

A Critical Study of Wael B Hallaq's Understanding of Islamic Law

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Abstract

Today, Islamic law and the Islamic state are two topics that are hotly debated around the world. Among the Western scholars where Islam, the Prophet of Islam, the mission and teachings of the Prophet were the subject of interest, there are writings and speeches on contemporary Islamic state and Islamic law, Research and criticism have become important topics for many reasons. The most important of which is that the existence of the state in the West is in jeopardy and the main reason for this is the structure of the state that man has devised and which has established its supremacy over state institutions and state law. New forms of conflict began to emerge. Just as it is the way of the people of the West to turn to Islamic teachings in every matter. Similarly, in this case too, Islamic teachings were turned to research, and criticism on Islamic law and the Islamic State began. Although Ignác Goldziher, Duacan Black Macdonald, Joseph Schacht, Norman Calder and Coulson had a lot to say about Islamic law. However, in the modern state context, no one worked on Islamic law. The responsibility for which was taken up by the eminent professor of the 21st century, Wael Hallaq. Hallaq's views on Islamic law are of twofold:

1. Hallaq does not consider Islamic law to be divine, but human evolutionary and variable.¹

2. According to Hallaq, in the past, Islamic law interacted with societies 'but the rule of law remained stable² while it was used later, especially due to the colonial effects that deprived it of its intended purpose.³

From the first point of view, he gives an overview of the conditions of the pre-proclamation of prophethood and the post-prophethood of Makki life. It also provides details of Madani life and the early evolutionary period, i.e the formative period, in the context of human theory of evolution.⁴ From 2nd point of view, Islamic law as a philosophy of morality is considered unworkable due to disagreement with modern nation-states.⁵ A research and critical review of the first point is under discussion in this article.

Key Words: Islamic law, Islamic State, Pre-Islamic Period, Islamic Period, Sources of Law, Formative Period

Introduction

According to Hallaq, the sources of Islamic law are variable. Similarly, the laws derived from these sources are also variable. The role of the jurists is of fundamental importance in presenting the sources of Shari'ah as legal theories. In order to understand Hallaq's views, it is first necessary to understand his views on the sources of Shari'ah.

Sources of law

According to Hallaq, the three main sources of Islamic law are as follows:

1. Arabian Customary Law
2. Near Eastern Legal Culture
3. Quranic reforms

According to Hallaq two sources of Islamic law belong to pre Islamic period. These are⁶:

1. Pre-Islamic Arabian traditions (Customs) in short it can be called Arabian Customary law.
2. Social, Cultural and Political Variations(it can be called Near Eastern Legal cultures)

While third source of Islamic law was added by Prophet Mohammed SAW, Hallaq renamed it as follows:

3. Quranic Reforms.

In the context of the first two sources, he attributes the third concept to the Prophet (peace be upon him) and does not consider it to be inspired. He also gives examples of Qur'anic reforms. And in all these examples, the law is based on change and evolution, and the same change is seen in the whole formative period. The theory of this change (Theory of variation of Islamic law, given by Hallaq) is clearly stated in three books, *Origins and evolution of Islamic law*, *History of Islamic legal theories*, and *Sharia (Theory, Practice and Transformation)*. In fact, the biggest misconception of Hallaq is related to the basic sources of Islamic law. Which he considers sources of law its description is different in Islamic law, it is unnatural to consider Islamic law as mere human law. And it is also unfair to determine the direction of understanding its change and evolution as a social need and to know the effect of geographical factors on it. The explanation of these ideas is given below.

Three basic questions

Here we need answers to three questions in order to understand the concept of Hallaq.

1. Who formulated Islamic law, what has it got to do with government and society, and what is its status in the modern nation-state in the context of its past?
2. How did Islamic law come into being?
3. What are the sources of Islamic law?

