues, *ibādah*-based problems.

We can therefore, conclude that for Islam to be relevant through all ages and for the progress of Islamic civilization in future, there is the need for *Ijtihād* by competent scholars.

Taqlīd

Literally, *taqlīd* means to put a chain around the neck. In Sharī'ah, it means complying with edicts of a jurist as regards the fundamentals of religion. He who follows a jurist or accepts a jurist's view is called *muqallid*. If a Muslim is unable to understand and derive Islamic laws by himself from the Qur'ān and Hadith due to lack of knowledge, lack of time etc, *taqlīd* becomes necessary because it affords the Muslim a more viable option.

Taqlīd is not blameworthy in the sense that many our decisions in life are based in taqlid. This is noticed in our consultations with those that are more knowledgeable than us in some disciplines. For instance, we consult doctors and comply with their pieces of advice and follow their prescriptions. In the same vein, we consult lawyers and accept their recommendations and strategies. Therefore, if we could comply with the doctors' prescriptions, the recommendations of the lawyers and civil engineers, there is nothing bad or unlawful if we resort to experts in fields wherein we lack expertise such as religious matters.

Al-Mujtahid directs people in religious fundamentals by issuing decrees called *Aḥkām*. A Muslim is, therefore, faced with two options i.e. to become a *mujtahid* (jurisprudent) or a *muqallid* (a follower). *Fatwā* is a decision or a conclusion a *mujtahid* reached on an issue or a predicament after much endeavour. The authenticity of the *fatwa* passed can only be confirmed if it is based on the Qur'ān, the Sunnah and ijma.

Taqlīd ghayru al-shar'iyy means to follow anyone in worldly affairs. If the prescription of a doctor is not against the Qur'ān and the Sunnah, we follow it. But if a doctor should prescribe unlawful thing as a cure to an ailment such as alcoholic drinks for the cure of a person's disease, such a prescription must not be followed unless there is no alternative in the world. But if the prescription is not haram, it is permissible to use it.

The Framework of Muslim Law

In Islam i.e. Sharī'ah, all human actions have a definite order. Every Muslim should be aware of what is expected of him, what he should not do and what he can be indifferent. In the light of Hadith, the framework of Muslim law in relation to a Muslim's actions is divided into five.

- **Wājib or Farḥ (obligatory):** This is a commandment that must be performed. Non-performance of the commandment is considered a sin. A person who fails to observe any obligatory duty is punished on the Day of Judgement.
- **ḥaram:** It is an action that must not be committed because it is forbidden. It is punishable by law e.g. stealing, bribe taking, lying etc.

- **Mustaḥab/Mandūb:** It is an action that is rewarded if one performs it. However, if one fails to do it, one will not be punished e.g. offering salat in congregation, brushing teeth with *miswak* etc.
- **Makrūh (Disliked):** This is an action which is disliked by the Sharī‘ah. One should not perform it. However, if one performs it, one is not punished for doing it. For instance urinating while standing and other actions that are harmful to others.
- **Mubah (allowed) /Jaiz:** This is an action that is permitted by the Sharī‘ah but it is legally indifferent. To put it simply, an action that had equal significance whether one performs it or not e.g. eating lawful food, going for sight seeing, enjoying a stroll in the park. One will neither be rewarded for doing it nor punished for abstaining from it.

Farḥ ‘ayn: These are actions that are compulsory on every Muslim. They cannot delegate them to others e.g. salat etc. **Farḥ Kifāyah:** These are actions that are compulsory for every Muslim but their observance can be taken over by some other Muslims. If this is done, others are relieved of the acts. It means these actions can be delegated to others e.g. participation in *salatu al- Janāzah* (prayer for a dead Muslim) is *farḥ ‘ayn* (compulsory) but it becomes *farḥ Kifāyah* if some Muslims perform the salat. It means the obligation of performing *salatu al- janāzah* has been removed from the shoulders of other Muslims. Another one is the science of religion (Sharī‘ah). Allah says: “And it is not proper for the believers to go out to fight (Jihad) all together. Of every troop of them, a party only should go forth, that they (who are left behind) may get instructions in (Islamic) religion, and that they may warn their people when they return to them, so that they may beware (of evil)” (Q9: 122).

Summary

In this lecture, the concept of *insidād bābul Ijtihād* was examined thoroughly. The assumptions of the anti-*Ijtihād* and the views of the proponents of *Ijtihād* were carefully analysed. *Taqīd* is assumed to be blameworthy by some scholars while some believed that it is not blameworthy in the sense that many of our decisions are based in *taqīd*. All human actions are evaluated based on five divisions. The evaluation of all human actions was done in the light of the framework of Muslim Law.

Post-Test

1. What are the assumptions of those who believed in the closure of the gate of *Ijtihād*?
2. State and explain the views of the proponents of *Ijtihād*.
3. *Taqīd* is very important in our worldly and spiritual lives. Discuss.
4. The evaluation of a Muslim’s actions is divided into five. Discuss.
5. Explain *farḥul‘ayn* and *farḥul kifāyah* in relation to Muslim Law.

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LECTURE SIX

Marriage in Islam

Introduction

Marriage (Nikah) in Islam has certain rules and regulations. All the rules and regulation must be followed before contracting it. You will be introduced to them in this lecture. What marriage is expected to do will be examined in this lecture. In fact, this lecture will prepare a good background for the next lecture.

Objectives

At the end of this lecture, you should be able to:

1. explain nikah in relation to social contract.
2. discuss the functions/purposes of marriage in Islam.
3. explain the Islamic perspective of marriage
4. state the views of Maliki jurists concerning marriage
5. state the categories of women that are forbidden for men and vice versa to marry in Islam.
6. list and explain the Islamic requirements for the validity of marriage
7. explain the rights of husband and wife.
8. discuss polygamy in Islam

Pre –Test

1. What are the functions or purposes of nikāḥ (marriage in Islam)?
2. Discuss the views of Maliki jurists as regards marriage.
3. List the prohibited categories of partners in marriage in Islam.
4. List the Islamic requirements for the validity of marriage.
5. Discuss the polygamy in Islam and the rights of husband and wife.

CONTENT

Nikāḥ or Zawāj means marriage. It is an institution that has certain rules and regulations. These rules guide both males and females who want to engage each other in marriage. A woman becomes lawful for a man and vice versa by contracting marriage. They are permitted sexual relations only if they fulfill the conditions attached to al-Nikāḥ in Islam. Marriage is a noble communion between man and woman, a communion which is blessed by Allah and based on freedom of choice. To put it differently, both are free to choose their partners of their choice and

liking. Marriage is recognised in Islam as the basis of society. It is not only a social contract but also a sacred covenant which must not be taken with levity. This institution leads to the uplift of man and is a means for the continuance of the human race. Therefore, spouses should respect, love and honour each other.

The Legality of Marriage

The divine wisdom behind the creation of a man and a woman who enter into social contract is referred to in the Qur'ān: "And among His signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect" (Q30: 21).

The Prophet is reported to have said: 'The marriage is my tradition whosoever keeps away therefrom is not from amongst me'. He also said: *Yaa ma'shara ash shabābi man istatā'a minkumul bā'ah falyatazawwaja fa'innahu aghā lilba'ari wa a'sanu lil faraj* (O! You youngmen, whoever is able to marry should marry, for that will help him to lower his gaze and guard his modesty) (Doi, 1984, P. 115)

"O you youngmen, whoever is able to marry, should marry, for that will help him to lower his gaze and guard his modesty"

The purpose of marriage

If we go through the messages of the Holy Qur'ān and the Sunnah, they will show the sound nature of husband and wife relationship. The message shows that marriage is strongly recommended in Islam. This recommendation is seen in various parts of the Qur'ān and Hadith.

Marriage unites a man and a woman in Islam. The word garment used in the verse is a metaphor. This refers to husband and wife. The implication is that marriage relationship should protect their chastity, give them comfort and bring them peace, grace and stability as garment protects one's nakedness, enhances one's beauty and general appearance. It also shows the close intimacy, mutual comfort and mutual affection that should exist between the two. Celibacy is against the teachings of the Qur'ān. Therefore, monkhood has no place in Islam. A Muslim should not shun his worldly responsibilities and shut himself four walls of a monastery. If a Muslim fulfils his responsibilities to his wife, children, parents and fellow-men, they are regarded as Ibādah (worship). The Prophet of Islam advised his followers to keep fast and break it, offer prayer and have some rest. This is because a man's body has a right over him, his eyes have a right over him and his wife has a right over him. Therefore, a mature Muslim is expected to get married in order to raise a descent family.

One of the advantages of marriage is increase of mankind. If one marries and one is blessed with children, dynasty is preserved. Followers of the Prophet also increase as he will boast on the Day of Judgement for the increased number of his followers. After one's death, one's religion, sons or daughters may pray for one.

Dead parents get the rewards of their good actions and the prayers of his children. However, they are not punished for the sins committed by their children. Allah says: "I will attach them to their issues and they will suffer no loss owing to their evil actions but their good deeds will increase owing to the good deeds of their children. If the child should die before them, they will draw their parents to paradise" (Al-Ghazali, 2001).

Marriage brings peace and tranquility if all its rules are adhered to strictly. A chaste and religious wife helps her husband in cooking of food, spreading of bed, cleansing of utensils and other duties of livelihood. All these acts lessen the duties of a man and he has more time for divine service.

The Functions of Marriage

Companionship and counselling of each other

One of the functions of marriage in Islam is companionship and counseling of each other. When a man and a woman come together in marriage, they give each other companionship, each showing affection, care, understanding, tolerance towards the other. It is through marriage that a man becomes lawful for a woman and vice versa. It is also through marriage that they are permitted to have sexual relations. Extra-marital relations are prohibited in the Holy Qur'ān. Any companionship that devoid of marriage must not involve sexual relations. If it does, it is adultery or fornication. Such is frowned at in the Holy Qur'ān. Allah says: "Do not come near adultery (Q17:31). This leads to the second purpose of marriage. Intense mutual love and mutual concern for each other (Q30:21) can be shown through marriage.

Sexual Satisfaction, Reduction of Tension and Rewards

When a man and a woman come together in marriage, they are able to express their love and attraction towards each other without committing the sin of adultery. To put it differently, marriage protects people from committing adultery or fornication. Their private parts are thus saved. Sexual passion is so strong in some men that one wife cannot satisfy them and so there is provision of marrying four wives. Some of the companions had three or four wives and those who took two wives were many. This protected them from exercising their sexual urge in a wrong way. Allah says: "It is made lawful for you to have sexual relations with your wives on the night of fasts. They are *libās* (i.e. body cover, garments, screen etc) for you and you are garments for them" (Q2:187). Through marriage, man and woman are able to exercise sexual urge to get rewards based on the Hadīth of the Prophet.

"O Messenger of Allah, the rich have taken away all the rewards. They observe the prayer as we do, and they keep the fasts as we do and they give □adaqah (charity) from their surplus riches". Upon this he (the Prophet) said: Has Allah not prescribed for you (a course) by following which you can also do □adaqah? Verily in every tas□īh (i.e. saying sub□anallah) there is a □adaqah, every takbīr (i.e. saying Allahu Akbar) is a □adaqah, every ta□mīd (i.e. saying Al□amdulillahi) is a □adaqah, every tahlīl (i.e. saying Lā ilāha illā llah) is a □adaqah, enjoining of good is a □adaqah, forbidding of evil is a □adaqah, and having sexual intercourse with your wife is a □adaqah. They (the Companions) said: "O Messenger of Allah, is there reward for him who satisfies his sexual passion among us?" He said: "Tell me, if he were to devote it to something forbidden, would it not be a sin on his part? Similarly, if he were to devote it to something lawful, he should have reward (Muslim)"

Therefore, marriage provides an outlet for exercising one's sexual feelings without committing sins. Sexually transmitted diseases, rape, homosexuality, pornography, gay, lesbianism etc are likely to be eliminated or at least reduced in a society that encourages marriage of a man and a woman. This is also in line with the Hadith of the Prophet which encourages young men to get married with a view to lowering their gaze and guarding their chastity.

The Continuance of the Human Race

Marriage is a lawful way of having children because it creates an environment that is conducive for the wife during pregnancy and lactation. Children can get the best start in life through marriage. Parents have some duties to perform towards the children. They are responsible for the education and maintenance of their children. The resultant effect of having children through marriage is to prevent anti-social behavioural patterns such as armed robbery, corruption and hooliganism. It is through Nikah that parents know their rights and obligations towards their wards. If children are given a good foundation, the society will be good for it. Another reason for marriage to procreate for the continuance of the human race is stated in the Qur'ān. Allah says: "And Allah has given you wives of your own kind, and has given you, from your wives, sons and grandsons, and has bestowed on you good provisions..." (Q16:72)

An Act of *Ibādah*

Marriage also assists a Muslim to perform another form of *Ibādah*. It is *Ibādah* to get married because one has to endure the inconveniences of coming together of two people who have different backgrounds. Therefore, tolerance is very important in marriage. The couple has to tolerate each other. Otherwise, the marriage may break after a short period of consummation. With tolerance, understanding and viewing marriage as *Ibādah*, the marriage can be sustained for life. The Prophet is reported to have said that: "when a man marries, he has satisfied half of his faith, so let him fear Allah regarding the remaining half".

Marriage gives a person other ways of doing *Ibādah*. Some of them are patience at the character and conduct of the wife, bearing the hardship of the family members, doing good to the family members, showing them the path of religion, educating the children and earning for them lawful things. All these acts are considered as *Ibādah*. However, one should not allow marriage to divert one from the remembrance of God and from the path of honesty and virtue.

The Islamic perspective of Marriage

As good as marriage in the life of human beings, it may not be generally compulsory for every person if the Qur'ānic verses (Q3:4 Q24:32) and the Prophetic traditions cited earlier on marriage are considered. For instance, the Prophet is reported to have said "Oh assembly of young people: whoever of you has the means to support a wife, he should get married for this is the best means of keeping the looks cast down and guarding the chastity and he who has not the means let him keep fast, for this will act as castration".

Maliki jurists take it that marriage in its origin is deemed to be recommended but for certain reasons affecting certain individuals, it takes other shapes. Abu Hanifah and Imam Hanbali jurists agree with Maliki jurists as to that. But Imam Shafie jurists deem marriage in its origin to

be *mubah* i.e. supererogatory. Imam Dawood Al-Azhari deems marriage to be obligatory (Abu Zahra-ahwal Shakhsia 24).

Here are the views of Maliki jurists on this issue.

- Marriage becomes obligatory for a man who has strong sex desire and fears committing illicit relations and has the means for it i.e. he has the dower, strength and the maintenance. For the woman, marriage is also obligatory if she is unable to earn her living or she fears illicit relations.
- Marriage is forbidden for a man who can control himself and has not the means for marriage or has bad illness which will affect the wife or his expected offspring.
- Marriage is recommended (Sunnah) for the man who has desire for sex but can control himself, keep chastity and hopes to have offspring.
- Marriage is *mubā* that is supererogatory for a man who can control himself and does not hope for offspring and marriage will not prevent him from performing his rituals.
- Marriage is condemned for a man who has no sex desire and at the same time marriage will prevent him from performing his rituals.

The Prohibited Categories of Partners in Marriage

A Muslim may marry any other-Muslim according to one's choice. However, Islam prohibits marriage between certain categories of persons in accordance with the Qur'ānic injunctions. Allah says:

“And marry not women whom your fathers married, except what has already passed; indeed it was shameful and most hateful, and an evil way.

Forbidden to you(for marriage) are: your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your foster mother who gave suck, your foster milk suckling sisters, your wives' mothers, your step-daughters under your guardianship, born of your wives to whom you have gone in – but there is no sin on you if you have not gone in them (to marry their daughters), the wives of your sons who spring from your own loins, and two sisters in wedlock at the same time, except for what has passed; verily, Allah is Oft-Forgiving, Most Merciful.

Also (forbidden are) women already married except those (captives and slaves) whom your right hands possess. Thus has Allah ordained for you. All others are lawful, provided you seek (them in marriage) with mahr (bridal-money given by the husband to his wife at the time of marriage) from your property, desiring chastity, not committing illegal sexual intercourse, so with those of whom you have enjoyed sexual relations, give them their mahr as prescribed; but if after a mahr is prescribed, you agree mutually (to give more), there is no sin on you. Surely, Allah is Ever-All-Knowing, All-Wise.”(Q4: 22-24)

“And do not marry *al-mushrikāt* (idolatresses etc.) till they believe (worship Allah alone). And indeed a slave woman who believes is better than a (free) *Mushrikah* (idolatress etc), even though she pleases you. And give not (your daughters) in marriage to *al-mushrikun* till they believe (in Allah alone) and verily, a believing slave is better than a (free) *mushrik* (idolater) etc, even though he pleases you. Those (*al-mushrikun*) invite you to the Fire, but Allah invites (you) to Paradise and Forgiveness by His Leave, and makes His *Ayāt* (proofs, evidences, verses, lessons, signs, revelation etc) clear to mankind that they may remember” (Q2:221).

A Muslim should not marry the above-mentioned women. In the same vein, the equivalent prohibitions are applicable to females towards males. For instance, in the Qur’anic verse quoted above, a man must not marry his daughter. In the same vein, a daughter must not marry her father. From the quotations, there are permanent and temporary prohibitions. As regards the permanent prohibition, 13 females are prohibited permanently while 7 are prohibited temporarily. Those in the second group are

- Marriage to sisters at the same time. But if one dies, or is divorced, one can marry the other.
- Marriage to a woman already married is forbidden. If she divorces her husband or her husband dies, one can marry her.
- An idolatress should not be married. However, if she accepts Islam, she can be married
- A woman cannot marry a non-Muslim man. But if he accepts Islam, a Muslim woman can marry him.
- Marriage to a fifth wife when four wives are subsisting is prohibited. If one dies or is divorced, one can replace the dead or the divorced with another wife if there is the need for her.
- A woman in *iddah* (waiting period) should not be married
- A woman in *Ihrām* performing hajj should not be married. But when she finishes the rites of Hajj, she can be married.

It could be inferred from the explanation and the verses quoted that the prohibition is due to the reasons of blood (consanguinity) relations, fosterage, marriage affinity, morality and religious differences.

Tahlīl is a temporary marriage whereby a woman divorced three times by a previous husband is married temporarily with a view to divorcing her later so that she may return to her husband. If a woman is divorced three times, her husband cannot take her as his wife until she marries another man. It is when the woman is divorced willingly and without external forces that her first husband can marry her. Some people indulge in *Tahlīl* to arrange a false marriage so as to avoid the injunction. This is prohibited and the Prophet cursed the man who marries a woman for that purpose and the man for whom it is done. (Ahmad and at Tirmidh)

Other forbidden type of marriage is *mut‘ah* i.e. temporary marriage. This marriage is contracted for a specified limited period. It was reported by Ali that the Prophet forbade *mut‘ah* (temporary marriage) and eating the flesh of the domestic donkey on the day of the conquest of khaybar (Saheeh Muslim).

Conditions for the validity of marriage

The Islamic requirements for the validity of marriage are as follows:

Taradī (Mutual consent of the couple) is the first condition. There must be *sīghah* (forms) before contracting a valid Islamic marriage. The proposal (*ʿĪjāb*) and consent (*qubūl*) القبول و الايجاب must be made on the free consent of the contracting parties. Consent obtained by fraud or coercion invalidates the marriage. Both proposal and acceptance are made in the presence of two males or one male and two female witnesses. It is allowed for guardians to make such proposals on behalf of minors and persons of unsound mind. Agents can be made to perform these roles. However, they must be sane and adults. They must also act within the scope of the authority given to them. In Islam, offer (*ʿĪjāb*) and acceptance can be conveyed by words, writing, gesture or indication, conduct (e.g. smiling, etc). No special form is prescribed. Whatever form is used must be understandable by the parties.

Mahr (marriage gift)

Mahr is a way of honouring a woman at the time of her marriage with a gift. This reflects the husband's respect for her and it also shows his sincere desire for partnership with her throughout life. *Mahr* can be specified or named at the time of the contract. There is no minimum or maximum *mahr*. It is left to circumstance, custom and capacity of the husband. This assertion can be inferred from the following Qur'ānic verse and the prophetic traditions. When Umar tried to limit *mahr* to 400 dirhams, a Quraysh woman reacted against his stand reading Q4:20 where Allah says: "But if you decide to take one wife in place of another, even if you have given the wife you put away a talent of gold as her marriage portion, take not the least bit of it back?" Immediately Umar withdrew his stand and admitted his error. The following are some of the things used as *mahr* during the time of the Prophet:

- ❖ The Prophet gave some of his wives around 500 dirhams and others were given less when circumstances were difficult.
- ❖ Abdur-Rahman b. Awf informed the Prophet that he has given a piece of gold that has the weight of a date stone as *mahr*. The Prophet prayed for him.
- ❖ The Prophet also prayed for a woman who accepted a pair of shoes as *mahr*.
- ❖ The conversion of Abu Talhah into Islam was used as *Mahr* for Umm Sulaym. When Abu Talhah proposed to Umm Sulaym, she said, "By Allah, someone like you would not be refused, but you are a *kāfir* (an unbeliever) and I am a Muslim, and it is not lawful for me to marry you. If you should accept Islam, that would be my *mahr*, and I would not ask of you anything else". So he became a Muslim and that was her *mahr*". Abu Talhah proved to be sincere in his conversion and fought with the Prophet in numerous battles.
- ❖ Teaching the Qur'ān to a wife-to-be can be used as *mahr*. It was narrated that a man wishing to marry was told by the Prophet to go to his family if he could see what he could give as *mahr* even if only an iron ring, when the man returned he said: "No by Allah, I did not find anything, even an iron ring. But here is my waist wrapper? The Prophet said: "If you wear it, there is nothing of it on her, and if she wears it there is nothing of it on you: so he sat for a long time and then got up to depart. The Prophet said: "What do you have memorised of the Qur'ān?" He replied, "Surah so-and-so," enumerating the surahs. The Prophet said: "Go for I have married you to her for what you

know of the Qur'ān". And in another narration, "so teach her some of the Qur'ān" (Bukhar and Muslim).

- ❖ Ali married Fatimah, daughter of the Prophet with his sword-shattering coat of mail

The corollary of these different forms of *mahr* is that *mahr* should be simple and affordable. The Prophet is reported to have said. "The best marriage is the easiest, and the best marriage gift is the easiest". It is allowed to defer the payment of *mahr* if a man is in a financial difficulty. It then becomes a debt upon him which must be paid to her even after divorce or death of her husband.

