

Similarities between Legal Theory (Doctrine) with Fame of Fatwa in Legal and Jurisprudential System

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Abstract

Rules have been developed based on religious scholars and lawyers views and what is relevant today is that in the absence of law or its brevity, the intellectuals refer to legal theory, if it is a practice among the intellectuals, in this case, proving the validity of this type of fame of fatwa would be that the intellectuals give importance to religious scholars views in customary law and if this is not satisfactory for the religious legislator, he must declare his dissatisfaction; so although the doctrine is not binding, but in the absence of doctrine, law has authority and if it is accepted that is prevalent among intellectuals, in this case jurists famed theory may be considered right which has very important status based on rational practices, in religious rulings. Therefore, since doctrine in law closely resembles fame of fatwa in fiqh and its principles, opinions of jurists and doctrine in jurisprudence becomes more important and perhaps, the fame in fiqh is such as advisory theory in customary judicial law. In the contemporary legal practice, it is common that when a judge gets in trouble in understanding the instances of case law or adapting legal foundations with cases and instances, he refers to the procedure of majority of courts and acts accordingly. This paper has attempted to explain the criterion of validity of fame of fatwa and doctrine in fiqh and law and to survey similarity of these two subjects.

Keywords: Fame of Fatwa, Doctrine, Criterion, Discovery, Authority

INTRODUCTION

If we accept that authority of legal theory in lack or brevity of law is as a permanent practice of intellectuals, is it possible to prove the validity of fame of fatwa based on it in fiqh? Doctrine is defined as: the collection of opinions expressed in explaining and interpretation of legal and jurisdictional rules by the legal experts is defined as legal theory (doctrine). In the legal system, when the discussion arises about legal sources, doctrine is presented as a source of law and is referred to as lawyers' opinion in the analysis and interpretation of law. So doctrine is the result of unanimous opinions of some experts. And fame of fatwa is that in a legal issue, jurists have given a fatwa without a narrative according to it or if we find a narrative,

we can be sure that hadith isn't the proof of fatwa. In legal and jurisdictional system of Islamic law considering scholars ideas is so important in diverse ways. In this system, because there are scriptures (Quran and Sunnah), the opinions of scholars have a lot of scientific value in terms of understanding and interpretation of the texts, particularly if the time of issuance of the texts is closer to infallible Imam (AS) lifetime. Today, in legal systems, law scholars' opinion isn't stated as a formal legal foundation, but the role it plays in the legal system is that indirectly and sometimes directly has influenced legislator and affects judges' practice in courts. In preparation and creation of new rules, legislators use legal scholars' opinions and are inspired by these theories, develop new legislations, and sometimes legislator invites scientists to participate in the regulation of the new law. Also principle 167 of Islamic Republic of Iran's Constitution provides that: The judge is bound to endeavor to find hukm of each case in case law and if not found, based on authoritative Islamic sources and authentic fatwas, issue the verdict and may not refuse it under the pretext of silence or brevity or conflict of law in the matter of examining cases and sentencing. A valid fatwa is famed fatwa of jurists, rather than any judge who

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is not mujtahid, in the absence of law, should act with reference to his marja's fatwa, in this case it turns out that the constitution of the Islamic Republic of Iran in the case of absence of the law, has endorsed famous fatwas' of jurists.