The answer to the first question

According to Hallaq's view, the answer to the first question is that Islamic law, unlike modern state law, was not enacted by the government or the state.⁷ (According to Hallaq's view, government and state are two different things.⁸) Rather, it was self-imposed by society and its legal experts, and the Shari'a interacted with traditional social law, but the rule of law prevailed.⁹ Modern state law is formulated by the state. Legal experts simply study it, explain it, and judges make decisions accordingly.¹⁰

The answer to the second question

The answer to the second question is that Islamic law was formulated through legal theory, which was based on the Qur'an. Then the ideology of

Sunnah and Hadith flourished and other jurisprudential sources came into existence.

The answer to the third question

The answer to the third question from the point of view of Hallaq is that Islamic law has three main sources. Two of them belong to the pre-Islamic period while the 3rd one belongs to the Islamic period which we have already mentioned.

Sources of Pre-Islamic Period

- I. **The first source** relates to Arabian Customary law, the details of which are as follows.

Hallaq says that Islamic law includes pre-Islamic Arabian Traditions, he writes in Sharia: "although many new rules and principles were introduced, the old institutions and ancient customs remained largely unchallenged. Indeed, much of Arabian law continued to occupy a place in sharia, but not without modification."¹¹ He narrated examples of Qasams, Palm Trees and blood money¹² to relate Islamic law with Pre-Islamic arab traditions.¹³ He says: "Examples include, among many others, prayer(salat), fasting, alms tax,¹⁴ mercantile transactions, contracts¹⁵, forms of sale, barter, retaliation and Qasama."¹⁶

2. **The second source** is from Near Eastern Legal Culture, which is described below.

To discuss about **Social, Cultural and Political Variations (Near Eastern Legal Cultures)** it is necessary to understand about social, political, religious, economical and geographical situation of arabia before the advent of Islam. Hallaq says: "Long before islam appeared on the scene, Mecca and Madina had a long history of settlement and formed part of the **cultural continuum** that had **dominated the near east** for millennia. The two towns were not at the center of imperial culture, but they were tied to it in **countless ways**. Prior to the arab expansion in the name of islam, arabian society throughout the region had developed the same types of institutions and forms of culture already long established in the lands of the **south and north**, a development that would later facilitate the arab conquest of the entirety of that region, including its **two major empires**."¹⁷ He narrated examples of fairs and trade to relate Islamic law with Near eastern cultural variations.¹⁸

3. **The third source** is the Qur'anic reforms, the details of which are as follows. Ritual practices(nmaz ,wazu, haj o umrah etc) ,Social Practices(Dowry ,Marriage and divorce system etc),Commercial Practices(Alms tax,business ,palms tree business etc) and Warfare Practices(booty etc) are major discussions of Hallaq to explain prophetic policies about Quranic reforms.¹⁹**Following policies are used by prophet according to hallaq to develop new laws²⁰.**

Innovations

Adaptations

Additions

Reformations

According to Hallaq, Islamic law continued to grow in the post-complete format period based on the third source. According to Hallaq, the Prophet of Islam himself did not give the complete law. His words are here below: "It was within the Hejazi cities of Mecca and Yathrib – later renamed Medina – that a person called Muhammad came forward to proclaim a replacement religion with a political order at its center. By the time of his death in 11/632, he had left behind a little state and clear notions of justice, but with underdeveloped ideas of law and a good less developed judiciary. Soon, however, Islam was to overcome lands east and west, starting from western China to the Iberian Peninsula. Along with this territorial expansion, the new religion generated a full-fledged, sophisticated law and system within the short span of the three-and-a-half centuries that followed its inception."²¹ According to Hallaq, the Prophet (peace and blessings of Allah be upon him) also left the political and legal issue of his succession unsettled. He writes: "In 11/632 the Prophet died, leaving unsettled the question of succession. The dispute over governance was resolved in favor of Abu Bakr, a distinguished Meccan of senior age who had adopted Islam when Muhammad was still preaching his new religion in the city. Abu Bakr's short tenure as caliph, however, allowed him to accomplish little more than to quell the so-called apostasy rebellions that erupted among the Arab tribes upon the death of the Prophet. By the time of his death in 13/634, order was restored, the tribes having been largely subdued. With this reassertion of Islamic dominance over the entire

