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THE DEVELOPMENT OF ISLAMIC JURISPRUDENCE AND CLASSICAL JURISPRUDENCE

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Abstract

Islam is a religion of Allah the Almighty who sent His messengers to preach his religion with scriptures and that religion is Islam. The book of Allah contains a message and commandment to mankind directing the mankind to restrain from certain act that are abominable and as such punishment will be the consequence of those who violate the rules of Allah. At the same juncture, the commandment wishes some promises to those who obey the rules of Allah of some rewards to paradise as the place of their abode. However, Islam as a religion cover every aspect of life of the believers and the rules and commandment always go with time and situation of the whole world. On these reasons, Islam allows certain things that are not clearly mention and do not contradict the rule of Allah to be practiced, e.g. customs. The prophets of Allah decide to the people sent to them on what to do and undo. After their demise their companions preside over matters by making reference to the book send to them through the prophet. As the generation goes the companions took over and preside and those who follow them. This extension brings about many changes as the religion goes with time and the understanding of the scholars also differs which lay the foundation of Islamic jurisprudence. New things emerge where no authority to relied on and need to be position by way of religion and the Qur'an or Sunnah does not clearly make a pronouncement. This create a gap where scholars gave their contribution and opinion by making reference to Qur'an and Sunnah in deciding some matters and because of this different views of the scholars bring in different understanding and different laws. But the Qur'an and Sunnah remain the source relied by any scholar in his saying or writing.

Introduction

Islamic law is based on sources and fundamentals. That means it has foundations upon which its tenets are firmly cemented. It has a well- organized system of clear cut postulation. Its major tenets and rule of conduct are wholly derived from and logically connected with its basic principles. For example, the first source of Islamic law is Holy Qur'an, the second is the Sunnah of the prophet Muhammad (P.B.U.H) which in his word stated thus "I leave two things for you. You will never go astray while holding them firmly; the book of Allah and my Sunnah."[1]

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[1] Doi, A.A., Shariah, the Islamic Law, London: Tatta Publishers, 1984, P7

 The third and fourth sources are Ijma i.e. consensus opinion of the Islamic scholars and Qiyas i.e. analogical deduction by exercise of Ijtihad. The various principles of Islamic jurisprudence stem from these two sources and the Shari'ah that springs there from are simple of plant that spouts forth from its seeds.

Islamic law is a divine law i.e. it was reveal by Allah to mankind through Prophet Muhammad (P.B.U.H.). But in it there is provision and authority given to man to interpreted and expand the divine guidance by means of analogical deductions and through other jurisprudentially permitted processes.[2]

The above stated sources of Islamic law: i.e. Qur'an, Sunnah, Ijma and Qiyas, provide detailed guidelines covering the myriad of problems that arise in the course of man's life. The wider scope and purpose of Shari'ah the more it differs from an ordinary legal system in the Western sense of the term. It connotes the ideal code of conduct or a pure way of life. This is the reason why Shari'ah cannot be separated from Islamic ethics. The process of revelation of various injunction of the Qur'an shows that the revelation came down when some social, moral and religious issues arose or when some companions consulted the prophet concerning some significant problems which could have repercussion on the lives of Muslims.

There is no aspect of human life which the Qur'an does not deal with such as marriage, divorce, inheritance, rights and obligation of the spouses, the waiting period of woman who lost her husband (Iddah), fosterage, contract, commerce, banking, weights and measures, equity, fraternity, liberty, crimes and punishments, justice to all, principles of an ideal state, fundamental human rights, law of war and peace and many others.

The Sunnah as stated above, teaches us to emulate the good character of the Prophet of Islam. It is the teaching of the Qur'an and Sunnah that stripped us of the burden and chains of ungodly beings as stated in the Holy Qur'an which refers to the marvelous achievements of the prophet when it

[2] Hamidullah, M., Muslim Conduct of State Kuwait: IIFSO Publication, 1970, VI,1, P. 7

provides "And he (the prophet) relieves them of their burden and chains that were around them".[3]

The Sunnah also shows the way, the practice, and the rule of life and refers to the exemplary life and conduct or the model of behavior of the prophet in what he said, did, or approved. Its teaching extends to how to behave to people around us and obey our leaders. The Qur'an provides "I am only a warner, and there is no God save Allah, the one, the absolute Lord of the Heavens and the Earth and all that is between them…''.[4]

