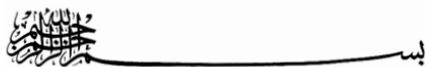


ACKNOWLEDGEMENTS

God has given me an abundance of blessings that are far beyond my comprehension! I hope that He accepts this modest addition to knowledge, with all of its shortcomings, as some form of worship, in gratitude for His many bounties. I would also like to pay a special tribute to a number of scholars and mentors, who have greatly contributed to my scholarly development. Appreciation is due to the late Shaykh Mohammad al-Ghazaly, late Shaykh Ismail Sadiq al-Adawi, and Shaykh Mahmoud Faraj, for what I have learned from them about the Islamic law and the Qur'an in my early years, to Professors Mohamed Kamel and Hazem Rafat for the ideas I developed based on my Ph.D. studies in Systems Analysis at the University of Waterloo, Canada, to Professors Ahmad al-Assaal and Salah Soltan for encouraging me to pursue research on *maqāṣid al-sharī'ah* during my Masters of Jurisprudence studies at the Islamic American University, Michigan, to Dr. Gary Bunt for the research I developed under his supervision during my Ph.D. studies in Religious and Islamic Studies, at the University of Wales, Lampeter, U.K., and last but not least, to H.E. Ahmad Zaki Yamani, the Founder and Chairman of Al-Maqasid Research Centre in the Philosophy of Islamic Law, London, U.K., for entrusting me with the position of the Founding Director, and for his great and continuous support. I would also like to mention a few scholars, who have contributed significantly, although in various ways, to the scholarly contents of this book. May God reward and bless the following scholars: Abdallah Bin Bayyah, Mohamed S. El-Awa, Yusuf al-Qaradawi, Taha al-Alwani, al-Habib ibn al-Khoujah, Faisal Mawlawi, Hasan Jabir, Mohammad K. Imam, Ibrahim Ghanim, Saif Abdul-Fattah, and Ahmad al-Raysuni. I am also grateful to the International Institute of Islamic Thought (IIIT) especially to Dr. Jamal Barzinji and Dr. Anas al-Shaikh-Ali, for their high level of professionalism and support, as well as Shiraz Khan, Maryam Mahmood, and Maida Malik, for their hard work and valuable comments, and to Sideek Ali for the chart illustrations. Thanks also go to Suhaib Elamin for the initial setup of the charts and references that appear in this book. Finally, I shall always remain deeply indebted to my family, especially my mother, Layla al-Tahery, my wife, Wanda, and Radwa, Omar, Ahmed, and Sarah!

JASSER AUDA

FOREWORD



Of knowledge, we have none, save what
You have taught us. (The Qur'an 2:32)

The International Institute of Islamic Thought (IIIT) has great pleasure in presenting this scholarly work on the topic of *maqāṣid al-Sharī'ah* (the higher objectives and intents of Islamic Law). The author, Dr. Jasser Auda, is a well-known multi-disciplinary scholar, who has developed a specialization in this field. This novel work of serious and careful scholarship, presents a new approach to the methodology and philosophy of Islamic law that is based on *maqāṣid al-Sharī'ah*. We hope that the important analysis and ideas contained in this study, will not only make an important contribution to the field of *maqāṣid al-Sharī'ah*, but also attract wider attention and generate greater interest among readers.

Since few works, if any, are available in the English language on this subject, *al-maqāṣid*, the IIIT decided to fill the vacuum by initiating the translation and publication of a series of books on *maqāṣid al-Sharī'ah* to introduce this important area of thought to English readers. In addition to this particular work the series so far includes: *Ibn Ashur Treatise on Maqāṣid al-Sharī'ah* by Muhammad al-Tahir ibn Ashur, *Imam al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law* by Ahmad al Raysuni, and *Towards Realization of the Higher Intents of Islamic Law: Maqāṣid al-Sharī'ah a Functional Approach* by Gamal Eldine Attia. Although the topic is a complex and an intellectually challenging one, it needs to be emphasized that these books are not only for specialists, scholars and intellectuals alone, but additionally provide very interesting and useful reading for the general reader.

