

A critical study of Hallaq's "Theory of Variation of Islamic law"

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Abstract: *Much has been written in each part of the world about Islamic law. In our times "Modern State" based on "Modern Law" is a big challenge for Muslim communities to adapt "Modern Law" as "Islamic Law" Or to use sources of "Modern Law" as "Sources of Islamic law. From historical development, society is under variation so law is also variable thing and it is an acceptable and recommended concept in modern world.in the modern scenario it's a big challenge for Muslims to deal with this concept of variation in law and its sources. From Islamic history variation in Islamic law is adjustable with concept of Ijtihad.in this sense its acceptable concept to modify Islamic law according to need of society in accordance with modern law. Then why modifications in Islamic law in accordance with modern law are opposed in Muslim communities or states? What is difference between concept of variation in Islamic law developed by Muslim traditional communities and modern western scholars?*

Key words: Islamic law, Sharia, Theory of Variation, Formative Period, Modern Period

Introduction

From Western Scholars Goldziher¹, Schact², Joynboll³, Coulson⁴, Goiten⁵ and Hallaq⁶ worked on Islamic law and its sources. At some points they opposed each other while sometimes they are agreed with each other. One thing is most common in them that they are agreed to prove Islamic law in-authentic or non-practical while opposition is about arguments to prove their assumptions.⁷ About history, Usul ul Fiqh, and sources of sharia, there exist different thoughts in western society.⁸Hallaq's ideology is much different from rest of others.⁹His ideology has three main themes. These are:

- I. Concept of variation of Islamic law and its sources¹⁰ with reference to past and present situation of society.

2. Concept of variation in origins, evolution and development of Islamic law during formative period.
3. Concept of contradiction between Modern state and Moral Philosophy with reference to sharia.¹¹

In my previous article “A critical study of Wael B. Hallaq’s understanding of Islamic law”¹², I discussed understanding of Hallaq about historical development of **Sources of law** in formative period and in this article, I briefly discussed his **Ideology of Variation in Islamic law** in theoretical and practical form including all periods till modernity.

Introduction to “Theory of Variation of Islamic law”

Hallaq himself has a number of misconceptions about Islamic Law and its sources. Hallaq’s ideas are multidimensional. Sira, Hadith, Fiqh, History and Quranic Sciences are also parts of his research. He has mixed a number of misconceptions and is misguided in this way. Basically, His work is of five types:

1. Origins (Sources) of Law (based on concept of **Variation**)
2. Evolution of Law (based on concept of **Variation**)
3. Development of Law (based on concept of **Variation**)
4. Modification and Reduction of law (based on concept of **Variation**)
5. Implementation of Law (based on concept of **Utopia**)

Hallaq’s theory of variation of Islamic law is based on following four points.

1. Islamic law and its principles are variable in its nature.¹³
2. It has been deviated from its roots because of political impacts.¹⁴
3. It is insufficient and non-practical and only works in the private sphere as compared to European law.¹⁵
4. It's impossible to establish an Islamic State based on Islamic Law without reconstruction of moral philosophy in context of developing modern projects in modern state.¹⁶

In the first one case we also agreed with him that Islamic law is variable. But the nature of variation is only restricted to issues of society. The sources of law and principles to determine ways to deal with questions are not variable. **The major problem is that the sources of Islamic law considered by Hallaq are different with respect to Muslim Theology.**¹⁷ The theory of variation by comparison between past and present, presented by Hallaq is not correct. The Shariah has a priority position among Muslims, the only difference is the lack of application of the rules of the Shariah, which is due to Ignorance, comfort and indulgence, and it is not a defect of Sharia rules. The majority of Muslim societies did not accept the colonialist distortions, due to which the process of conflict between colonialism and Muslim scholars and societies continues. And the scholars who opened the ways of distortion in the Sharia have been rejected by the majority of the Ummah. Examples of these modern scholars are given by Hallaq in his three books: Sharia (Theory, Practice and Transformation), Introduction to Islamic law and History of Islamic legal theories. Although he has drawn wrong conclusions from this and the idea of rejecting innovation and adopting the path of innovation actually indicates the motives behind it which led him to accept Islamic law as a variable rather than as a moral one (the colonial effects are hidden in this variation).

