

Sharia in the Modern World: A Comparative Study of the Islamic law and the Social Contract Theory

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Abstract

The validity of the Islamic law and customs is recognized not only in East but also in the West. It is no longer archaic to modern scholars and teachers. Islamic law proposes nonviolent and morally sound solutions to the modern-day problems. This paper makes an attempt to study the different mediums of Islamic law from the perspective of the social contract theory. It explores different branches of Sharia and aims to see it as a suitable replacement for the core implications of the social contract theory. Thus, it concludes that Islamic law holds the potential to create a peaceful world for all human beings and eliminate the fear of violence and exploitation for it is based on strict adherence to morality. Islamic law promotes moral values which are missing in modern law.

Keywords: *Community, Sharia, Social Contract Theory, Quran and Sunnah.*

Introduction

Social contract theory with its explanation of human nature and the need for laws is an important work. It suggests that without a stable government and society man is free to do whatever pleases him.¹ However, it has faced some criticism because of its take on the idea of morality and its emphasis on a dictator-like ruler. Hobbes imagined a utopian world. In that world people signed a contract with the ruler. This contract stated that no one will wage a war against anyone. The limitation of this theory is that it only talks about the people who are sensible and are willing to comply with the terms of the contract. It does not provide any instructions regarding the treatment of people who are not a part of the contract.

In a society like ours, where certain people obey the rules and certain people disobey them, a theory like this is not applicable. Islam provides fundamentals laws

and teachings that covers all kinds of human conduct and provides solutions for all forms of transgression. Many western critics now suggest that Islamic law provides adequate rights to women. They further suggest that when the English colonizers replaced Sharia with their own laws, the purpose was to deny women of their rights in property that Islam had given them. Thus, Islamic law appeals to the senses because it gives each and every citizen equal rights. Nevertheless, the word Sharia is still portrayed by many western scholars as harsh. It is also seen in the history of the Islam that many tribes of Arabian Peninsula were reluctant to accept the Sharia laws as they talked about justice and equality of all human beings.

Social contract theory

Hobbes imagined a bleak background for his theory. The background to this theory is suggestive of the age of ignorance. Human beings lived in the state of ignorance without any laws. There was no government or supreme leader. Therefore, it was characterized by utter sense of anarchy. The human race was in constant struggle against each other as there were no laws. In order to cease the chaos and wars, our species made a few agreements. Pactum Unionis guaranteed the protection of material goods. It was an important treaty that formed the basis of the social contract theory. Thus it was agreed that the property of people would be protected. Secondly, Pactum Subjection is ensured that people obey a king or state.²

Therefore, human beings formed an alliance to protect one another given that they are not attacked by each other. Hobbes base his social contract theory on the idea that human beings are essentially immoral. Thus to control their inspirations and ambitions, there needs to be a system that keeps a check on them. However, Islamic law encourages human beings to behave morally. It does not see them as beast or animals that need to be tamed. Rather Islam encourages its followers to behave in accordance with the teachings of Divine revelation. God says that, "You are the best nation brought forth for the people of the world: you enjoin right and you forbid wrong, and you believe in Allah."³

The Islamic law encourages human beings to not turn into beasts and obey the commands of the Supreme Creator. The Islamic law is also flexible with the changing circumstances. However, Hobbes gives full authority to the ruler. He must not be questioned but obeyed at all cost.⁴

Islam urges the participation of the community in religious matters. The opinion of all the members of the Ijma committee matters and no single person is given the right to enforce his command on others.

Islamic Law

The meaning of the word Shari'ah is rooted in its purpose. Its literal meaning is, "the path to water"⁵ It also means that it is a path to eternal bliss and salvation. The believer is promised a reward in this world as well as in the next world. Sharia is the direct opposite of Hawa. Sharia prepares human beings for the next life while the latter term suggests a hedonistic attitude towards life itself. Hawa comprises of morally corrupt desires and tendencies.⁶ Islam recognizes the presence of Hawā or unlawful desires. However, unlike the social contract theory, it also recognizes the

presence of goodness in human beings. Man is given a choice to act according to the dictates of his own will or adopt morality that is based on the principles of justice and humanity. The morality that Islam propagates is very different than the idea of morality put forward by western philosophers. The latter suggest human beings act lawfully because they are in a social contract. Thus they don't harm anyone because no one will harm them and if someone harms them then the other person will be penalized. This means that morality is based on the idea of fear and compliance. Islam instills morality that is based on the idea of compassion and the fear of God. Human beings are instructed to take care of fellow human beings in all conditions. This morality is based on the idea that God is merciful and he has instilled some of his qualities in his creation. Islam places man in a superior position and he becomes the vicegerent of God on Earth because he is obeying the rules.⁷

One can say that Hawā is the lawlessness that Hobbes also refers to in his critique of the social contract. Without the law, the human society is jungle of lawlessness and injustice. Sharia is the word of God and is based on divine revelation and Sunnah. Only Sharia inspires Muslims to act lawfully and meaning to their actions. Islamic law developed side by side with the developments in the Muslim societies. It is interesting to note that the Islamic law and its various components are still evolving. Therefore, Islamic law is not archaic but modern in its outlook. The criticism on social contract theory is that it is archaic and rooted in fantasy. It is also suggested that it finds no basis in history.⁸ Therefore, it is impractical. Islamic shari'ah is developed and re-adjusted with the changing times and norms of the modern age. As it will be observed in the next few sections, many components of the Sharia such as Istihsān meet the need of modern times.