It must be mentioned that this essential aspect of contract of Islamic marriage, *maḥr* (Dower) i.e. the gift given to the bride is mainly meant for the bride. It is not her parents' gift. Giving the bride's parents goods and property requested by them as a *maḥr* i.e. dower before they could give their children in marriage as practised in Nigeria is not one of the conditions of Islamic marriage. This practice is common in the western part of the country. In fact, the *Qur'ān* allows the bride to forego her right to dower if she wishes and the marriage is still valid (Q4:4).

وَأْتُوا النِّسَاءَ صَدَقَاتِهِنَّ نِحْلَةً فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَرِيئًا

Waliyy (Marriage Guardianship)

The *waliyy* may be the lady's fathers or any other man appointed by the bride's family. He is to give the lady or the woman in marriage. The *Qur'ān* (Q4:25) states: "Marry them with the permission of their people". Guardianship is a condition for the validity of a marriage contract as stated in many Hadiths. The Prophet said: "There is no marriage except through a guardian"; "There is no marriage except with a guardian and two witnesses"; "There is no marriage except through a guardian, and the ruler is the guardian of one who has no guardian"; "Any women who married without the permission of her guardian, her marriage is invalid, her marriage is invalid, her marriage is invalid". It is believed that the guardian is in the best position to guide, advise and protect her interest. The guardian will be able to assess the man's character and other things. He should not prevent her when she has found a suitable suitor out of his own selfish interest.

Witnesses

The marriage must be witnessed by at least two very reliable male witnesses. Witnessing of the words of initiation by one party and acceptance by the other during the same meeting is a condition for the validity of the marriage in Islam. The witnesses must be of age, sound in mind and must actually be present. They must hear and understand the words of the contract.

Walīmah (wedding meal)

The *walīmah* (wedding meal) is not obligatory but strongly recommended. When making *walīmah*, extravagance, waste and showing off must be avoided. *Walīmah* is done to make the conclusion of a marriage contract known to the public, in contrast to unlawful relationships which are usually concealed. The husband's means determine the extent of *walīmah*. However, care must be taken to avoid extravagance. Invitees to the *walīmah* must attend unless they have genuine excuses not to go. The Prophet is reported to have said; "When one of you is invited to a

walimah, he should attend it. Whoever does not respond to the invitation has disobeyed Allah and His messenger. If he should be fasting, let him invoke blessings, and if he is not, let him eat” (Bukhari and Muslim). Such genuine excuses include sickness, exclusion of poor people, gossip, serving of unlawful food or drinks etc.

The Prophet directed Abdul Rahman ibn Awf to slaughter a goat on the occasion of his marriage. The Prophet himself made a feast on each of the occasions of his marriage. Once he slaughtered a goat and on another occasion he made the feast with two “muds” (handful) of barley to guide the Muslim to act according to their financial ability.

Rights of Husband and Wife

A wife must recognise her husband’s position of authority and behave well to him. The wife must be obedient to her husband in all that is fair and does not involve disobedience to Allah and His messenger. She should not allow a person her husband dislikes to enter her husband’s house even if he or she should be among the wife’s relatives. The husband has the right to discipline the wife for her deliberate disobedience or rebellion against the husband. However, the discipline must be within the framework of Shari’ah as stated in the Qur’an.

She is entitled to *mahr*. It is her property, not her parent’s property. She is entitled to good and lawful food, clothing, housing, medication in moderation. She must be treated well. The husband must be kind to her and considerate for her feelings.

The husband needs to be just and equitable among his wives if they are more than one. Equality in provisions, in time spent with each, and fair treatment is within the husband’s capacity. However, it does not include equality in feelings towards them. This is because it is impossible to have the same feelings for them due to their different behaviours as we cannot have the same feelings for all our children. But we must provide for all our children and wives equally in things that are within our power.

The wife is entitled to education and guidance particularly religious education so that she can fulfil her duties to Allah and this will prevent her from unlawful behaviours. The husband should not be negligent in this regard otherwise he is accountable to Allah in this regard. She is entitled to protection of her person and reputation from harm of any kind.

Polygamy

Polygamy means having more than two spouses concurrently. A man who has more than two wives at the same time is practising polygamy while polyandry is for a woman who has more than two husbands at the same time. It means a person who practises either polygamy or polyandry has more than two spouses at the same time. In Islam, polygamy is limited to the maximum of four with certain condition while polyandry is completely forbidden. Monogamy refers to a person that has only one spouse while bigamy means having two spouses. Islam allows monogamy, bigamy and polygamy (having more than two wives at a time) on certain conditions. Polygamy practised by a man is allowed in the sense that it corresponds with the biological nature of human beings. This is because a man can father a great number of offspring. It is not possible for a woman to carry more than one pregnancy at a time. Allah says.

Although Islam allows polygamy for a man, it is with certain conditions. In the pre-Islamic Arabia period, men married as many wives as they could. The Holy Qur’an then brought a legal limitation of four on the number of wives a person can have at the same time.

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ فَإِنْ خِفْتُمْ
أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَلِكَ أَدْنَىٰ أَلَّا تَعُولُوا

“And if you fear that you shall not be able to deal justily with the orphan-girls, then marry many other women of your choice, two, three, or four but if you fear you shall not be able to deal justily (with them), then marry one or (the captives and the slaves) that your right hands possess. That is nearer to prevent you from doing injustice” (Q4:3). Justice is emphasised in the above-mentioned verse. The justice required of a husband having more than a wife is in respect of time, feeding, clothing, accommodation and other things that are within his capacity. As regards his feeling and love, it is not possible for him to do justice for one that has more than one wife as enumerated in the Qur’ān. Allah says: “You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them (by giving her more of your time and provision) so as to leave the other hanging (i.e. neither divorced nor married). And if you do justice, and do all that is right and fear Allah by keeping away from all that is wrong then Allah is Ever Oft-Forgiving, Most Merciful” (Q4:129).

The reason for this many not be far-fetched. Their behaviours can not be the same. One wife may be caring, kind, loving and show concern. She may be ready to bear with the husband in all situations. The others may lack these virtues. It is, therefore, natural to have more feelings towards the former than the latter. Despite the differences in their behavior, the Qur’ān warns man not to abandon one totally or neglect her. If this happens, the abandoned wife will feel unwanted and unhappy. He should manage the affairs in such a way that none will feel dejected, neglected and unwanted. Man should put in mind the advice of the Prophet when dealing with his wives. He said: “Whoever, marries more than one wife and does not maintain justice among his wives shall be raised paralysed on the Last Day”. The greatest reason is that it is allowed in the Qur’ān by Allah but with caution and conditions as explained earlier.

It should be mentioned that if a man marries more than one wife, all the children born by all the wives will have a clear identity of the father and the respective mother that produced the child. The reverse is not the case. That is if a woman is allowed to marry more than one husband, it will be difficult to identify the actual father though the mother may be clearly known. To avoid this confusion a woman is not allowed to marry more than one husband.

In addition, there are more women than men in our society. If polygamy is not allowed for man, it means some women will be without husband. Furthermore, problems which may not allow the first wife to perform her roles may arise in her. Such problems include barrenness, serious illness, mental illness and lower libido. The sympathy of the husband is desirable. He doesn’t have to send one out in order to take another in her place. Islam says he should keep them.

Even during wartime, widows, unmarried young men etc that are left would be taken care of through polygamy. Through polygamy, they can be catered for, protected and made to enjoy the satisfactions of family life and children. It is also to curb the sexual evil which is common. Most of the people keep innumerable concubines. A solution to this problem is necessary and polygamy provides the answer. Thus, adultery is prevented. Under these circumstances practising monogamy is unjust. Concubinage is regular sexual connection with a female who do not hold the legal status of a wife. In other words, keeping a woman in the position of a wife without marrying her is un-Islamic.

Recent Approach to Marriage

The father as well as mother should be choosy when they want to come together as husband and wife. To choose a good partner that can raise healthy as well as well-behaved children is an important duty of every man and woman. In fact, the four qualities the Prophet mentioned must be taken into consideration. For sons to be good, Umar said a father should marry a good mother. A father should avoid a woman whose defects can affect their children in terms of health and character and this is because a defect in a father or a mother can make the son defective (Tambihul Gafileen p. 46-47).

To give credence to this issue, the Prophet is reported to have said: “make a careful choice of where to drop your sperm because “genes” pass from parents to offsprings (Minhajul Muslim p. 92)”. Therefore, the recent approach to marriage to go for genotype before the solemnization of marriage is Islamic based on the Hadith of the Prophet.

Summary

In this lecture, I have examined marriage (nikah) from the Islamic perspective. Functions of marriage in Islam such as companionship, sexual satisfaction, the continuity of human race and divine service are discussed fully. Marriage is compulsory for some people while it is not for others. It is even prohibited for some people. All these issues were discussed fully in this lecture. The prohibited categories of partners in marriage in Islam the conditions for the validity of Islamic marriage, polygamy and the rights of both husband and wife are fully examined and discussed.

Post-Test

1. Define *nikāḥ* and its functions in Islam
2. What are the views of Maliki jurists on marriage?
3. Mention 10 of the women that are forbidden in marriage in Islam.
4. List and explain with examples where necessary the conditions for the validity of marriage in Islam.
5. Discuss polygamy in Islam and the rights of husband and wife.

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LECTURE SEVEN

Modern Reforms Concerning Marriage

Introduction

In this lecture you will learn the reforms introduced into Islamic ways of marriage by the modernists. They allow what is prohibited in Islamic marriage and prohibit what is allowed. In this lecture, we shall examine their reforms in areas such as polygamy and marriage with non-Muslims in the light of the Qur'ān and the Sunnah.

Objectives

At the end of this lecture, you should be able to:

1. mention some reforms introduced into Islamic marriage.
2. understand the stand of Islam as regards marriage with non-Muslims.
3. mention some Muslim countries and the reforms that were introduced into Islamic marriage in those countries.

Pre-Test

1. List three of the modern reforms concerning marriage.
2. Can apostasy bring to an end Islamic marriage?
3. Is it allowed for a Muslim to marry a non-Muslim?
4. Discuss marriage with Sabian.

CONTENT

The modernist view on polygamy

The modernists consider some provisions contained in the Qur'ān and Hadith to be outdated and outmoded. They believe that they are not relevant to our time. The belief that the provisions of Islamic jurisprudence are permanent in nature and application is disregarded by them. The elites in the Muslim countries also imbibed this doctrine. Western pattern of life has influenced the teaching of Islam to the extent that anything that is not in line with it is tagged uncivilized, barbaric and the like. When the imperialists come to the Muslim countries, they tried to change, modify and remove so many Islamic practices. The Muslim scholars who were educated in Europe have been brain washed to the extent that they see many things wrong in some aspects of the teachings of the Qur'ān.

We have said that the Sharī'ah does not oppose limited polygamy (polygyny). It allows it with certain conditions. One of these provisions believed to be outmoded is polygamy. They consider polygamy to be a barbarous provision which should not be utilized. To them, polygamy

is impracticable in this modern age because it does not conform to the so-called western pattern of life. They introduced un-Islamic restrictions on polygamy.

In Syria, Syrian law on personal status Decree no 59 article 17 made the prior permission of the court a condition before a person can marry more than one wife. The court would determine the ability of the husband to do justice between the co-wives. If the court is satisfied, the man would be given the permission. However, the determination is neither feasible nor possible. They all know it would be difficult for any man to get court injunction in his favour because of the impossibility of determining the capability of the husband as regards justice. This is an indirect way of prohibiting polygamy that is allowed by Allah. It was in Syria that the law reforms started in 1952 before it extended to other Muslim countries. These countries have gone against the Qur'ān and the Sunnah.

Another condition is that there must be some lawful benefits in the polygamous marriage before it can be allowed (as in Iraq law). This is also not possible to know because the marriage has not come into existence. This reason shows that the modernists wanted at all cost to forbid polygamy. The same provision against polygamy is contained in the Iraq Law of personal status of 1959, article 3 (IV), the Malaysian law sections 37, the Iranian law etc.

Another argument of the modernist is that the Qur'ān (Q4: 129) states clearly that it is not possible for a person to do justice no matter how one desires to do so. They therefore, concluded that it is an express injunction against polygamy. To put it simply, they believed that the verse prohibits it entirely because to them it is impossible to be just between wives.

In Turkey, polygamy is forbidden and the court is empowered to declare the polygamous marriage invalid and dissolved without an exception. One has to dissolve the first wife before one takes the second wife according to the provision (The Turkish Family Law 1951 of Cyprus). The same thing applies in the Tunisia code of personal status of 1956. In fact, in virtually all the mentioned countries, there are legal penalties for a person that marries more than one wife.

In Tunisia, no one dare marry more than one wife. Polygamy was totally prohibited by the Tunisian code of personal status. It states "Polygamy is forbidden". Any person who, having entered into a bond of marriage contracts another marriage before the dissolution of the preceding one, is liable to one year's imprisonment and to a fine (Act 18).

In Pakistan, the Arbitration council needs to permit the taking of the second wife on the necessity and justification. The consent of the existing wife was a necessity except in cases of insanity, physical infirmity or sterility. If a person should take a second wife without fulfilling these conditions, he would be imprisoned for one year or be asked to pay a fine up to RS 5000 or both. If the *mahr* was deferred, he was required to pay it immediately before he could be allowed to take a second wife based on the approval of the council. The existing wife after receiving her deferred *mahr* had the right to get divorce. The reformer waited for more than 1400 years before they could deem it necessary to prohibit polygamy. The Sharī'ah law of polygamy has not been tampered or reformed by the modernists in Saudi Arabia, some countries in East Africa, West Africa and Asia.

The modernists do not consider Q4: 3 as a moral exhortation but it is regarded by them as a legal condition precedent to polygamy. Since impartial treatment is not possible, marrying more than one wife is prohibited.

If polygamy was not allowed, the Prophet and the companions would not have practised it during their lifetime. Cases from polygamous homes were brought to him and he found solutions to them. He dissolved some marriages that were not workable. There was no Hadith that

prohibited polygamy. Polygamy was not forbidden by the Umayyad and Abbasid dynasties. The founders and leaders of the four schools of Islamic jurisprudence did not forbid polygamy but found solutions to the problems arising out of polygamous union.

It is only the Qur'ān that allows both monogamy and polygamy (Polygyny). Scriptures such as the Vedas, the Ramayan, the Mahabharat, the Geeta, the Talmud and the Bible preach polygamy (Polygyny). No restriction to the number of wives a man can have in all these books i.e. one can marry as many as one wishes. For instance in Judaism polygyny is permitted for it is stated in Talmudic law (the Holy Book of Jews) that Abraham had three wives; Solomon had hundreds of wives etc. It was Rabbi Gershom ben Yehudan (960 CE to 1030CE) that issued edict against polygyny. The early Christian men were permitted to marry as many wives as they could because there is no restriction on the number of wives a man can have in the Bible. It was only a few centuries ago that Christian church, the Hindu and others restricted the number of wives a man can have to one.

Islam allows polygamy (polygamy) as contained in Q4:3. This is the chief reason for its permissibility because Allah who created us knows us more than we know ourselves. The Qur'ān however puts an upper limit for polygamy. The issues of having scores of wives or hundreds of wives are restricted to the maximum of four.

Furthermore, during the pediatric age, there are more deaths among males than the females because the latter has more immunity than the former. A female child can fight germs and diseases better than the male child. Virtually, in every country, there are more females than males. Even during wars, more men are killed as compared to women. The implication of this is that females would be in abundance. There are also fewer widowers in the world than widows. This implies that females are more than males. In a country such as India where males are more than females, it is due to the high rate of female infanticide in the country because more than one million female foetuses are aborted every year. Another point in support of the view that marriageable females are more than males is the issues of gay. In many countries women outnumber men because a large number of the male population are sodomites especially in the United States of America, the United Kingdom, Germany, Russia to mention but a few. If every man is then restricted compulsorily without the allowance of marrying more than one wife with certain reasons, the resultant effect of this is that many women who are interested in getting married to men would not be able to get husbands.

The two options that such women can take are to marry a man who already has a wife or to remain unmarried. The latter is dangerous because the unmarried women would exercise their sex instinct which Allah implanted in every woman in a wrong way as a prostitute. Therefore, Islam answers the call of nature affirmatively, with its insistence on the family as the best safeguard of public virtue, and its asseveration that it is the only right and legitimate way. The Qur'ān says (Q16:72): "God has made mates for you of your own nature and made for you of them children and grandchildren and posterity, and provided for you sustenance of the best. Are they then going to believe in vain things and not be grateful for God's favour".

We have said that Islam allows polygamy with certain conditions. We have also said justice should be done to all the wives in the areas of clothing, feeding, accommodation and companionship. What the husband needs to do is to provide his wives equal treatment according to his means. The Prophet and his companions did not condemn polygamy. They neither outlawed it nor discouraged any Muslim who had one reason or the other to marry more than one

wife. They too married more than one wife. They laid beautiful examples on how a person wishes to practise polygamy should follow. Some companions had more than four wives.

The misuse of polygamy can be corrected. It is not peculiar to polygamy. Other aspects of law are also being misused. If there is a misuse, we should find solutions to the problems. It is not the right solution to cancel what Allah allows. Imposing a fine or imprisoning a person intending to practise an aspect of the Qur'ān is a violation of the Sharī'ah. It is not likely that the consent of the existing wife would be gotten considering the very jealous nature of women. By asking a man intending to practise polygamy to seek a subsisting wife's consent is an indirect way of prohibiting what Allah allows.

The likely resultant effects of suppressing a man's desire to take a second wife are adultery, concubinage and prostitution. Despite the prohibition of polygamy by some churches, some staunch members are said to be polygamists; and they and their wives have not been ejected from the fold. Man is a natural polygamist. The effect of banning polygamy is seen in the Catholic church losing some of its members who cannot endure monogamy. Many go to protestant churches, Africa churches and others that accommodate the issue of polygamy. This is because they are silent on the issue. Their silence means acceptance.

In Africa, polygamy is recognised. In fact, it is a measure of success in life and a sign of wealth and nobility. Polygamy is practised in an unlimited way for religious as well as socio-economic reason. Whether one is a Christian, Muslim or a member of an African church, polygamy is an established attitude and is not a religious question but a traditional and sociological one in Africa. Polygamy was an established practice among all the early Biblical and Qur'ānic prophets. It was extended to the time of the prophet Mohammad.

Most of the reasons given for polygamy were not religious. Many Muslims thought that they should marry as many as possible. This shows or indicates that even for the Muslims, polygamy is not a religious affair so much as a traditional practice. They married more wives according to the Yoruba custom. Throughout early history up to the time of the Prophet, there was no limit imposed on limitless polygamy. The Prophet was the first person to limit it to four wives on the condition that there was equal justice to all of them. After the Qur'ānic limitation was revealed restricting the system of limitless polygamy, it is a historical fact that the Prophet did not contract any other marriages.

In the west, monogamy is a blended mass of prostitution. The implication of this is that they pretended to be practising monogamy when in actual fact they are practising polygamy without responsibility. The account of Dr. Annie Besant gives the full picture:

In the words of Mrs. Annie Besant, a founder member of Theosophical Society, Madras, India in her book 'Life and Teachings of Mohammed' writes: "There is pretended monogamy in West, but it is really polygamy without responsibility; the mistress is cast off when the man is weary of her, and she sinks gradually as the 'woman of street', for the first lover has no responsibility for her future. She is hundred times worse of than the sheltered wife and mother in polygamous home. We see thousands of miserable women who crowd the streets of Western countries during the night. We must surely feel that it does not lie within the Western mouth to reproach Islam for polygamy. It is better for woman, happier for woman, more respectable for

woman, to live in polygamy, united to one man only, with legitimate child in her arm, surrounded with respect than to be seduced and cast off in the street, perhaps with an illegitimate child outside the pale of Law”.

This is hypocrisy and more degrading than a limited polygamy. The Sharī‘ah is the most just law. Christian countries make a great show of monogamy, but actually they practise polygamy. The part which mistresses play in western society is too obvious to be mentioned. In this respect, Islam is a fundamentally honest religion.

A person practising polygamy undertakes full support and full paternal responsibility in respect of the children of all his wives. Man is polygamous by instinct. No woman wants her husband to take a permanent rival to herself to share his bed, but the alternative of divorce or illicit sex are far worse evils. Most women here always wanted and still do want the security of a legal husband and family. It is easier to share a husband when it is an established publicly recognised practice than when it is carried on secretly along with attempts to deceive the first wife.

The modernists believe that if a man is allowed to marry more than one wife, a woman should also be allowed to have more than one husband so that she can also have a variety of sex. It should be borne in mind that men and women are equal in Islam but not identical. Allah gave them different capabilities and different responsibilities and created sex differences. It is possible to identify the father and the mother if a man has more than one wife. It is no easily possible to identify the father of a child whose mother has more than one husband. Before the father can be identified, the three would be made to pass through genetic testing. The human error cannot be ruled out totally from using this method of identification. The children of this type of marriage undergo severe mental trauma and disturbances as a result of putting them through this type of test.

Man can perform his duties as a husband despite having several wives. If a woman has several husbands and they are having extra-marital sex, the tendency to be infected with sexually transmitted diseases is high. If one of the husbands should be infected, he would pass it to the wife, and the wife in turn get other husbands infected even if others do not have extra-marital sex. However this is not possible with a man having more than one wife if all of them do not have extra-marital sex.

Apostasy

The reform of the modernists as regards apostasy was that it cannot bring to an end a valid Islamic marriage. To put it simply, if either the wife or the husband should change to other religion other than Islam, the modernists believe that the marriage is still valid and continues. Conversion of either of the couple to another religion is not enough ground to dissolve a valid Islamic marriage. An example of this is contained in the Indian Anglo-Mohammedan law of the Act 1939 and the Muslim Family Law Ordinance of 1961.

The Holy Qur‘ān states categorically that a Muslim man should not marry a polytheist woman (Q2:221).

وَلَا تَنْكِحُوا الْمُشْرِكَاتِ حَتَّى يُؤْمِنَ وَلَأَمَةٌ مُؤْمِنَةٌ خَيْرٌ مِنْ مُشْرِكَةٍ وَلَوْ أَعْجَبَتْكُمْ وَلَا تُنْكِحُوا
 الْمُشْرِكِينَ حَتَّى يُؤْمِنُوا وَلَعَبْدٌ مُؤْمِنٌ خَيْرٌ مِنْ مُشْرِكٍ وَلَوْ أَعْجَبَكُمْ أُولَئِكَ يَدْعُونَ إِلَى النَّارِ وَاللَّهُ
 يَدْعُو إِلَى الْجَنَّةِ وَالْمَغْفِرَةِ بِإِذْنِهِ وَيُبَيِّنُ آيَاتِهِ لِلنَّاسِ لَعَلَّهُمْ يَتَذَكَّرُونَ

And do not marry Al-Mushrikât (idolatresses, etc.) till they believe (worship Allâh Alone). And indeed a slave woman who believes is better than a (free) Mushrikah (idolatress, etc.), even though she pleases you. And give not (your daughters) in marriage to Al-Mushrikûn till they believe (in Allâh Alone) and verily, a believing slave is better than a (free) Mushrik (idolater, etc.), even though he pleases you. Those (Al-Mushrikûn) invite you to the Fire, but Allâh invites (you) to Paradise and Forgiveness by His Leave, and makes His Ayât (proofs, evidences, verses, lessons, signs, revelations, etc.) clear to mankind that they may remember.