DISCUSSION

Status of lawyers' opinions and fame of fatwa in jurisprudential resources: given scholars' opinions and their role in customary law, one can argue that intellectuals' practice on this issue is settled as such in the case of lack or brevity of law, they should refer to opinions and fatwas of lawyers and religious scholars. And as such practice been prevalent at the time of the holy legislator that in the absence of the Imam (AS) and the lack of law and order, intellectuals refer to the scholars? In some narratives, it has stated that infallible Imams (AS) referred their followers to their companions to get an answer. Sahib Javaher in this case says: "if we have obedience only based on the news and we do not pay attention to the words of the Imams' companions, we may reach to fiqh which is outside of Muslim and religious believers' faith. So the practice of narrators of hadith was referring to the ideas of the companions of the Imams (AS) which has been common at the time of the Imams (AS) and to achieve real opinion of Imam (AS) in the case of lack or brevity of narrative or dissimulation, issue was referred to companions and their opinions was importance to. In this context, Abdullah bin Muhraz narrates that a man made a testament before me that his heritage was five hundred or six hundred dirhams and his heir was a girl. He also said I have an agnates in Levant. Imam said: give half of heritage to the girl and the other half to the agnates (paternal male relatives), and when I came to Kufa, I informed companions of this problem, they said Imam has used taqiya, return the other half to the girl. Then he said in the Hajj, I saw Imam Sadiq (AS) and told what companions had said me to do and I had done, Imam (AS) approved my work. Sheikh Jafar Sobhani based on this hadith says: "early companions, companions of the infallible Imams (AS) gave importance to the fame of fatwa between themselves, so that deterred them from acting based on what had heard from Imam to refer to Imam once more and to hear the same word from him and gave priority to fame of fatwa on the that hadith that heard themselves from Imam (AS). It's not deserving for a jurist to ignore it for the sake of a rare principle or a narrative. Therefore, these issues reveals the importance of fame of fatwa among companions which are formed within Mutlaqat Principles and fame of fatwa in this area is authoritative.

According to the late Boroujerdi, if those who are under the subordination of the head, never act based on their

opinion, because intellectuals believe that they supposedly do not say or act anything, unless under the order of their head. Also Imam Khomeini when Maqbuleh Omar bin Hanzaleh in proving the validity of fame, issues a fatwa and considers Maqbuleh as referring to the principle that intellectuals have ruled and proves fame of fatwa in this way and considers the intention of "no doubt in it exists" in Maqbuleh the rational rejection of doubt. And he believes that adherence to every norm which is the instance of "no doubt in it exists" in custom and intellectuals reasonably and don't mind its contrary possibility, is necessary. And in other place he states: "If on the basis of rational practice, subordinates issued a hukm which is not apart from directives of head and chief and chief is satisfied of the hukm, intellectuals suppose that fame of fatwa among companions is discoverer of the consent of their chief". According to Imam Khomeini and Ayatollah Boroujerdi, if the overwhelming majority of early jurists have agreed on a fatwa, intellectuals suppose that this fatwa accords with infallible Imams (AS) opinion. So considering opinions of jurists is mainly objective which can help to correct understanding of the issue and the judgment.

FAME OF FATWA VALIDITY CRITERIA AND DOCTRINE IN JURISPRUDENCE:

doctrine in law may be considered as opinion of a lawyer and property of discovery is not a matter in it but doctrine in fiqh may be considered directly source of fiqh and may have similarity with authority of fame of fatwa, because of the need to explore hukm by the way of valid reason in fiqh. In this regard, Grand Ayatollah Boroujerdi and Imam Khomeini consider fame of fatwa with certain conditions from direct sources of fiqh and place great importance to opinions and views of jurists in this field. Even they give priority to the views of the early companions and earlier scholars over the hadiths in narrative communities of early scholars. The question is in which ways by fame of fatwa and doctrine in fiqh, we could be reached to Imam words? Shia scholars have presented different ways: some jurists have mentioned twelve ways to discover Imam opinion. But here the most important ways are presented and discussed.

WAYS OF EXPLORING IMAM OPINION IN VALIDITY OF FAME OF FATWA

This stage is one of the stages that Usulis have paid more attention to it and there are issues where have been place of Shiite scholars views. These issues include: (a) what is the criterion of validity of fame? (B) What are the ways

of exploring Imam opinion? (C) Is discovery criterion in consensus, also available in fame?

