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NATURE OF TASTE OF LEGISLATOR, ITS AUTHORITY AND ROLE IN INFERENCE

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ABSTRACT

The current essay is focused on the explanation of the nature of taste of the legislator. Although different meanings have been mentioned for the taste of legislator, it is evident that the most correct meaning of a term must be sought for in the place where it has been born. Here, this birth place is religion or Sharia system. Now if we consider Sharia a system which has been designed by the legislator for providing the worldly and otherworldly prosperity, given our failure of understanding the reality, a jurist reaches the faculty of Ijtihad and after numerous efforts accompanied with religious reasons, he builds a system of Sharia in his mind. This mindset is the taste and system of Sharia. After its formation in the mind of a jurist, it arranges the total course of all arguments and as a touchstone, it gives him the power of evaluation of various reasons in non-written cases.

Keywords: *Taste of Legislator, Sharia Office, Legislator's Path, Sharia System.*

INTRODUCTION

In Shia jurisprudence, the taste of legislator and Sharia taste are among the terms whose emergence dates back to the eleventh century of Hijrah and the age of flourishing and development of Isfahan Seminary of Religious Sciences. With the formation of the roots of the aforementioned terms in the religious literature of this age from jurisprudence and Hadith and from philosophy to Quranic exegesis for the first time in Shia jurisprudence the term *Mazaq Al Sahr'* (Taste of Sharia) is used by Mulla Mahdi Naraqı (d. 1789) and then, this term was warmly received by some distinguished jurists like Saheb-e Jawahir. Thus, taste of the legislator gradually became a well-established procedure in Shia jurisprudence. Although since the very beginning, the jurists were interested in the taste of the legislator for the sake of mere reference and there was no independent discussion of the nature, the taste of the legislator and other secondary discussions of it. However, today due to the increase of the views from outside of one science to the discussions in it, a jurist's resort to evidence beyond the known reasons like Book, Traditions, Reason and Consensus, have led the mind of a jurisprudential audience towards the quiddity of this new evidence and substantiate the necessity of its knowledge by him.

Earlier works have not discussed the nature of taste of legislator and they share the same weakness and they lack sufficient attention to the background of the use of the word "taste" in such senses as religion, initiation, office and system. It is needless to say that failure of finding the true root of a term has led to the emergence of a set of definitions that not only does not

contain any basis for inclusion of all applications rather by negligence of the words of most of the jurists who have referred to this term since the era of the late Naraqı up to now, they have just sufficed to the texts of few jurists like Sahib-e Jawahir and for this reason they have made conclusions which despite their value, are partial.

CONCEPTOLOGY

Taste

Mazaq, an Arabic term for taste in lexical works (cf. Ibn Manzur, 1984: 10/111) is equivalent with Zawq and Zawaq and has been used in the two senses of flavor and trying the flavor of an object regardless of its being a material thing like food and drink or immaterial like death and faith.

Sharia

Sharia as a term, means luminous path be it a material path like road, avenue and brook or an immaterial path like religion and intellectual school; this is why religion is referred to as Sharia (cf. Jawahiri, 1980: 3/1236).

Taste of Sharia:

Numerous meanings have been enumerated for the taste of Sharia but each one of these definitions is encountered with certain problems and we cannot consider any of them a comprehensive and complete definition of the term. These definitions can be outlined as follows:

- *A clear judgment or principles which is decisively documented to the word of the divine legislator though this principle or judgement is not explicit or implicit purport of the quadruple sources of book, tradition, consensus and reason because with such a reason there was no necessity of referring the judgement of Sharia to taste* (Hekmatnia, 2006: 15).

In this definition, one can refer to some cases of the jurists' resort to the legislator's taste in which the taste of Sharia has been the explicit or implicit purport of the authentic sources like: According to the taste of Sharia, the infidel is not allowed to lead the Muslim and thus if the exposed child is condemned to Islam, the adopted child must be also a Muslim because here there is a type of Velayat (Sabzewari, 1983: 23/354).

Now, it is totally clear that the source of the taste of legislator is the explicit purport of the following verse: "*And never will Allah grant to the unbelievers a way (to triumphs) over the believers*".