This is against the stand of the modernists. The so-called reformers believed that marriage of Muslims with non-Muslims is valid and it can continue even after the latter renounces the Religion of Islam.

Marriage with non-Muslims

The modernist allows what is prohibited in Islamic marriage. They allow Muslim women to marry non-Muslims. An example is the Turkish Family Law of 1951. The reformers are also silent about the marriage of Muslim men with non-Muslim women who are polytheists. Muslim men can only marry Muslim women or women of *Ahlul kitab*. Women who are not *ahlul kitab* must not be married. The reformers did not see anything bad in a Muslim man marrying either a polytheist or a non-Muslim of other religion other than *Ahlul kitab*.

During the lifetime of the Prophet, the Prophet forbade his companions from marrying polytheist women. An example is the case of a Muslim called Kannaz Ibn Hasin al-Ghanawi who was in love with Anaq, a polytheist woman and wanted to marry her but the Prophet forbade him from marrying her. This is because the relations of husband and wife are not only sexual, but also spiritual. A Muslim should not enter such a marriage with non-Muslims in the name of liberalism or modernity or the so-called civilization. Marriage with a woman of the people of the Book (*Ahlu-kitab*) is permitted in Islam (Q5:6) i.e. marriage with Jewish and Christian women is allowed.

If one knows that if one marries women of the people of the book and one can keep one's children immune from the influence of their mothers, one can enter such a marriage. Otherwise one should avoid it because there are one thousand and one Muslim women without husbands. The companions who married non-Muslims had the necessary strength of character to prevent their non-Muslim wives to convert their children into other religions. Their children maintained the religion of Islam. Abdullah b. Umar considered Christian women as polytheist because they say that their Lord is Isa (Jesus) when he is but a servant of Allah. There are some practices that Jewish woman or Christian women do that a Muslim should not do. Some Christians bow down for the statue of Mary. Some Jewish or Christian women can sip or drink alcoholic drinks. They can also pray to Jesus. Jesus is even considered as their saviour. If a Muslim should do any of those mentioned things, he is a polytheist. Therefore, a Muslim must think twice before marrying this category of wives.

Marriage with Sabian

Magian women is allowed because they are regarded as Ahl kitab (people of the book). There are various reports on this tribe. It was believed by some that they live in the vicinity of Mosul while some believed they live in the vicinity of Iraq. Some believed they read the Psalm of David. Therefore, they are *Ahlu kitab*. Some believed that they fast for thirty days; they believe in Allah and some prophets; they pray five times a day; they say with their mouths, Lā'ilāha illā llah (there is no god but Allah) to mention but a few of what they do. They are mentioned in the Qur'ān (Q5:69).

الَّذِينَ آمَنُوا وَالَّذِينَ هَادُوا وَالصَّابِئُونَ وَالنَّصَارَىٰ مَنْ آمَنَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَعَمِلَ صَالِحًا
فَلَا خَوْفٌ عَلَيْهِمْ وَلَا هُمْ يَحْزَنُونَ

“Surely, those who believe (in the Oneness of Allāh, in His Messenger Muhammad SAW and all that was revealed to him from Allāh), those who are the Jews and the Sabians and the Christians, - whosoever believed in Allāh and the Last Day, and worked righteousness, on them shall be no fear, nor shall they grieve”.

Based on these account, a Muslim may marry a Sabian woman.

As regards the wish of the reformer to allow Muslim women to marry non-Muslim men, the Qur'ān categorically forbids such a marriage. It says: Q60:10. The Qur'ānic verse speaks for itself as regards the prohibition of Muslim women marrying non-Muslims. The believers are warned not to send back to the unbelievers the believing women. They are prohibited from marrying non-believing men. Some polytheistic rites were performed in consultation of marriages. Items such as cola-nut, honey, sugar-cane, alligator, pepper, alcoholic drinks etc were used to invoke the spirit of ancestral gods and goddesses in order to make the couple productive and have a happy married life.

Tabanni adoption (Q33:4-5)

The modernists also allow what Islam prohibits and vice-versa. Adopted child does not have the status of a natural son or daughter. The modernists considered the adopted child to be unlawful for a person to engage in marriage because they have elevated them to the status of a natural son or daughter. An example is contained in the Turkish code. The reformers twisted the Sharī'ah order to accommodate their wishes and desires.

مَا جَعَلَ اللَّهُ لِرَجُلٍ مِنْ قَلْبَيْنِ فِي جَوْفِهِ وَمَا جَعَلَ أَرْوَاجَكُمْ لِلنَّائِي تُظَاهِرُونَ مِنْهُنَّ أُمَّهَاتِكُمْ وَمَا
جَعَلَ أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ ذَلِكُمْ قَوْلُكُمْ بِأَفْوَاهِكُمْ وَاللَّهُ يَقُولُ الْحَقَّ وَهُوَ يَهْدِي السَّبِيلَ (4) ادْعُوهُمْ
لِأَبَائِهِمْ هُوَ أَقْسَطُ عِنْدَ اللَّهِ فَإِنْ لَمْ تَعْلَمُوا آبَاءَهُمْ فَاِخْوَانُكُمْ فِي الدِّينِ وَمَوَالِيكُمْ وَلَيْسَ عَلَيْكُمْ
جُنَاحٌ فِيمَا أَخْطَأْتُمْ بِهِ وَلَكِنْ مَا تَعَمَّدَتْ قُلُوبُكُمْ وَكَانَ اللَّهُ غَفُورًا رَحِيمًا (5)

Allāh has not put for any man two hearts inside his body. Neither has He made your wives whom you declare to be like your mothers' backs, your real mothers. [AzZihâr is the saying of a husband to his wife, "You are to me like the back of my mother" i.e. You are unlawful for me to approach.], nor has He made your adopted sons your real sons. That is but your saying with your mouths. But Allāh says the truth, and He guides to the (Right) Way (Q33:4). Call them (adopted sons) by (the names of) their fathers,

that is more just with Allâh. But if you know not their father's (names, call them) your brothers in faith and Mawâlikum (your freed slaves). And there is no sin on you if you make a mistake therein, except in regard to what your hearts deliberately intend. And Allâh is Ever Oft-Forgiving, Most Merciful (Q33:5).

Summary

In this lecture, I have discussed modern reforms concerning marriage. The reformers considered polygamy to be prohibited. However, Islamic law allows limited polygyny. They also considered adopted child to be unlawful for a person to engage in marriage. Islam does not give adopted child the status of natural son or daughter. Therefore, it is allowed to engage adopted child in marriage. Apostasy renders an Islamic marriage invalid. The modernists believed the marriage is still valid. A Muslim should not marry a non-Muslim. This is against the stand of the reformers. Marriage with Sabian is lawful because they do all what a Muslim does and refrain from all what a Muslim avoids.

Post-Test

1. Mention 4 of the Muslim countries the imperialists changed, modified and removed Islamic practices.
2. Discuss the reforms introduced into Islamic practices in 4 of the Muslim countries.
3. Islam allows polygyny but places some restrictions. Discuss.
4. Write Q4:3 and Q4:129 in either Arabic or English and comment fully on them.
5. In what areas is a husband must do justice between his wives.
6. Can apostasy render invalid an Islamic marriage?
7. Muslims are not allowed to marry non-Muslims. Comment.
8. Is marriage of a Muslim with Sabian allowed?

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PROPERTY OF DISTANCE LEARNING CENTRE, UNIVERSITY OF IBADAN

LECTURE EIGHT

Divorce in Islam, Modern Reforms concerning Divorce and the Islamic Perspective

Introduction

This lecture will introduce you to divorce (*talaq*) in Islam, the modern reforms and the Islamic perspective.

Objectives

At the end of this lecture, you should be able to:

1. mention various ways by which marriage can be dissolved in Islam
2. understand very well different terminologies use for dissolution of marriage in Islamic law.
3. explain both revocable divorce and irrevocable divorce.
4. enumerate the modernists' reforms and the Islamic perspective on divorce.

Pre-Test

1. Mention some terminologies used for dissolution of marriage in Islam.
2. Discuss 5 of the ways by which marriage is dissolved in Islam.
3. A unilateral divorce which the Sharī'ah allows is prohibited in some Muslim countries.
Comment

CONTENT

Divorce which is reluctantly allowed in Islam is a word use for the cessation of a marriage contract. Spouses are encouraged to stay together for life, and they are to consider marriage as a strong covenant which must be guided jealously. However, if they cannot live together in peace and harmony, they are not forced to stay married. Reconciliation must be done to keep them together if there is a dispute between the spouses. If it fails or is impossible, Islam reluctantly allows it. There are various ways by which marriage can be dissolved in Islam and different terminologies are used for dissolution of marriage in Islamic law.

Divorce at the instance of the husband (□*alaq*)

When a husband wishes to divorce his wife, he pronounces □*alaq* when the wife is not doing her menstruation. Immediately, the word is pronounced, the wife starts her *iddah* period of about 3 months in her husband's house or any agreed place. The husband will be responsible for her feeding, clothing and shelter as usual. One of the reasons for the *iddah* is to allow time for reconciliation. Another reason is to confirm whether the divorced wife is pregnant or not. A woman in the *iddah* cannot marry until she finishes her *iddah* period.

During this period, the husband should not have sexual intercourse with her. If he does, the divorce has been revoked by him and the marriage will continue. The dispute may also be settled during the *iddah* and the husband can revoke the divorce. Both then continue to be husband and wife. No formalities are necessary to abrogate a revocable divorce during these months. A mere indication of desire for renewal of the marriage relationship by them suffices. This is called revocable divorce. If reconciliation is not possible till the end of the *iddah*, the wife remains divorced. She is free to marry another man.

Irrevocable divorce

It is allowed to pronounce divorce and revoke it twice before the expiration of the *iddah*. It should be mentioned that on the third occasion of pronouncing it, the man cannot take her back again. She has to go and marry another man. This is called irrevocable divorce (□*alāq bā'in*) (Q2:230). This is to check the husband's licence to divorce as often as he liked, by declaring that revocable divorce could be given only twice. It is unlawful to pronounce divorce three times on one and the same occasion with a view to meaning that divorce had been given three times (Q65:1-2). The Qur'ān is against this type of divorce and the Prophet also frowned at it. When a case of this type of divorce three times at a sitting was brought to him, he annulled it because it makes a revocable divorce irrevocable (□*alāq bā'in*) (Q2:230). If the second marriage after consummation fails without the first husband influence or manipulation, the man can take her back. It means another man must have had sexual intercourse with her. There should not be a false marriage between the woman and the second husband with a view to satisfying the rule of the Sharī'ah. This means *tahlīl* is prohibited. *Tahlīl* or *halāla* is a way of making lawful the wife that had been irrevocably divorced by means of pronouncing the triple divorce. The method was that she married another man on the understanding that the man (the second husband) would divorce her without having sexual intercourse with her. When the second husband divorced her, she would become lawful (halāl) for the first husband to remarry her. *Halāla* was a trick and deceit and Allah's curse is on those who practise it. The Prophet is reported to have said: "The curse of Allah is on the man who commits *halāla* and the man for whom the *halāla* is committed".

Divorce at the instance of the wife

Khul' is derived from *Khul' al-thawb* (meaning removing the dress). Literally, *Khul'* means releasing or removing as it is derived from *Khul' al-thawb* meaning removing the dress. This is in line with the Qur'ānic verse "Women are your dress and you are their dress" (Q2:182). Technically, it means a method of divorce in which the wife asks her husband to release her. The wife will agree to give back all or part of her □*adaq/mahr*, or anything else that is mutually agreed in return for her release from the marriage. If the wife should have such hatred for her husband that she repays him the *mahr* that terminates the marriage. It should be mentioned that

this type of divorce is revocable within the stated period. If she changes her mind during the *iddah* period and her husband agrees, he can still take her back into his home (Q4:128).

Divorce by a Sharī‘ah Court (*Faskh*)

The wife whose husband is not treating her well can resort to the Sharī‘ah courts. The wife whose husband has also been incapable or negligent in supplying her with maintenance or has put obstacles in the way of her obtaining it can go to the court. If either partner deprives the other of conjugal rights or fails in marital duties and the case is taken to the court, the court can compel them to treat each other right. If either proves recalcitrant or refuses to obey the judge’s order, the judge can compel them to divorce. In addition, if the husband accuses his wife of lewdness, unchastity or unfaithfulness or denies his own paternity and cannot prove his case, the judge may order the marriage to be dissolved. The wife is not to give back anything to the husband. (Q2:229). If all the complaints are found to be true and genuine the judge may order the marriage to be dissolved.

Divorce by Mutual Consent of Husband and Wife (*Mubara‘ah*)

In cases of irreparable breakdown of relationships, the partners can mutually agree to separate. The two can agree to separate after everything possible is done to ensure happy sound home-life for the sake of the family’s members and of the society to which they belong fails and they found out that their misery is only increased and the bankruptcy of the relationship is only worsened by forcing them to stick together. The mutual agreement of husband and wife to separate is called *mubara‘ah*. It is like a divorce by the husband.

Husband’s Comparison of wife’s back with his mother’s (*Zihar*)

During the days of ignorance, an Arab would say to his wife *anti ‘alayya ka sahri ummi* meaning you are to me as the back of my mother. The implication is that if he sleeps with his wife, it is as if he sleeps with his mother. The woman remained deserted and she was not at liberty to leave the husband’s house. This was to punish the wife. Islam frowns at this culture. It then prescribes that such a declaration puts an end to the marriage (Q58:1-4) and imposes on the husband who wants to resume conjugal relations with the wife to free a slave or fast for two consecutive months or feed sixty poor people.

Oath of Conjugal Suspension (*Ila*)

During the pre-Islamic period, the wife might be kept in a state of suspense for the whole of her life to punish her by the taking of oath that one shall not go in to one’s wife. The period of such an abstention was unlimited. The Holy Qur’ān commands that if the husband does not resume conjugal relations within four months, the wife is divorced (Q2:226-227).

Mutual Imprecation (*Li‘an*)

Li‘ān is derived from *la‘ana* meaning curse. Literally, it means mutual cursing. Technically, it is a way of dissolving a marriage when the husband accuses his wife of committing adultery or his wife has given birth to a child which is not his own. He will be asked to swear in the name of Allah four times that he saw his wife committing adultery or that the pregnancy was not from him. He would then invoke Allah’s curse on himself if his accusation is false on the fifth swearing. If he could not do that, he is entitled to 80 lashes for false accusation. However, if she does, he will not be punished. The wife would be asked to take her turn. If she does not accept

the accusation, she would also swear four times and curse herself the fifth time. If she fails to take the oath, it means, she would face death penalty for adultery. If she takes the oath, that marks the end of their marriage. The judgement continues on the Day of Judgement. The judge pronounces irrevocable divorce and it is left to Allah to decide on the Day of Judgement (Q24:6-9).

The Modernists' Reforms and the Islamic Perspective on Divorce

The modernists believe that divorce should be rendered practically impossible by severe sanctions because of its effect on family life which is supposed to immunise and protect children from moral ailments and psychic traumas. In cases of irreparable breakdown of relationships, should the partners stay in the hell they have made or may a way-out be found for them?

It is better to bring a marriage to a peaceful end rather than making the couple and the children live in "hell" indefinitely. However, the modernists make divorce extremely difficult because of the conditions attached. This was an attempt to change the law of Allah and the Sunnah of the Prophet. The reform introduced into this aspect of the Shari'ah family law is that a husband should first of all apply to the court of law. A unilateral divorce which the Shari'ah allows is prohibited by the so called modernists. It is only the court that can dissolve a marriage. An example is contained in the Turkish Family Law of 1951.

Also, the Iraq Law of Personal status of 1950 prohibits a unilateral divorce pronounced by a husband unless it is registered and granted by the court. This is applicable in Indonesia, Pakistan, Syria, Tunisia, morocco etc. The husband who wishes to divorce his wife must pay the divorced wife an additional indemnity by way of compensation. If the two spouses agree to dissolve the marriage, the court may dissolve it. If either the wife or the husband insists upon divorce and he or she insists, the court is empowered by the Tunisian Law to dissolve it.

Islam realistically faces the consequences of irreparable breakdown as a fact and provides a way-out after necessary steps laid down in the Qur'an and the Sunnah have been taken, and yet the reconciliation is not possible. Their misery is only increased. The bankruptcy of the relationship is only worsened by forcing the partners to stick together. Islam makes it easier for people to enter the married state and start families, also makes it more difficult to break up the home.

Everything possible is done to ensure happy sound home-life, for the sake of the family's members and of the society to which they belong. Therefore, it is written in surah 14:19, "O men, live with your wives in kindness and equity. If you dislike anything in them, that may be the very point which God will use to bring about much blessing". Islam encourages the man's conscience to live in kindness and equity with patience, and not to cast off a wife who is temporarily in disfavor, since it may be that goodness and blessing may come through those very wives; so that it would be stupid to end the relationship hastily. In the same chapter (Q4: 128), Allah says: "If a wife fears cruelty or desertion on her husband's part, there is no obstacle to their arranging an amicable settlement between them for which the wife must renounce some of her rights. But if they return through reconciliation and peace through such unselfishness, such a settlement is better than separation and divorce". The initiative to remove differences and restore understanding in family life is preached in the Qur'an. Well meaning relatives do everything possible to bring about reconciliation. They should study causes of differences and go deep into confidential matters without either of the couple feeling that their private secretes are being exposed while taking these steps. The members of the two families should exert all their powers

of sincerity and affection to bring about reconciliation. Both should be exhorted to unselfishness, tolerance and understanding of each other's point of view

The couple should respect the elders and have full confidence in their compassionate affection and allow affection and peace to reign in their family (Q65:2). Two just persons from amongst you shall bear witness to the evidence before God when a divorce is settled. Without these two witnesses, there is no legal divorce. An advantage of their appointment is that they can exert every pressure of affection and wisdom to avert the final catastrophe for quite a period before reluctantly, if they have to do so, agreeing that there is no other way out. No divorce is allowed save after the woman's period of purification after menstruation or childbirth completed.

The *iddah* period gives a breathing-space which can result in the man's change of heart and decision to continue the marriage bond with the wife he planned to divorce. The wife should remain in the *iddah* period provided she has not committed sins. But if she involves in lewdness, she can be ejected. The Qur'ān says: "You may not expel woman from their house, nor may they themselves quit, except if they have been proven guilty of some open lewdness (during the *iddah* period). These are limits set by God. Should any man transgress these limits, he does so at the peril of his own soul, and to his own harm; for you know not whether God may bring about some new situation later (than the decision to divorce)".

Summary

In this lecture, we learnt that divorce is reluctantly allowed in Islam. We also examined various ways by which marriage can be dissolved in Islam. Such ways include divorce at the instance of the husband (*talaq*), divorce at the instance of the wife and divorce by a Sharī'ah court. We differentiated between revocable divorce, and irrevocable divorce. A unilateral divorce pronounced by a husband is valid provided it is not done when he is angry. This is prohibited by the modernists. The issue was examined critically from the Islamic perspective.

Post-Test

1. List some terminologies used for the dissolution of marriage in Islam.
2. List and explain 4 of the various ways by which marriage can be dissolved.
3. Differentiate between revocable divorce and irrevocable divorce in Islam.
4. Discuss the modernists' reforms and the Islamic perspective on divorce.

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LECTURE NINE

Inheritance in Islam, the Reforms and the Islamic Perspective

Introduction

Allah is the ultimate owner of everything. This becomes very clear to man when he is dead. His ownership of property ceases with his death. The real owner i.e. Allah takes control of the property. The heirs are given their divinely-fixed shares as contained in the Qur'ān. The dead person or his/her heir is not permitted to dispose off his estate according to his wishes. In this lecture, you will learn how inheritance is shared in Islam. The pitfalls that must be avoided when sharing it and when writing will are to be discussed. You will also learn the modern reforms concerning inheritance.

Objectives

At the end of this lecture, you should be able to:

1. explain inheritance in Islam.
2. list some pitfalls that must be avoided when writing one's will.
3. state and explain the three heads of expenditure before the distribution of the estate
4. quote relevant Qur'ānic verses on inheritance
5. state the factors that can deprive heirs of their dues.
6. discuss the modernists' view concerning inheritance and the Islamic perspective.

Pre-Test

1. Mention some things that must be avoided when writing one's will.
2. List the three heads of expenditure before the distribution of the estate
3. Mention some heirs and their divinely –fixed shares.
4. What are the views of modern reformers concerning inheritance in Islam

CONTENT

Inheritance is called *mīrāth* in Islam. The branch of knowledge that teaches the fixed shares of the different heirs, in the estate of the *mūrith* (the deceased) is called *farā'id*. The prophet encouraged people to learn this branch of knowledge in one of his traditions. He said: "I shall be taken away, learn *farā'id* and teach it to others..." He also said: O people learn *farā'id*. It is half of knowledge". The Prophet is also reported to have predicted that: "The first (branch of) knowledge which will be taken away from my Ummah will be '*ilmul farā'id*'".

Allah who is the ultimate owner of everything has assigned how the wealth He puts in the custody of a person after his death be shared. Man or his heir is not permitted to dispose off his estate according to his wishes and desires with his death. His ownership ceases. The ownership moves to his heirs automatically. Their divinely-fixed shares should not be tampered with. The consequence of changing the Sharī'ah laws of inheritance or tampering with them is hell on the Day or Reckoning. Allah will cast him into the Fire; forever will he dwell therein; and for him will be a disgraceful punishment.