Arabian Peninsula, the nascent state emerged all the more powerful, with a reinforced assurance of its military strength and religious conviction.”²²

In the above issue and in the formation of the complete system of state and law, among his successors, Hazrat Umar played an important role and Hallaq calls it World Order II. He writes in sharia: “Umar I promulgated a number of ordinances and regulations pertaining to state administration, family, crime and ritual.”²³

Conclusion about sources of law

From the above discussion it is clear that Hallaq wants to say:

- 1) Macca/yasrab or hejaz was a center place of market and worship.
- 2) its people were connected with all over the world in different ways.
- 3) They have different lifestyles and cultural set up.
- 4) Arabian culture, religion and law is a combination of different civilizations ,territories, places, people and empires. i.e Arabs have almost nothing themselves all is collected from different sources. Hallaq says: “All in all, the peninsular arabs maintained extensive relations with their neighbours to the south and north, whom they shared ethnic, linguistic and cultural grounds. The Meccan traders,as well as the prophet and his companions ,were thoroughly familiar with the cultures of the fertile Crescent and yemen, and developed a sophisticated knowledge of legal practices which ,through various channels ,came to inform the law that was to develop in time into Sharia.”²⁴
- 5) His words like “it is said or evidences are found etc” are not acceptable without research or evidence.²⁵
- 6) His sources are almost secondary /not primary. And Some material is copied from a book of W.B Hallaq and pasted in another book of Hallaq.
- 7) His ideas about the Holy Prophet Peace Be Upon Him and Islamic law are related with his pioneers. These are not true but only their assumptions.

Understanding of Hallaq about Formative Period

Hallaq introduce Formative Period in these words: “That historical period in which the legal system arose from rudimentary beginnings and then developed to the point at which its constitutive features had acquired an identifiable shape.”²⁶

Writing about formative period Hallaq takes a literature review and worried that only three books are before him about that topic, he specially addresses to Schacht's book; *Origins of Muhammadan Jurisprudence* "According to Schacht's opinion, formative period includes middle of the three centuries. And another opinion is here that Schacht was wrong, formative period is completed in middle of 4th century. Hallaq's own point of view is something different from both of these ideas.²⁷ He has a middle position to divide the period into two forms on the basis of formation and identification of shariah. According to Hallaq Islamic law has two traits.

1. Essential Attributes

2. Accidental Attributes

According to Hallaq, total attributes of Islamic law are four in numbers, these are:

- (1) The evolution of an entire judiciary, with a full-fledged court system and law of evidence and procedure.
- (2) The full elaboration of a positive legal doctrine.
- (3) The complete emergence of a science of legal methodology (Legal Theories) and interpretation which reflected, among other things, a large measure of hermeneutical, intellectual and juristic self-consciousness.
- (4) The complete emergence of the doctrinal legal schools, a cardinal development that successively presupposed the emergence of varied systemic, juristic, educational and practice-based elements. (Any other essential attribute, such as, e.g., the religious character of the law, must ultimately and derivatively fall into one or more of those four."²⁸

Essential Attributes

Those attributes that gave it(law) its shape are called essential attributes. From above given four attributes 1st two attributes are named as essential attributes by Hallaq.

Accidental Attributes

From the above given four attributes, the last two attributes are not developed till middle of the 3rd century, so, these are not part of essential attributes and these are named as accidental attributes. by Hallaq. he says: "By the centre of the third/ninth century, the third and fourth attributes had not yet developed into anything like their complete form. By the middle of the fourth/tenth

century, however, all of them had. And This is the cut-off point. All later developments, including change in legal doctrine or practice, were “accidental attributes” that – despite their importance for legal, social and other historians – didn't affect the constitution of the phenomenon we call shariah. With or without these changes, Islamic law, for our present purposes, would have remained shariah, but without the legal schools or the science of legal theory, shariah can't be deemed, in hindsight, complete”²⁹ He is much confused here to explain accidental attributes. It's clear from the above given statement of Hallaq, he could not mention the limit of 3rd and 4th century. However, here is given what he wants to explain? From Hallaq's point of view there is a minor difference between two thoughts about Formative period of Islamic law. And this can be removed by accepting the division of the traits of Islamic law into two forms. The major problem, which is base of difference of opinion is also explained by Hallaq.in my opinion its basically not more than verbal misconception. He approved the concept of Joseph Schacht in his own way by giving a concept of two traits as an argument . it will be cleared in further discussion.