- *The inference made by the seasoned jurist based on the principles of the jurisprudential judgments to which he resorts when certain reasons and generalities as well as universal principles are unavailable* (Center for Information and Islamic Documents, 2010: 715).

In denial of this definition beside the points that were mentioned in the criticism of the first definition, we suffice to an example of the taste of Sharia in the chapter devoted to Khums which struggles to weaken two ideas and reinforce the third idea.



Those jurists who disagree with the use of Khums during the Occultation era are of two groups; some of them believe that these properties must be kept by the well-established and authorized jurists and then to be moved from one hand to hand so that it is delivered to the Twelfth Imam. Some of the jurists contend that these properties must be buried. However, it is unbelievable that these ideas would be in line with the taste of the legislator because according to the verses of Quran and sacred texts, part of the Khums belongs to the poor and this group exists in the Occultation era (Rouhani, 2002: 309).

In this argument, the taste of the legislator is documented to the establishment of a particular right for a group based on a verse of Quran and traditional texts.

Now can we underline the lack of specific reasons, generalities and universal principles in the aforementioned definitions?!

- *What might be inferred from the totality of religious reasons like preference of some of the expediencies over the others or concentration on some corruptions instead of other corruptions and so on and so forth (Badri, 2008: 262).*

In criticism of this definition one should state that the taste of the legislator is not always the outcome of the totality of the reasons rather, sometimes, we can infer priority from one reason a la analogy (cf. Safi, 2007, vol. 1: 131 and Makarem, 2004, vol. 5: 130).

- *Consciousness of style and rhythm of legislator in codification of the judgments which are acquired via various ways and the jurist becomes able to understand the religious judgement through this consciousness; because he finds it in line with the style and method of the legislator in certain chapter or other chapters (Alishahi, 2011: 163).*

This definition is grounded in two major pillars: consciousness of a jurist of various ways of codification of divine laws by the religious legislator and the ability of understanding the legislator's judgement via the mentioned method. It seems that this definition has its origin in the other definitions.

- *The taste of the legislator means the fatwa issued by the jurist as regards the decisive and not doubtful approbation (Makarem, 2007: 340).*

This definition will be critically assessed in our discussion of the term approbation.

Now despite the existence of a clear notion of "taste" by the linguists and the terms "legislator, legislation and Sharia" by the jurists, why there are different notions of the term "the legislator's taste"? It seems that more than anything else, this suggests the meaning intended by "taste" in this combination.

Therefore, in order to understand the exact, clear and at the same time complete and comprehensive meaning of the term "taste of the legislator", we need to conduct an exact study of the applied meanings of "taste" and its additional combinations by the jurists and not the linguists. Thus, we will provide a thorough examination of the historical background of the application of the term "taste" so that we can present a precise and comprehensive notion of the term "taste of the legislator".

1. Historical Background of Application of Taste:

The term "taste" has been used in the Shia works before the eleventh century of Hijra in its lexical sense (cf. Ibn Shubah, 2002: 417).



For the first time in his jurisprudential essay "Legislator of Redemption", Mir Damad has used the combined term "*Taste of Eloquence*". Similar combinations were frequently used in Shia religious works in 11 and 12 centuries of Hijra and it is in the context of this literature that the term "taste of sharia" was coined for the first time by Mulla Mahdi Naraqı (Naraqı, 2002: 24). In the religious texts of the aforementioned era and after it, including Persian and Arabic, "taste" has been used along with such terms as "school" (cf. Mulla Sadra, 2003, vol. 4: 182; Vahid Behbahani, 1996: 274), "religion" (Esfarayeni, 2003: 36 and 364), "initiation" (Qazvini, 1992: 244) and "approach" (Nuri, 1988, vol. 1: 209 and 215).

2. Nature of Taste of Legislator:

Given what was said as regards the historical background of the application of the term "taste" one can say:

Firstly, in the era when Naraqı used the term "taste of Sharia", the word "taste" in combination with someone or something referred to school, religion, initiation and approach and thus "taste of Sharia" implied school of Sharia.

Secondly, Shahid Sadr has explained the meaning of "school" as follows:

School consists of fundamental theories (Sadr, 1997: 365).