Some of the things that must be avoided when sharing/writing one's will

1. A disobedient child or a hated parent should not be excised from the will or his share. A daughter or son who is very rich should not be excluded from inheritance for the reason of being wealthy. His share must be given to him. A daughter or a son married to a wealthy person should also not be excluded from the inheritance.
2. However, if a person kills another person with a view to inheriting him or her, he should not be given his shares. He is barred from inheritance. Non-Islamic law should not be used to administer the inheritance. Every heir must be given his fixed share based on the Qur'ānic injunctions and the Hadith. However, a guardian can be appointed to manage the shares of a minor on his behalf till he is mature.
3. All the estate must be distributed in line with the law of inheritance as contained in the Qur'ān. Therefore, there is no room for reserving some property to an heir and sharing the rest.
4. Adopted child and grandchildren should not be included in the sharing of the estate. It is not allowed to bequeath more than a third of the property to those that must not inherit i.e. the maximum a person can give to non-heir is $\frac{1}{3}$. This one third which he allowed to bequeath to non-heirs is by divine injunction. He can only act by his volition on the one third.
5. Wish or no wish does not matter as regards inheritance. The testator (*mūrith*) does not have a say in the sharing except a third and the heirs could not exercise his volition to accept or to reject the inheritance. It means if an heir is not interested in the inheritance, his wish does not cancel his right of inheritance.
6. If an heir is given more than his dues in the inheritance, he should rectify the injustice in the will. Otherwise, he is consuming hell. A person should not dispose his estate during his life time so as to deprive his heirs their shares.
7. The rule of inheritance should not be applied when one is making gifts to one's sons and daughters during one's life time. Both should be given gifts of equal value during one's life time.
8. Wealth acquired by unlawful means e.g. gambling, prostitution, bribery and corruption, theft, interest (*riba*) etc should be excluded from inheritance. These should be returned to their rightful owners if it is possible. Otherwise, they should be given as \square *adaqah* to the poor on behalf of the true and untraceable owners.
9. If a deceased used an asset as collateral security for a debt, it should be sold and the amount used to pay his debt. If there is an excess after paying the debt, it must be shared among the heirs based on their fixed-shares. If a deceased has paid insurance premiums, the actual premiums are part of the inheritance. The excess is not shared but given to the poor.

10. If a deceased is a partner in business, the business remains dissolved and his share is calculated and given to his heir. He is not entitled to future profits of the business.
11. Heirs do not inherit lease. If the asset is heir's asset, it is shared. If he is a lessee, the asset is returned to the lessor and the balance is given to his heirs.
12. A sum of money set aside for performing Hajj; making gift; building a mosque or a school; buying jewellery for a particular person; paying zakat etc should form part of the deceased estate to be shared by his heirs if he could not exercise them before he dies.

The Three Heads of Expenditure before the Distribution of the Estate

The three heads of expenditure that must be taken into consideration first before the distribution of the deceased's estate are:

All expenses incurred wholly and exclusively for the burial of a deceased person must be deducted from his estate before the distribution. The expenses include the bricks used in the grave, the cost of transporting the deceased to his grave, the payment made to the one who bathes the deceased, the cloth used to wrap him, the cost of the piece of land used to bury him and other related costs. However, if someone decides to pay for all these expenses, they should not be deducted from his estate. A husband is to bear the expenses for the burial of his wife or children if he is financially capable. Otherwise, the people of the neighbourhood or the Muslim community may bear them.

The second head of expenditure is his debts which should be paid from his estates before the distribution it should be recalled that the prophet refused to pray *salatul Janāzah* on one of his followers. The Prophet's refusal to observe *salatul janāzah* of a person is because of the person's unpaid debts. It was when a companion, Abu Qatadah gave a guarantee that he would pay the debts that the Prophet led the funeral prayer of that person. Narrated by *Salama b. al-Akwa*: "Once, while we were sitting in the company of the Prophet (PBUH), a dead man was brought. The Prophet (PBUH), was requested to lead the funeral prayer for the deceased. He said, "Is he in debt?" the people replied in the negative. He said, "Has he left any wealth?" they said, "no." So, he led his funeral prayer. Another dead man was brought and people said, "O Allah's Apostle, lead his funeral prayer." The Prophet (PBUH) said, "Is he in debt?" they said "...Yes" He said, "Has he left any wealth?" they said, "three dinars." So he led the prayer. Then a third dead body was brought and people said (to the Prophet), "Please, lead his funeral prayer" He said, "Has he left any wealth?" they said, "no." He asked "Is he in debt?" They said, "Yes! He has to pay three dinars." He (refused to pray) said, "Then pay for your dead companion. Abu Qatadah said. "O Allah's Apostle! Lead his funeral prayer and I will pay his debt." So he led the prayer" (Bukhari, v. 3, p. 271). Once a companion said to the Messenger of Allah! My brother has died and has left small children, should I spend money on them (rather than pay his debts). The Prophet said: "Your brother is imprisoned on account of his debt. Pay his debt". This shows that the claims of creditors extend into the life after death. Therefore, the heirs and other well-wishers of the deceased should endeavour to pay the deceased's creditors.

Some of the debts may include:

- ❖ Confirmed money borrowed from individuals or corporate bodies.
- ❖ The unpaid *mahr* (obligatory bridal gift) of the wife
- ❖ The outstanding *zakat*

- ❖ *Kaffārah* i.e. the cost of feeding a person who wants to observe the fast of sixty consecutive days, or the cost of feeding sufficiently sixty poor persons or the cost of freeing a slave.
- ❖ *It'ām*; the cost of feeding a person in lieu of Ramadan fast the deceased could not observe due to extreme old-age or illness.

The third heads of expenditure that must be deducted from the estate before the distribution is the *wasiyyah* i.e. the will. This should not be more than 1/3 of the remaining estate after the first two heads of expenditure have been taken care of. A man is allowed to dispose 1/3 of his estate (at will and wish (i.e. according to his discretion) when he is sound and healthy. However, when a person approaches the last stage i.e. when he is suffering from *marā'ul mawt* (the illness in which a person dies), his unfettered freedom is withdrawn. The right of the heirs in his estate take effects. This estate must be shared according to the law of inheritance.

Legality of Inheritance and Will (Q4: 6-14,176; Q5: 105-108)

وَابْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ وَلَا تَأْكُلُوهَا إِسْرَافًا وَبِدَارًا أَنْ يَكْبَرُوا وَمَنْ كَانَ غَنِيًّا فَلْيَسْتَعْفِفْ وَمَنْ كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوفِ فَإِذَا دَفَعْتُمْ إِلَيْهِمْ أَمْوَالَهُمْ فَأَشْهِدُوا عَلَيْهِمْ وَكَفَىٰ بِاللَّهِ حَسِيبًا (6) لِلرِّجَالِ نَصِيبٌ مِمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ نَصِيبًا مَفْرُوضًا (7) وَإِذَا حَضَرَ الْقِسْمَةَ أُولُو الْقُرْبَىٰ وَالْيَتَامَىٰ وَالْمَسَاكِينُ فَارْزُقُوهُمْ مِنْهُ وَقُولُوا لَهُمْ قَوْلًا مَعْرُوفًا (8) وَلْيَخْشَ الَّذِينَ لَوْ تَرَكَوْا مِنْ خَلْفِهِمْ ذُرِّيَّةً ضِعَافًا خَافُوا عَلَيْهِمْ فَلْيَتَّقُوا اللَّهَ وَلْيَقُولُوا قَوْلًا سَدِيدًا (9) إِنَّ الَّذِينَ يَأْكُلُونَ أَمْوَالَ الْيَتَامَىٰ ظُلْمًا إِنَّمَا يَأْكُلُونَ فِي بُطُونِهِمْ نَارًا وَسَيَصْلُونَ سَعِيرًا (10) يُوصِيكُمُ اللَّهُ فِي أَوْلَادِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثِيَيْنِ فَإِنْ كُنَّ نِسَاءً فَوْقَ اثْنَتَيْنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَ وَإِنْ كَانَتْ وَاحِدَةً فَلَهَا النِّصْفُ وَلِأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِنْ كَانَ لَهُ وَلَدٌ فَإِنْ لَمْ يَكُنْ لَهُ وَلَدٌ وَوَرِثَهُ آبَاؤُهُ فَلِأُمَّهِ الثُّلُثُ فَإِنْ كَانَ لَهُ إِخْوَةٌ فَلِأُمَّهِ السُّدُسُ مِنْ بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ آبَاؤُكُمْ وَأَبْنَاؤُكُمْ لَا تَدْرُونَ أَيُّهُمْ أَقْرَبُ لَكُمْ نَفَعًا فَرِيضَةٌ مِنَ اللَّهِ إِنْ اللَّهُ كَانَ عَلِيمًا حَكِيمًا (11) وَلَكُمْ نِصْفُ مَا تَرَكَ أَزْوَاجُكُمْ إِنْ لَمْ يَكُنْ لَهُنَّ وَلَدٌ فَإِنْ كَانَ لَهُنَّ وَلَدٌ فَلَكُمْ الرُّبْعُ مِمَّا تَرَكَنَّ مِنْ بَعْدِ وَصِيَّةٍ يُوصِيْنَ بِهَا أَوْ دَيْنٍ وَلَهُنَّ الرُّبْعُ مِمَّا تَرَكَنَّ إِنْ لَمْ يَكُنْ لَكُمْ وَلَدٌ فَإِنْ كَانَ لَكُمْ وَلَدٌ فَلَهُنَّ الثُّمُنُ مِمَّا تَرَكَنَّ مِنْ بَعْدِ وَصِيَّةٍ تُوصُونَ بِهَا أَوْ دَيْنٍ وَإِنْ كَانَ رَجُلٌ يُورِثُ كِلَالَةً أَوْ امْرَأَةٌ وَهِيَ آخٌ أَوْ أُخْتٌ فَلِكُلِّ وَاحِدٍ مِنْهُمَا السُّدُسُ فَإِنْ كَانُوا أَكْثَرَ مِنْ ذَلِكَ فَهُمْ شُرَكَاءُ فِي الثُّلُثِ مِنْ بَعْدِ وَصِيَّةٍ يُوصَىٰ بِهَا أَوْ دَيْنٍ غَيْرِ مُضَارٍّ وَصِيَّةٍ مِنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَلِيمٌ (12) تِلْكَ حُدُودُ اللَّهِ وَمَنْ يُطِعِ اللَّهَ وَرَسُولَهُ يُدْخِلْهُ جَنَّاتٍ تَجْرِي مِنْ تَحْتِهَا الْأَنْهَارُ خَالِدِينَ فِيهَا وَذَلِكَ الْقَوْزُ الْعَظِيمُ (13) وَمَنْ يَعْصِ اللَّهَ وَرَسُولَهُ وَيَتَعَدَّ حُدُودَهُ يُدْخِلْهُ نَارًا خَالِدًا فِيهَا وَلَهُ عَذَابٌ مُهِينٌ (14)

يَسْتَفْتُونَكَ قُلِ اللَّهُ يُفْتِيكُمْ فِي الْكِلَالَةِ إِنْ امْرُؤٌ هَلَكَ لَيْسَ لَهُ وَلَدٌ وَهِيَ أُخْتٌ فَلَهَا نِصْفُ مَا تَرَكَ وَهُوَ يَرِثُهَا إِنْ لَمْ يَكُنْ لَهَا وَلَدٌ فَإِنْ كَانَتَا اثْنَتَيْنِ فَلَهُمَا الثُّلُثَانِ مِمَّا تَرَكَ وَإِنْ كَانُوا إِخْوَةً رِجَالًا وَنِسَاءً فَلِلذَّكَرِ مِثْلُ حَظِّ الْأُنثِيَيْنِ يُبَيِّنُ اللَّهُ لَكُمْ أَنْ تَضِلُّوا وَاللَّهُ بِكُلِّ شَيْءٍ عَلِيمٌ (176)

إِلَى اللَّهِ مَرْجِعُكُمْ جَمِيعًا فَيُنَبِّئُكُمْ بِمَا كُنْتُمْ تَعْمَلُونَ (105) يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةٌ بَيْنَكُمْ إِذَا
 حَضَرَ أَحَدُكُمْ الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَانِ ذُوَا عَدْلٍ مِنْكُمْ أَوْ آخَرَانِ مِنْ غَيْرِكُمْ إِنْ أَنْتُمْ ضَرَبْتُمْ فِي
 الْأَرْضِ فَأَصَابَتْكُمْ مُصِيبَةُ الْمَوْتِ تَحْبِسُونَهُمَا مِنْ بَعْدِ الصَّلَاةِ فَيُقْسِمَانِ بِاللَّهِ إِنْ ارْتَبْتُمْ لَا نَشْتَرِي
 بِهِ ثَمَنًا وَلَوْ كَانَ ذَا قُرْبَىٰ وَلَا نَكْتُمُ شَهَادَةَ اللَّهِ إِنَّا إِذَا لَمِنَ الْآثِمِينَ (106) فَإِنْ عَثَرَ عَلَىٰ أَنَّهُمَا
 اسْتَحَقَّا إِثْمًا فَأَخْرَانِ يَفُومَانِ مَقَامَهُمَا مِنَ الَّذِينَ اسْتَحَقَّ عَلَيْهِمُ الْأَوْلِيَانِ فَيُقْسِمَانِ بِاللَّهِ لَشَهَادَتُنَا
 أَحَقُّ مِنْ شَهَادَتِهِمَا وَمَا اعْتَدَيْنَا إِنَّا إِذَا لَمِنَ الظَّالِمِينَ (107) ذَلِكَ أَدْنَىٰ أَنْ يَأْتُوا بِالشَّهَادَةِ عَلَىٰ
 وَجْهِهَا أَوْ يَخَافُوا أَنْ تُرَدَّ أَيْمَانٌ بَعْدَ أَيْمَانِهِمْ وَاتَّقُوا اللَّهَ وَاللَّهُ لَا يَهْدِي الْقَوْمَ الْفَاسِقِينَ (108)

And try orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgement in them, release their property to them, but consume it not wastefully, and hastily fearing that they should grow up, and whoever amongst guardians is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable (according to his work). And when you release their property to them, take witness in their presence; and Allâh is AllSufficient in taking account(Q4: 6). There is a share for men and a share for women from what is left by parents and those nearest related, whether, the property be small or large - a legal share(Q4: 7). And when the relatives and the orphans and *AlMasâkin* (the poor) are present at the time of division, give them out of the property, and speak to them words of kindness and justice. (Q4: 8) And let those (executors and guardians) have the same fear in their minds as they would have for their own, if they had left weak offspring behind. So let them fear Allâh and speak right words. (Q4: 9). Verily, those who unjustly eat up the property of orphans, they eat up only a fire into their bellies, and they will be burnt in the blazing Fire! (Q4: 10). Allâh commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allâh. And Allâh is Ever AllKnower, All Wise (Q4: 11). In that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may

have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allâh; and Allâh is Ever AllKnowing, Most Forbearing (Q4: 12). These are the limits (set by) Allâh (or ordainments as regards laws of inheritance), and whosoever obeys Allâh and His Messenger (Muhammad SAW) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success(Q4: 13). And whosoever disobeys Allâh and His Messenger (Muhammad SAW), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment (Q4: 14).

They ask you for a legal verdict. Say: "Allâh directs (thus) about *AlKalâlah* (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two-thirds of the inheritance; if there are brothers and sisters, the male will have twice the share of the female. (Thus) does Allâh makes clear to you (His Law) lest you go astray. And Allâh is the All-Knower of everything" (Q4:176)

O you who believe! Take care of your ownelves, [do righteous deeds, fear Allâh much (abstain from all kinds of sins and evil deeds which He has forbidden) and love Allâh much (perform all kinds of good deeds which He has ordained)]. If you follow the right guidance and enjoin what is right (Islâmic Monotheism and all that Islâm orders one to do) and forbid what is wrong (polytheism, disbelief and all that Islâm has forbidden) no hurt can come to you from those who are in error. The return of you all is to Allâh, then He will inform you about (all) that which you used to do. (Q 5:105). O you who believe! When death approaches any of you, and you make a bequest, then take the testimony of two just men of your own folk or two others from outside, if you are travelling through the land and the calamity of death befalls you. Detain them both after *As-Salât* (the prayer), (then) if you are in doubt (about their truthfulness), let them both swear by Allâh (saying): "We wish not for any worldly gain in this, even though he (the beneficiary) be our near relative. We shall not hide Testimony of Allâh, for then indeed we should be of the sinful." (Q5: 106). If then it gets known that these two had been guilty of sin, let two others stand forth in their places, nearest in kin from among those who claim a lawful right. Let them swear by Allâh (saying): "We affirm that our testimony is truer than that of both of them, and that we have not trespassed (the truth), for then indeed we should be of the wrong doers (Q5: 107)." That should make it closer (to the fact) that their testimony would be in its true nature and shape (and thus accepted), or else they would fear that (other) oaths would be admitted after their oaths. And fear Allâh and listen (with obedience to Him). And Allâh guides not the people who are *Al-Fâsiqûn* (the rebellious and disobedient) (Q5: 108).

Some salient points from the Qur'anic injunctions on inheritance and will

- ❖ The father's share is one sixth if the deceased has a son (1/6 only)

- ❖ The father's share is one sixth and whatever remains of the estate after the inheriting members of those heirs whose shares of inheritance have been fixed by the Sharī'ah (*dhawil-furūd*) i.e. 1/6 plus
- ❖ The father receives more than 1/6 if the deceased has neither son nor daughters nor any grandchildren. He is entitled to the residue (i.e. *Asbat nasabiyyah*).
- ❖ Paternal grandfather inherits only in the absence of the father and grandfather.
- ❖ *Akhyāfi* brother inherits $\frac{1}{3}$ in the estate of the mother. If there is only one *Akhyāfi*, he inherits 1/6 in the estate of the mother.
- ❖ If there is a son or grandson, all *Akhyāfi* inherit nothing. The same rules apply to *Akhyāfi* sisters.
- ❖ The husband inherit $\frac{1}{2}$ the estate if the deceased has neither children nor any grandchildren.
- ❖ The husband inherit $\frac{1}{4}$ if the deceased has children (of the present or the former husband)
- ❖ The wife inherits $\frac{1}{4}$ if the deceased husband has neither children nor grandchildren. If he has more than one wife, all of them would share $\frac{1}{4}$ equally.
- ❖ The wife inherits $\frac{1}{8}$ if the deceased husband has children or grandchildren.
- ❖ The legitimate children may be from the surviving wife or another wife.
- ❖ If he has more than one wife, all of them will participate equally only in $\frac{1}{8}$ of the estate of the deceased.
- ❖ A wife in iddah will inherit in the estate of her husband if she has not completed her iddah period when her husband dies.
- ❖ Divorce at the request of the wife (*khul*) prevents such a wife from inheriting in the estate of her husband.
- ❖ The mother inherits $\frac{1}{6}$ in the estate if the deceased child has children.
- ❖ The mother's share is $\frac{1}{3}$ of the balance remaining after deducting the wife's share or the husband's share provided the deceased does not have a child.
- ❖ The mother's share is $\frac{1}{3}$ of the whole estate if the deceased has neither children nor a husband or wife.
- ❖ A daughter inherits $\frac{1}{2}$ in the estate if the deceased has no sons. If there are two daughters or more, they share two thirds ($\frac{2}{3}$) of the estate if the deceased does not have sons.
- ❖ A daughter receives ($\frac{1}{2}$) half the share of a son if the deceased has a son. Both the daughter and the son will share the residue in this way no matter the number of the daughters and sons. Each daughter will receive half the share of a son.
- ❖ A granddaughter receives $\frac{1}{2}$ the estate if the deceased does not have children but has one granddaughter.
- ❖ Granddaughter shares $\frac{2}{3}$ in the estate equally if the deceased does not have a child.
- ❖ If the deceased has a daughter and one or more granddaughters, they all share one sixth ($\frac{1}{6}$) equally among themselves.
- ❖ If the deceased has a son or two or more daughters, granddaughters will not share anything.

- ❖ Grandmothers closer to the deceased will displace those farther away and they share 1/6 of the estate of the deceased equally if the deceased does not have mother. If the deceased has mother, the grandmothers do not inherit.
- ❖ Debts and wills must be settled before the distribution of the estate of the deceased to the heirs with fixed shares. Nobody should be deprived of his share.
- ❖ The property of the orphans should be given to them when they reach the age of maturity. Their property through inheritance should not be consumed wrongly or squandered wastefully.
- ❖ If the guardian of the property is poor, he can take what is reasonable from the property by a way of his wages or salary for managing the property. When the property is to be released to them, there should be some witnesses to the delivery of trust to serve as a shield in case there is perjury.
- ❖ Islamic laws of inheritance are the limits of Allah which must be taken seriously. There is humiliating punishment for anyone who transgresses the limit of Allah as regards the Islamic law of inheritance.
- ❖ It is part of the Sharī'ah to write a will. However, it should not be more than 1/3 of the property. Will in Islam should not be written to deprive the heirs their rights or favour some heirs at the expense of the others. In fact, its rules must be observed.

Factors which deprive heirs of inheritance

1. A sane heir who kills his *mūriṭh* (the person whose estate is to be inherited should not inherit or be given anything.
2. A non-Muslim heir cannot inherit a *mūriṭh* that is a Muslim. The property of the Muslim goes to the Islamic state Treasury (if there is any) or the Muslim community in the area.
3. A male or a female who renounces Islam will be inherited by his or her heirs.
4. A slave can neither inherit his master nor be inherited. However, if he is set free, the person
5. who sets him free is entitled to inherit him.
6. A prophet could neither inherit nor be inherited.
7. A widow should not be deprived of inheritance in her husband's estate if she marries again.
8. However, a divorced wife cannot inherit her former husband.
9. The infant and the unborn child in its mother's womb will inherit in exactly the same way as adults. Some heirs are deprived of inheritance because of the presence of others.
10. *Akhyāfi* brothers and sisters who are children of one mother and different fathers could not inherit if the deceased has a son or a daughter or a grandchildren or father.
11. Grandchildren could not inherit the deceased if the deceased has a son. Great grandchildren could not inherit if there is a son or grandson. Granddaughter could not inherit the deceased if he has two daughters.
12. Paternal and maternal grandmothers could not inherit the deceased if he or she has mother or father.
13. Brothers and sisters could not inherit if the deceased has children or grandchildren or a father or grandfather.

14. Paternal grandmother and maternal grandmother could not inherit if the deceased has father.
15. Brother's son could not inherit in the presence of the deceased's father or brother.
16. Paternal uncle could not inherit in the presence of the deceased's father or grandfather or great grandfather or son or grandson or brother or brother's son.
17. An illegitimate child will not inherit the deceased father but inherit the mother.
18. The relatives of the husband do not inherit in the estate of his wife and vice versa.
19. Adopted children do not inherit in the estate of their foster parents.

Modern Reforms Concerning Inheritance and the Islamic Perspective

Wasiyyah (will)

The reform introduced to wasiyyah by the modernist was that an heir who is entitled to a fixed share of the inheritance can also be given a bequest. Such a bequest is valid and effective. In fact, they consider the consent of the other heirs irrelevant i.e. their consents are not needed before such a bequest can be effected.