Problem of Formative Period

According to Hallaq, Difference of opinion is because of different wrong assumptions, these are as follows:“Far more complex than plotting the end-point of the formative period is that the determination of its beginning. It is no exaggeration to mention that of all the main questions in Islamic legal history, the problems involved in studying These beginnings have proved the foremost challenging. The problems related to “beginnings” have for long stemmed more from unproven assumptions than from any real historical evidence. Hence, the classic Orientalist creed that the Arabia of the Prophet was a culturally impoverished region, which when the Arabs built their sophisticated cities, empires and legal systems, they could not have drawn on their own vacuous cultural resources. Instead, it's maintained, they freely absorbed the cultural elements of the societies they eventually conquered, including (but especially) the Byzantino-Roman and Sassanid civilizations. In this account, Syria and Iraq become the loci of legal transmission.”³⁰ The main problem of western scholars is about confusion of determination of “Exact time duration of Formative Period” If they start it from “Prophetic

Period” then its necessary for them to take sources of law from that period and by accepting it, the base of legal theory is automatically related with that period, while they consider the development of legal theory from 2nd century. So, it’s very difficult for them to prove their assumptions right about development of Islamic law.

Misconceptions about Formative Period

There are a few misconceptions about “beginnings ‘of formative period and “Sources of Islamic law”. The Concept of division of formative law into two attributes by Hallaq is because of misconception about “Beginnings of Formative Period” and historical development of” Sources of Islamic law”.

Beginnings of Formative Period

Most of western scholars considered the beginning of Islamic period from 610 CE, While commencement of Formative period from 1H i.e. 623 CE. Hallaq himself and many others take most effective concept of formative period from 11H/632C.E-350(450)H/982(1082)C.E.

Hallaq says: “By the time of his death in 11/632 ,the founding father of Islam had left behind a little state in medina (previously Yathrib) whose ideological props were fiercely uncompromising moral principles fitted into a longer context of tribal justice .With the rapid conquest of lands lying between western china and Iberian Peninsula , ‘The new religion generated a full fledged, sophisticated law and system within the relatively short span of the three and a half centuries that followed its inception.”³¹

According to Hallaq’s concept of “Essential Attributes” and” Accidental attributes” both of these are related with Prophetic Period. Then why and how he can say about development of formative period in 350-450H? Other Basic problem is that he can not mention the names of “Essential Attributes” and” Accidental attributes”. In our opinion, if he wants to understand formative period according to his theory of attributes of Islamic law, then, he must accept “two sources” are base of Islamic law in beginnings, these are “Quran and Sunnah”. And What he called accidental attributes these are not separated from “Essential attributes”. These are other sources of law i.e. “Consensus and Qiyas i.e. Ijtihad “. According to Muslim Scholars “Essential Attributes” are called “Primary Sources of Islamic Law “while “Accidental Attributes” are called “Secondary Sources of Islamic Law”.

Development of "Sources of Islamic law"

According to western approach the basic concept about sources of Islamic law is taken after death of Holy Prophet Peace Be upon Him. The concept of sunnah, hadith and other sources including historical development of law in the form of legal theories is considered after half of 1st century to 350H. And in Hallaq's understanding It can be considered as "Accidental Attributes" of Islamic law. Hallaq is also much confused about "Accidental attributes" of Islamic law. According to his point of view if these are related with half of 3rd century to half of 4th century then why Sunnah, Hadith, Consensus and other sources are considered the part of Accidental attributes? Here is given the contradiction between his assumptions: Here are given the 3rd and 4th Attributes from essential attributes which are named as "accidental attributes" by Hallaq:

(3) the complete emergence of a science of legal methodology and interpretation which reflected, among other things, a large measure of hermeneutical, intellectual and juristic self-consciousness;

(4) the complete emergence of the doctrinal legal schools, a cardinal development that successively presupposed the emergence of varied systemic, juristic, educational and practice-based elements. (Any other essential attribute, such as, e.g., the religious character of the law, must ultimately and derivatively fall into one or more of those four."³²

Here is given the concept of their development, Hallaq says: 'By the centre of the third/ninth century, the third and fourth attributes had not yet developed into anything like their complete form. By the middle of the fourth/tenth century, however, all of them had. And This is the cut-off point.'³³

After migration to Medina an interesting thing is that, he discussed the evolution of law after the death of the Holy Prophet Peace be upon him. For example, by giving the concept of Sunnah of Holy Prophet Peace Be Upon Him He says:"However, some evidences indicate that the Sunnah of the Prophet became an established concept soon after his death."³⁴ Here is also a problem with western thinking about Islamic law that, they cannot clearly mention the time duration of development of both Primary and Secondary Sources Sources. it's the basic reason of their misconceptions and variations

in their ideas about Islamic law. However, the summary of Hallaq's ideology about Formative Period is given in the following graph.

Graphical Representation of Formative Period

Sr.No	Period	Attribute	Explanation
1.	First half of First Century	Development of "Essential Attributes"	The attributes are not nominated by Hallaq. However, "Concept of development of Sunnah of Prophet" is related to that period.
2.	2 nd Half of 1 st Century	Development of "Essential Attributes"	The attributes are not nominated by Hallaq. However, "Concept of development of Hadith of Prophet" is related to that period.
3.	2 nd To Half of 3 rd Century	Development of "Accidental Attributes"	The attributes are not nominated by Hallaq. However, "Concept of development of Legal Theories" is related to that period.

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4.	Half of 3 rd to Half of 4 th Century	Development of "Accidental Attributes"	The attributes are not nominated by Hallaq. Assumptions cannot support his ideas.
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Conclusion about formative period

Hallaq basically explains the process and stages through which Islamic law was derived. However, it is clear that his "concept of variation of Islamic law" about development of Islamic law can be understood through its history. It's clear that according to Hallaq, not only Islamic law is derived but also its Sources are evolved and developed historically. The sources of Islamic law are the basic parts of "Legal Theory" 'As it is a historically developed theory so its sources are also historically developed things. His concept of variation of Islamic law is also related with Variation of Sources of Islamic law, from sources; Quranic evolution was completed in life of prophet, while sunnah development was completed in Caliph period and Hadith development completed in Ummaid period and all other sources were developed later on. During development process ijihad and ijma played their role in each period. All other sources of law are developed by jurists. Different jurists gave birth different theories of law. These are called legal theories and this process was completed in middle of fourth century. I called his concept "The Concept of variation of Islamic law" because it varies all the time from different dimensions for different objectives. Here is also a need to work his different dimensions for variations in his concept of Islamic law and his objectives for this variation. Hallaq also criticizes Western scholars here, especially Joseph Schacht about ideas regarding formative period of law. And instead of attributing the formation of Islamic law to Imam Shafi'i alone, he considers it a full-fledged almost 350-year efforts of a group of Jurists along with Caliphs of Islam. The sources of legal theory were developed from 610-950 C.E with above mentioned attributes³⁵ by combined efforts of law experts (Mufti, Author Jurists, Judges (Qadi) and Law Professors).³⁶ Each of these Islamic sources i.e Qur'an (Prophetic Period), Concept of Sunnah and abrogation

Caliph's period), Concept of Hadith (Period of Umar bin Abdul-Aziz) and all other sources (Secondary sources of law) are developed as Legal theory by Jurists in the formative period. Hallaq considers these sources, developed by the jurists. All these sources are variable and also, in modern times, Islamic law is subject to change as a result of colonial influence.³⁷