To the consensus of Shiite scholars, the discovery of opinion of Imams (AS) is criterion of consensus validation. Imam Khomeini believed that the criterion of fame is also the criterion of consensus, and consensus is not nothing but fame. He says in this regard: in the passage of fame of fatwa of early scholars, we discover the fame of the problem at the time of the Imam (as) and from there, we are transferred to Imam (AS) opinion. Late Boroujerdi doesn't suppose ensuring fame easy and available and he says: we cannot be sure only by realization of fame by early scholars, and we should not rely on any fame in any case. But in different cases, we must investigate and after full investigation and careful reflection in words, ruling should be issued. Fame of fatwa of early scholars, by itself, has no value; it is only a way to Sunnah, if you reached to the word of Imam in a confident and determined way, this fame or doctrine in jurisprudence is valid.

In fact, Imam Khomeini and Ayatollah Boroujerdi, do not consider fame of early scholars apart from their consensus and also Mustafa Khomeini said: "The unanimous matters in front of early scholars are matters famed for not being granted the possibility of a consensus, "The unanimous matters to early scholars is famous matters which is not possible being agreed upon them, the term consensus is nothing but fame also". Mohammad Hojjat Kuh Kamari also doesn't suppose consensus claimed by Seyyed Morteza as corrective consensus. So claimed consensus of early scholars can be supposed as the fame.

The most important means of discovery of Imam opinion that Usulis will utilize in Al-Mu'alaqat (acquired) consensus are also discussed in the fame of fatwa that which ways can in fame of fatwa are means of discovery of Imam (AS) opinion.

1. al-Hissi (intuitive): This was known by the early scholars, including Shaykh Mufid, Seyyed Morteza. Abualsalah and al-Muhaqqiq al-Awwal have chosen this way. In the description of this method, it is said: When an issue is studied by Jurist and after exploring and searching of all opinions, he notices that all scholars has accepted the verdict of the issue and there is minimal friction between them, the researcher finds the opinion of jurists is acquired in accordance with the opinions of Imam (AS). Although he doesn't know exactly Imam (AS), but when he acquired all the opinions, feels that has also earned the hukm of Imam (AS). So Imam opinion is within the opinion of Jurists and this way of discovering the religious order matches with al-Dukhuli (inclusion) consensus. But theoretically

there is no problem with the authority via the inclusion way only its occurrence is facing problem because the ways quoted in religious books are certainly not this way, and at the time of Occultation are not useful.

2. The Ijma' of Lutf (benign): The Ijma' of Lutf (benign) approach is chosen by Sheikh Tusi, he has raised it in theological discussions and has referred to it under the subject of Usul in Al-'Uddat fi l-usul book. One of The real needs of people in the path of evolution is understanding the true principles of the Shari'ah. What favor is higher than that God helps human in understanding obligations and prohibitions? This favor is unchanging tradition of God which has been realized at the time of revelation of the Quran and during life of Prophet Muhammad (PBUH) and the infallible Imams (AS) through the verses and during Occultation of infallible Imam (AS) that people have no way to truths and problems, it should be exercised, if scholars have consensus on a ruling, even if their ruling is untrue, general favor of God is to somehow induce actual ruling to all the jurists through the Hidden Imam and to disrupt the consensus so that no consensus be realized. Accordingly whenever we find a decree that all jurists are unanimous on that and no one is not against it, we conclude that the ruling in accordance with reality, is Imam (AS) opinion. Also this rule of reason, but although in its location has been proven that rational rule does not have any exception, wherever it comes interests of the people, this rule will be exercised, either in Usul or in Furu of religion. However, this method is suspect. Since the holy legislator has expressed generalities, first, about some material provisions the gate of ijtehad is open to scholars during Occultation to do research; therefore, if the infallible Imam (AS) don't disrupt the consensus opinion, which is against the truth, the task is not over. Second, it is not exclusively about consensus matters, but a person who has many followers if made a mistake, Lutf ruling must be appropriate to be expressed.
3. Taqriri: Advocates of this view believe that: whenever in the presence of Imam (AS), an agreement is formed and Imam doesn't reject the ruling, her silence is as Taqriri and approval of jurists opinion, because if the jurists opinion are contrary to the divine mandate, Imam legally is obliged to deny the denied, because denying the denied is obligatory upon all. The disadvantage of this type is that to guide people through the good and forbidding them from evil is wajib if the necessary conditions is ascertained, while for those who failed to receive a religious order, the conditions in this kind of way is not clear.
4. al-Hadsi (the surmised consensus): Sheikh Morteza Ansari, Muhaqqiq Qomi, Haj Reza Hamadani and

many of the latter scholars have accepted al-Hadsi approach. With obtaining consensus of all scholars in a ruling of feqh rulings, we ensure the opinions of infallible Imam (AS). Especially from early jurists' opinion, we find that through surmise, we reach confidence in the rule of Sharia.