This is not Shari'ah compliant because Allah has fixed for each heir his or her share. The moment a person's life come to an end, he is not permitted to dispose off his estate according to his wishes and desires. His ownership of the property ceases with his death. The real owner i.e. Allah takes control of the property. The heirs are given their divinely-fixed shares as stated in the Qur'an. It should be noted that the Prophet said: "Anybody who deprives an heir his right by giving other heirs more than their dues would be denied *al-Jannah*. Such a person is destined for the chastisement of the Fire i.e. Hell". It should be noted that extension of one's transgression to even the period after death by giving an heir more than his or due through *wasiyyah* in addition to his divinely-fixed shares is not a transgression of small measure. The sin is vile in the extreme. The person has destroyed his life of the hereafter by defrauding the divinely appointed heirs of their dues. It should be borne in mind if a person commits this type of sin, there is no opportunity of repenting or correcting the injustice done except if the person given such undue rights returns them to their rightful owner. Otherwise, hell-fire is the destination of such a deceased person.

The reformers also introduced obligatory bequest in favour of the orphan and grandchildren who should not be given inheritance if a deceased has a son. An example of the so-called reforms is contained in the Egyptian Law of Request, 1946. The Syrian Law of Personal status 1953 also contains their reforms. It says: The grandchildren shall not be entitled to any obligatory bequest if they otherwise inherited from their father's ascendants nor if any of them left a legacy or a gift which is equal to an amount of that of the obligatory bequest. Where a man has less than the due obligatory bequest, the balance shall be made up".

In the Tunisian code, only the first generation of grandchildren, male or female is considered. In Moroccan code (1958), a third of his estate is compulsorily earmarked for the grandchildren of the deceased whose first son had died before him. The share of the grandchildren should be equal to the share their father would have received if he died after the deceased provided it is within one third of the estate.

According to the Islamic law of inheritance briefly discussed at the beginning, nearer relations exclude remote ones. Therefore, if a deceased has a son who is nearer to the deceased, his grandson who is a remote relation cannot inherit. Both the orphan and grandchildren could be

taken care of from one-third of the estate of the deceased as stated in the Sunnah and the Qur'ān as earlier quoted.

It should be noted carefully that if a child dies during the life-time of his or her parents he is considered to be non-existent in relation to the share which he would have acquired in his parent's estate if he had been alive on the occasion of their death. The deceased child would not be considered at all. The other surviving children will inherit all the estate including the share that would have been given to the predeceased child if he were to be alive. Therefore, it is not right to transfer the share of a son who had died before the demise of his parents to his children.

The modernist in the Anglo-Mohammad law in India allowed widows who were owned the *mahr* to retain possession of their husband's estate. When a husband dies, his burial expenses must be taken first from the estate. Care must be taken to avoid waste and unnecessary expenses. Expenses such as the bricks to be used in the grave, the transport cost, the payment of the *ghāsil* (the washer) and the clothe are taken from the estate of the deceased. It is after the provision of this that the creditors including the wife who was owed *mahr* are paid their dues. After these two, the *wasiyyah* is discharged from one third the value of the remaining estate. After these three heads have been taken care of, the remaining estate is shared among the heirs based on the divinely fixed shares as stated in the Qur'ān. It is seen that it is not right for a wife whose *mahr* was not paid to retain her husband's estate.

Tabanni (adoption) (Q33:4-5)

The modernists also allow what Islam prohibits and vice-versa. Adopted child does not have the status of a natural son or daughter i.e. he or she cannot inherit the person who adopted him and vice versa in Islam. As far as modernists are concerned adopted child can inherit the person who adopts him/her and vice-versa because they have elevated them to the status of a natural son or daughter. An example is contained in the Turkish code. The reformers twisted the Sharī'ah in order to accommodate their wishes and desires.

Conclusion

It is clear that the reforms are in line with the wishes and desires of the reformers. Their reforms are nothing but deviations from the Sharī'ah as contained in the Qur'ān and the sunnah of the Prophet. We should stay clear of deviations so as not be among the rebels (Q5: 50), the wrong-doers (Q5: 48) and the unbelievers (Q5: 47). The Sharī'ah as contained in the Qur'ān and the Sunnah suits every age and time. It does not have a limited application. It is applicable to all time. The lapse of time cannot affect the Sharī'ah. The Sharī'ah can never be obsolete. In fact, its principles and basic theories are valid till eternity. They do not need any changes before they match all eras. Unprecedented new cases are accommodated under the Sharī'ah. Therefore, Muslims must believe in all aspects of Sharī'ah without an exception if they want to be complete Muslims. Because of this prohibition in some countries, some able men have resorted to extra marital relationships which are prohibited in Islam.

Summary

In this lecture, we have learnt that Allah takes control of the property of a person after his death. The divinely-fixed shares of the heirs were stated clearly in this course. The three heads of expenditure i.e. burial expenses, payment of debts and will were explained fully. We also discussed factors which deprive heirs of inheritance. Such factors include adoption, killing the person whose estate is to be inherited and divorce. The modernists introduced obligatory bequest in favour of the orphan and grandchildren when the children are in existence. This is not acceptable in Islamic law of inheritance. In Islam, nearer relations exclude remote ones.

Post-Test

1. What is 'ilmu farā'i
2. The consequence of changing the Shari'ah laws of inheritance or tampering with them is _____ on the Day of Reckoning.
3. Mention 8 of the things that must be avoided when writing one's will
4. List and explain the three heads of expenditure before the distribution of the estate.
5. Mention 5 heirs with their divinely –fixed shares of the inheritance in Islam.
6. What are the factors that can deprive heirs of their dues?
7. State the views of modern reformers concerning divinely-fixed shares of the heirs, adopted child and will. Give the Islamic perspective of the above-mentioned areas.

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LECTURE TEN

Siyāsah Shar‘iyyah

Introduction

Sharī‘ah law is divided into two main categories *Ibādat* (worship) and *mu‘āmalat* (laws that deal with human interactions). These two divisions contain only the general principles. You will learn the details left to the discretion of the community (Ummah) through *siyāsah shar‘iyyah* (the government’s authority to legislate). You will also learn the extent of the government’s power to legislate in this course.

Objectives

At the end of this lecture, you should be able to:

1. define and explain *siyāsah shar‘iyyah*.
2. discuss the misuse of this concept by the reformers.
3. explain Q4: 59 in relation to the government’s authority to legislate.

Pre-Test

1. Explain *siyāsah shar‘iyyah* and its application
2. Discuss the misuse of the concept of *siyāsah shar‘iyyah*.
3. The reformers believed that they were acting in line with Q4:59. Discuss.

CONTENT

Literally, *siyāsah* refers to politics. *Shar‘iyyah* is derived from the word Sharī‘ah and it means something that concerns the Sharī‘ah, the Islamic law. *Shar‘iyyah* is used as an adjective to qualify *siyāsah*. Both mean the legislative right or the government’s authority to legislate. Sharī‘ah law is divided into two main sections: the legal injunctions that concern the acts of worship (*Ibādah*) and the rules and laws that deal with human interaction. The acts that are under the first division include ritual purification, prayers, zakah, fasting, pilgrimage to Makkah etc. The second division has the following acts: financial transactions, law of marriage, divorce, penal punishments, foods and drinks, law of inheritance etc.

It must be mentioned that there are rules and regulations laid down in the Qur’ān on these two divisions. These rules must be adhered to strictly. They are made to protect religion, life, lineage, mind and property. The government’s power is to be exercised on the basis of the general principles of the law and with the intention of protecting the aim of these principles.

It must also be mentioned that the right and the wrong which Muslims are commanded to enjoin and forbid respectively are in general terms in the Qur'ān and the Sunnah. Their details cannot be known. It is left to the ruler by implication, the government to exercise his legislative power to enforce the right and prohibit the wrong. It is not possible to find in the two sources detailed laws guiding every aspect of human life.

It is only the general principles that the two contain. The details are left to the discretion of the community (Ummah). The ruler passes legislation on some other areas on which express injunctions are not found. However, the legislation must not go against the general principles laid down by the two original sources i.e the Qur'ān and the Sunnah. In fact, rulers are allowed to legislate inasmuch as the legislation does not contradict the general principles. If it does not contradict the Qur'ān and Hadith, it is called *siyāsah shar'iyah* i.e. the legislative right or the government authority to legislate. Ibn Qayim supported this view when he says: "Any means which establishes justice and prevents injustice is legitimate *siyāsah shar'iyah*. If it fulfils this condition, it attains legitimacy in relation to the Qur'ānic injunction of enjoining what is right and forbidding what is wrong (Q3:103-104,110). In addition, the order of the Qur'ān to obey Allah, His messenger and those in authority justifies the discretionary authority. This is also in relation to *ta'zir*."

This technique of *siyāsah shar'iyah* must be used with sincerity and piety particularly the modern reformers. Some people indulge in this technique to change the Islamic laws to suit their aims. Some rulers in some Islamic countries and Muslim countries have been formulating codes of laws allowing the prohibited acts such as the consumption of alcoholic drinks and adultery.

As an attempt to escape the application of the strict Sharī'ah principles, they introduced their so called reforms. This was done by directing some courts in some Muslim states not to entertain any case on some Sharī'ah principles which they thought were obsolete and outdated. Instead of exercising the power given to them within the limits imposed by the sovereignty of Allah, they exceed the limits by allowing what is forbidden and vice versa. By this, they transgress the limits. Allah warns them: "Transgress them not. For whoso transgresses Allah's limits, such are wrong doers" (Q2: 229). The reformers also believed that they were acting in line with the Q4:59 which says: "O you who believe! Obey Allah and His Messenger and those from among yourselves who hold authority; and if there is any dispute between you concerning any matter, refer it to Allah and His Messenger, if you really believe in Allah and the Last Day. This is the best course (for you) and also better in the end".

The authority given to the rulers must be exercised in line with the Qur'ān and the Sunnah. Rulers should not be obeyed if they go contrary to the Qur'ān and the Sunnah because the Prophet is reported to have said that: "No obedience is to be given in the case of an act of disobedience to Allah"; "There is no obedience in an act of sin"; "Obedience is obligatory in good and in virtue"; "If a mutilated slave is made your leader and leads you in accordance with Allah's Book, listen to him and obey him"; Hearing and obeying are the duty of every Muslim, both regarding what he likes and what he dislikes, as long as he is not commanded to perform an act of disobedience to Allah, in which case he must neither hear nor obey.

The proponents of this technique are the Egyptian scholars who advocated for the modernization of Egypt and Islam. People respected their views simply because of their erudition. They took the advantage of this to mislead many Muslims. Legal sovereignty is the exclusive and absolute prerogative of Allah and none can share in it. The messenger is the only authoritative representative of the political and legal sovereignty of Allah on earth. As a natural

consequence of the representation, he is therefore entitled to the obedience of those who acknowledge Allah as their sovereign. Allah's decision and His Messenger's directives must be obeyed and accepted without any reservation whatsoever.

As a corollary to this, obedience to all others particularly those in authority is subject to the obedience to the two. "It is not fitting for a believer, man or woman, when any matter has been decided by Allah and His Messenger, to claim any say in their affair, and whoso disobeys Allah and His Messenger, he indeed goes astray in error manifest" Q33: 36.

All these injunctions indicate that nobody has any power over and above the verdict of the Qur'an and the Sunnah. The legislature, the executive and the judiciary can only pass laws, issue orders and decide legal matters respectively in line with the Qur'an and the Sunnah. In the same vein, all the three arms of government should not reject any decision contained in the two. The obedience to the Messenger is not obedience in its own right. It is a consequence of Divine Command that a believer can obey Allah only by obeying His Messengers because he is the only authentic and reliable source through which the Divine Message is received. Q 4: 80. "Whoever disobeys me disobeys Allah and whoever obeys the Messenger obeys Allah".

Men in authority also refer to the government. Obedience to them is subject to both the Qur'an and the Sunnah. The government is obeyed if it conforms to the spirit of the Sharī'ah. *Ul-amr* refers to all those persons who are in any way at the helm of affairs of people such as religious scholars, thinkers, political leaders, administrators, judges of law courts, tribal chiefs and the like. If there is a dispute between the government and the people or between people, it should be referred to Allah and His Messenger i.e. to be settled in line with the Qur'an and the Sunnah. However, they use their own good sense in the light of the two to make a decision if they could not find directly any guidance from the two.

Men in authority are free to make laws on matters where the Qur'an and the Sunnah are silent on i.e. where there are no clear injunctions. Even then, they legislate in the light of the general principles contained in the Qur'an and the Sunnah (Q. 26: 15). Therefore, all acts of the rulers are legitimate in as much they are within the framework of Sharī'ah and compatible with its judicial decisions and spirit.

Summary

Siyāsah Shar'īyyah is the government's authority to legislate particularly where Sharī'ah is silent. Sharī'ah which covers Ibādat and mu'āmalat gives only the general principles. The details are left to the discretion of the community. However, the people in government are free to legislate on matters that there are no clear injunctions. The legislation must not go against the general principles laid down in the Qur'an and the sunnah. The reformers took the opportunity of this concept to change the principles of Sharī'ah to suit their desires.

Post-Test

1. Define *siyāsah shar'īyyah* and relate it to Q4:59.
2. Discuss the concept of *siyāsah shar'īyyah* and its misuse by the modern reformers.
3. How can *siyāsah shar'īyyah* be used that will not go against the general principles.

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LECTURE ELEVEN

The Three Major Categories of Crimes in Islamic Law

Introduction

In this lecture, you will learn the three main categories of crimes in Islam. They are *add*, *al-qiṣā* and *al-ta'zīr*. The Islamic penal system recognises these three kinds. I will discuss the first two: *add* and *al-qiṣā* so as to form a good background for the next lecture i.e. *al-ta'zīr*.

Objectives

At the end of this course, you should be able to:

1. mention the three major categories of crimes in Islamic law
2. list the major offences of *add* crimes with their punishments.
3. explain the difference between the law of *qiṣā* (retaliation) during the Pre-Islamic period and the Islamic era.

Pre-Test

1. List the three categories of crimes.
2. Mention the four major offences that are regarded as *add* crimes and state the punishments attached to them.
3. Differentiate between the law of *qiṣā* during the Pre-Islamic period and the Islamic period.

CONTENT

In Islamic law, there are three major categories of crimes. Some of them have penalties prescribed for them in fixed terms in the Qur'ān and/or the Sunnah while others are left to the discretion of the judges.

The three categories of crimes are;

- i. *add* (The most serious crimes)
- ii. *Al – qiṣā* (Retaliation)
- iii. *Al – ta'zīr* (The discretionary punishment).

The Islamic penal system recognises these three kinds of punishment. We will discuss the first two briefly so as to form a good background for the target of this chapter i.e. *al-ta'zīr*.

□ *add* Crimes and their Punishments

Islamic criminal law recognises four major offences to be □ *add* crimes. They are theft, armed robbery, illicit sexual relations and slanderous accusation of unchastity. Each of these offences has a penalty prescribed in fixed terms in the Qur'ān or the Sunnah. The punishments are determined in the Qur'ān or the Sunnah. They can neither be lightened nor made heavier. The offences are not pardonable either by the victim of the offence, by the government, or by the judge. The punishments are the limits of Allah which no one should transgress as contained in the Qur'ān. Some jurists added drinking of alcohol and apostasy to the offences of *hudūd* while others do not recognise them as such because their punishments are not defined in the Qur'ān.

Al-sariqah (theft) is one of the offences of *hudūd*. Its punishment is prescribed and fixed in the Qur'ānic verse (Q5: 38). It states; “As for thieves, both male and female, cut off their hands. It is the recompense of their own deeds, an exemplary punishment from Allah...” The Prophet ordered the amputation of thief's hand during his lifetime. Before this punishment is inflicted, the value of the stolen property must at least be worth or should exceed a minimum fixed by the law. This minimum value may be determined by the lawmakers in each country. This is because there is no consensus among the jurists as regards the minimum value. The following amounts: ten dirhams, a fourth of a dinar, three dirhams and one-quarter of a dinar are some of the amounts fixed by different jurists. The hand should be amputated from the wrist. Before this punishment is carried out, the stolen goods must have been properly kept in a proper place called *hirz* (the custody of the goods or the storage place). (Ibn Qudamah, 1985).

Al – □irābah is armed robbery. It is also called *al – sariqah al –kubra* (the great theft) and *qat' al – □arīq* (high –way robbery). In an ordinary theft, the taking of someone else's property by stealth is *sariqah* while *al – □irābah* refers to the taking of someone else's property by force or at gun point. As regards □*irābah*, the culprit is liable to punishment even without actually having brought the intended crime to completion i.e. if he is unable to complete the operation of armed robbery. (Abdul-Rahmon, 1982)

The punishment for armed robbery is stated in the Qur'ān (Q5: 33 – 34). “The only recompense for those who make war upon God and His Messenger and strive after corruption in the land will be that they will be killed, or crucified, or have their hands and feet cut off on alternate sides, or will be expelled from the land. Such will be their recompense in this world and in the hereafter. Theirs will be an awful punishment, except those who repent before you overpower them. For know that God is forgiving, merciful”. The recompense for an evil deed is a similar evil (40: 11 – 40; Q 2: 194). Any of the four punishments for the crime of □*irābah* i.e. death, crucifixion, cutting off the hands and feet on the opposite sides and banishment (imprisonment for life) can be inflicted on the culprit.

Al-zinā means illicit sexual relations whether they are done voluntarily or by force. All the sacred laws forbid it. It refers to both adultery and fornication. Hence, both are forbidden. The punishment for *Al-zinā* is contained in the Qur'ān where Allah says: “The committers of *Al-zinā*, male and female, flog each of them with hundred stripes, and do not let pity for the two withhold you from obedience to God, if you believe in God and the Day of Judgement. And let a party of believers witness their punishment” (Q24: 2).

Some jurists were of the view that a married male or female should be given one hundred lashes and stoned to death, while an unmarried male or female should be given one hundred lashes and then banished for one year. It must be mentioned that not all of them are in agreement with the issue of stoning (Ibn Qudamah, 1985; Sihnun, 1323; Doi, 1984). Those who disagreed

considered the punishment to be for Jews. If Jewish laws are in their pristine forms, they are Divine, and hence from Allah in the same way with the Islamic laws. It can be concluded that the source of both laws is Allah. Therefore, many rules in both of them are similar. This is an evidence of the divine nature of Islamic law which is based entirely on morality. Any moral transgression is seriously condemned by means of severe punishments.

Al – Qadhf refers to false accusations i.e. an unproved allegation that a person has committed *Zinā*. The punishment for it is eighty stripes as stated in the Qur’ān (Q24: 4-5). “And those who accuse honourable women but do not bring four witnesses, flog them with eighty stripes and never again accept their testimony. They are indeed evil-doers, except those who afterwards repent and make amends”. Once the crime is proved either by testimony or by confession, the guilty person should not go unpunished. Of all the *hadd* punishments stated in the Qur’ān, the punishment for a married person who commits adultery is not stated in the Qur’ān but in the Sunnah. However, the punishment for unmarried is stated to be 100 lashes.

Deterrence looks to the future. Retribution is a justification for punishment which looks to the past. Expiation is to clear the person’s account with society and God. The punishment prescribed for theft can halt all types of theft. Under the Islamic law the murderer may be punished by the death penalty or by paying blood-money. The victim’s relatives can make their choice. If they like, the offender may be pardoned altogether. It is also an act of reforming offenders (the criminal)

The punishment for Alcohol– drinking is not strictly defined in the words of the Qur’ān or the sunnah. Therefore, it is not included in the offences of hudud. *Khamr* is defined as any drink which makes a person drunk. It is prohibited in Islam. The drinking of alcoholic beverages (*Shurbu al – Khamr*) is prohibited in both the Qur’ān and the Hadith. The punishment for it is not in the Qur’ān but it was fixed by the Prophet. However, there was no consensus as regards the number of lashes a person who drinks alcoholic beverages should be given. This is contrary to the position of all the four schools of Islamic law who believed that the punishment for drinking is a *qadd* punishment. According to the Shāfi, Zāhiri and Zaydi schools, its punishment is forty lashes (Ibn Qudamah, 1985; Ibn Hazm). Some believed that the punishment for drinking should be parallel with the punishment for slander (*qadhf*) i.e. eighty lashes. This was based on the opinion of Abdul al-Rahman b. Awf and some other companions. The Prophet’s companions held various views concerning the punishment for drinking. One point that needs to be stressed is that the drinking of alcohol is a serious sin though no punishment is mentioned in the Qur’ān for this sin.

Riddah or *Irtidād* technically refers to turning back from Islam to another religion or unbelief. A person who abandons Islam for another religion is called *murtadd* (apostate). Some jurists believed that death penalty is the punishment for apostasy but this is not stated in the Qur’ān. The only punishment in the Qur’ān is that the apostate will be punished in the Hereafter (Q16: 106; Q2: 217; Q5: 54). If the death penalty is for apostasy, it will contradict a Qur’ānic verse which states that there is no compulsion in religion (Q 2: 256).

Some jurists cited the Hadith transmitted by Bukhari and others to support the death penalty for an apostate. The life of a Muslim may be taken only in three cases i.e. in the case of married adulterer, one who has killed a human being, and one who forsakes his religion and separates himself from his community (*al – murtadd an dīnihi* and *al - mufarriqu lil jama’ah*). If a person abandons Islam and then fights God and His Prophet, it is then that he can be killed. If his

apostasy does not accompanying fighting against God and His Prophet, he should not be killed because there is no force in religion. The Prophet never put an apostate to death.

Qiṣā (retaliation)

Qiṣā (retaliation) is inflicting on a culprit an injury exactly equal to the injury he inflicted on his victim. However, this was not the case before Islam. The pre-Islamic Arabs did not have friendly cooperation among different tribes. This occurred only among the members of the same tribe. Vengeance on trifling issues was rampant among different tribes. Cases of revenge between two or more tribes lasted for several years. A small dispute could turn into an actual war between tribes. For instance, the beating of a she-camel belonged to a woman of Banu Bakr (a tribe) by a member of Banu Taghlib led to a war between the two tribes and lasted for forty years. During the period, revenge was not only taken against the culprit (e.g. murderer) but also it was taken against his fellow – tribesmen. (Ibn Qudamah, 1985; Abdur Rahim, 1994). When they accepted blood – money (*diyyah*), it varied according to the position of the culprit i.e. the murderer and his tribe. The blood– money of some tribes was half that of other tribes. They considered the difference in strength, status and prestige between one tribe and another before they decided on the vengeance or the blood-money they would take i.e. the higher the status in the society, the higher the blood-money or revenge. In the same vein the lower the status, the lower the revenge.