In the 2nd one case there is contradiction b/w his own thoughts. He accepts that Islamic law was independent law in the past; the Shariah had priority over all customs and traditions, while in the modern state every moral order (religion) has a secondary status. Similarly, Sharia interacted with societies in the past while

colonialism, in the modern state, used it for political purposes. Hallaq has no strong evidence or logic to prove that Sharia is politics dependent law. Only "state's law is politics dependent. Islamic law is not only state law he himself accepted it. It is also not parallel to politics. State itself is under rule of Islamic law."¹⁸

For 3rd case, it is observed that In his own book Sharia he called Islamic law, an insufficient and impractical law and is limited to private sphere (personal life) of person.it is his misconception, Really Islamic law is sufficient and practice able for whole society. He has no logic or strong evidence to prove it impractical and insufficient. He extracts his idea by comparing it with European law. And there is a much need to arise a number of research questions on base of this comparison. This comparison itself is contradictory. (Having different "Origins and Moral Philosophies").

In fourth and last one assumption he compared two contradictory things which are illogical itself. Islamic law is based on Revelation while Modern State's law is based on Human thoughts. So, there are no comparison b/w two contradictory things.

However, His first assumption is under consideration and rest of others can be analyzed on base of critical analysis of this one assumption. His approach about, Pre-Islamic Arabia, Personality of the Prophet, and His message of reformations, development and history of Islamic law is based on "Concept of Variation" of law. Therefore, Hallaq's understanding of Islamic law can be introduced as "Theory of Variation of Islamic law". It is defined as:

"Islamic law, its sources and principles are variable in nature. Islamic law is man-made and historically developed law affected by cultural diversities, social, ethical, spiritual, moral and political changes and religious authority is very important for its modifications and reformations".

Basics of Hallaq's theory of Variation of Islamic law

This theory is based on Terminological Differences in Islamic literature. **Sharia, Islamic law or Fiqh** and **Muslim's law or Muslim State's law** are different things. Sharia (only Quran and Hadith) is not variable while Islamic law is variable. The variation of Islamic law is based on arguments extracted from Sharia (Therefore this variation is not against spirit of Islam because it is based on arguments from Sharia i.e. The Quran and Hadith or Sunnah. So, It is also renamed Sharia law).In view of current situation, We want to introduce two other terms "Muslim's law" and "Muslim state's Law" (Its variation can be affected by imperialism or other social, political and cultural activities, therefore it may not be supported by Sharia). Misconceptions or Confusions are due to misunderstanding of these terms, their concepts and their implementations.¹⁹

Misconceptions and Contradictions in Hallaq's ideology

Hallaq has a number of misconceptions about the "concept of variation of Islamic Law". He is confused himself and considers this confusion is with all the people. From his confusion and misconception, it's clear that whom (Western Scholars) he addresses all are confused and have misconceptions about Sharia and Islamic law. According to Hallaq, there are a number of misconceptions about Islamic law or Sharia. He says:

"Islamic law or sharia has become an ugly term, as often associated with politics as with the chopping off of hands and the stoning of women. An endless array of popular books has distorted sharia beyond recognition, confusing its principles and practices in the past with its modern, highly politicized, reincarnations."²⁰

From given statement it's clear that According to Hallaq Islamic law or sharia are synonyms and Islamic law or sharia is distorted by politics. Present sharia or Islamic law is politicized and beyond recognition. There is a difference b/w present and past Islamic law /sharia.

It's clear that the modified and varied form of law today is considered Islamic law or sharia by Hallaq. According to Hallaq, Modifications or variations of law are the results of political use of Islam. He says in his book "An Introduction to Islamic law":

"This book attempts to correct misconceptions about Islamic law, first by giving a brief account of its long history and then by showing that what happened to it during the last two centuries made it what it has become. While historically, it did its best to distance itself from politics and to remain an example of the rule of law, it has now ironically become a fertile political arena, and little else in term of law."²¹

Here is also a contradiction in his ideology. How can a law be an example of rule of law without politics? An interesting thing which has been clearly seen in Hallaq's ideology is that, in his book "Authority, Continuity and Change in Islamic law" he accepts and approves himself that Islamic law is variable thing and this variation is in its nature. (Then, why did he call the modifications of Islamic law as that law is highly politicized?) in his book Authority he writes:

"I shall argue that legal change was not incidental to Islamic law but that it was channeled through processes that were embedded in the very structure of law."²²

He also misused The Islamic concept of "Ijtihad". In his article "Was the Gate of Ijtihad Closed?" He tried to prove that the closeness of Ijtihad was under political pressure.²³

Another contradiction in ideology of Hallaq can be seen from following passages of his book Sharia (Theory, Practice, Transformations):

"Following the collapse of the Soviet Union, Islam has come to fill a pivotal conceptual role of an antithesis of the west, the self-described abode of liberal democracies and the rule of law. with the wide spread rise of the islamist movements during the last three or four decades so called Islamic law or sharia has increasingly occupied center stage in the languages and practices of politics –mainly in the islamist camp itself, but also in the western world."²⁴

It's clear that, He considered it an antithesis of the west. About practical value of Islamic law, He says:

"It could never match up to any version of European law, it was seen as ineffective, inefficient, even incompetent. it mostly applied to the private sphere of personal status, having early on "divorced, itself from "state and society."²⁵

Why Islamic law divorced from "State and society" as compared to European law? If it's divorced then how can he say that it's highly politicized? It's amazing when he says himself that Islamic law and its application is independent of the 'State'.²⁶

It is clear from Above given discussion that " Hallaq's concept about variation of Islamic law "is not only an assumption but its confusable reality.

Here it's necessary to understand his concept of variation of Islamic law during the Prophetic Period, Formative Period, Medieval Period, Colonial Period and Modern Period. Now our basic research is to elaborate his concept of variation about Islamic law in different dimensions, perspectives, applications, Comparisons, objectives, historical developments and its nature of variation from Muslim theology and purposes. It's a very vast field to work on Islamic law, but our research is limited to our topic. We have only discussed his concept about variation of Islamic law from a historical perspective. There are different dimensions of work on Orientalists specially Hallaq's ideology about Islamic law i.e., nature of law, theories of law, state and law, sources of law, development of law, variations of law, role of jurists in development of Islamic law, future of Islamic law and Muslim states etc. So, there is a much need to work in this field and we hope our research will be very helpful and motivational work to divert the concentration of scholars to it. It is possible to implement this concept of variation in ideology to all other western scholars working on Islamic teachings.

A short graphical comparative introduction of Hallaq's ideology with that of Islamic Ideology is given below:

Sr #	Topic	Hallaq's Ideology	Islamic Ideology
1	Concept About Personality Of The Founder of Islamic Law.	Ist Announcement of Political World Order by Mohammad.	Mohammad Peace Be Upon Him is a last Prophet of Allah Almighty ²⁷ , Not only a politician.
2	Concept About Sources of Islamic Law.	Three Sources Of Islamic Law: 1) Pre-Islamic Arabian Traditions (Customs). 2) Social, Cultural and Political Variations (Near Eastern Legal Cultures). 3) Quranic Reforms.	Two Primary sources of Islamic law. ²⁸ 1) Quran 2) Hadith/Sunnah (Explanation of Ist one source). Two Secondary sources of Islamic law (Based on Primary Sources) 1) Ijma 2) Qiyas (Ijtihad) Different Tertiary ²⁹ Sources of Islamic Law. (Based on Primary & secondary Sources i.e. Istihsan and Masalih)
3	Concept About Evolution of Islamic Law.	Evolution of Islamic law: Concept of Garrison Towns. Concept of Sunnah. Concept of Hadith.	Extraction and Use of Secondary and Tertiary sources of Islamic law in light of Primary sources. ³⁰
4	Concept About development of Islamic Law.	Development of Islamic Law: Role of Jurists specially Shafi's role to develop Legal Theories.	Development of legal theories. Tadveen Usul ul Fiqh. Role of Imam Azam, Imam Mohammad, Imam Malik, Imam Shafi and Imam Ahmed Bin Hamnbal. ³¹
5	Concept of variation and reduction of Islamic Law.	Colonization of Muslim world under British rule and reduction of Islamic law from universal to personal status. ³² Destruction of Muslim states under pressure of UNO during the Modern Period.	Development of religious and political movements in reaction to face challenges of modernity.
6	Concept About Implementation	Implementation of Law: Development of the concept of	Development of different schools of thought and their implementations in

	of Islamic Law.	Utopia.i.e Concept of "Impossible state". ³³	of specific areas independent of world views. Expounding to all over the world to establish "International Islamic State based on "An Old Islamic Political World Order" of one nation theory and practice.
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From the above graph it is clear that there is a much difference b/w ideology of Hallaq and Islamic ideology about personality of Holy Prophet (Peace Be upon Him), sources, evolution, development and implementation of Islamic law. Therefore, Hallaq's theory is renamed as "**Theory of Variation of Islamic law**".