Sources of Islamic laws

The sources of Islamic law provide guidance to the Muslim ummah. The Qur'ān, Sunnah of the Prophet and Ijmā' are primary sources of Shari'ah. Other sources of Islamic law include Qiyās and Istihsan. The Holy Qur'an is the basic source of the law and it talks about almost all issues. It talks about other nations that were destroyed because they refused to accept the divine revelation. Muslims are commanded to accept the teachings of the Holy Qur'ān and the Prophet (pbuh). Other Islamic laws extend from primary sources of Islamic law such as Qur'ān and Sunnah. Islam instills the fear of God. However, it also talks about the mercy of God. Hobbes in his analysis of civilized society, suggests that men fear each other and the sovereign ruler. Therefore, they obey the rules of the state because of fear of punishment.⁹ However, Islam talks about the reward of obeying the rules. It also talks about the ever-merciful nature of the Almighty.

Qur'ān

The Holy Book is the divine revelation and it is the most important medium of Islamic teachings. The word Qur'ān invokes comprehensive meaning. It means a book, "that which is read."¹⁰

The Qur'ān is not only for the experts but also for the ordinary people. In this

way, the ordinary man learns about the moral conduct that is expected of him. Thus, Islam allows the ordinary person to learn about religion and debate about religious issues. If human beings have any questions, they consult the Holy Book. It eliminates the possibility of chaos and the society works smoothly. Quran provides human beings with adequate knowledge and guidance. Holy Qur'ān touches on different topics in different chapters. It is not divided subject wise. The Holy Book is also called Huda (guide). It talks about almost all issues. This leaves no room for doubt and all concerns of the population are answered.

For example, Qur'ān lays emphasis on Zakāt. Social contract theorist views taxes in a different light. According to them, citizens gave up their economic independence by giving out money to the state. Taxes help the state to run the country and create a peaceful environment. However, Islam talks about zakāt from a different perspective. It is an obligatory tax that is used to help the poor. Islam also urges Muslims to consider zakāt as a way to help the needy. Zakat is a charity spent in the cause of Allah. The purpose of it is to gain the favor of Allah Almighty and it does not mean that one is giving up his/her economic freedom.

The Holy Quran also devotes some verses to instruction regarding family life. These include instructions about marriage and inheritance. Islam urges Muslims to treat their family members with love and respect. Social contract theorists view family as they view a state.¹¹

The idea of loyalty and love is lost when one considers family as yet another institution. Rather family becomes a controlling force that is artificially created. Islam sees family from a humanistic perspective and concludes that one must be responsible to his/her family.

Hobbes suggests that civilians must show undisputed obedience to the king. He further suggests that no one can question the king even the church.¹²

The Quran, however, makes it clear that government must serve the people. Allah says, "Indeed, Allāh commands you to render trusts to whom they are due and when you judge between people to judge with justice]"¹³

Moreover, it further commands that the ruler or the head of the state should be fair and do justice. It suggests that government must resolve conflict in the right way. Care must be taken in the selection of the officials. Islam says that the government must be responsible and just. The Quran urges that justice must be served and that human rights must not be ignored.

The Sunnāh and Ḥadith

The Sunnāh of the prophet complements the teachings of the Qur'ān. The Sunnah also demonstrates the role of the Prophet as the head of the state. Prophet always consulted his companions in important matters. For example, before going to any battle he would hold a Shura to discuss the strategy of war. However, there are some matters in which the prophet must be obeyed.

God commands Muslims to obey the Prophet and his orders at all costs for he is the final authority on the divine revelation. The Sunnah includes a broad range of orders given by the Prophet of Islam. It includes what He (pbuh) said, did, and

permitted or condemned. The literal meaning of Sunnah is, "a normative way of acting, conduct, practice...and behaviour."¹⁴

Hadith is the actual narration of Sunnah. Hadith literally means, "talk".¹⁵ Hadith and Sunnah are considered an important part of the Islamic teachings. The Sunnah complements the Quran. The Sunnah re-affirms a command that is stated in the Holy Book. This includes instructions related to respecting other's property. It also includes rule pertaining to crimes like homicide. Sunnah also gives an explanation of divine revelations. Regarding prayer, the Prophet said, "Pray as you have seen me praying"¹⁶

Social contract theorist imagines a strict ruler for the Commonwealth. However, the Prophet of Islam was always kind and compassionate. It was also because of his(PBUH)'s kind nature that the infidels accepted Islam.

