NOTES AND COMMENTS

DOCTRINE OF *IJMA* IN A SECULAR STATE PARADOX OR DILEMMA

I

THE EVOLUTION, emergence and development of Islamic legal system is the result of a historical, social, political and administrative process. Islam as a religion of action rather than of belief has not remained oblivious to the external influences. Islamic law and jurisprudence have accepted, assimilated and even rejected the extraneous elements. These extraneous elements comprise various components of the laws of Arabia, pre-Islamic Arab customs and numerous elements assimilated from the peoples of the conquered territories of non-Muslims. The doctrine of *Ijma* is the basic authority responsible for this process of acceptance, assimilation and rejection of external elements and influences in Islamic law. It is for this reason that this doctrine is considered to be "the foundation of foundations" and the movable element in the law.[1] Historically, and politically, the doctrine of *Ijma* has served as an important device to unify the Muslim community in its formative stages and in later periods also. With the emergence of disagreement in Islam and variations in the interpretation of Quran, *Ijma* emerged as an important source of Islamic law. Quran has been the basic unifying force of the Muslim community throughout the ages. However, it is surprising, as pointed out by scholars, that the community was never called "ah-al-Quran". The reason put forward is that Quran was never applied in its pure literal form. The fact that Quran has been a guide and inspiration for the Muslim community to regulate and conduct its affairs notwithstanding the application of Quran always remained a subject of interpretation. This accounts for the reason that for the Muslim community the phrase "al-Salatu-Jamiah" was frequently used during the Prophet's time and during the period of early caliphate. The phrases like "ah-al-Salah" and "ah-al-Qiblah" were also used.[2]

The instances recorded in al-Bukhari, al-Jami and al-Sahih trace the origin and genesis of the doctrine of *Ijma*. The instances reveal that the people would assemble to discuss and resolve any important social problem in the time of Prophet and during the early caliphate. This exercise may not be strictly termed as *Ijma* in its technical sense, but it certainly forms the basis of the doctrine.

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1. Snouck Hurgronje, *Selected Works* 289; *cf.* A.A. Fyzee, *Outlines of Muhammadan Law* 21-22 (1964).

2 Al-Bukhari, Al-Jami, Al-Sahih.

II

The root meaning of *Ijma* is "to collect", "bring together", "congregate". The term is believed to have been derived from the Arabic idiom 'Ajmatul-Nahab" which may be considered as an appropriate example to indicate the meaning of *Ijma*. It means an open ground wherein people are assembled, and they are not separated from each other lest they should go astray.[3]

The term has another meaning also. It means composing and settling a thing which has been decomposed (and unsettled) as an opinion which one determines, resolves or decides upon. Hence the phrase "Ajmat-ul-amar" (I determined, resolved or decided the affair).[4] The Quran is believed to have used the word *Ijma* in this connection in Sura 20:64 (Sura "Taha").

III

The doctrine of *Ijma* has been a subject of great controversy since its very inception. Attempts have been made to justify this important doctrine of Islamic jurisprudence on the basis of Quran, Sunnah and reason.

The antagonists of the doctrine aver that there is no direct reference available in Quran to accord sanctity to it. Be that as it may, the advocates of the doctrine quote extensively from the Quran to support the doctrine. The Suras which are often quoted from Quran in support of the basis of the doctrine are: Sura 20:64 (Taha); 4:115 (Nisa); 2:143 (Baqara); 9:16 (Tauba); 3:189 (Al-i-Imran).

Prominent among the scholars who justify the basis of *Ijma* on Quran are Al-Jassas, Al-Ghazali, and Fakhar-ul-Din-al-Razi. Imam Shafi's name is also mentioned in this behalf. But surprisingly, al-Shafi does not make any mention of Quran to support *Ijma*, though he strongly defends it on the basis of (Hadith) traditions.

The doctrine of *Ijma* has been generally justified by the scholars on the basis of Hadith. A host of traditions are reported in support of *Ijma*. The tradition: "My community will never agree on error" is considered to form the basis of the doctrine of *Ijma* in its technical sense.

