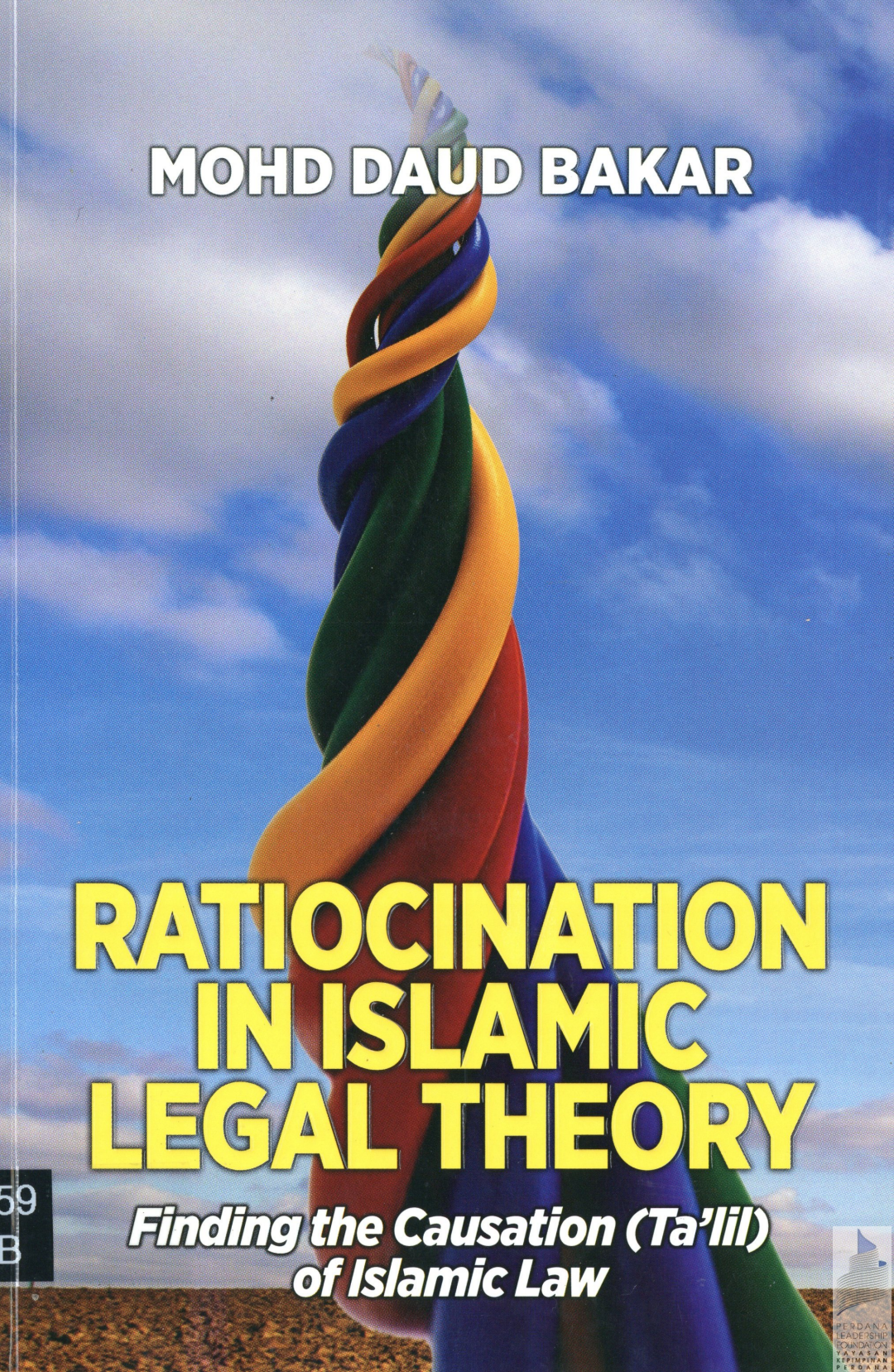


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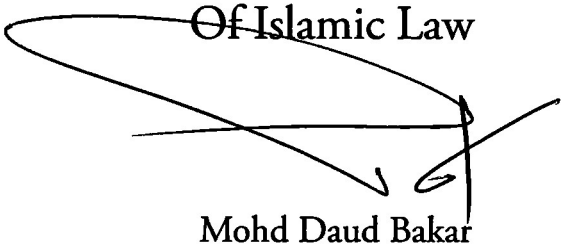
RATIOCINATION IN ISLAMIC LEGAL THEORY

Finding The Causation *(Ta'lil)* Of Islamic Law



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PREFACE

Islamic law is a Divine revealed law. It starts from given or self-evident premises which constitute the sources of Islamic law. While the sanctity of legal arguments in Western legal circles is based on the structure of premises and quality of relationship between the propositions which justify the conclusion, the validity of arguments in Islamic law rests primarily upon the epistemological value of the revealed premises from which they are constructed. Nevertheless, the Divine premises, contrary to the prevailing belief in Western Islamic law literature, are by no means essentially irrational and illogical.