Besides the Qur'an and Sunnah, the consensus of opinion of the learned men and jurists, known in the Shari'ah terminology as the Ijma, plays an important role in Islamic law since it provides a limit to juridical interpretation. Qiyas or analogy is well recognized as the fourth source of Islamic legal system since it serves as an instrument to be applied to the growing needs and requirements of the Muslim community. The analogy is based on very strict logical and systematic principles and is not to be misconstrued as mere fancies and imagination of men. Besides the four sources, the Shari'ah takes cognizance of some other secondary sources of jurisprudence such as Istihsan or juristic preference or equity of jurists and Istislah, Qiyas, which assist in providing elasticity and adaptability to the entire legal system.[5]

From the advent of Islam to the end of the era of the rightly guided Caliphs which were Abubakar, Umar, Usman and Ali, the only two sources of Islamic law were Qur'an and the Sunnah of the Prophet (Al-Hadith).[6] During his lifetime, affairs were dealt with according to the revelations (Qur'an) received by the Prophet or his own inspired teachings (al-Hadith).[7] The question of the consensus of the Muslims with or without him did not arise, nor was it given any consideration for he was unquestionably the sole interpreter of the word of Allah.[8] After his death, the Qur'an

[3] Qur'an: 7:25
[4] Ibid: 16:90
[5] Al-Shahawi, I.D., Kitab Al-Shahawi Fi Tarikh al- Tashri al-Islam, Cairo: al-mutahidah, 1970, pp17-19.
[6] Ibid;
[7] Ibid;
[8] Bernand, M., ''The school of Iraq; Their emergence and validity today'', Journal of Islamic and comparative Law, Vol. 7. (1977), p. 55

and Sunnah still remained the two major sources of Islamic jurisprudence.[9] However, the living prolongation of these two sources was naturally terminated with the death of the Prophet. Hence, finite sources could not suffice the needs of infinite events. The nascent Islamic empire rapidly expanded to incorporate races, cultures and environments of various kinds. Consequently, jurisprudential problems arose for which there were no references in the Qur'an or the Sunnah. This situation necessitated the foundation of two other sources i.e. Ijma and Qiyas.[10] The purpose of the latter was to meet the demand of those novel jurisprudential problems,[11] while that of the former was to stand as a substitute authority to that of the prophet who was no longer physically present. However, Ijma as such was not formally instituted at this period. That had to wait until the second century of Islam. Yet, what was later called Ijma occurred informally at that period. Whenever they were faced with a fresh jurisprudential problem,[12] the first two successors of the Prophet, Abubakar and Umar, used to summon a general meeting of the well-informed about Islam among the unanimity of the companions upon a jurisprudential solution, the problems were dealt with accordingly.

Consensus was also generally established in this fashion based on the interpretation of some texts of the Qur'an or the Sunnah, or analogy from either of them.[13] Once the consensus was established upon a certain issue, the companions, Ibn Khaldum[14] tells us, used to disapprove of any dissenting opinion that was voiced after it.

It is clear from the forgoing that before any Ijma was formulated, Ijtihad was exercised in the sense that when a novel issue, that had no categorical references in the Qur'an or Hadith came up, the companions of the prophet in Medina were called upon to strive to arrive at what is supposed to be the divine legal pronouncement on the

[9] Ibn-Khaldum, Muqaddima ibn Khaldum.: Princeton, University Press (2nd Edition) 1980, Vol. 3, pp.23-24

[10] Madkur, M.S., Manahij al-ijtihad Fil-islam Kuwait: Jamiat al-Kuwait, 1973, p.44

[11] Mahmassani, S.R., Falsafat al Tahsir Fil-Islam, (Trans. By Farhat J. Ziadeh), Laiden: E.J. Brill, 1961, p.16

[12] Ibid.