As a result, taste or school represents a synthetic and interrelated body. This is what today is referred to as "system and office" (Brijanian, 1994: 876).

Therefore, in the words of jurists who have used the term, "taste of Sharia", the intended meaning has been "system of Sharia". This is exactly like what we see in the texts and words of some jurists and contemporary thinkers in the form of such terms as "system of Sharia" and "system of jurisprudence" instead of "taste of Sharia" and "taster of jurisprudence". This application has been accepted in the domain of philosophy and human sciences (cf. Misbah and Mohiti, 2012: 111).

3. Now given what was said earlier:

System as used in this context refers to a set of elements and relations between them which are interrelated via certain characteristics. These elements constitute a totality with their environment and move for fulfillment of a unique goal in an integrated fashion (cf. Zawraq, 2007, vol. 1, p. 41 and Rezaeian, 1996: 27).

Sharia, as a term, refers to religion, initiation and school of thought (Tarihi, 1996, vol. 4: 352). As a result, taste of legislator or the system of Sharia can be considered as a system that is designed by the divine legislator for providing the worldly and otherworldly prosperity of humanity and one jurist achieves it.

Of course, in understanding this meaning, we have to pay attention to the following points as necessary premises and antecedents:

Firstly: as to the compatibility of the terminological sense of taste with its lexical sense, one can state:

"Taste" refers to one's preference and attitude. In other words, when we speak of "one's taste" we are referring to something that is in line with his general attitude (Dehkhoda, 2010, vol. 13: 20565). Thus, one needs to say that the word "taste" in such combinations as "taste of Sharia" refers to "locus of the taste faculty" and not the act of tasting something. The application of this word with this grammatical structure in the sense of attitude, initiation and the like, is a type of allegory and based on a causal relation because the approach and initiation of everyone bespeaks of the acceptance of a set of affairs that are accepted by the person as



desirable. This synthetic body has been used by such figures as Naraqī as the system of Sharia; however, given the historical background mentioned earlier, it is not impossible that "Mazaq", despite its Arabic root, represents a Persian term in Shia jurisprudence in the sense of attitude and initiation.

Secondly: the foundation of Shia jurisprudence is grounded in the possible attribution of errors to the jurists. Then, taste and system of Sharia by a jurist is a reflection of the true Sharia system. Thus, in some cases, the resort to the taste of legislator has been endorsed by the jurists who can possibly commit errors. Accordingly, revisiting the aforementioned definition of the taste of legislator, one should say that the taste of legislator is a reflection of the system in the mind of jurist which has been designed for providing the worldly and otherworldly prosperity of humanity.

4. Reaching the Taste of Legislator:

Here we begin with mentioning two premises and one conclusion:

Firstly, jurisprudence as a science features a plan or system which has organized the worldly and otherworldly affairs and determines the collected laws provided by Sharia for human being (Allameh Helli, 2000, vol. 1: 40). Thus, in the parlance of jurists, Shar' and Sharia are tantamount to jurisprudence and the goal of revelation of divine Sharia has been the guidance of humans towards the principles of Sharia, i.e. jurisprudence.

Secondly, as we mentioned earlier, the terms "taste" and "school of thought" are equivalent with system. As to the relationship between school of thought and taste of an object with the knowledge of that object it is said:

School of thought is an attitude and knowledge is the interpretation of that attitude (Sadr, 1997: 360).

As a result, jurisprudence as the science of Sharia will be an interpretation of taste and school of thought of the legislator and it is perhaps for this reason that some have rightly considered jurisprudence as the embodiment of Islamic Sharia (Hosseini Haeri, 2004: 110).

Now drawing upon Shahid Sadr (Sadr, 1997: 367-373) one can say:

Jurisprudence and the system of Sharia are the storeys of the same building. The upper storey is called jurisprudence and it has been formed exactly based on and in the form of the lower storey, i.e. system of Sharia. Compatibility of these two storeys is so that sometimes their difference is neglected or treated with negligence.