Al-Shaybani is regarded as the first jurist who justified *Ijma* on the basis of a tradition; "Whatever the believers consider good is good, and whatever they consider evil is evil in his eyes."

The doctrine was further strengthened and justified by al-Shafi during the latter half of the second century. He quoted a number of traditions

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3. Ahmad Hassan, *The Doctrine of Ijma in Islam* 15.
4. E.W. Lane, *Arabic-English Lexicon* (1863); *cf.*, Ahmad Hassan, *ibid.*

from Prophet to prove and justify the authority of *Ijma.* Al-Ghazali further developed and established the concept by quoting from Quran and Hadith.

In spite of quotations from the Quran and justifications from a number of traditions, the tradition "My community will never agree on error" is the one frequently quoted to justify the doctrine of *Ijma.* The tradition had already been mentioned by Ibn-i-Majah, Trimidhi and Ahmad-bin-Hambal in their respective collections in third century. But the tradition appears in different versions and in different contexts in these collections. Al-Jassas is the first scholar to mention this tradition in the present context of *Ijma.*

IV

The interpellation from the antagonists regarding the competence of *Ijma* has been yet another predicament of jurists. *Ijma* was prevalent in the community though in a different context. It was applied, as pointed out earlier, to hold the community together on socio-political issues. It was a device mainly used for the solidarity of *jamah, i.e.,* community. At the time of election of Abu Bakr as the first caliph, a controversy due to the feuds between Ansars and Banu Hashmites arose that Abu Bakr was elected in a haste and only by a few. The controversy was set at rest by Omer (who later became the second caliph), who declared that community had approved the election, though belatedly. The tradition "My community will never agree on error" was used in this context for a long time. Abu Masud al-Ansari is reported to have been asked on the occasion of the assassination of Uthman—the third caliph about "Fitnah" (schism). He is reported to have replied "Adhere to the Community because God will not let the Community of Muhammad agree on an error".

It was in the latter period, when the doctrine of *Ijma* was fully developed as an important source of Islamic law that legal matters were brought within its purview. For a long time, the term *Ijma* was used to mean the agreement of the overwhelming majority of Muslims on legal, social and political matters, but the exercise was ultimately restricted to legal matters only. However, after the doctrine was recognized as an important source of Islamic law, the question of the competence of *Ijma* came up. It was contended by majority of the scholars that the consensus of opinion does not mean the consensus of overwhelming majority of Muslims but the consensus of scholars and learned ones only. In due course of time, the tradition that "my community will never agree on error" was interpreted to mean that the "Scholars of my community will not agree on an error". This interpretation of the tradition has been enunciated by scholars like Abdullah-bin-Mubarak, Ishaq-bin-Rahwayh, al-Shatibi and others. Al-Shafi, who is credited with the great contribution in the elevation of this great edifice of Islamic law, takes a contrary view. While quoting a host of traditions from Prophet, he concludes that the agreement

of consensus of opinion of the community means adherence to the agreed view of the community on legal matters. Al-Shafi rejects the interpretation that the agreement means the agreement of scholars only. He justifies this interpretation on human reason that the majority cannot be irrational to agree on an error. His contention is that *Ijma* is based on the essentials of Islam transmitted from the Prophet, by the people in general to the people in general. This knowledge he describes as "Ilm-al-ammah". This kind of transmission of legal knowledge was later termed as *tawatur*. The number of obligatory prayers and rates of *zakat* have been established on the basis of *tawatur*. Al-Shafi sounds reasonable in pointing out that a large number of people cannot agree on falsehood. He thus concludes with the remark: "... and we know that the people at large cannot agree on what contradicts the Sunnah of the Prophet and on an error."[5]

Al-Ghazali, while taking a contrary view advocates the *Ijma* of the learned and scholars. He argues that scholars command supremacy by virtue of their knowledge of religion and insight into legal matters. This accounts for the reason that the masses in the community readily recognize the agreement of the scholars on a certain point. Hence the consensus of learned is tantamount to the consensus of the community. This marks the firm beginning of participation in *Ijma* by a selected and privileged few.