[13] Al-Shalabi, A., P.165

[14] Muwaddimat ibn Khaldum, Vol. 1, pp17-19: Rosenthal, F., VOL. 3, pp. 23-25

matter. It is when the opinions of the companions of the prophet concur with each other without any dissenting view that Ijma is regarded to have been formed on the particular issue in question. Nevertheless, it should be noted that matters upon which the unanimity of the companions was attained fall into two separate categories:[15]

i. Matters dealing with the fundamentals of Islam:

These are the testimony to the oneness of Allah and the prophet hood of Muhammad; Praying five times daily; Alms giving (zakat); Fasting during the month of Ramadan; Performance of Hajj (pilgrimage); The principle of faith, i.e. belief (Iman) in God, His angels His revelations (books), His prophets, the day of resurrection and predestination i.e. Qadr of good or bad.[16]

ii. Matters concerning the details of the above mentioned fundamentals[17] and principles of faith:

These are the interpretation of some texts of the Qur'an and the Sunnah, and analogical deduction from the texts of both of the sources, such as text of the Qur'an and the tradition, and analogical deduction from the texts of both of these sources, such as their consensus on the nullification of a Muslim's marriage to a non-Muslim who is neither a Christian nor Jew;[18] giving the grandmother of a deceased person one-six of his or her property in inheritance,[19] and prohibition of the eating of swine-fat for Muslims.[20]

Consensus of the first category was absolute and none of the companions and Muslims after them, irrespective of their sect or legal school of thought (madhhab), controverted it. The reason for this was that it was based on the text of Qur'an and the Sunnah which meaning and interpretation is categorical. But the consensus of the second category is a focus of controversy. The above explanation (which holds for the Ijma of this category too) on how the Ijma was usually arrived at in this period would

[15] Abu Zahra, M., Mawsu'at al-fiqh al-Islami. Cairo: Matba at Yusuf, 1967, Vol. 1, pp.3-36

[16] When it comes to the details of these tenet of Islam mentioned above, scholars of the variousIslamic schools of thought have different opinions about some of them.

[17] Abu Zahra, Mawsut'at. P.35-36.

[18] This consensus was derived from the Qur'an, 60:10

[19] Muwatta al-Imam Malik, Beiruit: Dar al-Nafa'is li al-tiba'ah 1971, p.346

[20] Qur'an 5:3, 6:146 and 16:15

to the conclusion that this kind of Ijma was local or Medina in nature, as it always occurred in the seat of the Caliphate, Medina. Records do not tell us that the companions in Mecca, Ta'if and the rest of the then Islamic domains were consulted about it, let alone partook in it.[21] Consequently, this phenomenon leads to the following conclusion:

i. That the Ijma was not conclusive.
ii. That it was elitist because only the well-informed about Islam among the companions in Medina were consulted about it and not the generality of the then Muslim community.[22]
iii. That it was implicit (sukuti) and not explicit (qawli). Not every one of the ''artificers'' of the Ijma used to agree verbally with the decision taken on the issue involved, but some kept silent and their silence was regarded as consent.[23]
iv. That some of these Ijma were not based on texts from the Qur'an and the Sunnah but on analogical deduction from either of them. The Ijma on the Caliphate of Abubakar could be a typical example for this.

Each of these points raised, later had bearing on the controversy that arose regarding Ijma in the second century of the Muslim era, for the jurist of this period based their concept of Ijma on such early Ijma and further instituted it as one of the sources (usul) of Islamic jurisprudence.[24]

With the great expansion of the Islamic conquests towards the end of the reign of Umar and during the reign of Uthman, some of the companions who used to participate in juridical consultation migrated from Medina to other areas as military commander or advisers, or as ordinary soldiers in the military expeditions, and sometimes as governors or teachers in the conquered territories. In his own case Umar endeavored to keep the companions at his side in Medina for consultation and did not allowed them to

[21] Khallaf, Abdallwahab, Ilm usulul-fiqh. Kuwait: al-Darul Kuwaitiyyah li al-tibaah, 1968, p.50
[22] Al-Dawalibi,M., Al-madkhal ila ilmul usulul-fiqh, Beirut: Dar al ilm Li al-malayin, 1965, pp334.
[23] Schacht, J., The origin of Muhammadan Jurisprudence, Oxford: Clarendon Press, 1979, p. 82
[24] See al-Dawalibi, pp.33-341.