Surmise has two versions: (a) sometimes server agent forms the discovery of infallible Imam (AS) opinion. (b) Sometimes server agent forms the discovery of valid reason.

The first version: approach of the discovery of infallible Imams (AS) word is a way accepted by the Shia world jurist, the late Ayatollah Boroujerdi. Accordingly, whenever a consensus arise on the main principles of the jurisdictional issues, it is discoverer of Imams (AS) word. In his opinion, it is not dedicated to consensus, but the fame among early scholars is valid and authorized, but due to lack of discovery, he doesn't consider consensus on Bifurcating problems as authority, let alone the fame.

The second version: Whenever great jurists in the judgment of the jurisdictional issues reach to consensus (regarding that in the position of fatwa, they avoid rational and doubtful istihsans) and with regard to their accuracy and extreme compliance with piety and caution, from their consensus and coordination in jurisprudence, ruling can be discovered that their opinion was based on a valid reason and that valid reason is unifying factor for them, but now we do not have access to that valid reason, because if there was no valid reason, consensus or fame was not achieved and they didn't rule out explicitly. This method has been attributed to Haj Mirza Mohammad Hussein Naeeni and Esfahani.

(B) Jurists Views on the Ways of Discovering Infallible Imam (AS) Opinion

Each of these ways from jurists and Usulis point of view may be reviewed. Jurists consider that this state of affairs in validation of consensus are untenable, since most of these ways are out of our debate, only the ways described above are discussed. Although early scholars believe in some of the mentioned areas and consider them as discoverer of opinions of infallible Imam, but many of the latter scholars consider none of things mentioned above as criterion and basis of the discovery of the opinion of infallible Imam. They believe frequency of suspicions and leading to confidence. In other words, guessing is the cause of the discovery of infallible Imam opinions. But it is strongly likely that preceding scholars practice has been in the way of surmise, but in order to appease the Sunnis, they has expressed inclusion approach and similar ways and have counted them as implying infallible Imam words.

Grand Ayatollah Boroujerdi like all Shiite scholars considers discovering opinion of infallible Imam as criteria of validity of consensus and doesn't consider criteria such as Lutf, Taqir and else as the cause of the discovery and doesn't talk about surmise element. Accordingly, if we accepted criteria such as Lutf and Taqir, we must recognize that the realization of the discovery is only in the consensus group, that is, by fame, this discovery does not take place, because if the right to remain completely hidden is deemed to be contrary to lutf, but if the right doesn't remain completely hidden, does not constitute violation of lutf and lutf is not obligatory, meaning that if fame was created untruly, the right doesn't remain completely hidden and interference of infallible Imam to disturb fame is not necessary, but if all scholars reach consensus on wrong, complete secrecy of right takes place. Accordingly fame, based on the principle of lutf and Taqir does not include the element of discovery, but based on the view that discovery is result of inclusion of infallible Imam (AS) in the nation, fame can be discoverer of opinions of infallible Imam, if opponents of famed opinion have known his decent and we know them. This is why if the descent of opponents are known, we know infallible Imam (AS) is not included in opponents, so he is in famed group.