In this pathbreaking study, Dr. Jasser Auda presents a systems approach to the philosophy and juridical theory (*uṣūl*) of Islamic law based on its purposes, principles, higher objectives, and ends (*maqāṣid al-sharīʿah*). For Islamic rulings to fulfil their purposes of justice, equality, human rights, development, and civility in today's context, the author places *maqāṣid*, as the group of divine intents and moral concepts, at the heart and basis of Islamic law. He introduces a novel method of analysis, classification, and critique that utilises relevant features from systems theory such as wholeness, multidimensionality, openness, cognitive nature, and especially 'purposefulness' of systems. More broadly, this systematic methodological approach has implications for the reconstruction of the law, human rights institutions, civil society, and governance anchored in Islamic principles and juridical thought.

The IIIT, established in 1981, has served as a major center to facilitate sincere and serious scholarly efforts based on Islamic vision, values and principles. Its programs of research, seminars and conferences during the last twenty four years have resulted in the publication of more than two hundred and fifty titles in English and Arabic, many of which have been translated into several other languages.

We would like to express our thanks and gratitude to the author, who throughout the various stages of the book's production, co-operated closely with the editorial group at the IIIT's London Office. We would also like to thank the editorial and production team at the London Office and those who were directly or indirectly involved in the completion of this book: Maida Malik, Dr. Wanda Krause, Shiraz Khan, and Sideek Ali. May God reward them and the author for all their efforts.

Ramadan 1428
September 2007

ANAS S. AL-SHAikh-ALI
Academic Advisor, IIIT London Office, UK

INTRODUCTION

IN THE NAME OF ‘ISLAMIC LAW’?

I am writing these lines after I drove this morning through London, UK, to my office. It was supposed to be a pleasant experience, given the great July weather and the (unusual!) clear skies today. However, unfortunately, this morning’s drive to work was not a pleasant experience, because the city, and the whole country, is on the ‘highest level of alert.’ Security people told us yesterday that this means that another ‘terrorist’ attack is ‘imminent’! So, like all Londoners, I was nervous about travelling through the city, and was constantly looking around for any ‘suspicious behavior,’ whatever that means.

Nevertheless, I was additionally annoyed with all that is happening in this city these days, because what I simply call ‘crimes’ (rather than ‘acts of terrorism’) are done ‘in the name of the Islamic law,’ so declared some of the people who were responsible for them. I was angrily exclaiming: ‘Islamic law’? What ‘Islamic law’? Does ‘Islamic law’ sanction indiscriminate killing of people in peaceful cities?! Where is ‘wisdom and people’s welfare,’ which every Muslim knows is the basis of the ‘Islamic law’?

I remembered Ibn al-Qayyim’s (d. 748 AH/1347 CE) words about the ‘Islamic law,’ which I am quoting below and will be referring to more than once throughout this book. Note that in Arabic, Ibn al-Qayyim used the word ‘shari‘ah,’ which I shall explain in detail later.

Shari‘ah is based on wisdom and achieving people’s welfare in this life and the afterlife. Shari‘ah is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its

opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Shari‘ah, even if it is claimed to be so according to some interpretation.¹

This is what this book is about, despite its specialised language that I am aware a non-specialised reader would find difficult to digest.

WHERE IS THE ‘ISLAMIC LAW’?

Islam is the religion of roughly one-quarter of the world’s population.² Most Muslims live in the region that extends from North Africa to South East Asia, and Muslim minorities across Europe and the Americas are the second or third largest religious communities.³ Islam comprises people from almost every ethnicity, including Arabs (currently 19%), Turks (4%), Indians/Pakistanis (24%), Africans (17%), and South-East Asians (15%). Muslims grew from a small group in Makkah at the beginning of the seventh century CE to an established ‘Islamic State’ that overpowered both the Roman and Persian empires by the end of the same century. Islam, then, became the religion of a variety of cultures and a civilization that spanned over the medieval centuries.