Sunnah also dictates laws that are not mentioned in Quran. This kind of order is called al- Sunnah al-mu'assisah. Although these orders are created by the Prophet yet they are in no way independent of the divine revelation as the Quran says. "Nor does he say (ought) of (his own) Desire"¹⁷

Islamic law is based on the divine revelation. It tells about the real life incidents. It is factual and genuine guidance for the human beings. Sunnah can be divided into two general categories.

1. Sunnah is divided into tashri'iyyah and ghayr tashri'iyyah.¹⁸

2. The second kind of Sunnah pertains to matters that are not legal.¹⁹

This set of Sunnah explains the rituals that the prophet of Islam followed. It includes his preference of food, and the way in which he dressed. Example of this kind of Sunnah is that the prophet preferred to sleep on the right side. Such actions are wajib, mandub or mubah.

Another example of the conduct of the prophet is that whenever his daughter visited him he used to stand and welcome her. This kind of Sunnah is related to the personal life of the Prophet of Islam. The social contract theorist does not explain about the personal conduct of the ruler. They merely talk about the political might of the ruler. Islam aims to inspire the believer by giving examples from the life of Prophet.²⁰

Thus Islam aims to create a nation that is civilized and well behaved. It not only teaches Muslims to act in a moral way but also encourages courtesy and good manners.

Legal Sunnah (Sunnah tashri'iyya)

This kind of Sunnah is further divided into three types. It encapsulates what Prophet did and said as an administrator, judge and Prophet of God. The prophet avoided war at all times. He only encouraged war when there was no other option. Hobbes too suggest that the purpose of the ruler is to ensure peace and avoid war when possible. Here it becomes important to discuss Hobbes' stance on war. He saw war as an undesirable state of being. He says that in war, "the life of man[is], solitary, poor...brutal"²¹

Thus it is interesting to note that Hobbes' too despised the idea of war at

some point. However, as earlier established, the Leviathan must instill his fear in his fear in order to deter war. Hobbes' leviathan or ruler is guided by one purpose. His purpose is to ensure peace in the society. Thus the system taxes is imposed on the subjects. Each person pays varying amounts of taxes depending upon the expense that state pays for their defense. Here it seems that the purpose of tax is not to help the poor and underprivileged but to protect the people of the status quo.²²

Ijma

Ijma constitutes the third principal source of Islamic decree. The literal implication of this term is determination. It is basically the unanimous decision of jurist on a certain matter. These mujtahids are called jurist and are significant personalities that interpret the teachings of Quran and Prophet. Ijma is thus a domain of the very learned people and it must not be influenced by the opinions of the ordinary man. During the life of the Prophet there was no need for Ijma for his word was the final in every matter. After the demise of Prophet, companions used to consult one another on important matters. Later, the successors of the companions were responsible for reaching a judgment. These people are called Tabi'un and they later passed this role to the next generations.²³

It is important for the majority of jurist to agree on a judgment for the ijma to be successful. However, the difference of opinions of different members must be respected and considered. It is also important that there must be no socio-economic discrimination in the ijma process. The opinion of the rich and the poor holds the same value. The members of the Ijma must be respected and their words hold a value.

The Quran says, "O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you"²⁴

God gives certain authority to the decision makers of the Islamic state. These people are also called, "ulu al- amrr". Their decisions should be free of errors.

There are many Ahadis that support Ijma. The Prophet says that, "My community will never agree on an error."²⁵

Here it is important to note that Hobbes' view about human knowledge is in clash with the Islamic rulings. Hobbes believes that the only thing true about the human effort to deduce a judgment is that human beings can never reach the absolute truth.²⁶

Thus, they need a sovereign state and a strict ruler that can guide them and hold reigns to their immoral aspiration. Islam however aims to suggest that human endeavors to reach a conclusion are not faulty and human beings can actually make good judgements.

However, the ijma must have a Sanad. Ijma becomes an opinion without a proof that supports it. It must be based on the divine revelation or the teachings of the holy prophet.

There are two types of Ijma. Explicit Ijma is when all the members of the committee express their opinion in any form. Implicit Ijma is when some of the members remain quite despite given a chance to express their opinion on a certain Ijma. It thus does not include the agreement of all the members. Abdullah bin Hamid

Ali," Scholarly consensus: Ijma': between use and misuse,"²⁷

The members of the committee must be educated and experienced in the Islamic teachings. Ijma provides an opportunity to the Muslim community to exercise their rationale but within the confines of the already established rules.