Ayatollah Boroujerdi discusses surmise and frequency of suspicions and does not consider discovery as monopolized by consensus and validates fame as well. He says fame of ruling for the early scholars discovers valid reason for the ruling. Imam Khomeini as late Boroujerdi thinks and in this regard says: if early consensus and fame are realized, because there is criterion of consensus in the famous fame, through surmise certainty is acquired for the existence of valid reason, or the ruling has been known at the time of infallible Imam (AS) as the owners of Usul and books didn't feel necessary to ask infallible Imam (AS) and not asking questions was for the sake of fame and clarity from the time of the Prophet (PBUH). As a result, it is not in the form of narrative and this is not unlikely. Therefore, as long as, certainty about infallible Imam is not found through surmise, there is no reason for the authority of fame of fatwa. Late Ayatollah Khoi, does not accept the element of surmise and because the likelihood of error in surmise exists and we cannot reach to final ruling through surmise, believes it isn't discoverer of the infallible Imam words and valid reason, as a result, at the time of early scholars, fame isn't valid because they didn't serve Imam (AS) to personally understand his word and their news is near to surmised news and it is not valid.

Sheikh Ansari and the late Muzaffar believe: if fame of fatwa or jurists consensus in all ages be quoted as through surmise, certainty is acquired to infallible Imam word or valid reason is obtained, it is proof, provided that it isn't

through the lutf and like it, but by the matters which are close to intuitions to ensure their provisions. Late Akhund considers surmise way as proof, either by inclusion way or by way of commitment such as lutf, if they ascertain infallible Imam word. So by review of words of jurists, we reach to the conclusion that most of the latter scholars, consider surmise as the way of discovery of infallible imams (AS) word and it must be in a manner that confidence in the words of the infallible Imam can be acquired by surmise.

Shahid Sadr in explanation of authority of fame of fatwa and discovering infallible Imam opinion refers to two methods: (a) sometimes with a practical reason (b) sometimes with theoretical reason. The discovery of infallible Imam word based on practical reason would be fulfilled only through lutf way. So whenever among scholars, consensus is achieved; if their opinion is contrary to right, based on reason, lutf of Allah demands upon his servants that they require their present leader to express the right. Shaykh Tusi has accepted this theory.

And the discovery of infallible Imam word based on theoretical reason: there is concomitant between the fatwas of scholars on a given ruling and the discovery of opinion of Imam and concomitant between fatwa scholars and Imams (AS) word means the property of discovery and property of being discovered and the relationship between these two things.

In terms of theoretical reason perceptions, there are three types of concomitant:

1. Intellectual concomitant is discoverer of the Imam word or religious ruling like transmitted news that would come into ruling.
2. The normal concomitant, is discoverer of the Imam word or religious ruling like the human lifespan that usually comes to old age.
3. Accidental concomitant is discoverer of the Imam word or religious ruling for example from a group of news is certainty obtained for us but it's not mutawatir.

In explanation of rational concomitant, between consensus (fame) and the discovery of Imam opinions it is said, it is impossible to separate fatwa of many jurists about an issue from opinion of Imam because each of these fatwas have caused suspicion to Imam opinion, and more the number of jurists, the more suspicion to Imam opinion increases, to the extent that certainty is obtained for human that their opinions accords with infallible Imam (AS).

But according to Ayatollah Khoi, this word about intuitive news, is correct about mutawatir news, because the possibility of disagreement of mutawatir news with the fact, or the possibility of error in intuition arises from the

possibility of deliberate lying of narrator. Both possibilities about such news, because of the multitude of narrators is weak and rejected. But it is not true in intuitive news based on reason.

According to the Shahid Sadr, there is no problem to say frequency of probable cases, sometimes because of the frequency results in separation of people from fact, according to this view, the more is the number of participants, more is their proximity to the fact and infallible Imam (as) is higher. And preferred method in discovery, the consensus of jurists about infallible Imam opinion by the calculus of probabilities is that whenever during Occultation of infallible Imam (AS) all the contemporary scholars of Imam Khumeini issue fatwa on certain ruling and something that confirms this fatwa is not available, it becomes clear that this ruling has basis, because it is not possible such great scholars have issued fatwa without reason, and it is unlikely that jurists are ignorant of requirement of early ruling opposing this fatwa because they have themselves have narrated these rulings for us. So there is basis and reason which based on it, great scholars have left requirement of early ruling and issued fatwa based on it.