Today, however, the most recent United Nation Development Programme (UNDP) Annual Reports show a Human Development Index (HDI) on the lower side for most countries with majority of Muslims.⁴ The HDI is calculated based on a number of factors, which include literacy, education, political and economic participation, women empowerment, in addition to standard of living. Some wealthy Arab states, which rank exceptionally high in terms of average income per capita, rank much lower in terms of justice, women empowerment, political participation, and equal opportunity. Related UN reports also point to various forms of human right violations and corruption in most countries with majority of Muslims, as well as dilemmas with co-existence and citizenship of Muslim minorities in their societies. In summary, Muslims everywhere are currently facing major development challenges, which are posing a large number of serious questions.

I understand the ‘Islamic law’ to be a drive for a just, productive, developed, humane, spiritual, clean, cohesive, friendly, and highly

democratic society. However, throughout my travels in various countries, I see little evidence for these values, on the ground, in Muslim societies and communities everywhere. So, the big question that I have is: Where is the ‘Islamic law’? How could it play a role in this crisis?

This book attempts to provide an answer to the second question, which, I believe, will eventually bring about an answer for the first question. In other words, when the ‘Islamic law’ proves to have the capacity of making a real change in average-Muslims’ lives, they will embrace it and it will eventually make a difference.

IS THERE A PROBLEM WITH THE ‘ISLAMIC LAW’?

So far, I have put the ‘Islamic law’ between quotes, because I have to define what I mean by ‘Islamic law’ before I could claim that it brings justice, mercy, development, and so on. This definition is in addition important in order to answer the question of whether there is something wrong with ‘Islamic law,’ and hence the critique that this book presents.

A detailed analysis of the terms *fiqh*, *sharī‘ah*, *fatwa*, *madhāhib*, *ijti-had*, *qānūn*, and *‘urf*, and the intricate relationships between these terms, will be explained in this book. However, for now, I would like to differentiate between three different meanings of the general term ‘Islamic law,’ in order to answer the above question at this point.

1. *Shari‘ah*: The revelation that Muhammad (ﷺ)⁵ had received and made practicing it the message and mission of his life, i.e., the Qur’an and the Prophetic tradition.
2. *Fiqh*: The huge collection of juridical opinions that were given by various jurists from various schools of thought, in regards to the application of the *shari‘ah* (above) to their various real life situations throughout the past fourteen centuries.
3. *Fatwa*: The application of *shari‘ah* or *fiqh* (above) to Muslims’ real life today.

Detailed analysis of these issues and related issues is the mission of this book. However, my answer to the above question (Is there a problem with the ‘Islamic law’?), in plain English, is the following:

- If you mean by the ‘Islamic law’ the shari‘ah, i.e., the revelation that was given to Muhammad, which he internalised, practiced in his own life, and went through a long educational process to educate his companions and the world about it – then the answer is: No. There is no problem with the ‘Islamic law.’ It is a way of life that is all about justice, mercy, wisdom, and good, as Ibn al-Qayyim had mentioned.
- If you mean by the ‘Islamic law’ the fiqh, i.e., the Islamic schools of law’s wealth of heritage, then the answer is, also: No. There is nothing wrong, generally speaking, with juridical reasoning carried by scholars for their own environments and times. It is true that some individual scholars had made mistakes and/or had taken controversial positions on issues. However, this is the nature of juridical research. The role of scholars, at all times, is to correct each others and participate in the ongoing debates.
- However, if you mean by the ‘Islamic law’ fatwa, then the answer is: It depends on how the fatwa is issued! Some *fatāwā* are manifestations of Islam and its moral values, and some others are simply wrong and un-Islamic. If the fatwa is copied verbatim from some classic book in the Islamic law, then it is quite possibly flawed because it is quite probably addressing a different world with different circumstances. If the fatwa is based on some sort of twisted interpretation of a script, with an aim to serve the political interests of some powerful people, then it is wrong and un-Islamic. If the fatwa is allowing people to commit an act of injustice, discrimination, harm, or immorality, even if it were to be based on some sort of ‘interpretation,’ then it is also wrong and un-Islamic. If the fatwa is issued based on the Islamic authentic sources, on one hand, while keeping people’s welfare and the principle values/purposes of the Islamic law (Arabic: *maqāṣid al-sharī‘ah*) in mind, on the other hand, then it is a correct and valid fatwa.