On the other hand, it is only the divine legislator who is in charge of construction and formation of the system of Sharia and one jurist in this age is only able to command the upper storey relying on juristic effort and based on the Book and Tradition that have been provided by the legislator. Thus, lower storey can be discovered by the jurist in the light of the features and indices of the upper storey. After this discovery, he can have access to the infrastructure and the principle upon which the jurisprudence has been founded in non-textual cases or even beyond that in some cases he can achieve a new understanding of the reasons based on Sharia. Then, discovery and uncovering the taste of the legislator or the system of Sharia is the result of the association of the two premises:

- 1) Jurisprudential knowledge resulted from jurisprudential efforts in the field of Sharia reasons.
- 2) Endeavor for discovery.



To explain the aforementioned two premises, one can state that although the jurists by reaching the degree of *ijtihad* and inference of the judgments reach the ability to comment on Sharia issues we should not neglect the fact that *ijtihad* and jurisprudential thinking like many of the techniques are among the analogically graded universals and a function of the principle of intensification and weakness insofar as one more knowledgeable and powerful jurist, when compared with an average jurist, is equally competent to answer the questions of Sharia. Thus, many jurists, specifically those who have resorted to the taste of legislator, have considered dealing with jurisprudential reasons or continuous involvement with the jurisprudence, to be among the main conditions and pillars for discovery and resort to taste of legislator. Accordingly, Saheb Jawahir has written:

Needless to say, it is not expected of a jurist who is well versed in the path of jurisprudence and knows the language of Sharia to resort to reasons based on the traditions for every single problem (Saheb Jawahir, 1984, vol. 2: 50-52).

This sentence shows that what constitutes a unique jurisprudential system of Sharia in the mind of a jurist and endows him the power to resort to the system of Sharia in many non-textual cases is the jurisprudential thinking along with effort and not mere achievement of the faculty of understanding the judgement based on Sharia reasons.

In discovering the taste of legislator, the importance of study of the reasons and contemplation is so that a seasoned jurist does not resort to the taste of the legislator before a thorough contemplation and assessment of the reasons (cf. Rouhani, 1998, vol. 3: 35-38). Then, one cannot accept the claim of the taste of legislator and resorting to it from every person who is known as a jurist.

5. Authority or Non Authority of Taste of Legislator

The taste of legislator or system of Sharia is a system or path that has been designed by the legislator for human life so that man can reach his worldly and otherworldly prosperity and the seasoned jurist is expected to discover this system not to construct it.

Now given the fact that the basis of the Shia jurisprudence is grounded in the attribution of error to the jurist, one jurist can get involved in the procedure of discovery of the system of Sharia but not necessarily reaching the reality and his system which has been established via *ijtihad* and effort not to be exactly in line with the true system. Thus, claim of agreement or disagreement of something with the taste of the legislator is part of the non-verbal reasons and its authority is based on its revelation of the reality. Then, authority of the taste of the legislator, as the major premise of the argument, is evident for both jurists and they are just divided as regards the minor premise. This can be inferred clearly from the application of the taste of the legislator. For example, a jurist writes as to Zakat as follows:

The taste of Sharia suggests that the amount that has been donated by the person as Zakat cannot be left as such due to the absence of the needy and poor people and part of this amount can be used for delivering it to the needy (Khoei, 1998, vol. 24: 228).

The other jurist argues that one should doubt of the certainty of the taste of the legislator (Rouhani, 1998, vol. 3: 35-38).

Therefore, authority of the taste of the legislator is accepted by the jurists and the dispute is merely about the authority of the mental picture that a jurist acquires from the system of



Sharia and resorts to it. Nevertheless, in the study of the cases of resorting to the taste of Sharia by the jurists we are encountered with three modes of attribution;

First: those cases where the jurist resorts to the taste of the legislator as the source of certainty (cf. Eraqi, nd.: 87; Saheb Jawahir, 1984, vol. 30: 310). Those who resort to the taste of the legislator consider certainty as the highest degree of authority. Kashif Al Ghita underlines the evidence of certainty acquired in this way and writes:

It is evident that knowledge of the intention of Lord is the measure of obedience of the servants and among those cases where the intention of the Lord is known one can refer to the mentality of the jurist using sound taste and correct understanding based on the available reason; in such cases, no doubt can be casted about its validity" (Kashif Al Ghita, 2002: 187).