So jurists' fatwa is pending between two possibilities: 1. they have issued the fatwa citing narration they have in their hands and it's not reached to us. 2. There is something other than narration in the name of intellectual confirmation, according to it, they have given their fatwa. The first possibility is rejected because if there was a narration, it has been reached to us through argument or narrative jurisdictional books of people who make consensus, it is not reasonable that citation of jurists to be a narrative that its implication is clear but has not reached to us yet. Although in their narrative sets, they refer to even weak narrations that in terms of citation and reference, has not been trusted.

So if in the ruling a hadith is not mentioned, it is stating that the ruling is received through intellectual irtikaz that it had been in previous generations and companions have been intermediate of early jurists and infallible Imams (AS) through which all feqh has come to them. and such irtikāz is not a definite narrative which is narrated but implication of Sunnah including action, word and description of infallible Imam has been used and through affairs which are close to intuition, certainty is obtained about their provisions because irtikāz is not such as intuition and like intuitive rational arguments that is likely all people who make consensus and give fatwas make mistake in understanding them. With this expression, we obtain certainty about ruling which through intellectual irtikāz comes to infallible Imam (AS) opinion.

From the standpoint of Shahid Sadr, the view that the fatwa frequency about intuitions results in separation but not in surmise, is not true. Because we do not want to obtain Imam (AS) opinion directly that to be said that Imam (AS) word is hidden from them, but we discovered opinions of infallible Imam (AS) by the intellectual irtikāz that have been among companions of the Imams (AS) because this irtikāz is obtained because they are contemporary to infallible Imam (as) and have received all of their opinions from them.

In the description of discovery issue, Shahid Sadr said: In fact discovery is based on probabilities. Spirit of discovery of Imam opinion in mutawatir news and consensus (fame) is that mutawatir news are source of intuitional testimonies, but consensus and fame is origin of surmised testimonies and surmised news and origin of calculus of possibilities which come certainly to us, their worth is less than probabilities is mutawatir news. Accordingly, if fatwa is closer to intuition, it is more effective and volume of opinions and ijthads in consensus (fame) is less than the issues wherein discovery of fact is stronger. At this rate, the consensus (fame) which in jurisdictional issues have theoretical and ijthad foundations is defined by the consensus (fame) which in jurisdictional issues have non-theoretical and ijthad foundations, that is, the more we get close to the time of infallible Imams (AS), volume of the intuition increases and the volume of surmises decreases. This is where the value of the latter scholars' fatwa is more than early scholars' fatwas.

In normal concomitant picture, usulis has said discovery of Imam (AS) opinion by scholars opinions from is such as discovering chiefs' opinion by subordinates, for example, if the cabinet of ministers and government make consensus on an issue, that's going to normally represent that ruler has agreed with it.

Grand Ayatollah Boroujerdi has accepted normal concomitant within main issues area and according to him, in a real issue we considered that all jurists are unanimous and has obtained it from infallible imams (AS), normal concomitant takes place. If within the scope of main issues, consensus or (fame) is reached, the normal concomitant between the fatwas of scholars and consent of the infallible Imam (AS) is realized and authority of fame and consensus is achieved. Like the issue of Al-Tasib in inheritance matter which is not either a rational problem or bifurcating, from Shiite jurists' consensus on one thing, we discover that ruling is obtained from infallible Imam (AS) and if not, how they knew that Al-Tasib was wrong. Unlike the Sunnis, because in Quran the issue of invalidity of Al-Tasib has not raised. Imam Khomeini are also of the same opinion. Therefore, expression of concomitant is ironic that on basis

of it, consensus within the central tenets of the argument can be validated. You can even extend this to fame of fatwa that concomitant presence between famed old scholars and the ruling of Imam (AS) ensures the fame of the ruling for Imam (AS).

Ayatullah Khoi accept normal concomitant whenever companions with their chiefs are like companionship of ministers with their rulers but consensus of scholars on a given issue during Occultation is not as such and it can't be accepted and present possibility for validity of surmise consensus is not useful. In surmise consensus, consensus of early scholars has primary effect, but obtaining opinion of all early scholars is not possible and claiming consensus about early scholars is not a complete claim. Regarding late Khoi, it can be said, final result of scholars' consensus is that it normally can be discovery of religious ruling. But it is not to say that there is concomitant between consensus and religious ruling because meaning of concomitant between two things require that no separation would be between them and there is the same criterion in fame of fatwa.