You can see from what I mentioned above the scope of this book, and the issues that it will be dealing with. However, the issues related to the above concepts that this book is discussing are complex and require a detailed treatment. That is why I prefer at this point to provide below, a

general scope of the disciplines involved in this book, and finally, an abstract summary of what this research is trying to achieve. Thence, I shall leave the reader with the material in the chapters themselves.

SCOPE OF DISCIPLINES

Classifying human knowledge into ‘disciplines’ reduces the complexity of concepts by grouping them under identifiable fields, rather than dealing with each concept individually.⁶ These identifiable fields allow seekers of knowledge to develop expertise in specific disciplines. Non-expert enquirers are then able to identify a field of knowledge to which their enquiry belongs and refer to specialists in that field to answer their questions. However, ‘disciplinisation’ should not be an obstacle in the way of using relevant concepts from ‘different’ fields in research endeavors. Nor should it be a way of monopolising sources of reference in any discipline in order to restrain creativity and control new ideas. This book takes a multidisciplinary approach that integrates relevant knowledge from a variety of fields within the general ‘disciplines’ of Islamic law, philosophy, and systems. The following is a brief outline on how knowledge from these fields will be integrated. More details will be provided throughout the book.

Within the discipline of Islamic law, this book is concerned with the ‘fundamentals of Islamic law’ (*uṣūl al-fiqh*). However, topics related to Islamic law (*fiqh*) itself, the science of narration (*‘ilm al-ḥadīth*), and the science of exegesis (*‘ilm al-tafsīr*) are also discussed. For example, rulings from *fiqh* are mentioned to illustrate the practical impact of fundamental theories. Moreover, basic rules (*qawā‘id*) from the sciences of *ḥadīth* and *tafsīr* are discussed in the context of their relation with the fundamentals of law. The purposes (*maqāṣid*) of the Islamic law are proposed by some twentieth century reformers as a standalone discipline.⁷ However, traditionally, *al-maqāṣid* were studied as a secondary topic within *uṣūl al-fiqh*, usually under the category of ‘unrestricted interests’ (*al-maṣāliḥ al-mursalah*) or the appropriate attribute for analogy (*munāsabah al-qiyās*).⁸ This work, however, will endorse *maqāṣid* as ‘fundamental methodology’ for *uṣūl al-fiqh*, regardless of the debate over whether or not it should be considered a standalone discipline.⁹

Within the discipline of philosophy, the fields of logic, philosophy of law, and postmodern theory are directly related to this book. Logic is at the heart of reasoning about law, Islamic law included. Of specific significance to this book is philosophers/jurists within the fifth to eighth Islamic centuries who endorsed, developed, or criticised Greek logic, and how their own logic influenced their methodology of reasoning. Modern logic is also of special significance here, since its points of departure from traditional logic will be our drive for criticising the logic of *uṣūl al-fiqh* itself. Philosophy of law, in a modern sense, will be addressed in this book in terms of how philosophy of Islamic law could benefit from its concepts and structure, especially its recent systems-based developments. Postmodern theory is an ‘anti-modernism’ branch of philosophy that has inspired some powerful contemporary critiques of law in general and Islamic law in particular. This book will analyze these critiques and ‘criticise’ them in turn.