Accepting the argument of Al-Ghazali, majority of jurists and scholars maintain that the consensus of "ahal-hal-wal-aqd" (power of loosing and binding) is sufficient to constitute *Ijma*. Abu Bakr's election, which was made by a few and later ratified by majority, is put forward as the basis of this interpretation. However, for historical and political reasons the *Ijma* of scholars has been accepted as binding.

The number of scholars required for the participation and validity of *Ijma* has yet been another dilemma of jurists and theologians. This issue has generated great controversy at certain points of time. Some scholars assert that the minimum number required for the validity of *Ijma* should be three, whereas others point out that it should be large enough not to give room to commit an error. However, the majority of jurists maintain that no minimum or maximum number of scholars is required for the validity of *Ijma*. Abu-al-Malik al-Juwayni correctly maintains that if there is no jurist except one in the community in a certain age and he agrees on a certain opinion about a disputed question, his agreement would be considered *Ijma*.[6] He, however, qualifies it by *tawatur*, *i.e.*, acceptance of the opinion by a large majority of people because then there would be no scope of error.

It is pertinent to note that the words *ummah* or *jamiah* has never

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5. Al-Shafi, *Risala*: 285, English translation by Majid Khaduri, *cf.*, Ahmad Hassan, *supra* note 3.

6. Ahmad Hassan, *ibid.*

been used to denote either all and sundry or arithmetical majority in the context of *Ijma*. It has always been understood to denote a fairly good number of people. Abu Bakr's election was accepted by majority and not by all and sundry. All the people in Medina did not take oath of allegiance to him. *Ijma* of the companions of the Prophet was held valid though some disagreed with it also. Abu Abbas is reported to have differed with the companions who rejected his opinion on *mutah* (temporary marriage) *awl* (increase in the law of succession) and *riba al-nasiah* (interest on loan). In fact, there has been no hard and fast rule regarding the number of jurists to participate in *Ijma*. Later developments in Islamic jurisprudence prove the point. Abu-Bakr-al-Jassas rightly points out that it is not practically possible that all the persons individually express their opinion and give their consent.[7]

H.A.R. Gibb aptly observes that *Ijma* is "vox populi, the expressed will of the community—not as measured by counting of votes or the decisions of the Councils at any given moment, but as demonstrated by slowly accumulating pressure of opinion over a longer period of time"[8]

V

The Islamic law grew into a system through a rational process of debate and discussion. The process remained rational in spite of the fact that the Islamic law is a sacred law. It acquired its intellectualist and scholastic exterior by a rational method of interpretation and not by an "irrational process of revelation."[9]

There is great scope of interpretation and discussion on legal subject-matters in Islam because the Quran does not deal with legalities in detail. It contains lesser legal element and more of ethics. Hence, as scholars point out, there is a great scope for *Ijma*. It is through this great doctrine that Islamic law was able to cope up with the challenges of the time. S.M. Yusuf rightly observes in this behalf:

> [B]y the time the Islamic civilization reached the Golden age, the Corpus of Islamic law had developed sufficiently enough to cope with the various needs of a complex life, so much so, that there remained no actual need for fresh efforts in the field (unless the Ijtihad were taken as a mere game of cricket). In proof of the same quality, it can safely be asserted that the Corpus of the Islamic law has evolved during the early centuries of Islam continued down to the modern times to minister to all the needs of family life, public activity, highly developed industries, crafts, inter-

7. Al-Jassas, *Kitab-i-Usul-al-Fiqah* 226; *cf.*, Ahmad Hassan, *ibid.*
8. *Modern Trends in Islam* 11.
9. Joseph Schacht, *et al* (ed.), *The Legacy of Islam* 396.

national commerce, international relations, war and peace, particularly the fact is remarkable that the vast and vigorous economic activity of the Muslims extending from Spain to Canton and involving all sorts of transactions were governed by no law other than that which is dubbed today as 'static.'[10]

The allusion of Yusuf is certainly towards Iqbal's lamentation that both Islamic thought and law have become static and gate of *Ijtihad* has been closed down: Yusuf points out that the door of *Ijtihad* has always remained open. However, Yusuf has a different socio-political milieu in view.