The subjects discussed is about rational and normal concomitant. But accidental (Ettafaqieh) concomitant can have discovery property?

Usulis about image of accidental concomitant have said: on occasions scholars consensus is associated with the opinion of infallible Imam and discovers it and the late scholars method in consensus claim and consensus on a fatwa is the same way. Based on late Khoi opinion, rejecting accidental concomitant does not have the same meaning. Its problem is that it cannot be organized under a principle and discovery of infallible Imam word through this way is different from people and opinions difference and it is possible that a jurist considers consensus only by consensus of scholars of all periods and another jurist, through consensus of scholars of a period or a group of scholars of a period, some believe that concomitant of consensus and discovery of infallible Imam opinion by consensus of only three jurists, say Sheikh Ansari, Great Mirza Shirazi and Mirza Mohammad Taqi Shirazi; and it is because of the severity of their piety and precision.

Shahid Sadr believes that the latter's belief that the consensus (fame) due to concomitant is discoverer of the infallible Imams (AS) opinion. In fact, it is related to the possibilities that is under multiple general and specific factors, hence the consensus (fame) by a variety of different cases and other features are different in terms of discovery of the infallible Imam opinion and in one hand, exploring jurists opinions demonstrates that when dealing with consensus (fame), their approach is not fixed. Some of them in some of the jurisdictional issues refer

to consensus (fame), while the same group deny another group of jurists reference to a consensus (fame) in other jurist issues, this is because they have not reached degree of complete discovery of infallible Imam word, and when they have accepted it, and use it to argue, it becomes clear that (fame) in that case, has reached the degree of discovery of infallible Imam word.

Different positions of jurists is dependent on the differences between the results that they have achieved from infallible Imam word and through this way, we can become aware of the basic rules in which jurists have trusted for the discovery of infallible Imam word, so some Usulis who deny the validity of fame of fatwa because they believe that in most situations where fame of fatwa is concluded, the discovery of the infallible Imam is not realized and it cannot be brought under certain rules. But Ayatollah Khoi said concomitant with consensus of only three great jurist is possible, in fame of fatwa of earlier scholars that makes up the majority of jurists, concomitant between these types of fame and discovery of infallible Imam (AS) is possible.

C – Opinion of Jurists on Ways of Valid Reason Discovery

Some have said sometimes consensus of a large number of leading jurists on a religious ruling, is discoverer of valid reason that if we get it, we hold fast to it. For example, if jurists agree on this issue that volume of kurr water is one hand and a half in one hand and a half, this practice discovers that there is a valid reason, although we do not have it, but with confidence on the ruling, scholars agree to it, especially method of early scholars was accepting news and in accordance to texts of news, fatwa was issued; they even didn't quoted narratives except ones their authority was proved.

Muhaqqiq Naini considers approaches of discovery of authentic reason for people who make consensus one of the closest ways to right. In his opinion, if this accident has continued at the time of companions, say Zorare and Muhammad bin Muslem till period of owners of fatwa or period of latter scholars. In that case, certainly satisfaction of the infallible Imam is discovered, but as much as possible, we can obtain consensus of scholars from period of fatwa owners, so this incident is not discoverer of infallible Imam consent, but eventually the only thing found is a valid reason. (Ibid.) It is noteworthy that discovery of valid reason by the consensus (fame), may like discovery ways of infallible Imam word be done with concomitant or calculus of probabilities. However final argument that can be adduced on this method is that virtue of jurists, prevents issuing fatwa without knowledge and clearly in scientific arguments, they refer to religious reason.