migrate elsewhere except for warranting circumstances. Uthman on the other hand did not follow this attitude during his reign, and consequently, a large number of companions, disperse into various provinces of the Islamic empire. The result was that the attainment of unanimous opinion on issue became difficult and the companions, faced with fresh problems, exercised personal juridical interpretation (Ijtihad) individually or in small groups, each in their new abodes.[25]

Since in the nature of things, some of these companions witnessed, with the Prophet, events which others missed, some practiced individual interpretation where others, especially those who are still in Medina where there were more companions, used the tradition: a phenomenon which on many occasions led to different conclusions. Furthermore, the different people, environments, culture and past civilizations of the conquered territories in which the companions lived, also had their influence on the juridical interpretation and the method of its application. This eventually led to more controversy.[26]

Uthman, the third Caliph, was killed by rebels who protested against what they claimed to be his misadministration. Ali was thereupon inaugurated as the fourth and the last of those whom the Sunni Muslims regard as the rightly-guided Caliphs. But Muawiya, the most powerful of Uthman's relatives and the governor of Syria, accused Ali of having secretly collaborated with the rebels in the killing of Uthman. He therefore challenged his authority as the Caliph, and even claimed the caliph office for himself. Civil war ensured, splitting the Muslims into groups: the partisans of Ali and the partisans of Muawiya. At the culminating battle of Siffin, the two parties agreed upon an arbitration that turned out in favour of Muawiya.[27] A relatively small group of Ali's partisan protested against his consent to the arbitration, and finally deserted his cause. They were later called al-Khawarij,[28] the dissenters while

[25] Musa M.Y., PP 50-51.
[26] Al-Shahawi, pp. 48-49
[27] Veccia Vaglieri, L., Ali, E.I., Vol.1, pp. 38. The Shiah and some Sunni Historians, e.g. at-Tabari, ibn al-Athir and others maintain that the arbitration was ''rigged''
[28] Levi Della Vida., ''Kharijites'', E.L., Vol.4, p.1074; al-Shahawi, p.77.

those still maintained their support of Ali and his right to the caliphate were called Shi'at Ali, the party of Ali.

For political reason, then, Muslims were now divided into three separate bodies: the Shi'ah, the Khawarij and the main body of the Muslim community. Also for political reasons, the first and the second group further divided into sub-groups.[29] This division later manifested itself in legal issues,[30] and the Ijma of the Muslim jurists, much less of the commons, became a mere fiction. In addition to that, Muawiya and his Umayyad successors, excluding Umar II, undermined the principle of consultation (shurah) on state affairs with the jurists as observed by their forerunners, the rightly-guided caliphs. It is important to remember that the majority of those general agreements later called Ijma had been derived from this type of consultation. Thanks to the relentless efforts of the early jurists, most of the main legal issues were settled and established before the second half of the first century, when the political division started to manifest itself in juridical issues.

Ijtihad During the Life Time of the Prophet and His Companions (Swahaba)

Throughout the Umayyad period, except for the short reign of Umar II, the situation did not improve. By this time, some of the companions who has dispersed into the Islamic provinces and who continue to issue legal opinions, had achieved fame and found disciples of their own. Some of these disciples in their turn became outstanding and famous. Legal opinion of a companion or his disciples inhabiting a particular province gained prominence, if only in that same area.[31]

With the accession of Umayyads, the influence of Shari'ah and hence the influence of this pious group, the jurist, diminished. Subsequently, they "began to construct an ideal picture of what conditions should be in contrast with actual circumstances, trying to systematized the existing legal material and infuse it with Islamic religious principles" in position to what had been the Umayyads' practice. This episode marked the beginning of the divorce

[29] Al-Shahawi, pp. 80-81 and 86-87.
[30] Ibid., pp. 50-51; al-Khudari, pp.118-119
[31] Mahmassani, op sit, p. 17

of Shari'ah from the actual life of the Muslim community and it also marked the foundation of Islamic jurisprudence.[32]

To substantiate their authority against the practice of the government, they gave particular weight to tradition and instituted the concept of Ijma and its infallibility[33] based upon early Ijma and on the majority decisions of their predecessors. This initiative was also required as a general measure to maintain a binding authority similar to that of Muhammad in order to minimize, if not to eliminate, dissenting viewpoints. In the last phase of the Umayyad period, the attitude towards the tradition and the application of it to the Shari'ah and also the relationship of the human reasoning (Ra'ay) to it, divided the main Muslim body, the Sunnis, into two groups: the traditionists (Ahlul-Hadith) and the rationalists (Ahlul-Ra'ay). From these two groups there later emerged and flourished the various recognized school of thoughts and practice (Al-madhahib) during the Abbasid period. The recently mentioned division of the main Muslim body further widened the difference of opinion among the jurists and rendered the establishment of Ijma on any virtually impossible.