To correct this difference, the law of *qiṣā* was introduced by Islam. In Islam if a person kills another person, the life of the murderer is taken for the life of the murdered person. The lives of the members of the culprit’s family would not be taken in addition to his life when revenging. A fixed amount of money is to be exacted as Islamic law does not differentiate the blood-money to be paid by the culprit from one tribe to another or according to the victim’s position in his tribe. The pre-Islamic custom of revenge was replaced with Islamic law of *qiṣā*. This is to show that all men are equal in the sight of God. *Qiṣā* is the punishment for homicide. However, if the relatives of the victim do not demand *qiṣā*, *diyyah* which is the payment of blood-money is demanded from the culprit. These concern the homicide that is deliberate. As regards accidental homicide i.e. the homicide done by a mistake, it is only *diyyah*. The *diyyah* is freeing a believing slave and payment of compensation to the family of the deceased. The culprit may also be allowed to go scot– free (Q4: 92, Q2: 178–179). When carrying out *qiṣā*, it should be done in the manner that causes the least possible pain. *Qiṣā* is inflicted upon a group of people for killing one person.

Summary

The major categories of crimes in Islam are *ḥadd*, *qiṣāṣ* and *ta‘zīr*. *Ḥadd* offences include theft, armed robbery, illicit sexual relations and slanderous accusation of unchastity. Their punishments are determined in the Qur’ān and the Sunnah. The offences are not pardonable either by the victim of the offence, by the government or by the judge. The punishments are the limits of Allah. We mentioned other offences that are regarded as *ḥadd* offences by some Sharī‘ah scholars. We also examined *qiṣāṣ* (Retaliation) during the pre-Islamic period and the Islamic period. Law of *qiṣāṣ* during the pre-Islamic period was full of injustice. The injustice and the differences in its application were corrected by Islam.

Post-Test

1. List the three major categories of crimes in Islamic law.
2. Islamic criminal law recognises four major offences to be *add* crimes. Discuss them with their punishments.
3. How did the Sharī'ah correct the differences between the law of *qiṣā* during the pre-Islamic period and the Islamic period?

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LECTURE TWELVE

Al-Ta'zīr

Introduction

There are some crimes mentioned in the Qur'ān without specifying their punishments. The judges are left to determine them. Apart from the determined offences, many other offences are not mentioned in the Qur'ān and the Sunnah not to talk of their punishments. Therefore, both offences and their punishments have to be determined by the judge. Their determination must be related to the general principles in the Qur'ān and the Sunnah.

This lecture will make you understand some offences mentioned in the Qur'ān without specifying their punishments. You will also understand the roles of *ta'zīr* in the determination of undetermined punishments for the determined offences. You will also understand *ta'zīr* punishments for the determined offences. How to handle both undetermined offences and their punishments is also covered in this lecture.

Objectives

At the end of this lecture, you should be able to:

1. define *al- ta'zīr*.
2. identify some crimes whose punishments are not stated in the Qur'ān.
3. understand the roles of *al- ta'zīr* in the determination of the punishments for offences whose punishments are not in the Qur'ān and the Sunnah.
4. State some *ta'zīr* punishments.

Pre-Test

1. Explain *ta'zīr* and mention its objectives.
2. List some crimes mentioned in the Qur'ān without specifying their punishments.
3. What are the roles of the judge in relation to *ta'zīr*?
4. What should be the watchword of the judge when determining the *ta'zīr* punishments?

CONTENT

Ta'zīr is a verbal noun derived from the verb *'azzara* (a four - letter verb) which means to reform, to prevent etc. Technically, it means a punishment aimed at preventing the criminal from committing further crimes and at reforming him. In *ta'zīr*, the court is allowed to use discretion both as to the form in which such punishment is to be inflicted and its measure.

The objectives of *ta'zīr* are to reform the criminal and to prevent him from further crimes i.e. it aims at reformation and deterrence. All crimes for which *qadd* and *qi'ā* are prescribed are excluded from *ta'zīr*. Some time, *ta'zīr* is made to replace *qadd* crimes where the evidences to establish such *qadd* crimes are not enough.

There are some crimes mentioned in the Qur'ān without specifying their punishments. The judge or the ruler is left to decide the type of punishment to impose and the manner of inflicting it. For instance, the judge is left to decide on the type, amount and the manner of punishing those who practise homosexuality. The Qur'ān says: "As for the two of you (males) who are guilty of it, punish them both". If a wife is guilty of gross misconduct, and has refused to respond to other prescribed forms of correction, the husband is given a certain amount of freedom in deciding how to use his authority as regards the third form of correction i.e. beating her lightly. These steps are taken to protect his family as the head of his family. In the same vein, the rulers or the judges are given a certain amount of freedom to use their discretion as regards some cases that fall outside the areas of the fixed punishments *al-udūd* and *al-qi'ā* in order to safeguard the society. "As for those (women) from whom you fear disloyalty and ill-conduct, admonish them (first), (next) refuse to share their beds, and (last) beat them (lightly)"

Another verse from which the law of *ta'zīr* can be deduced is: "The recompense of an evil is a like evil.... But if a person forgives and makes reconciliation, his reward is due from God". In this verse, the judge is left to use his discretion to determine the amount of punishment the offender would be given while taking into consideration the maximum penalty mentioned in the verse by a way of equality. They must not give more than the like of evil the offender has committed. However he is allowed to give less than the maximum punishment.

Ta'zīr is also found in the Sunnah as regards the punishment for drinking alcohol. The Prophet's companions held various views. Some believed it should be fifty lashes. Some considered eighty lashes as the punishment for the drinking of alcoholic drinks. This is an indication that the judge is allowed to use *ta'zīr* as regards this offence. The Prophet ordered all Muslims to boycott Ka'b b. Malik and Murarah b. Umayya. Their wives were also asked to boycott their beds. This was because they intentionally without any excuse refused to go with the Prophet to the battle of Tabuk when their services were needed. Later, a Qur'ānic verse was revealed stating that they had been forgiven. The punishment of boycott was fixed by the Prophet in the form of *ta'zīr*. The creditor is encouraged to give a debtor who is financially handicapped more time to pay his debt or he should write it off. However, in relation to this Qur'ānic injunction, the Prophet allowed a rich person who refused to pay his debt to be punished in this Haddith. The extent of the punishment is not mentioned. The judge is to use his discretion in the form of *ta'zīr*.

The punishment for apostasy can only be *ta'zīr* because there is no compulsion in religion (Q2:256). Therefore, it can be rightly said that the Qur'ān and the Sunnah refer to this type of punishment by implication, if not directly based on the examples given.

***Ta'zīr* Punishments**

It must be mentioned at the onset that it is not possible to list all *ta'zīr* punishments. This is because the judges are left to determine *ta'zīr* punishments and they have a wide variety from which they can choose the one they consider to be suitable to the particular crimes at their hands. However, they are not to order a punishment that is against the Islamic law such as whipping an offender nakedly and asking an offender to eat pork or drink alcoholic drinks. Whatever

punishments a judge is to order must serve the purpose of preventing any further crime and reforming the offender.

Beautiful preaching or admonition

If a person has done an unlawful thing, he should be admonished in the first instance before another form of correction is taken provided the sin committed is not among the offences of $\square udūd$. An example is given in the Qur'ān concerning a disloyal wife who is to be first of all admonished or counselled to remind her if she has forgotten the implication of what she has done. It may also be to inform her if she was not aware of the implication of her actions. This kind of $ta'zīr$ is for those that commit a minor offence. It is believed that such an admonition would benefit him if he is a believer based on the Qur'ānic quotation which says:

وَذَكِّرْ فَإِنَّ الذِّكْرَى تَنْفَعُ الْمُؤْمِنِينَ

“And remind (by preaching the Qur'ān, O Muhammad SAW) for verily, the reminding profits the believers” (Q51:55).

Reprimand

The judge may feel that reprimand is enough to correct and reform an offender. Such words of reprimand are taken to be $ta'zīr$. However, the judge must be careful when uttering words of reprimand so that words of $al-fahashā'$ are not uttered based on the Qur'ānic verse against foul language.

إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَى وَيَنْهَى عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ

Verily, Allāh enjoins Al-Adl (i.e. justice and worshipping none but Allāh Alone - Islāmīc Monotheism) and Al-Ihsān [i.e. to be patient in performing your duties to Allāh, totally for Allāh's sake and in accordance with the Sunnah (legal ways) of the Prophet SAW in a perfect manner], and giving (help) to kith and kin (i.e. all that Allāh has ordered you to give them e.g., wealth, visiting, looking after them, or any other kind of help, etc.): and forbids Al-Fahshā' (i.e. all evil deeds, e.g. illegal sexual acts, disobedience of parents, polytheism, to tell lies, to give false witness, to kill a life without right, etc.), and Al-Munkar (i.e. all that is prohibited by Islāmīc law: polytheism of every kind, disbelief and every kind of evil deeds, etc.), and Al-Baghy (i.e. all kinds of oppression), He admonishes you, that you may take heed (Q16: 90).

Threat

The judge may threaten an offender if his offense is a minor one. He is asked to mend his ways and not to repeat the offense. He may pronounce a sentence against him, and the execution is delayed until he commits the offense again within a time frame or a given period of time to be determined by the judge. He is to use his discretionary power to determine the form the threat would take.

Boycott

The Prophet asked his followers to boycott Kab, Murarah and Hilal who did not participate in the battle of Tabuk. Their wives also were asked not to sleep with them because they did not have any excuse or reason not to go to the battle of Tabuk with the Prophet. This form of *ta'zīr* is to some extent difficult to apply nowadays

Public disclosure (*Al-Tashhīr*)

When the trustworthiness of an offender is questionable, he may be asked to disclose his other property. The pieces of information about him may be published in the newspaper. They may be broadcast on the radio and television so as to call people's attention to his gross misconduct so that people would not trust him. They would not also give him position of authority or responsibility or trust.

One other way by which this type of *ta'zīr* can be carried out is to take the offender to every part of the city particularly his area and tell the people the crime he has committed so as to call people's attention to his dishonesty and lack of trust.

It could also be recalled that the Prophet was angry at the behaviour of one of his companions who had kept part of Zakat he collected for himself and gave the prophet the rest. He scolded him: "if the appointed man had stayed in his father's or his mother's home, would anyone have given him a gift or not? He was then asked to disclose what he had kept for himself.

Fines and seizure of property

Fines and seizure of property can be used as *ta'zīr* punishment. It is left to the judge to decide how much the offender should be fined. Crimes and their fines may be listed in a muslim country. It must be mentioned that some jurists do not recognise this type of *ta'zīr* while some asserted that the Prophet made use of this type of *ta'zīr*. So, there is a controversy as far as this financial punishment is concerned.

Imprisonment

Ta'zīr can also be in the form of imprisonment for a definite term for minor offences. There is no consensus as regards the minimum period of imprisonment as well as the maximum period. The jurists held various views as regards the minimum and the maximum. The Maliki, Hanafi and Hanbali schools did not have a maximum period for *ta'zīr* imprisonment, because it varies for each offence and from one person to another. However, Shafi'i fixed one month for investigation and six months for punishment. According to him, the maximum period should be less than a year.

Banishment

Banishment is also likened to imprisonment nowadays. Therefore, apart from the crime of fornication, banishment is considered as *ta'zīr* punishment for offenders who are likely to influence other people to copy their deviant behaviour.

Flogging

Flogging can be considered as the punishment of offences of $\square udūd$ such as 80 lashes for offences of adultery. It can also be regarded as *ta'zīr* punishment particularly in the case of alcoholic drinks. There is no consensus as far as the maximum number of lashes that can be given to the offender is concerned. The jurists held various views. According to some, it is 75 lashes, and some fix it at 39. One opinion holds it to be 99 while others do not allow more than 20. Therefore, the amount of *ta'zīr* punishment by flogging is left to the authority concerned who is to determine it according to the offender's character and other circumstances.

The death penalty (*Al-ta'zīr bil qatl*)

The death penalty can be imposed for the offences of $\square udūd$. It can as well be applied as *ta'zīr* punishment. As regards the latter, it is an exception. Hanafī texts recommended death penalty for habitual homosexuality, a habitual thief and the murderer on which *Qiyās* cannot be imposed because of the means used in the crime. The Maliki school permitted it for offences such as spying for the enemy, propagating heretical doctrine, practices which split the community and the habitual offender whose wickedness can only be so stopped. The shafī and Hanbali schools held the same view with the Maliki school.

Judges should do their best by means of conscientious reasoning (*ijtihād*) to choose the proper punishment in each case of *ta'zīr*. They should avoid injustice. They should also fear Allah and know that the judgement does not end here. It continues on the Day of Judgement. They must pronounce the most suitable *ta'zīr* punishment that will be capable of correcting and reforming the offenders or the culprit. *Ta'zīr* is a punishment for transgression against God or against an individual for which there is neither $\square add$ punishment nor *Kaffārah*. They should know that the Qur'ān and the Sunnah contain many statements which prohibit various activities and consider them as sins. Many of these prohibited activities do not have prescribed punishments attached to them. It is the duty of the judge to determine their *ta'zīr* punishment.

Usury (riba)

Usury is strongly prohibited not only by Islam (Q2:275-279) but also by all major religions of the world. The punishment for it is spelt neither in the Qur'ān nor in the Hadith. The judge determines the punishment for the already determined crime (usury) by a way of *ta'zīr*.

False Testimony

False testimony is considered a sin and a crime as stated in the Qur'ān. The punishment for false testimony is not stated in the Qur'ān. It is the judge's duty to determine its *ta'zīr* punishment.

Breach of trust

Breach of trust is also considered a sin as contained in the Qur'ān. However, the punishment for this determined crime is not mentioned in the Qur'ān. It is, therefore, the duty of the judge to determine its *ta'zīr* punishment.

Bribery (*al – Rishwah*)

Bribery is one of the dishonest ways of making money. This is strongly condemned in the Qur'ān and the Sunnah. Therefore, it is an offence determined by the Qur'ān and the Sunnah. The judge's work is to determine its *ta'zīr* punishment.

Theft

The amputation of the thief hand as the \square *add* punishment for theft is to be imposed only when the stolen property reaches a minimum value and has been taken from its proper place of custody or *hirz*. When one of these two conditions is not proved, the offender although not liable to the *hadd* punishment may nevertheless be liable to a *ta'zīr* punishment.

Many other offences can also be determined by the judge. However, they have to relate it to the general principle in the Qur'ān and the Sunnah and the goals of Sharī'ah. The right and the wrong are stated in the Qur'ān and the Sunnah. Judges need to investigate the Qur'ān and the Sunnah with a view to identifying them. It should be borne in mind that their details are not in the two sources rather they are stated in general terms. It is not possible to give detailed laws to control every aspect of human life. It is only the general principles which may be found therein. The details are left to the discretion of the community. It must be mentioned that the legislation passed by the ruler must be in line with the general principles laid down in the Qur'ān and the Sunnah. It must not go against any general principle therein. If these conditions are met, the ruler is free to pass whatever legislation they think is needed. This is called *siyāsah shar'īyyah* (the legislative right). This is the point of linkage between the two terms *al- ta'zīr* and *al- siyāsah shar'īyyah*. *Ta'zīr* is an evidence of the flexibility of the Islamic penal system. It must be mentioned point blank that without the law of *ta'zīr*, the Islamic penal system would certainly have been inadequate. With *ta'zīr*, it matches all ages and places. The ruler then has the authority to safeguard the public interest by making harmful behaviours unlawful and prescribing punishments for them. This is because the ultimate objective of *ta'zīr* is to punish wrong deeds which may do harm to the society or an individual. Moral standard is enforced through *ta'zīr*.

It provides Muslim states nowadays an opportunity of formulating policies outside the limited area of the \square *add* punishments. The variety of punishments allowed as *ta'zīr* can save the modern Muslim states from having to borrow their penal laws from Western models. *Ta'zīr* is also a proof that the Islamic concept of punishment is valid and relevant at all times.

Summary

Al ta'zīr is a punishment that aimed at preventing the criminal from committing further crimes. Some *ta'zīr* punishments are mentioned in relation to their *ta'zīr* offences. But the extent of the punishment is not mentioned e.g. beating a disloyal wife etc. The judge determines the form and the measure. Some *ta'zīr* offences are mentioned without mentioning their punishments e.g. *ribā* (usury) etc. It is left to the judge to determine their punishments.

Post-Test

1. Define *ta'zīr*?
2. What are the objectives of *ta'zīr*?
3. List and explain some *ta'zīr* punishments in the Qur'ān and the Sunnah.

4. Identify some offences whose punishments are not sated in the Qur'ān and the Sunnah.

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PROPERTY OF DISTANCE LEARNING CENTRE, UNIVERSITY OF IBADAN

LECTURE THIRTEEN

Takhayyur and Talfiq

Introduction

This lecture introduces you to the principle of *Takhayyur* and *talfiq*. The freedom of a person to be guided by the law of other schools of Islamic jurisprudence is called *takhayyur*. *Talfiq* is the fusion of juristic opinions of diverse mature. The schools explained some injunctions of the Qur'ān according to the understanding of their founders. There are differences in their rulings on non-major principles or belief. You will learn how each school respected the views of others. Followers of different schools work and live together nowadays. Therefore, *takhayyur* and *talfiq* are highly needed. You will also learn the principles that guide the two concepts.

Objectives

At the end of this lecture, you should be able to:

1. define correctly and explain fully the two terminologies: *takhayyur* and *talfiq*.
2. know that *takhayyur* is only on non-major Islamic principles.
3. trace the differences of opinion to the sayings of the Prophet.
4. understand the good relationship that existed among the founders of different schools of Islamic jurisprudence
5. explain *rukḥāh* (relief) in relation to *talfiq*
6. state the merits and the demerits of *talfiq*

Pre-Test

1. Explain *takhayyur* and *talfiq*
2. The founders of different schools of Islamic jurisprudence differed on non-major issues. Discuss
3. Explain *rukḥāh* (relief) in relation to *talfiq*
4. What are the advantages of *talfiq*?

CONTENT

Takhayyur is a verbal known derived from the verb “*takhayyara*, a five-letter verb. Literally, it means choice. Technically, the word means the freedom of a person to be guided by the law of any of the four schools of Islamic jurisprudence (Ibn Qudamah, 1985). The founder of the four sunni schools i.e. Hanafi, Maliki, Shafi and Hanbali had deep knowledge of both the Qur'ān and

the Sunnah. They studied, wrote and taught the *Sharī'ah* from these two sources (the Qur'ān and the Sunnah).

They were able to elaborate the Islamic laws into a comprehensive system of jurisprudence through *qiyās* and *Ijmā'*. There are differences in their rulings on some particular issues that are not major principles of belief. Their differences are on the interpretation of certain aspects of jurisprudence. This was not peculiar to these Imams. The differences among the community occurred during the time of the Prophet, the rightly guided caliphs and the early *tabi'ūn* though there was nothing like any particular school. The Prophet regarded the differences as blessings because through *ijtihād* they would be able to understand the Qur'ān and the Sunnah better. This is the reason why he said: "Differences of opinion among my ummah are a form of blessings" (Kasani; Al-Hakim; Ibn Hazm)

The implication of *takhayyur* is that if one is born in a Maliki home and has been using Maliki laws, he has the right to shift to another school say, Hanafi School if he finds in the school what could assist him to serve Allah in a better and easy way. All these schools hold the same beliefs, worship together and recognise the legal judgement of others in the *Sharī'ah* courts. Even the founders of these schools loved, respected and learned from one another. For instance, Abu Hanifah whose school is followed nowadays by most people in Turkey, Egypt, Russia, China, India, Afghanistan, Pakistan etc visited Madinah and listened to Imam Maliki's lectures despite the age difference between them.

Imam Shafi studied Hanafi jurisprudence and Muwatta of Imam Malik. His followers are abound in Indonesia, Yemen, Egypt, Syria, Malaysia and East Africa. Imam Hanbali whose followers are mostly in Saudi Arabia was a pupil of Imam Shafi. He also studied and memorised al-Muwatta of Imam Malik. This book is used by the followers of Imam Malik who are in North and West Africa (Doi, 1984)

If a Maliki should stick to only the Maliki laws of jurisprudence, he is called *muqallid*. He is, however, branded *gayru muqallid* if he is able to shift or use the teachings of another school, say Anbali. It should be recalled that *taqlid* from which *muqallid* is derived is to follow a jurist or accept a jurist's view as regards the understanding of the Qur'ān and the Sunnah. He has no liberty to be governed by the law of another school other than his own. If one exercises one's liberty to be governed by the law of another school other than his own, one is practising *takhayyur*.

It is only the judges that are well trained in Islamic jurisprudence that can make use of this principle. This is because he will be able to make a choice between the corresponding legal principles of the various schools provided it will assist him to give his judgement based on equity and justice. Such a judge should be pious, knowledgeable and mature. Judges should be well disposed to apply the laws of other schools other than their own based on our discussion on the attitude of the founders of these schools to one another. Nowadays, followers of different schools work and live together. Therefore, *takhayyur* is highly needed in a case of conflict of law. If this principle is used, bearing in mind the teachings of the Qur'ān and the Sunnah, the reforms necessary to suit the social and economic conditions of the modern time will be acceptable. *Takhayyur* also affords the judge the opportunity or the freedom to apply an opinion other than that of the school to which they were traditionally bound. Sudan is one of the countries that use *Takhayyur*.

Talfīq

Talfīq means piecing together or patching up through combination and fusion of juristic opinions of diverse nature. *Talfīq* did not exist in the era of the Prophet because there was no need of it. When Prophet Muhammad was alive, there was no need for any other guide because he was able to proffer solution to all matters. The Prophet was there to guide his followers on the necessary steps to take when confronting any issue. The companions studied him and imitated him. They documented his sayings and deeds for their use and for the use of future generations. Their collections were passed on to others. These collections contained all the cases he had judged and all the decisions he had reached. *Talfīq* became an issue after his death particularly during and after the time of the four Imams.

