

Islamic Jurisprudence as a Source of Law or an Alternative to Law?

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Abstract

In this research, a very important issue has been studied, which answers some questions which are: is there a need for legislation in the existence of jurisprudence in an Islamic country? Is there a need to legislate jurisprudence in the form of law? Should the judge be unrestricted to make a decision from the jurisprudential heritage of Islam?

In this regard, we have concluded from this research that jurisprudence is the essential source of law, but it cannot be an alternative to the law since the law has its own characteristics which are not found in the jurisprudence. Amongst these characteristics, the most important feature of law is that the law is binding and enforceable as previous jurists have pointed out to this difference and said: "There is no difference between a Fatwa and Qaza (court judgment), except that the mufti informs of the ruling on a point of Islamic Law, and the judge enforces it." Therefore, in those ijtihad matters (Jurisprudential Issues) about which the schools of jurisprudence have different point of views, or there are different opinions in the Hanafi School of law, based on the requirements of this era, it is necessary to give preference to one opinion through legislation of jurisprudence over others, and judge should be obliged to practice it, and the decision in such controversial issues should not be submitted to the judge's will; because the judge in his personal capacity may not have the capability to prefer one opinion over others. If we suppose that some judges have this capability, they may not have enough time to study all these issues. Thus, preference of jurisprudential matters should be carried out by a group of scholars who have capability of preferring some issues over others and have expertise in this field, and this is called legislation of Islamic Jurisprudence.

In this regard, it is also worth mentioning that the presence of preferred saying or decision (Rajih) in Hanafi Jurisprudence does not negate the need for the legislation of jurisprudence since these are not specified for Fatwa in the present era, because

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many of those preferred sayings need to be revised a lot since the preference of a large number of these sayings is based on reasons that have changed in present time , so the same manner of preference should be applied to these different viewpoints as our jurists used to practice, and review the preference of such issues as they did in similar situations.

In addition, there are some issues that arise in every era, and such issues are called Nawazil (contemporary issues). Such issues are existing on a large scale in the current era because the life style changed and developed unprecedentedly, and it is impossible to have the rulings of our ancient jurists about it, because these issues did not exist then, so now the solution of these issues should be presented in accordance with the principles of Islamic Sharia, which reveals need for legislation of Islamic Jurisprudence.

Moreover, there is another type of legislation that the existence of jurisprudence cannot dispense us with it. It is the law-making that takes place in the field of restriction of allowed things (Mubah) according to the Sharia rules since such issues have not been studied in the jurisprudential heritage, and it was not possible to study them because they are subjected to temporary benefits and harms and they change time to time. In short, jurisprudence is the source of the law, but it is not an alternative to the law, so law-making must be carried out based on jurisprudence.

Kew words: *Legislation, Ijtihad, preference, restriction of allowed things, fatwa.*