The example of this division of the scholars is the interpretation of the Qur'anic verses in relation to the period of a pregnant woman to the time of delivery. The Qur'an stated thus: "the time for conceiving the pregnancy and the time for gestation period is thirty months". In another verse the Qur'an stated thus: "and we have enjoined on man (to be good) to his parents: in travail upon travail did his mother bear him, and in years' twain was his weaning: (hear the command), show gratitude to Me and to thy parents: to Me is (thy final) goal".

The scholars divided that some are of the view a woman cannot deliver below six months while some are of the view that woman can deliver even after two years. Their argument is that, following the first verse and the second verse, if two years was deducted from thirty months what remain is six months which shows a pregnancy can only be delivered from six months not below six months, "the medical investigation confirm this".

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[32] Background of the compilation of the Muwatta, of Malik bn Anas, ''Islamic Studies,1968, Vol. 7, p.382.

[33] Schacht, op sit ''Islamic law'', P.345

Aishah the wife of the Prophet (SAW) was of the view that a woman can give birth even after two years of the pregnancy. Some scholars are of the view that pregnancy can be delivered even after four years. During the caliphate of Umar (RA) a man complain to him that, "O! Umar I left my wife for two years but I came back met her with pregnancy", therefore Umar ordered for her stoning to death for adultery. Mu'az bn Jabal respond by saying, "O! Umar if you stone the mother then what wrong does the child in her womb did? You should have allowed her to deliver then you stone her. After the delivery the husband rush to Umar and said, "the child looks exactly like me." On this reason some scholars are of the view that pregnancy can remain for even more than two years before delivery. All this is based on ijtihad and perception of the Islamic scholars and in most cases evidence confirmed this.

Ijma During the Abbasid Period

The Abbasids assumed power as, among other things, championing the Islamic law. It is therefore, natural that they patronized the Muslim jurists and re-established Islamic law in their dominion. However, the caliphs and their courtiers did not always apply the law in their own private lives.[34] This patronage by the Abbasids enhanced the emergence and the growing prosperity of the various legal schools of thought. They were more than ten in number, but only four of them have survived to the present day: Hanafi School, Maliki School, Shafi'i school, and Hambali School. The beginning of the second century of Islam and the next three decades that followed the emergence of the Abbasid rule witnessed, by far, one of the most productive period of Islamic jurisprudence. Yet, Ijma as the source of the jurisprudence encountered a significance setback at this period. This was because the two major jurisprudence fictions. Ahlul-Hadith and Ahlul-Ra'ay, from which subsequent schools sprang, developed independently and far apart from each other in different environments, cultures and circumstances.

In addition, Ahlul-Hadith, whose base was Medina, the seat of the prophet and most of his companions, had by

[34] Kitab al-aghani of Abu al-faraj al-Isfahani is full of instances of often exaggerated Islamic impious practices of the Abbasid Caliphs and their entourage in the place.

virtue of their location a much larger collection of the tradition of the prophet than their counterparts, Ahlul-Ra'ay whose base was in Kufah, far away from Medina. This phenomenon accounted for the enormously divergent opinions in jurisprudence that were predominant in that period. In fact, the juridical differences which were formally local in nature, now spread all over the Islamic dominions. Ibn al-Muqaffa, (102/720-139/756 approximately) a notable figure of the era in question, tells us in a treatise he presented to (most likely) al-Mansur, the then Abbasid caliph thus:

> Among the matters that the commander of the believers should look into concerning this two cities, and other regions, is the divergence of these contradictory verdicts which has reached serious proportion in [its bearing on people's vary] lives and [the security of their] womenfolk and property. [Attack on people's] lives and women are lawful in Kufah, and this same kind of divergence of verdicts hold in the very heart of Kufah [itself]. Thus, one district makes legal what is made illegal in another district. Moreover, this situation with all numerous diversities, affects the Muslims in their very lives and family honour. Judges make pronouncements, and their orders and verdicts are valid. Again, there is no group concerned with such things in Iraq or the Hijaz but vanity and contempt of others have overwhelmed them so much so that has involved them in matters which anger any sensible person who hears of them[35]