Secondary sources

Qiyas

Qiyas is the another source of law. Its literal connotation is to draw parallels between two things.

If an issues arises and the solution could not be deduced from the primary sources of Islamic commandments that one can resort to drawing analogies between two similar incidents.

Qiyas thus ensures that the followers of Islam reach a judgment regarding issues that are not mentioned in the Quran.

Ijtihad

The literal meaning of ijtihad are of mental or physical effort. It is in fact the personal effort of an expert to find answer for a problem.

A person who is an expert in the Arabic language, religion, holy scriptures and the ethos of jurisprudence is suited to perform ijtihad. Ijtihad must not be performed if other sources of Islamic law are adequate to provide the solution to a given concern.

God allows individuals to exercise their own intellect in matters in of religious significance. Quran says, "It is not (right) for the believers to go forth all tighter (for jihad). So why should not a party from every section of them (the believers) go forth to become learned in reliogion."²⁸

Ijtihad provides an opportunity to clerics to exercise their own mind and find answers to the queries.

Maslahah

Here the goal of Sharia is to protect the faith, life, peace, property and children of individuals. The purpose is purely altruistic and it aims to bring positive outcomes for a large number of people. It is important to note here that Hobbes also considered self-preservation an important motive. This motive led him to imagine a commonwealth in which the individuals sign the social contract.²⁹

However, unlike Hobbes's leviathan, Islam encourages men to engage in certain activities that promise reward and protection. Muslims are encouraged to discipline themselves in order to maintain moderation. Thus one of the Masalahah is that people should eat in moderation. These and certain commands of Islam are not forced on Muslims but gives each Muslim to choose for himself.

There are a different kind of Maslahah. First and foremost is the essentials. This encapsulates ideas that are important to the religion of Islam. These include religion, life, intellect, ancestry and material goods. Therefore, in order to protect one's religion one must perform the daily prayers. And similarly there are Islamic laws to protect one's property.³⁰

The aforementioned five principles are protected visa another set of rules that

are important but not essential for survival of community. For example, Islam grants the traveler certain leverages with respect to the daily obligatory prayers. These and many other leverages ease the life of Muslims thus ensuring that they don't face any difficulties. Lastly embellishments refer to acts that help to achieve higher goals in this life and the life after. Thus if one follows the moral dictates of Islam, one is granted the pleasure of god. There is certain condition which must be met for a judgment to be considered valid. The *maslahah* must be genuine. It must benefit all people and is not valid if the purpose is to benefit only a small fraction of people who are rich. Most importantly, it must be in line with the previous teachings and lessons of Quran. For example, *Riba* is prohibited and it cannot be legalized under any circumstances.

Maslahah aims to safeguard the rights of individuals by implementing certain laws. It also aims to make things easy for the believer and give certain leverages. This in turn makes the believer abide by the Islamic law because he/she knows that it is for his/her benefit.

Istihsan

“It literally suggests, “to (deem) something good”³¹

. The jurist might divert from the original law in order to tackle a new situation. Critics cite example from Quran. For instance, Islam encourages women to dress modestly and protect themselves from the male gaze. However, it does allow medical treatment from the person of the opposite gender. *Istihsan* considers the needs of human beings and it gives certain leverages to them as is suggested in the aforementioned example. Islam is a religion of peace and it aims to ease matters for its followers.

Urf

“It literally suggests, “that which is known”³²

It refers to the society's customs and laws. However, a custom is not accepted if it is not applicable to the *sharia*. Hobbes suggests that the world without the law is a jungle in which human beings are ready to cut each other's throats. When Islam was spreading, there were certain customs that the Arabs practiced. Most Arabs killed the girl child. Islam however rejected such customs for the betterment of humanity. Thus, Hobbes is right when he says that human beings need a law because of their egoistical nature.

Istishab

Istishab means that a law must remain valid until or unless there is a revelation that contradicts it. For example, if a person is missing then his rights will remain intact unless or until the news of his death is revealed. This means that no one can inherit his property for he is still believed to be alive. Hobbes' idea of the commonwealth is rigid. He does not make flexible changes in the form of government. He believes that a dictator like ruler must rule the people. Thus his idea of law is very rigid. Islam offers flexible changes to suit new trends of modern day life.

Conclusion

Thus this paper attempted to depict different branches of *Sharia* that can be

consulted time and again to create valid rules. It also depicted that the idea of morality is prominent in almost all of the medium of Sharia. Islam places the human at the center of its subject matter. The sole purpose of the Islamic teaching is to make man realize that he is indeed a superior kind of creation and that he can act as per the commands of Islam. This paper has therefore depicted that modern theories of law are somewhat ill equipped to understand the very nature of man. The social contract theory, specifically, does not focus much on the citizens but more on the ruler. Islam talks about the happiness of the greatest number of people.



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