The geographical milieu of *umma* is quite different today than what it was a thousand years ago. The Muslim community has been divided into independent states. The doctrine of *Ijma* has been a guiding spirit in all these states in the sense that they legislate on matters concerning their own people and their problems independently. It is very important to note that in this exercise, most of these countries have ignored the participation and consent of lay men in the process of law making for social change. The observation of S. M. Yusuf is very relevant in this behalf : "The history of the constitution making in Pakistan, where the religious feeling is strong, offers a striking illustration of the same. A union between the competent and the layman is an utter impossibility, a contradiction in terms, if not deliberate dishonesty. What contribution for example, can a layman make to the deliberation of the board of medical experts. A layman can only give an account of his ailment, he can only present the problem (and even his understanding of the nature of the problem is not to be relied upon—an experienced medical practitioner is always on the guard against being misled by the story of the patient) but he can never have a voice in the prescription of remedy."[11]

VI

In most of the Islamic countries, efforts have successfully been made to open new avenues to make innovations on Islamic legal system and cope up with the challenges of the times. Yet, there are countries where the Shariah law has come to a point of stagnation. This is mostly true of the secular states which, though allow freedom of religion, have no official religion. The stagnation of Shariah law on the one hand and a host of new problems arising out of modern socio-economic developments on the other have given rise to many a great problem regarding the application of Muslim law in such states.

It is worthwhile to analyze the varied attitudes which have been adop-

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10. "A Study of Iqbal's View on Ijma", *Iqbal Review* 17 (October 1962).
11. *Ibid.*

ted to deal with such a situation in a secular state like India. One is the attitude of status quo. The advocates of status quo may be classified into two categories. The first category comprises persons harbouring the fear that the discussion or debate on Shariah law in a secular state tantamounts to shaking the very foundations of Islam. According to this category, the doors of *Ijma* were closed with the demise of the last caliph of Islam. The misgivings of this category are, by and large, psychological and emotional which are mainly based on ignorance. Hence they may be forgiven for they do not know what they say.

The second category comprises persons with political considerations and motives. They have acquired a vested interest in the status quo because it keeps them comfortably placed in their respective tabernacles reaping the harvest in the name of almighty Allah. Allah has certainly been benevolent to this category for they thrive on the pitiable lot of the Muslim community in India. Many a self-styled *ulema*, so-called *moulvis* and Muslim leaders fall under this category.

The second attitude is a corrollary of the first. This attitude is reflected by the category of persons whose acquiescence in any debate or discussion on Shariah law is *ad libitum*. Their attitude is motivated partly by vested interest and partly by the forceful exigencies of the time. This has certainly resulted in some patch work here and there. For instance, the Dissolution of Muslim Marriages Act of 1939 or the recently enacted law on registration of Muslim marriages in the State of Jammu and Kashmir are the result of great social pressure.

The third attitude is that of extreme modernism. The modernists in Islam go to the extent of bringing Quran, which is the fountain head of Islamic legal theory, under historical study.[12] Hence the reinterpretation of Quran and review of all Islamic laws *ab initio*.

While making an appraisal of the doctrine of *Ijma* historically, it is clear that *Ijma* in Islam is an informal activity and that there is no definite and approved apparatus to ascertain the will of the community. In view of the socio-political structure of a secular state, the doctrine of *Ijma* has a greater scope and role to play in the alleviation of the teething troubles of the Muslim community.

The scholars in India have dilated upon the subject in the past, but the geo-political milieu in which they were living was quite different from what it is today.