To put an end to this critical condition of Islamic Jurisprudence Ibn al-Muqaffa suggested to al-Mansur that he officially establish "artificial" Ijma on every juridical issues He says:

> If only the commander of the believers might see fit to have these varying cases and ways of dealing (with them) brought to him in written form together with the argument of each group from the tradition or juridical analogy, the commander of the believers would then look into [all] that and in each case, execute his opinion, which forbidding what is contrary to it. [Then] he would write a comprehensive statement of the whole. [If this were done], we would hope that God might make these [varying] verdicts, in which right is mixed-up with wrong, one right verdict [in each case]. We would also hope that the unification of the ways of dealing [with cases] might bring close to unanimity of affairs [in general], according to the opinion and declaration of the commander of the believers.[36]

This advice of Ibn al-Muqaffa might have influenced al-Mansur in his attempt afterwards to formally

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[35] Ibn al-Muqaffa Abdallah, ''Risalah fi al-sahabah'' Athar ibn al-muqaffa, Beirut: Dar Maktabat al-hayah, 1996, p.353.
[36] Ibid. p. 53.

adopt al-Muwatta, of Imam Malik Ibn Anas and impose it on all Muslims in his dominion in order to unify Islamic jurisprudence. The same proposal was made to Malik by al-Mahdi and Rashid, respectively. But Malik found the proposed artificial Ijma objectionable because it would have eventually eliminated freedom of thought in Islamic jurisprudence. This, we believe, would have also deprived the jurists of access to or the right of application to juridical issues of other collection of al-Hadith which are not available in al-Muwatta. He therefore dissuaded each of the three caliphs from such attempt on each occasion in question.[37]

However, this period was followed by the period of wide travels in search for knowledge by jurists of the various schools. Many students of one Imam traveled to the other provinces and studied under other Imam or their disciples. Some of the Imams and their disciples met with one another and held debates on juridical issues. Some of the debates sometimes took place by correspondence. These academic contracts between various schools of thought occasionally led to one school copying from the other by virtue of a stronger argument it appreciated in the school it copied. The upshot of all this was a new orientation which strove to reconcile the conflicting view and to achieve an integration of the school of tradition with the school of opinion. Consequently, Ijma was reached among various schools of thought on major issues and "the differences among them come down mostly to relatively minor points of law and rituals…"[38]

Conclusion

This of course means that subsequent generations could not open up discussion on issues upon which Ijma had been reached in this early generations. Hence, the right of individual interpretation (al-Ijtihad) and the divergence of opinion therein, were confined to issues on which no Ijma had yet been attained. As this were gradually narrowed down through generations, and most areas of juridical interpretation were minutely covered (and even imaginary

[37] Abu Zahrah, M., Cairo: Daral-Thaqafah al-Arabiyah, 1952, pp.228-230.

[38] Gibb, H.A.R.,Modern Trends,p.14. see also Schacht, J., An Introduction, p.67.

4/1 juridical problems were provoked and solved), the scholars of later generations were restricted to commenting and
elaborating the thesis that contain those legal decisions.
Therefore, sometime after the fourth century A.H., ‘’so called ‘’ Ijma was reached to close the door of al-ijtihad
once and for all. The period between the second half of the
second century and the fourth century of Islam rightfully deserve to be called the era of Ijma. But the ‘’so-called’’
Ijma to shut the gate of al-ijtihad had never been conclusive.
It had always been challenged by eminent jurists such as al- juwayni, Ibn taymiyyah, al-Shawkani etc. until the middle of the $13^{th}/19^{th}$ century when the gate of al-Ijtihad was, once more, declared widely open by Salafiyyah movements in Arabia and the Indian sub-continent and by illustrious individual Muslim scholars such as Jamal al-din al-Afghani (1837-97), Muhammad Abd al-Rahman al-Kawakibi (1854-1902. And the scholars of the 19^{th} century like Nasiruddeen al-Albani, Bn Baz and the like.