Islamic law making process appears to combine the salient features of law making in both the Common Law as applied in England and the Civil Law as generally applied in the Continent. On one hand, this presupposes that Islamic law would rely heavily on ratiocination (*ta'lil*) for the purposes of an extension of a precedent to a new assimilated case as is the case in the Common Law system which is a case-law oriented. On the other hand, Islamic law is deemed to have legal techniques for the interpretation of the broad principles of the Qur'an and the Sunnah to be applied to a specific question at hand as is the case in the Civil Law system which relies heavily on the statute.

The work seeks to portray the rationality as well as practicality of Islamic law by looking at both *fatwa* and *qada'* literature. Respectively, reading of Islamic juristic writings or simply Islamic *fiqh* in isolation to the practice of Islamic *fatwa* and *qada'* will likely mislead the readers on a number of significant issues, *inter alia*, the closure of the gate of *ijtihad*, the stagnation of Islamic law in the changing circumstances, interpretation of Muslim heritage, culture and civilization and the like.

Also, both *fatwa* and *qada'* activities, unlike doctrinal writings, will reflect the operationalization of principles of

Islamic law to day-to-day cases of the Muslim community. The operationalization of any legal system is bound to disclose issues of epistemology, social-cultural realities of a community, interpretation and reinterpretation of the heritage and history, and reconstruction of new principles based on the accepted sources of guidance, All of these issues are 'intellectually' discussed in this work.

It is my ardent hope that this book will shed some light on how rational and coherent Islamic law making process is. There could have been some inconsistencies in this process (which is not unusual in other legal systems and law making processes), but in overall analysis, the readers will find that the duty to extract the ultimate legal position in Islamic legal or juristic tradition has been very structured and logical following certain algorithm.

There is no better theme other than ratiocination to dive deep into the fabrication unit of las making or legal interpretation in the realm of Islamic law. As much as we envisage to unlock the logical and coherent nature of law making process in Islamic legal tradition, we will also dwell with many integral technicalities and processes to navigate a man-driven interpretation from divinely-based provisions and guidance.

I sincerely hope that you will find the book not only intellectual but also insightful on Islamic legal theory algorithm and bandwidth. I aspire to kill two birds with one stone.

Note: I have finished writing this piece of write-up in early 2000s. In this book, I have not changed and edited the early manuscript significantly. Thus, most of the references may not be updated and current post 2000s. Nevertheless, I would like to believe that the list of the references and bibliography is still relevant, useful and intact.

CHAPTER ONE

Introduction and Hypothesis

The book has one purpose only. The book proposes to shed some light on the *modus operandi* of legal reasoning in Islamic law, as well as to analyze the reasons and background which gave rise to the misperception towards the very nature of the Islamic law making process in contradistinction to man-made law. This will be done by referring to some of historical developments including *fatwa* and *qada'* literature and *fiqhi* writings; all of which have contributed significantly to the development of Islamic law.

The emphasis of this book therefore, must be the relationship between theory and practice on the one hand and the relationship between revelation and reason on the other. By means of this academic investigation, the main functions that were assigned to *usul al-fiqh* (Islamic legal theory) and also the extent of *usul al-fiqh*'s ability to respond to changes will be thoroughly scrutinised. The ultimate aim is to show that *usul al-fiqh* played a significant role in the Shariah development that it reacted to certain realities in the historical process; and that it is far from being theoretical and *ad-hoc*.

To begin with, it is useful to understand how Islamic law - whether in *fiqhi* or *fatwa* or *qada'* circles - is constructed. Islamic

legal theory, unlike man-made law, starts from given or self-evident premises which constitute the sources of Islamic law. Generally speaking, source denotes the place or the basis from which a rule or a legal argumentation is taken, be it a law, a case or a treatise, as the case may be.

In the case of Islamic law, both the Qur'an and the Sunnah are the ultimate sources and both of these sources are clearly textual in character. Above all, they are sacred texts because they are the product of Divine inspiration. In other words, Islamic law historically developed through the text-oriented approach in the sense that Muslim jurists are guided not by intuition, but by *dalil*, by textual evidence, prescribed by both the Qur'an and the Sunnah.