Bilateral Variations

Variation theory includes bilateral variation i.e., Variation in law as well as variation in sources of law. Variation in sources of law has been discussed in previous articles mentioned above; here are brief details about variation in Islamic law in Ist phase of Formative Period i.e. Prophetic Period. Following examples are discussed in detail by Hallaq, to prove Islamic law as Variable Law.

- Concept of Ummah
- Concept of Qibla
- Relations with Jews,
- Relation with Christians
- Relation with Arab Tribes

Concept of Ummah

There is gradual variation in development of the concept of Ummah. Hallaq explains these variations in following ways:

"Quranic revelation soon began to reflect further independence in the identity of a new Muslim community, the ummah, which had now become entitled to its own law that paralleled, but was distinct from, other monotheistic laws. New verses were revealed, ushering in a list of commands, admonitions and explicit prohibitions concerning a great variety of issues, from eating swine to theft. Throughout we find references to the Jews and Christians and their respective scriptures. But the message becomes ever clearer: if the Jews and Christians were favoured with legally binding revelations, so too are the Muslims. Each community of believers must thus have its own law. The Quran repeatedly stresses that the believers must judge by what was revealed to them, for "who is better than God in judgment."³⁴

Concept of Qibla

There is a gradual change to give a new concept of Qibla in Arabian society. Hallaq explained it as follows:

"Upon migrating to medina, Muhammad began to face new realities, as he now was no longer fighting for recognition but rather stood in the role of leader. He also had to deal with the Medinan Jews who, like the Meccan tribes, opposed him and viewed his novel message with suspicion. Deeply disappointed by their position, he began to veer away from certain practices that the new religion had thus for shared with Judaism. Jerusalem was replaced by the Ka'ba as the sacred shrine of nascent Islam."³⁵

Relations with Jews

Charter of Medina played its role to build a peaceful community in territory. Orientalists considers it the political victory of Prophet (Peace be Upon Him). Hallaq also explains it as the policy of prophet to establish relationships with Jews as follows³⁶:

Even in Mecca, Muhammad already thought of the community that he hoped to create in terms of a political and social unit. This explains his success in organizing the Arab and Jewish tribes into a body politic immediately after arriving in Medina. The so-called Constitution he drafted their points to a mind highly skilled in formulaic legal documents, which is hardly surprising in light of the legal thrust of the Quran and the role Muhammad himself had played as arbitration judge (Hakam).

Relation with Christians

According to Hallaq in Quranic context relationship of prophet with Christians is explained in the verses 47-50 of Sura 5. Hallaq considers Muslims, Jews and Christians three different communities with different laws. He interpreted these verses (47-50) of the Quran as follows:

The Quran turns to the Christians, saying in effect that God sent Christ to confirm the Prophet hood of Moses and the Gospel to reassert the “guidance and advice” revealed in the Torah. “So let the People of the Gospel judge by that which God had revealed therein, for he who judges not by that which God revealed is a sinner” (5:47). If the Jews and Christians were favored with legally binding revelations, so too are the Muslims, the Quran declares. Sura 5:48, which marks a turning-point, states: We have revealed unto you the Book [i.e., the Quran] with the Truth, confirming whatever Scripture was before it ... so judge between them by what God had revealed, and do not follow their desires away from the Truth ... for We have made for each of you [i.e., Muslims, Christians and Jews] a law and a normative way to follow. If God had willed, He would have made all of you one community. (Italics mine) But God obviously chose not to do so, creating instead three communities with three separate and different sets of law, so that each community could follow its own law. The Quran repeatedly stresses that the believers must judge by what was revealed to them, for “who is better than God in judgment” (5:49–50).³⁷

Relation with Arab Tribes

According to Hallaq the third major part of Arabian society was the Arab tribes. From Hallaq's point of view here is also variation in message of Prophet to deal with them.