Conclusion about Hallaq's understanding of Islamic law

The first two of the above three sources are the invention of Hallaq for Islamic law. According to Muslim ideology, they are not sources but external factors. In this regard, the purpose of the Shari'ah was that where there was a need for change, they (the sources as well as the laws) were changed. Where there was a need for reform, they were reformed. Where there was a need to eliminate, they were eliminated and where there was no need to change they were continued. They were not separate sources but factors under influence of Islamic law. And this is how a natural divine law is formed. Since it relates to society, it is important to decide whether to amend, repeal or enforce the first laws in society. At the same time, the law, which is universally accepted, clarifies for the future the principles by which legislation can be enacted. And this attribute is fully present in Islamic law and its sources. Hallaq certainly connects the Islamic law of the past to society, but the bases of this relationship are wrong, so the wrong effects and consequences come to the fore. Hallaq considers the formation of complete Islamic law as an attempt of the jurists, While, the jurists did not formulate its principles nor did they formulate a law from their own self-made principles, but their work was purely to understand the Shari'ah and to compile the Shari'ah. The complete structure of the original Shari'ah, i.e the sources, was formed in the time of the Holy Prophet (Peace Be Upon Him) and was based on divine revelation. Similarly, in the current society, the views that are presented regarding the relationship between Islamic law and modern states, are true to some extent, because the current structure of modern nation-states is a product of colonialism, However, this does not mean that Islamic law is unenforceable in these states or that this colonial structure has always used Islamic law. Rather, it is the power of Islamic law that the Muslim majority does not trust in modern nation-states and their institutions And the voice of stability and application of Islamic law continues to be raised. However, it is also a fact

that this voice is suppressed by the rebellious vested interests of colonial Islamic law. And the performance of the institutions is in question. Due to which there is Anarchy and disintegration in Muslim States. Because the performance of these institutions is also under the influence of colonialism. **The real issue is the application of Islamic law, and the autonomy of modern state institutions in the light of Sharia**

Now for this, considering the state and Islamic law as contradictory, to connect modern national state institutions with the institutions of the past and the disregard of current social, political, cultural and moral needs to make Islamic law impractical for the future is due to a misunderstanding of Islamic law. Islamic law is not a static thing, nor does it have such a variable status that the whole edifice from sources to details is based on social change, but the nature of its change is based on the unchangeable principles with Inspirational attribute in its details. It has infinite interpretations in its limited words.

From an Islamic point of view, there are two main sources of Islamic law:

1. Qur'an
2. Hadith (Sunnah)

Some scholars cite four basic sources and add following two to the above.

3. Consensus
4. Qiyas (Ijtihad)

In addition to the above sources, the following sources are also considered as secondary sources.

5. Istihsan
6. Maslaha

Hallaq called these above given sources as 1st Legal Theory³⁸ and after role of Imam Ghazali, and Imam shatabi he called it 2nd Legal Theory of Law (Maqasid ul Sharia)³⁹. After that the addition of law of necessity and the role of modern scholars like Rashid Rida, Syed Qutab etc is regarded as significant in variation of sources and derivation of law in Islamic judicial system.⁴⁰ Hallaq's view of all these sources is that they came into being according to the needs of society. So, he demands a new theory of law in the modern state period.⁴¹ He considers it a human endeavor, which is not true. However, the Shari'ah is sufficient for the fulfillment of all human needs and

for eternal guidance it was revealed as an inspiration (revelation). Muslim jurists can derive the solution of their problems from stable revealed texts with legal logical and sharia arguments. This misunderstanding of Hallaq must be dispelled. All these sources have been deduced by experts for the guidance of man. Edited them and the principles of their use were extracted by jurists in the light of Sharia. The sources themselves are not human endeavors. The second misconception of Hallaq that the jurists formulated Islamic law and that legal theory is a fictitious thing needs to be corrected. The complete set of details of legal theory was taken from the Shariah and then every law was taken according to this theory. Although Islamic law satisfies a social need, the jurists' goal was not merely to satisfy a need, rather, it was to follow the Shari'ah according to the established Shari'ah principles so that the divine pleasure could be obtained.

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