Late Khoi and others have undermined this reason because if this is the reason of narrative, while not quoted it in their book, how may they exercise it? They have quoted weak narrations in their books and if we assume it, consensus of jurists on a given issue is not due to following latter scholars by early scholars. It is because latter and early scholars has referred to the valid reason they had, in the position of fatwa issuance and their justice prevents issuing fatwa without knowledge, though we don't know its reference certainly but generally we know it has been valid reason in their disposal. These types of consensus or fame are valid because it is impossible that understanding of all jurists be contrary to reason. So their agreement habitually indicates reason and is certain discoverer of the validity of referred reason but assuming this reason is not possible.

But the Shahid Sadr in reponse says: if we assume discovery of word of Imam is documented by intellectual irtikaz that certainly, we are guided to infallible Imam, there is no problem because in that case, there is no evidence and reason about which could make controversy.

RESULT

Jurists' features has much effect on discovery of religious ruling. If they are among the first scholars of Occultation period, whose period is connected to period of narrators and bearers of hadith and contemporary dogmatists of Imams (AS), by their consensus on a religious ruling, intellectual irtikaz can be achieved that have been located on the ruling class and if jurists are among people who due to differences in basics and their opinion in quality of scientific issues, they have disagreement over most of issues. Their agreement in a religious problem (in spite of their differences) demonstrates that what they actually achieved is close to right fact and right word. In the case of scholars consensus on a fatwa: on the problem that they have agreed and have issued fatwa over it, have not referred to a certain document; if there is a certain document, that document assessment will be important. In this case a lot of consensus and fame lose their value and it rarely happens that they mention a consensus or fame of fatwa without reference to other evidences, although late Boroujerdi has cited number 90 and 400 issues for fame of fatwa and number 500 issues for consensus. But there are a few problems which their document is either fame of fatwa or consensus.

At discovery of infallible Imam opinion, if there is no mirrors that reflects the lack of intellectual irtikaz in problem ruling mentioned by contemporaries of infallible Imams (AS) or scholars close to their time, otherwise such indications conflicts with the discovery of fame of

fatwa of infallible Imam and prevents finding final ruling by calculus of probabilities because in this case, it is hard to rule that fame has reached actual ruling. As because of the occurrence of errors in most of items that are not sufficiently clear, there will be the possibility of their error, on the contrary of the case where problem is clear to all scholars. The narrative which was quoted about the issue of purity and impurity in the people of Book is such a case. The type of question of narrator suggests that the problem of impurity in the minds of the companions has not been confirmed and so when asked about the purity or impurity of people of Book, he insisted before Imam Sadiq that he is a member of the People of Book, drinks wine, eats pig meat and I loaned him my shirt; if he returns the clothes, I should wash it for prayer? Imam (AS) said pray with it and do not wash it, because when he borrowed the clothes, he was pure and you are not sure that it's impure or not. Sometimes it happens that there are a lot of motivation to publish the ruling contrary to fame, in this case, if a fatwa is contrary to fame of fatwa, it should be spread rapidly due to preparedness of conditions and incentives, like the issue of Khums of benefit, namely if the actual ruling was not being necessary, in this case it should be spread among all people because the rulers at that time had been willing to publish such rulings and denying infallible Imams (as) of their rights. If in spite of these circumstances, a fame about the necessity of Khums be signed, it becomes clear that this fame has been concluded in the situation that there has been a lot of motivation on not signing it. The issue that well-known jurists have agreed on that, should be a problem which legal text entry in to it is not unexpected and not being intellectual or comparative matters because otherwise, jurists may reach that consensus, have made trust on unreligious reason, and therefore fame of fatwa is valid if they have right conditions for the discovery of infallible Imam opinion or have a valid reason, whether discovery is accompanied by concomitant or by calculus of probabilities. Generally, word in the fame of fatwa of the early scholars is the same word about consensus which based on ways to ensure, trust in the fame of the early scholars fatwa is possible. At the time of the Imams (AS) final discovery was possible and to gain the ruling which was based on ijihad was not possible but proving the validity of fame of fatwa after the Imams (AS) period that definitely fame ruling is based on ijihad. So acceptance of current practice, there has been at the time of the Imams (AS) this practice have been continued until the Imams period and its non-rejection by the legislator is proven.

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