In the Meccan phase, wines clearly were permitted: “From date-palm and grapes you derive alcoholic drinks, and from (hem you make good livelihood. Lo! Therein is indeed a portent for people who have sense” (16:67). In Medina, the position of the Quran changes, expressing an ambivalent sense of dislike toward alcoholic beverages. “They ask you [i.e., Muhammad] about wine and gambling. Say: ‘In both there is sin and utility for people’” (2:219). The sense of aversion subsequently increases: “O you, who believe, do not come to pray when you are drunken, till you know what you utter” (4:43). Here, one observes a pro-visional prohibition which relates to consuming alcohol only when Muslims intend to pray. Finally, a categorical command is revealed in 5:90-91, whereby Muslims are ordered to avoid alcohol, games of chance and idols altogether. It is interesting that the final, decisive stand on alcohol occurs in Sura 5 which, as we have seen, marks a turning point in the legislative outlook of the Prophet.³⁸

Conclusion

It is clear from above discussion that Hallaq’s ideology is totally based on theory of Variation of Islamic law in Bi-Lateral way. The sources of law and their interpretations with reference to time, place and objectives both are variable things with reference to time, place and objectives throughout all periods i.e. from Formative Period to Modern Period. The only difference is that he considered the variations of Formative period are

relevant, fruitful, and result orienting. While the variations of colonial period are not result orienting. Because variations were based on Ijtihad while modern changes or variations are based on colonial impacts. Basically, this is a misunderstanding of the Hallaq. The change of Islamic law is related only to the interpretation of the law; the change of sources of Shariah is not included in it. It is as fruitful for the Muslim Ummah today as it was in the past. However, in view of the colonial influences, the law that came into existence according to our proposed term is Muslim law. It will be called Islamic law only if it is the result of Ijtihad in the light of Sharia sources. Otherwise, it is not Islamic law. It is Muslim law. The variation of Muslim law is different from the variation of Islamic law. It is necessary to process Muslim law according to the principles of Sharia to make it Islamic law. It seems that the main reason for the misunderstanding of Hallaq is the lack of understanding of terms, which gives rise to the concept of variation of Islamic law. The Islamic law comes into existence through Ijtihad in the stable sources of Shariah. The variable and immutable nature of Islamic law is also related to the compatibility and incompatibility with the stable sources of Sharia. The variable Islamic law under the influence of Ijtihad is completely different from the variable law under the influence of British law. It is important for Hallaq to consider the scope of both of them. Then the problems and objections of Hallaq and other orientalists with this thought can be addressed and resolved.

¹ Ignaz Goldziher, *Introduction to Islamic Theology and Law*, Princeton University Press, Princeton, New Jersey 1910.

² Joseph Schacht, *Introduction to Islamic law*, Oxford University Press. Also read Joseph Schacht, *Introduction to Islamic Jurisprudence*, Oxford University Press.

³ Joyntoll, *Studies on the 1st Century of Islamic Society*, Carbondale, 1982.

⁴ Coulson, Noel James, *A history of Islamic Law*, Edinburgh University Press, 1964.

⁵ Goiten S.D, *Birth hour of Muslim law*, Berkeley: University of California, Press, 1978

⁶ Wael B.Hallaq, *Sharia, Theory, Practice and Transformation*, Cambridge University Press, Published in 2009.

⁷ Wael B.Hallaq, *History of Islamic Legal Theories*, Cambridge University Press, Published in 1997 (see discussion about Hadith)

⁸ Wael B.Hallaq, *Introduction to Islamic Law*, Cambridge University Press, Published in 2009 #01.

⁹ Wael B.Hallaq, *Introduction to Islamic Law*, Cambridge University Press, Published in 2009 #02.

¹⁰ Wael B.Hallaq, *Origins and Evolution of Islamic Law*, Cambridge University Press, Published in 2004.

¹¹ Wael B.Hallaq, *the Impossible State (Islam, Politics and Moral Predicament)*, Columbia University Press, Published in 2013.

¹² Abdul Basit, *A critical study of Wael B. Hallaq's understanding of Islamic law*, Al-Qamar, Volume4, Issue2(April-June2021)

¹³ Wael B.Hallaq, *Authority, Continuity and Change in Islamic Law*, Cambridge University Press, Published in 2004.