Shah Waliullah has expressed his opinion on almost all important doctrines of Islamic law and theology including *Ijma*. He asserts that *Ijma* is valid only when it is sanctioned by *shura* and enforced by caliph. Shah Waliullah, no doubt, lauds the role of *Ijma* in the resolution of disputed

12. Fazlur-Rehman, "The Impact of Modernity in Islam" in *Islamic Studies* vol. 2. at 127 (June 1966). Latest contribution is Asghar Ali Engineer's *The Islamic State*.

legal questions, but his restrictions of socio-political framework within which he seeks to reach *Ijma* is an impracticality in a secular state.

Sir Syed Ahmad Khan considers *Ijma* as a secondary source of Islamic law and considers it valid within the framework of the Quran and Sunnah. Sir Syed appears to have a confused thinking on the subject. His compendium on doctrine of *Ijma* aside, even the clarification of his views on *Ijma* by his colleague and associate Muhsin-al-Mulk Mahid Ali Khan does not help us to fathom into Sir Syed's conception of the doctrine.

Ubayd Allah Sindhi offers the same interpretation as is offered by Shah Walliullah, though he extends the period of *Ijma* to the rule of *ummayads*.

Sir Muhammad Iqbal appears to have a clear thinking on the subject and his views could serve as a beacon light in the revaluation and restructuring of the doctrine in India. He advocates the freedom of *Ijtihad* to rebuild the law of Shariah in the light of modern thought and experience.[13] Iqbal appears to be deeply concerned with the doctrine of *Ijma* and its role in the revision of Islamic jurisprudence in the light of modern conditions. This prompted him to ask Sayyid Sulayman Nadawi a series of questions about Islamic jurisprudence, particularly about *Ijma*. He pointed out to Nadawi that Al-amidi's discussion of *Ijma* shows that the *Ijma* of the companions could override a Quranic injunction.

Ipbal's concept of movable element in society could form the basis of revaluation of doctrine of *Ijma* in India. The task may be undertaken by scholars, jurists and academics. It is unfortunate that stoicism of scholars in India have given a free hand to so-called ulema to hold sway in the field *ad libitum*. The situation has come to such a pass that Imams engaged in mosques to lead the prayer congregations on monthly salaries have assumed the role of *mujtahids* and scholars in India. Syed Shahabuddin, in a series of articles has made a brilliant exposure of these predators and filibusters in India. The articles have political overtones, but they starkly paint the pathetic situation prevailing among Muslims in India.[14]

The doctrine of *Ijma* is to be reinterpreted in a secular state like India in the light of these scholarly observations of S.M. Yusuf: "so far as 'Ijtihad' and *Ijma* are concerned, it is in their very nature that they are diffused among the whole community in such a way as to defy all attempts at regularization and organization into mechanical institutions which, as practical experience will amply bear out, are dangerously exposed to rigging and regementation. It is inalienable, non-transferable privilege of every Muslim possessing the *necessary qualities* for the task to exercise his mind

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13. Muhammad Iqbal, *Reconstruction of Religious Thought in Islam* 152-75.

14. The articles captioned "Shahi Imam: who he is?" and "Shahi Imam: who he is not"? appeared in *Indian Express*. Articles, though published to assess the role of Imam of Jama Masjid in Indian Muslim politics, holds good for other such types all over India.

and form his individual judgement in regard to the new situations arising out of the forward-march of life-history, culture and civilization".[15] Yusuf, correctly rules out the representation, delegation or selection in this regard. According to him: "even the number of 'Mujtahids' is indeterminable; it is bound to vary from time to time and place to place according to the nature and extent of education and culture."[16]

The scholars in India may be guided by his following observation: "Really Ijtihad, can be free only in one sense, *i.e.* in the sense of the freedom of conscience of the 'Mujtahid' from political pressure and survival to the temporary authority."[17]

The desideratum of Muslims in India is that they need an Iqbal, Ameer Ali, a Fyzee and a Tayabji to bring them out of their predicament which has been caused due to the complexities of modern day life.

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15. S.M. Yusuf, *supra* note 10. Emphasis added.
16. *Ibid.*
17. *Ibid.*

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