‘Systems’ is a new independent discipline that encompasses a number of sub-disciplines, amongst which systems theory and systematic analysis are specifically relevant to this work. Systems theory is another ‘anti-modernism’ philosophical approach which criticises modernism in a way that is different from postmodern theories. In this book, concepts from systems theory, such as wholeness, multidimensionality, openness, and purposefulness, will be utilised in developing our analysis methodology itself, which will, then, be utilised throughout. Related to systems is the new discipline of cognitive science. Concepts from cognitive science will be used to develop fundamental concepts of the theory of Islamic law, such as the concepts of classification/categorization and the ‘cognitive nature’ of the law. The concept of ‘cognitive culture’ will also be used to develop the concept of custom (*al-ʿurf*) in the theory of Islamic law.

Without incorporating relevant ideas from other disciplines, research in the fundamental theory of Islamic law will remain within the limits of traditional literature and its manuscripts, and Islamic law will continue to be largely ‘outdated’ in its theoretical basis and practical outcomes. The relevance and need for a multidisciplinary approach to the fundamentals of Islamic law is one of the arguments of this book.

ABSTRACT

This book presents a multi-disciplinary research that aims to develop the fundamental juridical theory of Islamic law via a systems approach. Current applications (or rather, mis-applications) of Islamic law are reductionist rather than holistic, literal rather than moral, one-dimensional rather than multidimensional, binary rather than multi-valued, deconstructionist rather than reconstructionist, and causal rather than teleological. There is lack of consideration and functionality of the overall purposes and underlying principles of the Islamic law as a whole. Moreover, exaggerated claims of ‘rational certainty’ (or else, ‘irrationality’) and ‘consensus of the infallible’ (or else, ‘historicity of the scripts’) add to lack of spirituality, intolerance, violent ideologies, suppressed freedoms, and authoritarian regimes. Dominant methodology generally resists learning from other philosophies that did not originate from the Islamic tradition, or else, totally adopts other philosophies that contradict with basic Islamic beliefs.

This research is divided into three themes, (1) methodology, (2) analysis, and (3) theoretical developments.

(1) Methodology in this endeavor is based on two theories: (a) theory of the purposes of Islamic law or *maqāṣid al-sharīʿah* (Chapter 1) and (b) systems theory (Chapter 2). Recent theories of *maqāṣid* (a) which introduce new notions related to reform and development, are surveyed. *Maqāṣid* is proposed as a philosophy, and fundamental methodology for assessing classic and current juridical theories of Islamic law. Systems theory (b) is utilised to define a new method for analysis that relies on the systems features of cognition, wholeness, openness, hierarchy, multi-dimensionality, and purposefulness. Purposefulness is the core feature of systems.

(2) This research will define ‘Islamic law’ (Chapter 3), carry out a critical analysis of various classic and contemporary theories and schools of Islamic law (Chapters 4 and 5, respectively), and introduce new classifications of classic methods and contemporary tendencies (Chapters 4 and 5, respectively). In order to develop the analysed theories of Islamic law, the above two approaches to methodology (a and b) will merge into one approach (in Chapter 6); Islamic law is defined as a

‘system,’ whose feature of purposefulness is realised through the realisation of *maqāṣid al-sharīah*.

(3) Therefore, a number of theoretical developments are proposed (Chapters 6 and 7), such as, legitimising the juridical implication (*dilālah*) of the purpose of scriptural evidence, resolving opposing evidences by considering their multiple dimensions, and contextualising hadith narrations by considering prophetic intents in various forms.

The theoretical outcome of this book is that the validity of any method of *ijtihād* is determined based on its degree of realisation of *maqāṣid al-sharīah*. The practical outcome is Islamic rulings which are conducive to the values of justice, moral behavior, magnanimity, co-existence, and human development, which are ‘*maqāṣid*’ in their own right.

JASSER AUDA

London, UK

July 2007, Jumada II, 1428