Talfīq can also mean mixing madhhabs for separate acts that have no direct link or dependency between them. It is also referred to mixing madhhabs for separate acts that are dependent on one another. For instance, salat depends on ablution (wudui). An example is that if one is performing wudui like a Maliki, one has to wipe one's entire head hair. However if one is performing wudui like a Hanafi, one does not wipe one's entire head hair. If one is performing wudui in a hanafi way (by not wiping one's entire head hair) and the person is praying like a maliki, such a person is practising *talfīq* in separate acts of wudui and salat. *Talfīq* can also be done within the same act. An example is when one is praying in a Hanafi way, one has to cross one's hand on one's chest in the prayer. The hands should be left dangling to the side if one is praying like a Malik. If a person is praying like a Maliki, and the person crosses his hand on his chest in the prayer, he is mixing the laws of Islamic jurisprudence of the two schools (Hanafi and Maliki). *Rukhāh* (relief) reveals itself in the principle of *Talfīq* where verdicts are combined together particularly when they are consistent in expressing the same line. (Ibn Qudamah, 1985; Kasani; Ahmad ibn Hanbal; Sihnun, 1323)

Talfīq* and the Issue of *Rukhāh

Rukhāh means relief. It connotes the rules enacted by Allah to lighten the obligation of a Muslim that is bound by Islamic rules and regulations in certain cases that call for such a relief. It is used in case of emergency or compulsion. The Prophet said: "Verily, Allah likes His *rukhāhs* to be adopted just He wishes that His obligations are obeyed. Verily, Allah gets furious with whoever does not follow His *rukhāh*" (Ibn Qudamah, 1985; Ibn Hazm; Al-Ghazali, 1322; Mirza Gharawi).

Rukhāh is the permission given by Allah to His servant in order to reduce his burden. This is to bestow comfort and abundance upon the weak and the excused. When one is on a journey of 78km or more, he is permitted not to fast as a form of *rukhāh*. Some scholars consider it *haram* (unlawful) for a person who fast on a journey of more than 78KM. He should make his duty easier for himself by finding or using and following *rukhāh* i.e. the verdict that is lighter and easier.

A mujtahid does not need *talfīq* because he is competent to deduce the rulings of Sharī'ah from the two sources by himself without relying on any schools. He is to act on his inferences and may not follow others' opinions. *Talfīq* is for *Muqallid* i.e. non – *mujtahid*. It is not for *mujtahid*. If a person is acknowledged as the most learned jurist, and has all the qualifications of his positions, he may not need *talfīq* and *rukhāh*. The most learned person's view may be followed. *Talfīq* may also be called *taqlīd* i.e. what they call *talfīq* is nothing but *taqlīd*.

Rukhḥah is a subset of *talfīq*. A person has the right to choose a way that is the easiest for him. The Sharī‘ah has no objection or prohibition against it. The adoption of *rukḥḥah* should not be for the sake of entertainment.

Reasons for Opposing *Talfiq*

If people indulge in it, it can cause weakness in their character or moral standards i.e. they may not be committed Muslims. It may also lead to open refusal to obey the order of the legitimate ruler. It can cause damage and evil consequences. *Talfīq* may lead to the use of dishonest methods in matters of the Sharī‘ah to achieve what one wants. Therefore, the tendency to commit *ḥaram* in the name of *rukḥḥah* is possible. It may make a person *fāsiq* (a wrong-doer or a sinner).

However, it is not right to say people should not take to *rukḥḥah* simply because it can cause the above-mentioned evils. The Qur’ān allows *rukḥḥah* and the Prophet also said he prefers following the easier path of any two ways. It is not right to prohibit something that is allowed by rules. Some *rukhsahs* have great effects such as in marriage and divorce. For instance, divorce is invalid when one pronounces it during anger or when one is angry (Vermin, 1978; Mirza Gharawi; Al-Sadr)

Benefits of *Talfiq*

A person has the right to choose a way that is the easiest for him provided the way does not go against the Sharī‘ah. It is very useful when putting up guideline for Islamic economic system, Islamic banking etc. This is because verdicts issued by several jurists may be combined together to form the theoretical framework for such disciplines. In relation to this issue, Martyr al-Sadr explains in his book, *Iqtisaduna*:

The exploration of economic doctrine is accomplished through an operation of ijtihād in understanding authentic texts (nass), classifying them, and reconciling their indications in a uniform manner, and we saw that ijtihād differs and varies as a result of the mujtahids' difference, in the way they understand the authentic texts and resolve the contradictions that occasionally emerge among those texts, and the difference in the rules and general jurisprudential methodologies that they employ. We also saw that ijtihād enjoys a shar'i characteristic and an Islamic attribute as long as it fulfills its obligation and provides a picture and defines its limits and contours in the framework of the Book and the Sunnah, and according to the general conditions that are not violable. It is concluded from what we said that the increase of our reserve with respect to Islamic economy and the emergence of numerous forms of it, are all legitimate and Islamic, and we can possibly select, in every field, the strongest element that we find in that form and the most powerful one in solving the problems of life and realizing the exalted ideals of Islam. This is an opportunity of inherent choice where a researcher holds his freedom and opinion. Taking advantage of this inherent opportunity and conferring the doer a right in selection in the general framework for ijtihād in

Islamic law is sometimes necessary condition from the technical viewpoint of exploring operation (Al-Sadr).

Summary

In this lecture, we have learnt that *takhayyur* is freedom to be guided by the law of any schools of Islamic jurisprudence while *talfiq* is combination of juristic opinions of different schools. We have explained that the differences in the rulings of the schools are not on major principles. Their differences are on the interpretation of certain aspects of jurisprudence. In this lecture, we stated that the founders of the four schools loved, respected and learned from one another. The issue of *rukhsah* and the benefits of *talfiq* were also examined.

Post-Test

1. *Talfiq* means –
2. *Takhayyur* refers to –
3. Explain in relation to *takhayyur* the Hadith: “Differences of opinion among my Ummah are a form of blessings”.
4. What are the merits and demerits of *talfiq*?
5. Discuss *talfiq* and the issue of *rukhsah*.

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LECTURE FOURTEEN

Recent Demand for Sharī‘ah in Muslim Countries

Introduction

Sharī‘ah is a Muslim way of life. The implication of this statement is that all his actions, whether relating to human dealings or spiritual aspects are regulated by the Sharī‘ah. The roles Sharī‘ah plays in the life of a Muslim are more than the roles blood and water play in the body. Considering the benefits of Sharī‘ah to the lives of Muslims, The Muslims have been making frantic efforts for the introduction of Sharī‘ah in many Muslim countries including Nigeria. Since 1085 CE, Muslims have been demanding it. Nigerian constitution allows it and it is only for Muslims. It does not concern non-Muslims. The dreams have not come into reality.

In this lecture, you will understand the reasons why Muslims have been demanding Sharī‘ah. You will also be informed of the efforts of the Muslims since 1085 CE to get it implemented for themselves alone. You will also know that the Muslim lands had been guided by Sharī‘ah in all aspects of life, public, private, social, economic, political and international dealings before the coming of their colonialists.

Objectives

At the end of this lecture, you should be able to:

1. state the meaning of Sharī‘ah and what it means to a Muslim
2. discuss the reasons for demanding the introduction of Sharī‘ah in Nigeria since 1085 CE.
3. know the efforts of the colonialists towards the cancellation of Sharī‘ah in some Muslim countries.

Pre-Test

1. Define Sharī‘ah
2. Discuss the reasons for demanding Sharī‘ah by Muslims all over the world.
3. Examine the efforts of the colonialists as regards the cancellation of Sharī‘ah in some Muslim countries.

CONTENT

Definition of Sharī‘ah

Sharī‘ah is literally translated to mean a course leading to where water is obtained in the desert. Technically, Sharī‘ah is the divine law laid down in the Qur’ān, the Sunnah and other acknowledged sources for the regulation and guidance of human conduct. It is a Muslim way of life. This means all actions of a Muslim, whether relating to human dealings or to his spiritual

aspects, are regulated by the Sharī'ah. The Sharī'ah covers *Ibādah* (worship), *al- aqwāl al - shakhsiyyah*, (sovereignty), *siyar* (international law), *al-āq* (law of morality), *uqūbat* (Islamic criminal law) and *al-adab* (ethics). It could be seen from these categories that no aspect of human endeavour is left untouched. This is to show that the Sharī'ah is a total way of life for Muslims. The above-mentioned categories show the roles of the Sharī'ah in the life of Muslims.

The Sharī'ah is like a manual attached to an electronic gadget. The manual guides the users on how he can use it successfully. If there is a problem, the manual also gives guidance on how to rectify the problem. In the same vein, the Sharī'ah guides not only all aspects of a Muslim's life, but also the society at large. This is because the manual sent by the Creator of this world to guide the inmates is the Sharī'ah. An attempt to deviate from the instruction leads to chaos and the like.

Some of the Roles of Shar'iah

The Sharī'ah guarantees security of life and property. For instance, it protects the interest of nursing mothers and their children by asking the nursing mothers to breast-feed their babies for a period of two years (Q2:233). The resultant effects of the breast-feeding are too obvious to be mentioned. A child that is breast-fed well will be healthy, sharp, agile, intelligent to mention but a few. It also reduces the likelihood of cancer of the breast, ovary and cervix in women. It also protects babies from diarrhea, pneumonia etc. The mother also enjoys good health by breast-feeding her baby. Sharī'ah prohibits adultery and fornication. The implications of this prohibition are many. In the first instance, all the sexuality transmitted diseases (STD) such as gonorrhoea and the Acquired Immune Deficiency Syndrome (AIDS) would be reduced to the barest minimum if not eliminated totally from the society. This is because the couple would be faithful to each other as a result of fear of the punishments attached to fornication and adultery.

Equality before the law is another benefit of Sharī'ah. If Sharī'ah is allowed, it promotes this concept because nobody is above the law. The case of Umar ibn al -Khattab (the second head of State after Prophet Muhammad) and an ordinary peasant who appeared in the Sharī'ah Court of Law when the latter had a case against the former. Both were made to face the law on an equal basis.

Sharī'ah covers private and public lives of Muslims. The Sharī'ah guides Muslims on their modes of dressing. It recommends modest dressing. It should not be transparent and tight. Body hug clothe should be avoided. Both males and females are ordered to lower their gaze. The resultant effects of all these Sharī'ah instructions are reduction in the case of rape, adultery, fornication etc (Q 24: 30 – 31). There are Sharī'ah instructions on how to enter another person's house. This protects people's privacy and removes embarrassments (Q 24: 58 –59).

The punishment for alcohol drinking can deter people from indulging in the habit. Therefore, the problems of alcoholic drinking such as uttering foul language, killing, psychiatric problem to mention but a few would be removed in a place that is governed by Sharī'ah.

Effective Leadership is guaranteed in a Sharī'ah governed state. People will be asked on how they rule. People in the legislative power, executive arm and judiciary will be conscious because they know they are answerable to Allah. If they evade judgements here on earth, the judgement continues on the Day of Judgement. The judgement does not end here. Consciousness of this fact will make them effective and efficient when performing their leadership role.

Sharī'ah can lead a nation to a vibrant economy because it prohibits some things that can serve as barriers to economic growth and development. Such things include prohibition of

interest, corruption, deceit etc. The populace groans in abject penury because of interest. Recently, the money (N1, 360bn through AMCON) that would have been used to give people effective and efficient power supply, good roads, functional water supply etc was used to stabilise the banking sector in Nigeria. This money is taken from taxes paid and the revenue from other resources.

Poverty alleviation or elimination is possible in a state that allows Sharī'ah. Through the payment of Zakat and its judicious disbursement and use it is possible to alleviate poverty and reduce it to the minimum if it cannot be eliminated totally. Under the Sharī'ah 2.5% is paid on one's money if it reaches *niḥab* (minimum amount one can have before paying Zakat). Zakat is also paid on other resources such as gold, silver, farm produce and animals. This is expected to stabilise the economy and improve the standard of living of not only Muslims but also people living in a country where Zakat is paid. This was the case during the time of Caliph Umar. People were satisfied economically to the extent that there was nobody to collect Zakat later.

It is part of Sharī'ah to counsel one's children as contained in the Qur'ān (Q31: 13 – 19). If children are properly guided, they would become good. Peace will reign in the society. The bad consequences of their misbehaviours will be avoided if they are properly nursed in line with the Sharī'ah. The future of the nation is expected to be bright because they are the leaders of tomorrow. In the verses quoted, Luqman taught his children not to be disobedient to their parents. By implication, they should not be disobedient to constituted authority. They were also advised to worship only Allah. They should avoid arrogance and the like.

The books of Sharī'ah also preach humility, patience, justice observance of salat etc. The resultant effects of all these are well known in a society where all these teachings are used. There are Sharī'ah instructions on how to enter another person's house. This protects people's privacy and removes embarrassments. The rule of courtesy to say *salamu 'alaykum* to those inside the house before one enters is a way of protecting the privacy of the individual. The implication of uttering *salamu 'alaykum* is that the people inside or the persons being greeted have nothing to be afraid of from the person greeting. The resultant effect of such utterances is that trespass, stealing, armed robbery, burglary and similar offences may not be possible if one really follows the intent of the words of greeting in Islam (Q24: 27 – 28, 58). Sharī'ah can effectively prevent famine, terrorism, disease, homelessness, debt, killing and armed robbery as it can effectively promote justice and fair play.

In view of these benefits and reasons, Muslims have been demanding to practise all aspects of their religion. The Sharī'ah is only for Muslims alone. The constitution (Section 38 (1) of 1999 Constitution) also guarantees freedom of religion and the practice of its legal, economic spiritual and social aspects of their religion. The Sharī'ah is for Muslims as contained in Q 45: 18 "We have made Sharī'ah for you (as a law), so follow it and not the fancies of those who have no knowledge". Some of the other verses which command Muslims to use Sharī'ah are Q5: 47, Q5: 48 and Q5: 50. This shows that the application of Sharī'ah is mandatory on every Muslim, male or female. It is not a matter of choice. The Sharī'ah is not for non-Muslims such as Christians, Jews and idol worshippers. The Qur'ān says: "Why should they come to thee for legal decision when they have their own Taorah which contains the laws of God? Even if thou apply it to them, they would still turn away (from you). For they are not really men of faith.(Q5: 46; Q5: 60)". This revelation came to the Prophet when a group of Jews came to the Prophet asking him to adjudicate in a legal matter among them. This is an indication that Sharī'ah is not for non-Muslims. It is not also an attempt to force Sharī'ah on non-Muslims. Because Sharī'ah is

indispensable to the life of a Muslim, the demand for it in some Muslim countries particularly Nigeria becomes stronger from time to time. It is his law, his culture and his essence.

Sharī'ah in Western Sudan including Nigeria

The application of Sharī'ah as a legal system started in Nigeria with the advent of Islam in the country through Kanem-Borno in 1085 CE. It was through traders from North Africa. Shaykh Muhammad Al – Maghili contributed a lot to the establishment of Sharī'ah through his writings particularly his *Ajiwabah* (answers to questions). He wrote the treatise for king Hajj Muhammad Askia of Songhay (1486 – 1527). His treatise, “obligations of Amirs”, was also written for the Amir of Kano, Muhammad Rumfa (1463 – 1499). During this period Maliki jurisprudence was applied law in Western Sudan. During the time Islam was penetrating West Africa, It also penetrated North African through the traders of North Africa origin. The North African Berbers were being islamised. As early as 14th century, Sharī'ah was in some parts of the North based on the account of Ibn Batuta (Akintola, 2001; Abdullah, 1998). By the last quarter of the nineteenth century when the Royal Niger Company came to explore Northern Nigeria for business transactions, Sharī'ah had become the way of life of people. When the British came, they met Sharī'ah in full force in the North. The evidence is contained in the treaty signed by the Shehu of Borno, Umar ibn Muhammad al-Amin Al-Kanem with the British. The treaty dated 7th Shawwal, 1267A.H. (5th August, 1851). Shehu said: “We shall set down the stipulations and answer them according to the principles of the Sharī'ah”. Henry Barth was also warned not to bring either the Bible or alcohol to Hausaland. Sharī'ah became fully entrenched during the Jihad of Uthman Dan Fodio (Akintola, 2001; Abdullah, 1998).

As regards the Southern States of Nigeria, the application of Sharia Law started from 1830CE. Some believed Islam entered the Yorubaland during the reign of King Mansa Musa of Mali (d 1337CE). Al – Masri and Doi said Ahmad mentioned the presence of Islam in Yorubaland in his work (Al –Kashf al-Bayan...). Adam al-Iloriyy mentioned that the mosque built by Muslim Missionaries was in 1550 A.D during the reign of Alaafin Ajiboye. In the Southern part of Nigeria, Oba Momodu Lamuye (1880 – 1906) established Sharī'ah court in Iwo city. Oba Oyewole, the Akirun of Ikirun had an Alikali Court presided over by Mallam Bako from Ilorin. Oba Abibu Lagunju of Ede established a Court and put Alkali Siddiq from Ilorin as the Judge (Abdul-Wahab, 2006; Abdullah 1998). In the Edo and Eastern States of Nigeria, the role played by Jihadists to spread Islam and establish Sharī'ah was recognised. During 1881–1910, Oba Momodu I of Agbede in the Eastern States of Nigeria destroyed all idols in his area with the help of the Jihadists from the North. All these accounts testify to the presence of Islam and the application of Sharī'ah in Western Sudan particularly in Nigeria (Akintola, 2001).

The Muslims had been governed by Sharī'ah before the coming of the Christian slave masters who colonised Nigeria and other countries. They met the Sharī'ah in full force both in the North and the South. The London Times of 1886 testified that when the Royal Niger Company reached Northern Nigeria in the 18th Century, it found a well-organised system of justice. They said: “These people have their own laws and customs which are better adapted to their condition than the complicated system of British jurisprudence”. The Sharī'ah was suitable to the life of Muslims before the colonial masters came with their legal system. Colonial Governor Moloney also testifies to this fact when he said: “The Muslims are the most orderly, intellectual and respectable class of citizens composed of the Yoruba”. Blyden, Governor Carter also said “The Muslims are, as a rule, the most intelligent portion of the country”. The

proclamation of 1900 section 20 of the Supreme Court Ordinance enacted by Lord Lugard stipulated that: “The Court shall always apply them (the Sharī‘ah Custom Laws) in all matters relating to Marriage and the family, land tenure, inheritance and succession”. They gradually confined the application of Sharī‘ah law to family personal law (Abdul-Wahab, 2006; Abdul-Rahmon, 1982; Doi, 1984; Ruud, 2003). That was the beginning of reducing the all-embracing power of Sharī‘ah. This happening was not only in Nigeria but also it happened in many Muslim countries.

Islamic law was abrogated in many Muslim countries such as India, Egypt, Turkey, Albania and Nigeria. Where it was not abrogated totally, it was confined to the area of family personal law. In India, up till 1791, full \square add penalty was practised. However by the middle of the 19th century, all the entire Sharī‘ah system was abrogated except the ones related to personal family laws such as marriage, divorce and inheritance.

The colonialists also cancelled totally all the laws of Sharī‘ah in Turkey. It was the Authoritarian dictator, Kamal Ataturk (1881- 1930) that forced Turks to drop Sharī‘ah which Sultan Abdul Aziz formulated and implemented in full force in 1869. The Turks replaced Sharī‘ah with Swiss Law. The same thing happened to Morocco, Tunisia and many other Muslim countries. Sharī‘ah was totally abandoned in some Muslim countries. It was partially practised in some other Muslim countries. In some Muslim countries, some Sharī‘ah principles were changed to suit the whims and desires of the colonialists and the brain-washed rulers. For instance, a second marriage during the life time of the first wife is a prohibition and attracts a penalty in Tunisia. The imposition of English law had a devastating effect on the Sharī‘ah. Many cases involving Muslims have been taken to the conventional courts. They were decided not in line with the Sharī‘ah but in accordance with the English Law. Some Muslims have been making serious efforts to reintroduce Sharī‘ah in all aspects of public, private, social, economic, spiritual and international dealings. It is their fervent belief that in Sharī‘ah lies the solution to all the problems facing the world today.

The demand for Sharī‘ah started around July 28, 1894 (Akintola, 2001; Abdullah 1998; Abdul-Rahmon, 1982) when the Lagos Muslim demanded for Sharī‘ah. They petitioned the colonial ruler demanding that they should be judged in accordance with the Sharī‘ah Law of Islam as reported by the Lagos Weekly Record. As if that was enough, they also submitted another petition in 1923 demanding the British overlords for the introduction of Sharī‘ah Courts. In 1938, a group of Islamic scholars requested for the introduction of Sharī‘ah. In 1948, Ijebu-Ode people under the umbrella of the Muslim Congress of Nigeria wrote to the Governor of Nigeria demanding for Sharī‘ah. They were tired of being subjected to Common Law i.e. the Christian Law.

The former Chief Justice of Nigeria, Mr. Justice Brooke as the head of the Brooke Commission of Inquiry established by the Government to look into some national and burning issues received a memorandum from the Muslim Congress of Nigeria demanding for the establishment of Sharī‘ah. They demanded unequivocally for shariah court: “We, therefore, pray this Commission to grant our request for a separate Muslim Court...”

During General Gowon’s time as the head of state (1960 – 1975), the same demand was made but he used his position to carpet the voices of agitation. At the All-Nigeria Judges’ Conference held in Lagos in 1972, it was part of its communiqué to establish a Federal Sharī‘ah Court of Appeal as the final court of appeal as regards the cases of Islamic Law.

During the time of General Muritala Muhammed (1975/1976) the Constitution Drafting Committee (CDC) was set up. Sharī'ah was entrenched in its proposal because of the demand for it by Nigerian Muslims. It was stated in the proposal that a Federal Sharī'ah Court of Appeal as well as a Sharī'ah Court of Appeal in each state of the Federation that wanted it may be established. Before his death, Muritala approved the proposal for the establishment of the Federal Sharī'ah Court of Appeal and a Federal Court of Appeal. But after his death, Obasanjo who took over the mantle of leadership of the country dropped the establishment of the Federal Sharī'ah Court of Appeal and signed into law the Federal Court of Appeal which is now called Court of Appeal (Cap. 75, Law of the Federal Republic of Nigeria 1990).

In 1979, Alhaji Ismail Babatunde Jose and Alhaji MKO Abiola represented the entire Southern Muslims in working out with the Northern Muslim representatives on the question of Shariah provision in the 1970 Nigerian Constitution. In 1989, the Nigerian Federal Military Government banned the discussion of Sharī'ah.

When Ahmad Sanni Yarima of Zamfara State saw the vigour with which the Sharī'ah was being demanded, he quickly made it his campaign promise. People voted for him massively and he won the election. He fulfilled his promise by launching it on 27th October, 1999. Other states declared their intention to join Zamfara. Kebi, Yobe, Kano and Gombe declared their intention to follow Zamfara's example between 1999 and 2000. In 1996, the Sharī'ah debate echoed during the Constitutional Conference under the regime of the Late General Sanni Abacha. It was reechoed during General Abdul Salami Abubakar. All these accounts indicate that Muslims have been demanding Sharī'ah for long. There is no single regime in this country that did not receive a Sharī'ah petition from the Muslims. Article 18 of the United Nations Declaration of Human Rights signed on 12th October, 1948, asserts freedom of thought, conscience and religion. It particularly affirms the individual's right to worship, observe, teach and practise his religion.