Second: Those cases where there is no explicit claim of the acquisition of certainty (cf. Saheb Jawahir, 1984, vol. 40: 387; nd.: 176; Araki, 1999: 182) the evidence shows that knowledge is a type of confidence based on a strong suspicion.

Third: Those cases where there is no clear evidence; in these cases the authority has its origin in certainty and confidence; because according to the studies of the author, none of the great jurists who have resorted to the taste of the legislator believes in the absolute authority and the acquisition of certainty is the only dependable source that reveals the taste of the legislator. Indeed, among those who believe in the authority of the suspicion of the jurist only Mirza Qomi in two cases which are equivalent to the taste of the legislator has referred to the path of Sharia (cf. Mirza Qomi, 1997, vol. 1, p. 99 and 2007, vol. 2: 969).

6. Role of Taste in Inference

The taste of legislator is the result of discovery of a jurist based on his command of the jurisprudence and engagement with religious reasons, on the one hand, and after discovery of the taste and system of Sharia, the jurist uses it as a touchstone and measure for evaluation of the reasons for inference of religious judgments insofar as by referring to this system – which is the outcome of the flourishing of every jurist – in non-textual cases he acquires the religious judgement or even beyond it in various cases he reaches a different and new understanding of a verse or tradition. He may refute some traditions or modify the application of them or perhaps restrict or expand the extensions in practical principles. Here we refer to some of them: interpretation of book (cf. Gharavi Esfahani, 1998, vol. 2: 425), refutation of traditions in conflict with the taste of the legislator (cf. Sabzewari, 1993, vol. 1: 395), narrowing down the extensions of the tradition like prophetic words (cf. Khomeini, 1995, vol. 2: 381), priority to consensus (cf. Saheb Jawahir, 1984, vol. 32: 6), establishment of a jurisprudential principle (cf. Khansari, 1995: 250), interpretation of a jurisprudential rule (cf. Bahr Al Ulum, 1983, vol. 3: 279), priority to epistemic principles like priority to the continuity (Khamenei, 1997: 28), priority to principle of caution (cf. Fail Lankarani, 1988: 544), priority to presumption of innocence (cf. Shobeiri, 2004, vol. 1: 458), development of the scope of principle of caution (Fazil Lankarani, 2001: 47), allocation of principle of innocence in thematic doubts (Broujerdi, 2006, vol. 1: 176, 177), allocation of the generality or reservation of the reason (Hakim, nd. : 303), discovery of elementary and secondary judgments (Marashi Najafi, 1995, vol. 1: 115) and so on and so forth.

6.1. Similar Terms



Some terms have been declared to be similar or equivalent to Taste of Legislator to which we turn here.

6.2. Tariq Al Sharia:

Path of Sharia in most cases is an alternative phrasing of taste of Sharia and this is why we should declare it semantically identical with the taste of Sharia unless another meaning has been intended (cf. Bahr Al Ulum, 2007, vol. 2: 311).

6.3. Daydan Al Shareh

The term "Daydan" is used by the jurists as an equivalent of the taste and path (cf. Vahid Behbahani, 1999, vol. 2: 204). It seems that Seyed Abd Al Hossein Lari (d. 1920) is the first jurist who has used "Daydan Al Shareh" for jurisprudential attribution (Lari, 1998, vol. 1: 512).

6.4. Dab Al Shareh

This term has been first used by Mulla Habib Allah Kashani (d. 1919) in the sense of path and taste of the legislator (Sharif Kashani, 1997: 44).

6.5. Nizam Al Sharia

The term Nizam (system) is equivalent to taste though there is a difference to the effect that in jurisprudential works system as used along with Sharia or Islam has been intended to connote the executive structure and not the theoretical structure. Nevertheless, in some cases theoretical structure has been intended (cf. Mazandarani, 2003, vol. 9: 84; vol. 11: 391).

6.6. Sham Al Fiqaha

It denotes jurisprudential taste (Shubeiri, 1999, vol. 20: 6550) which assists one jurist in denial of particularity and discovery of the touchstone (Naeini, 1994, vol. 2: 190). Then, Sham Al Fiqaha is one of the reasons involved in the discovery of the system of Sharia and not its equivalent.