¹⁴ Wael B.Hallaq, *the Impossible State (Islam, Politics and Moral Predicament)*, Columbia University Press, Published in 2013.

¹⁵ Wael B.Hallaq, *Sharia, Theory, Practice and Transformation*, Cambridge University Press, Published in 2009.

¹⁶ Wael B.Hallaq, *the Impossible State (Islam, Politics and Moral Predicament)*, Columbia University Press, Published in 2013.

¹⁷ See, Abdul Basit, *A critical study of Wael B. Hallaq's understanding of Islamic law*, Al-Qamar, Volume4, Issue2(April-June2021)

¹⁸ Wael B.Hallaq, *Introduction to Islamic Law*, Cambridge University Press, Published in 2009.

¹⁹ In my writings Sharia represents Quran o Hadith, Islamic law represents all rules of Quran o Sunnah extracted from sharia based on Primary and secondary sources of law it is also called as Fiqh. While from Hallaq's understanding, I meant Muslim's law and Muslim State's law and all confusions of Hallaq are based on this misunderstanding. He did not differentiate between Sharia, Islamic Law or Fiqh, and Muslim's Law or Muslim State's Law.

²⁰ Wael Hallaq, *Introduction to Islamic Law*, Cambridge University Press, Published in 2009. Page#01.

²¹ Ibid

²² Wael B.Hallaq, *Authority, Continuity and Change in Islamic Law*, Cambridge University Press, Published in 2004, Page#XII(166)

- ²³ Wael B.Hallaq, Was the Gate of Ijtihad Closed? , International Journal of Middle East Studies, Vol. 16, No. 1 (Mar., 1984), pp. 12.
- ²⁴ Wael B.Hallaq, Sharia, Theory, Practice and Transformation, Cambridge University Press, Published in 2009,Page#VII
- ²⁵ Wael B.Hallaq, Sharia, Theory, Practice and Transformation, Cambridge University Press, Published in 2009, Page#02.
- ²⁶ Wael B.Hallaq, Sharia, Theory, Practice and Transformation, Cambridge University Press, Published in 2009, Page#2-20/Wael B.Hallaq, Introduction to Islamic Law, Cambridge University Press, Published in 2009,Page#1-5
- ²⁷ Al-Quran 7:158.
- ²⁸ الشافعي، محمد بن ادریس، الامام، کتاب الرسائل، المطبوعه الکبریٰ الامیریہ، قاہرہ
- ²⁹ World Tertiary is not used in Islamic legal books, its addition by Writer to justify ambiguous things and to point out misconceptions of Hallaq. However, it's also part of secondary sources according to Muslim jurists. Ijma and Ijtihad are considered Primary sources along with Quran o Sunnah.
- ³⁰ دھلون، عرفان خالد، ڈاکٹر، علم اصول فقہ (ایک تعارف)، شریعہ اکیڈمی بین الاقوامی اسلامی یونیورسٹی، اسلام آباد۔
- ³¹ امینی، محمد تقی، مفتی، فقہ اسلامی کا تاریخی پس منظر، قدیمی کتب خانہ، آرام باغ، کراچی۔
- ³² Wael B.Hallaq, Sharia, Theory, Practice and Transformation, Cambridge University Press, Published in 2009.
- ³³ Wael B.Hallaq, the Impossible State (Islam, Politics and Moral Predicament), Columbia University Press, Published in 2013.
- ³⁴ Wael B.Hallaq, Origins and Evolution of Islamic Law, Cambridge University Press, Published in 2004,Page# 25-45/ Wael B.Hallaq, History of Islamic Legal Theories, Cambridge University Press, Published in 1997, Page#7-15/ Wael B.Hallaq, Sharia, Theory, Practice and Transformation, Cambridge University Press, Published in 2009, Page#31-54
- ³⁵ Hallaq, Origins, Page#27-43/ Hallaq, Sharia, Page#31-54.
- ³⁶ Hallaq, History, Page#7-15/ Hallaq, Sharia, Page#30-31
- ³⁷ Hallaq, History, Page#7-15
- ³⁸ Hallaq, Sharia, Page#32-33