The Muslims demand for the Sharī'ah Law to govern their lives. Failure to apply the Sharī'ah Law on Muslims has adverse consequence on them in this world and the hereafter. They want it to guide them and they do not prevent anybody from applying any law on himself or herself inasmuch it does not affect them as Sharī'ah does not affect non-Muslims. The provisions of Sharia are speedier and more effective than any man-made laws.

The Muslim lands had been guided by legal system called the Sharī'ah in all aspects of public, private, social, economic, moral, social and international dealings. However, all golden rules of the Sharī'ah were dropped when the British, French or Dutch imperialists came and changed the will of people. Many voices were raised against all European ways of governance that are against the Sharī'ah but the imperialists carpeted the few Muslims by fire by force. Through the hues and cries of some committed Muslims, Muslims were allowed to practise the Islamic personal law. They were able to succeed in cancelling all the other aspects of the Sharī'ah such as criminal law aspect of Sharī'ah, etc. Through the support received from some Muslim rulers and the Muslims who were trained under the influence of these new rulers i.e. the Europeans, the European system of commercial law was made to replace Islamic law of transactions in all the areas colonised by the imperialists. Such areas included South-East Asia, East Africa, West Africa and the Ottoman Empire.

It could be recalled that ottoman empire introduced Tanzimat between 1839 and 1876. In 1850 and 1858, French commercial code and French penal code were introduced to replace Islamic commercial law and the *qadd* punishment of the Sharī'ah. Egypt also did exactly the same thing with the Ottoman Empire. The Italian and German influences were also noticed in the

Muslim lands. By 1883, three-quarters of the legal system in Muslim lands were replaced by the European legal system.

In 1862, Indian penal code was made to replace the Sharī'ah which was in used for many centuries during the Moghul rule. Sudan, Morocco, Tunisia, Nigeria, etc were also affected and influenced by the colonial rulers such as French, European and others. Whatever little of Sharī'ah that is in force is in the area of family law. After the Second World War, Muslim countries started gaining their independence from their colonial masters. Some declared Islamic law as their source of legislation while others cancelled totally the Sharī'ah courts. As regard Sharī'ah family law that is being practised by many Muslim countries, the law was unchanged and uncodified in some countries (Doi, 1984; Ruud, 2003). It was changed through modern legislative process in some parts of some countries e.g. Zamfara in Nigeria. In some other countries, this aspect of the Sharī'ah was abandoned and replaced by the modern law. It is only in Saudi Arabia that both the Sharī'ah family law and Islamic penal law are used. Qatar, the two Yemens, Bahrain Kuwait etc use the Sharī'ah to a large extent.

The Maliki Family law operates unchanged in Nigeria, Niger, Senegal, Mauritania, Mali, Guinea, Chad and Gambia. Hanafi Family law in Afghanistan while Maldives use the shafii family law. In Turkey and Albania (ottoman Empire), the laws have been secularised. The muslims in the Soviet Union, Philippines, Kenya and Tanzania are subjected to secular family laws. The Islamic family law has been reformed or tampered with. The modernists changed the Sharī'ah to suit their imagination. They rejected, twisted and modified the legal injunctions of the Qur'ān and the Sunnah.

Summary

We have examined Sharī'ah as the divine law laid down in the Qur'ān, the Sunnah and other acknowledged sources. The roles of Sharī'ah such as security of life and property, decent modes of dressing, vibrant economy, poverty eradication, humility, justice and prevention of famine, terrorism etc are discussed at length. The application of Sharī'ah started in Nigeria in 1058 CE through Kanem–Borno. However, the colonialists cancelled or dropped a substantial part of the Sharī'ah which had been guiding all aspects of public and private dealings of Muslims their arrival. Muslims have been making frantic efforts to reintroduce Sharī'ah to guide them. All their attempts have been discussed in this lecture.

Post –Test

1. Give the meaning of Sharī'ah?
2. What are the roles of Sharī'ah in a Muslim life?
3. Discuss Sharī'ah in Western Sudan including Nigeria and the colonialists.
4. Is Sharī'ah for non-Muslims?

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LECTURE FIFTEEN

Muslim Women and Modern Reforms

Introduction

Islam is accused of regarding women as inferior to men. People blamed it for all the misdeeds and oppressive behaviours of men towards women. All these accusations led to the formation of women liberation movements. In this course you will understand the status of women in Islam. The enviable position which Islam has given to women more than 1432 years ago will be discussed. No religion except Islam accords women the recognition that befits them. All the rights and privileges given to women in Islam are unique and discussed in this lecture. You will also learn that all the agitations of modernists as regards the status of women have been taken care of in the Qur'ān and the Sunnah.

Objectives

At the end of this lecture, you should be able to:

1. understand that Islam has taken care of all the agitations of modernists as regards the status of women.
2. understand that Islam is the only religion that accords women the recognition that befits them.
3. state some of the rights of women in Islam.
4. list the agitations of the modernists as regards the status of women and the Islamic perspective/solutions towards the agitations.

Pre-Test

1. What are the agitations of the modernists as regards the status of woman?
2. How can you respond to their agitations from the Islamic perspective?
3. List and explain the rights of women in Islam.

CONTENT

Muslim Women and Modern Reforms

When the colonialists entered the Muslim countries, they took the deplorable conditions of women to their own benefits. It is unfortunate that these colonialists presented themselves as people who fight for the cause of women. In their countries, they failed to attain the same freedom until they fought for it. They accused Islam of regarding the woman as inferior to man.

They blamed Islam for all the misdeeds and oppressive behaviours of men towards women. All these accusations led to the springing up of women liberation movements in some Muslim countries. An attempt by Muslim women to imbibe the doctrines of their colonial master led them to the formation of a special class of women who regarded themselves as modernists. This group believes women should not only dress like men by going about in shirts and trousers, but also bear their fathers' names.

They also want women not only to participate in politics but also hold important positions particularly the headship of a country. To put it simply they want women to become presidents, chairmen to mention but a few. They also want women to practise polyandry, since men are allowed to practise polygyny i.e. they want women to have as many husbands as men could have wives. The modernists also advocate that women should go out and work. This group has been influenced by social ideas that are foreign to Islamic culture (Al-Hibri, 1997; Ahmed, 1992; Feillard, 1997). The modernists cajole gullible women into the idea of absolute freedom, and thus has led them to confusion, sexual harassment and rape. Many houses have been broken as a result of the freedom and rights which modernists are claiming and proud of. The rights and privileges which the colonial women got after long discussions, fighting, forceful pressure, imprisonment etc have been bestowed upon all women voluntarily without any form of force or revolt more than 1432 years ago.

It should be mentioned that some of the agitations of modernists as regards the status of women have already been taken care of in the Qur'ān and the Sunnah. It must also be mentioned that no religion except Islam accords women the recognition that befits them. Our discussion is based on the aspects of the rights of women as contained in the Qur'ān and the Sunnah. Whatever rights modern women enjoy fall short of what Islam has established by a Divine decree for the Muslim woman. Islam has established for woman what suits her nature and protects her against disgraceful circumstances of life. Some of these rights are discussed in the following passages.

Mode of Dressing

Women are to dress decently in Islam. Modest dressing is not for Muslim women alone. Muslim men are also enjoined to dress modestly and decently. The modernists alleged that Islam enslaves woman and reduces her beauty by commanding her to put on *ijāb*. This is not correct. The baselessness of the allegation is shown in the meaning of *ijāb*. *ijāb* in Islam means to dress in a way that all parts of the body are covered except the face and the hands according to the Hadith of the Prophet: "Aisah reported that Asma' daughter of Abubakr, came to see the Prophet with a thin cloth over her. The Prophet turned aside from her saying: "O Asmaa' when a woman reaches puberty, it is not good that any part of her (body) should be seen except this and this" (Pointing to his face and hands) (Al-Hafiz, 1996). The Qur'ān also says:

Tell the believing men that they should lower their gaze and guard their modesty: that will be most conducive to their purity---(and) verily Allah is aware of all that they do.

And tell the believing women that they should lower their gaze and guard their modesty and not display their charms (in public) beyond what (must ordinarily) appear thereof; hence, let them draw their head coverings over their bosoms. And let them not display (more of) their charms to any but their husbands, or their

fathers, or their husband's fathers, or their sons, their husband's sons, or their brothers, or their brothers' sons, or their sisters' sons, or their womenfolk, or those whom they rightfully possess, or such male attendants as are beyond all sexual desire, or children that are as yet unaware of women's nakedness; and let them not swing their legs (in walking) so as to draw attention to their hidden charms. And (always), O you who believe—all of you—turn unto Allah in repentance, so that you might attain to a happy state (Q24: 30 – 31).

These instructions are not only for women, men are also covered. Dressing is important because the way a person dresses tells a lot about the person. Therefore, Islam recommends modest dressing habit as well chastity for both males and females. If a woman dresses decently and modestly, people will respect her. Dressing well also reduces the temptation of staring at the opposite sex or using the eyes for seduction, and this in turn will reduce unlawful sexual relations. In Islam, man is expected to cover their nakedness particularly from the navel to the knee. If a woman dresses modestly, she would be protected against unwanted approaches. The adoption of modest dressing is to preserve the dignity of woman when a woman dresses decently and avoids putting on back-less, “body-hugs” “hot pants” mini skirt and “top-less” dresses, “the area-boys”, the rapists and the like will not approach her. She will enjoy a great degree of respect. Non-Muslims also appreciate Islamic modes of dressing.

Equality in the Procreation of Humankind

Both man and woman are partners with regards to procreation. The former is the father while the latter is the mother. In relation to this partnership: Allah says: Q4:1 “O mankind! Be dutiful to your Lord, Who created you from a single person (Adam), and from him(Adam) He created his wife (Eve), and from them both He created many men and women and fear Allah through Whom your mutual (rights), and (do not cut the relations of) the wombs (kingship). Surely, Allah is Ever an All-Watcher over you”.

Education

Education is very important in the life of a Muslim, male and female. In fact, the very first revelation of the Qur’ān to the Prophet started with the command to read i.e. to seek knowledge (Q96: 1 -5). The Prophet also said: “The search for knowledge is a compulsory duty for every Muslim, male and female” (Al-hafiz, 1996; Akintola; 2001). All these injunctions point to the fact that women should be educated. Even during the early days of Islam, many male and female members of the community were encouraged to acquire education. The resultant effect of the instruction was that a good number of men and women grew up to become giant scholars. Aisha, the Prophet’s wife, was a great scholar who taught many companions and other Muslims the Qur’ān and the Sunnah. Even in Nigeria, the case of Asmaa, the daughter of Uthman Dan Fodio is an example. She was well educated in the classics of the Arab and classical world. She was well versed in Arabic, the Fula language, Hausa etc. She was a leading scholar. Nana Asmau whose reputation was not hidden in West Africa wrote in a prose about the experience she had during the Fulani Wars. She was a counselor to her brother when he took the caliphate (Body,

1999). Therefore, when Islam enjoins the seeking of knowledge upon Muslims, it makes no distinction between man and woman.

Rights of females before birth up to their adolescence

Islam gives woman her rights from the time she was not in existence up to her adolescence.

Her right before birth

Islam advises Muslims to be careful when choosing their partners. They should give priority to religion and character when choosing their partners. If this advice is taken, their children will have righteous and caring parents. This will have a positive impact on the said children too.

Her right during pregnancy

The unborn baby is also protected from being aborted during pregnancy. When a person throws a stone at a pregnant woman and the woman died, the Prophet decreed that the compensation (*diyyah*) should be paid for the unborn child (male or female) (Bukhari)

Her rights during childhood

During the pre-Islamic period, female children were buried alive (Hitt, 1984). If a woman should give birth to a female girl, she would feel ashamed, grieved and dejected. The Qur'an gives the vivid picture of the situation when it says: "And when the news of (the birth of) a female (child) is brought to any of them, his face becomes dark, and he is filled with inward grief. He hides himself from the people because of the evil of that whereof he has been informed. Shall he keep her with dishonor or bury her in the earth? Certainly, evil is their decision" (Q16: 58 – 59). This attitude was reformed by Islam by considering the birth of a baby girl as a blessing from Allah. Allah mentions female first when he is calling our attention to His blessings with regard to giving birth to children. He states: "To Allah belongs the dominion of the heavens and the earth. He creates what He wills. He bestows female children to whomever He wills and bestows male children to whomever He wills" (Q 42: 49). The Prophet is reported to have said: He who trains a boy trains one person but he who trains a girl has trained the whole world. This is to show the status of women in Islam.

Choice of Husband

In Islam, the consent of both the men and the women is an essential element of marriage. A marriage contracted without mutual consent of the two parties is null and void (Q2: 232). It is allowed for a man to give his daughter in marriage to a person of his wish according to Maliki school of Islamic jurisprudence. Care must be taken not to abuse this provision. This is based on the assumption that the father has better experience and wisdom to make a good choice. It is also believed that the father loves his daughter and he would not injure her interest. All these assumptions are based on the ground that a girl may be carried away by emotion and youthful fantasy to make a wrong choice. However, if she dislikes the arranged marriage, it shall be annulled based on the prophetic tradition. The Prophet is also reported to have said: "the widow and the divorced woman shall not be married until their order is obtained, and the virgin shall not be married until her consent is obtained (Bukhari).

Property Rights

Islam grants woman equal rights to earn and own property. She has the right to dispose off her property according to her wish without the control of any man. She can enter any lawful contract which a man can. She is equal to man in carrying responsibilities and in receiving rewards for her deeds. Spiritually, woman is not less than man in the struggle. (Feillard, 1997; Minault, 1997; Wadud, 1999). In the same vein, if she commits a sin or an offense, she receives the same punishment a man would receive if he were to commit the offense. The Qur'ān says: "...Never will I cause to be lost the work of any of you, be he male or female ... "(Q3: 195) "...Men shall have a benefit from what they earn and women shall have a benefit from what they earn..." (Q4: 32).

Freedom of Expression

Women are allowed to express themselves in Islam. She has the right of expression as much as man. It is not right to condemn the sound opinions of a woman because of her femininity. She also has the right to consult and to be consulted (Q 42: 38 and Q 3: 159). Her femininity constitutes no obstacles to express herself. During the time of the Prophet and the caliphs, women did not only express their opinions freely but also put forward sound arguments to marshall their points (Q 58: 1-4, 60: 10 – 12). A specific example took place during the time of Umar, the second Khalifah when he said from the pulpit in the presence of a large crowd: "I will fine any man who gives his bride 500 dirhams or more as dowry. He shall be made to give the same amount as that by which his dowry exceeds the *Mahr* as – *sunnah* (traditional dowry) to the public treasury". At this, a woman who was at the foot of the pulpit cried out in a loud voice her objection to Umar's statement saying: "Your proclamation contradicts God's law: for does not suratul - Nsa" (Q 4:20) say: "But if you decide to take one wife in place of another, even if you have given the wife you put away a talent of gold as her marriage portion, take, not the least bit of it back?. How can you, then, in contradiction of the Divine Law which has stated that it is permissible to give more than the legal minimum marriage portion, make your proclamation?" Umar could not deny the sound argument of this woman and withdrew his proposition saying: "It was a man who erred and a woman who uttered the truth" (Doi, 1984; Abdati, 1975)).

This is a height of dignity that Islam has bestowed on the female sex to enable them express their opinion. From the example cited, the woman was able to lift her voice in public against his proposition and this made him to reverse his own public utterance.

The Right of Inheritance

Before Islam, woman was not allowed to inherit her husband children and other near relatives. She was part of the property to be inherited by man. Islam reforms the bad culture and allows females whether they are wives or mothers, sisters or daughters to inherit their near relatives according to degree of relationship and the number of heirs. Allah has given them this right of inheritance. Nobody has any gut to deprive them of this right. Will cannot be made more than one third of the deceased's property; and it should not be made to deny the rightful heirs of their shares.

There are variations in the rights of inheritance between man and woman due to the differences which exist between the financial responsibilities of man and those of women. Man receives two shares while woman gets one only. There are many reasons for the variations. Man is responsible financially for the complete maintenance of the whole family, wife, children and

other dependants. This role is not applicable to woman. Virtually, all categories of females are recipient. For instance, a wife receives from her husband; mother receives from her son; a daughter receives from her father; a sister receives from her brother and a female without relations receives from the society. Whatever she earns will be hers to take care of her personal expenses particularly the luxurious things that she likes to have.

Inheritance is a sort of aid that must be distributed according to the urgent needs and responsibilities. Man is in greater need than woman for bearing more burdens of all kinds of financial responsibilities. This is not the case with a woman. Woman is given inheritance because she is related to the deceased. Asking one man and two women to bear witness to contracts does not mean woman is inferior. It is a precautionary measure to guarantee honest transactions that if a woman of the witnesses forgets, the other will remind her.

Privileges of a woman

Exemption from some religious rights is one of these privileges. Women are exempted from (salat) prayers altogether during menstruation. They are not to refund the missed prayers when they are pure. They are also exempted from fasting during childbirth and menstruation but they will refund the number of days they missed after Ramadan when they are pure. Mothers enjoy more recognition in the sight of God (Q31: 14 – 15, Q46: 15). Woman is entitled to (75%) three-fourths of the son's love and kindness while man is entitled to one-fourth (25%). Paradise is believed to lie under the feet of the responsible mothers. Woman is also to be maintained completely by man. If she wants to work and contribute financially to the running of the home, she is allowed. It is praiseworthy and commendable before Allah if a woman who is financially capable assists her husband at home. **There are some women who do not consider their husbands to be in waterloo by marrying them and do not make life difficult for them. A few women are so good to the extent that their husbands would leave the affairs of home for them and they would manage them efficiently, effectively, religiously and without arrogance to their husbands. History has shown that children of such women are always great.** The corollary of these statements is that women who do not claim all the rights by making life difficult for their husbands would have their names and those of their children written in gold.

Asking a man to lead compulsory prayers does not mean he is superior to woman. It is a matter of avoiding distractions and evil thoughts that can emanate when a woman is leading. It is also to maintain concentration, harmony and order among worshippers. So, it is a regulation of discipline and not a sign of importance. For instance, the heads of state, men of timber and caliber, governments, commissioners etc stand behind an Imam and shoulder to shoulder to the pauper. This is to show that it is the regulation of discipline and not a sign of importance.

Adoption of Marriage Names

In common law or in the Western society, a woman must drop her father's name or maiden name once she is married. She has to adopt her husband's family name. Many of them publish their change of names in newspapers. However, women are allowed in Islam to bear their fathers' names even after their marriage. Some women add their husband's name to her father's name instead of dropping the latter. This is also allowed if they agree on the adoption of compound name. Islam ordains that every child must be called by his real father's name. If a person's father is not known, he must be called a brother in faith. (Q33:45). If a divorce should occur, the

woman needs to change her name again. However, if she has been carrying her maiden name, she does not have to change it again when there is a divorce between her and her husband.

ADOPTION

Islamic law enjoins parents to give a child a name at birth. The parent is enjoined to give a good name to their children as this will remain their identity in this life and the hereafter. On the Day of Judgement, Abu Dawd reported that the Prophet said: “You will be called on judgement day by your name and your father’s name. So, choose a nice name” (Abu Dawd No 4945). Children should be called by their names and their fathers’ names as instructed by the Qur’ān even if we adopt them. This means adoption can never give a person the status of natural son (Wadud, 1999; Tucker, 1998)

Zayd ibn Harithah whom the Prophet adopted as his son was given to Zaynab as her husband. But the marriage did not work and they had to separate. The Prophet later married Zaynab because she was left alone. This is an indication that an adopted son can never be a real son. Therefore, adoption does not bring about any of the ties and effects created by blood-relationship. By implication, adopted children must not inherit in the estates of their foster parents and the foster parents should not inherit in the estates of their adopted children. Both can make a *wasiyyah* (will) of not more than $\frac{1}{3}$ of their property for each other.

Sexual harassment

Another area where women are abused and they are clamouring for reforms is in the area of prostitution. Innocent female adolescents are used as prostitutes. Their agents benefit from this illegal trade. It must be explicitly made clear that Islam has prohibited adultery and fornication more than 1432 years ago. Prostitution is condemned in its totality in Islam as contained in the Qur’ān (Q23:17) and the Sunnah.

From the foregoing, it is clear that all the reforms looking for by women nowadays have been entrenched in Sharī‘ah more than 1,432 years ago. It must be mentioned that the rights and responsibilities of a woman are equal to those of a man though they are not necessarily identical. If woman is deprived of one thing in some aspects of life, she is fully compensated for it with more things in many other aspects. In Islam there is no difference between man and woman. Only excelling in virtue, piety, spiritual and ethical qualities can make people, males or females stand out from one another. It is left to men and women to strive and achieve that kind of excellence. It must also be mentioned that women are in no way inferior to men. Their abandonment of religious precepts in political, social, economic and spiritual matters, and the negative attitude of Muslims and their leaders put them in this sorrowful situation. Therefore, there is no need to devise a way of accommodating the reforms of the modern women i.e. the modernists. All their agitations have been taken care of by the Sharī‘ah. Efforts should be made to implement what the Sharī‘ah has enjoined more than 1432 years ago.

Summary

We have examined the agitations of the modernists as regards the status of women in Islam. We have also examined all rights given to women in Islam. All their agitations have already been taken care of in the Qur'ān and the Sunnah. Some of their rights are ownership of property, education, equality in the procreation of humankind, choice of husband, freedom of expression and bearing their father's names instead of their husband's names as their surnames. No religion except Islam accords women the recognition that befits them. Islam has established for woman what suits her nature and protects her against disgraceful circumstances of life.

In Islam there is no difference between man and woman. Only excelling in virtue, piety, spiritual and ethical qualities can make people, males or females, stand out from one another.

Post-Test

1. Mention some of the agitations of the modernists/women liberation movements.
2. What are the Islamic perspective to the agitations and complaints?
3. Is it allowed for a married woman to bear her father's name as her surname?
4. Is search for knowledge compulsory for both males and females in Islam?
5. Is there any equality between man and woman in the procreation of humankind?
6. Discuss the rights given to females right from before birth up to their adolescence.
7. Can a woman own property in Islam?
8. Give an example of a situation that indicates that women are free to express themselves in Islam.
9. Explain the reasons for the variations in the rights of inheritance between man and woman in Islam.
10. List and explain 4 of the privileges of a woman in Islam.

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