CHAPTER 3

The Evolution of Islamic Law and Ijtihad

There is a strong belief among orthodox Muslims and some ill-informed and misinformed non-Muslims that Islamic law is a monolithic whole and immutable. They believe it cannot be changed and it is its followers who have to conform to the rules of Islamic law. This chapter attempts to show how the myth of the immutability of Islamic law can be dismantled. It is argued that Islamic law consists of various schools and sources, both divine and human, and that foreign/un-Islamic elements have influenced the evolution of Islamic law over the centuries. The argument of conservative Islamic scholars that Islamic law has achieved finality and the process of *ijtihad* (individual independent reasoning) has come to an end is challenged and it is demonstrated that *ijtihad* is a continuous process and courts in Muslim states, for instance the Federal Shariat Court of Pakistan, are competent to be engaged in the process of *ijtihad* known as ‘judicial *ijtihad*’. The treatment of the private domain by Islamic law is analysed in order to find out whether and how it protects or undermines women’s rights.

The followers of Islam are divided into two groups: Sunnis and Shias, and so are their laws. The Sunni, the majority school, is further divided into four sub-schools (also called *mudhabs*): Hanafi, Maliki, Shafii and Hambali. The Shia sect is divided into Ithna Ashari (Twelvers) and the Ismaili (Seveners) (Fyzee, 1955). The political conceptions of Sunnis and Shias differ widely but the criminal laws and laws of personal status vary only in their details. The four sub-schools of the Sunnite doctrine have disagreements but share a common vision of law, its sources and the methods of its elaboration (Weiss, 1998). In the same fashion, Shia sub-schools differ in details from each other but are in agreement on the general rules among themselves and share a consensus with other Sunni schools (Schacht, 1955). However, despite their differences, all the schools and sources of Islamic law are considered valid and Muslims are free to follow whichever school they want. The Koran (39:55) said: ‘and follow the best of (the courses) revealed to you from your Lord …’
3.1 THE SOURCES OF ISLAMIC LAW

There are four major sources of Islamic law: the Koran, the Sunnah (the model behaviour of the Prophet Muhammad), ijma (consensus of opinion) and qiyas (analogical deduction) (Esposito and DeLong-Bas, 2001).\(^1\) Hashim Kamali (2000) has divided these sources into two types: revealed and non-revealed. The revealed sources are the Koran and the Sunnah forming the nass (nucleus/core) of the Sharia whereas qiyas and ijma are the non-revealed sources and are employed to derive law from the nass (plural, nusus) through the use of human reason and endeavour called ijtihad. ‘Literally nass means “something clear” but technically it signifies a clear injunction which is textually evidenced with regard to a certain point in the Quran and or hadith [recorded sayings of the Prophet]’ (Hassan, 1970:122). The specific rules of the Koran and the Sunnah, which are relatively small in number, are collectively known as nusus (Kamali, 2000:108; Weiss, 1998:200). It is from the nass that the law is to be derived.

3.1.1 THE KORAN

The word Koran means ‘recitation’ and Muslims consider it ‘the word of God’ (Rahman, 1966:30). The Koran (26:192) said ‘verily this is a Revelation from the Lord of the Worlds’ and ‘this Qur’an is not such as can be produced by other than Allah …’ (10:37). It was revealed to the Prophet Muhammad through the angel Gabriel. The words of the Koran (God) are eternal and ‘… none can change His words …’ (18:27). It is regarded as the final authority in terms of law and other issues. It is the constitution of the state and of society, the categorical imperative of personal ethic and the sublime expression of the summum bonum of the highest aspiration (Al-Faruqi, 1962). The Koran is ‘primarily a book of religious and moral principles and exhortation, and is not a legal document. But it does embody some important legal enunciations …’ (Rahman, 1966:37) and ‘also contains general injunctions, which have formed the basis of important juristic inferences’ (Rahim, 1911:71). Kamali (2000:119) claims that ‘less than three percent of the text deals with

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\(^1\) There are other sources called minor sources as well but disagreement exists among the jurists whether or not they should be considered as independent sources. They are: Istihsan (juristic preference), istislah (human welfare) and maslaha (public interest). See, All Pakistan Legal Decisions 2000 Federal Shariat Court 1. These minor sources are all considered as forms of ijtihad.