6.7. Estehsan (principle of continuity)

Estehsan refers to a reason that has dawned to the mind of Mujtahid but there is no word to express it (Pakatchi, 1988, vol. 8: 167). It can be close to the definition that takes the taste of legislator to be tantamount to the fatwa of jurist in decisive Estehsan not the suspicious ones (Makarem, 2007: 340). Of course, Estehsan in this sense refers to the reason regardless of its being decisive or dubious while taste refers only to the decisive part.

But in criticism of this affinity and the aforementioned definition one can state:

Firstly, the foundation of Estehsan including the decisive and dubious ones is grounded in the personal view of the jurist. Then, what is acquired through this way is based on the jurist not the legislator.

- Secondly, in the discussion of the discovery of taste from the reasons the dependence of taste of legislator to such reasons as book, traditions, various texts, analogy of priority and so on. has been demonstrated. Therefore, one cannot use this term as an equivalent of Estehsan or a jurist's fatwa for an ineffable reason.
- Thirdly, Estehsan if we endorse its authority, will not be equal to the taste of the legislator and it can be merely one of the reasons that discover the taste and system of Sharia.

6.8. Induction:

The argument in which we reach a universal conclusion via an examination of particular cases is called induction (Center for Information and Islamic Documents, 2010: 189). Therefore, induction can be among the reasons of discovery of the taste of the legislator and we cannot



regard it to be tantamount to the taste of legislator though by the majority of Shia scholars, inductive reason is valid as long as it leads us to certainty (Mughnyyah, 1975: 358).

6.9. Intentions of Sharia

In the definition of intentions of Sharia it has been said:

They refer to the wisdom, expediencies, meanings and secrets of the religious judgments and these judgments have been revealed for their preservation (Badri, 2008: 282).

Generally speaking, the theory of intentions of Sharia relies on the end and goals of divine judgments and struggles to reach the end through verses and traditions and then infer the judgments and what is of importance in it, is first the inference of intentions and its application as the rule of inference of judgement (Alavi, 2011: 185). Although in the works of some of the jurists in Shia jurisprudence, there are discussions of the causes of judgments and intentions of Sharia (cf. Mohaqeq Karaki, 1994, vol. 174; Sivari, 1983: 57-63.). These causes seem not to be after demonstration of the intentions of Sharia as the basis of religious judgement. Then, even if the intentions of Sharia are a reason for understanding and discovery of religious judgement, they are a part of the specific reasons belonging to general jurisprudence and its application in Shia jurisprudence will not be valid as long as it lies outside the circle of authority. It is in this spirit that Mohaqeq Helli has written:

From the intentions of Sharia, we become conscious that contracts are means for reaching their fruits and they are not anything but means of mediation" (Mohaqeq Helli, 1994: 167).

Given what has been said earlier, the taste of the legislator is a system that is designed by the legislator for providing the worldly and otherworldly interests of human being and the intentions of Sharia are focused on the discovery of intentions and goals which have been intended by the legislator in designing the system at issue. Then, taste of Sharia and intentions of Sharia are respectively the cause and result.

Anyway, if we can discover a judgement via the intentions and goals inferred from the verses, traditions, reason and so on. this discovery will be undoubtedly a cause for discovery of the existing judgement in the system of Sharia or a means for reaching the goals at issue.

CONCLUSION:

Taste of Sharia in the sense of system of Sharia was coined as a term in the thirteenth century of Hijra by Mulla Mahdi Naraqı (d. 1798) and introduced to Shia jurisprudence as an additional reason and then it was warmly received by distinguished jurists like Saheb Jawahir (d. 1840). Since then this term found a specific place in Shia jurisprudence insofar as after then few jurists can be found who has not referred to the taste of Sharia in his jurisprudential works and arguments. Taste of Sharia is in fact the mental structure and systematic office which provides a non-verbal reason thanks to the faculty of ijtiħad and numerous efforts associated with religious reasons. Through this means, the jurist is able to use his own jurisprudential argument in a systematic form. Of course, existence of such a reason not only opens a determinate route in all arguments before the jurist will have a special share in finding the judgment of the non-textual cases.



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