Therefore, Islamic law or *fiqh* becomes conceptual knowledge rather that intuitive perception.[1] Strictly speaking, it is not the law which is interpreted, but rather the sources of law. The law as a topically-organized finished product consisting of precisely-worded rules is the result of juristic interpretation; it stands at the end, not at the beginning, of the interpretative process.[2]

The decisive fact about those premises is that, while they are humanly conceived, Muslim usulists have striven to express what they perceive to be Allah's law since the Shariah was not given to man ready-made as in the case of modern acts and enactments. Also, it is worth mentioning that both modern law and Sharia law assume, though on different grounds, that men are capable of learning the true nature of right and wrong and that having done so, they can elaborate their knowledge rationally and apply it to concrete situations.[3]

The validity of arguments in Islamic law, however, rests primarily upon the epistemological value of the revealed premises from which they are constructed.[4] This can be clearly seen in the writings of great Muslim jurists such as al- Shafi'i, Ibn Rushd and al-Ghazali respectively. These scholars have

constantly insisted on the centrality of the epistemological value of the revealed premises in legal arguments.[5] On the contrary, the sanctity of arguments in Western legal circles is based on the structure of premises and quality of relationship between the propositions which justify the conclusion in which the epistemological consideration finds no place.

At this stage, it is rather appropriate to state that Shariah differs from *fiqh*, or Islamic positive law. Only the latter was the product of jurists' apprehension and formulation governed by the theory of sources known as *usul al-fiqh*. *Fiqh* differs from Shariah in the sense that Shariah is the Divine law as it is and *fiqh* is the Divine law as human beings understand it and derived from it.[6] *Fiqh* is approximation, albeit a human and close one, to the law of Allah and it may take the form of a *fatwa*, a court decision, an opinion on law rendered by the jurists to be the law of Allah.[7] The idea that Islamic law is a jurists' law needs a more thorough examination since this notion may likely lead to misperception of the lawmaking process.

This anxiety and concern of misperception about Islamic law making process have nevertheless turned into a 'reality'. Some leading Western scholars and judges have presumptuously described Islamic law as arbitrary, discretionary and capricious in character.

Farhat Ziadeh, for example, criticised the attitude of some American judges who have offhandedly used the term 'qadi-justice' as a total denial of the law; unprincipled, expedient and arbitrary. He wrote that, "....it is surprising to read the denigrating remarks of Mr. Justice Frankfurter about the office of the qadi. In his dissent in the case of *Terminiello vs. Chicago* (337 U.S. 1, 1949), Mr. Justice Frankfurter attacked the inclination of the majority to find a federal claim where none had been pleaded in the lower state courts. He (Frankfurter) said; "This is a court of review, not a tribunal unbounded by rules. We do not sit like a *kadi* under a tree dispensing justice according to consideration of individual

expediency".[8]

Similarly, the Ninth Circuit, in *Colonial Trust vs. Goggin* (230F. 2d 623, 1955) disparaged one plaintiff's argument by saying it was based upon an abstract theory of justice which might been entertained by an Oriental Cadi.[9]

John Makdisi discloses an earlier case indicating the same sentiment. In *Clark VS. Harleysville Mut. Casualty.*, 123 F. 2d 499, at 502 (1941), Judge Dobie of the Fourth Circuit Court of Appeals refused to construe the words of a Virginia Statute against its legislative intent when he stated:

"We cannot torture these words into fanciful meaning; we cannot ignore what appears to have been a crisp legislative distinction expressed in terms that are anything but uncertain. We sit, after all, as appellate court, administering justice under the law, not as an ancient *cadi*, dispensing a rough and ready equity according to the dictates of his own unfettered discretion".[10]

These remarks against the qadi-justice have given rise to many responses from the West. Lawrence Rosen, for example, has maintained that Justice Frankfurter's statement betrays the limitations of Western scholars' understanding of *qadi-justice* which is far from arbitrary or unsystematic.[11] According to John Makdisi, this wrong perception of Islamic *qadi* or *qadi-justice* originated from Max Weber's earlier description of Islamic law as a sacred law in which he stated that, "systematic law making aiming at legal uniformity or consistency was impossible".[12] According to Weber, the opinions of the Islamic jurists "are given without any statement of rational reasons (and thus) actually increase the irrationality of the sacred law rather than contribute, however, slightly, to its rationalization".[13]

This observation is further supported by the phenomenon of *ikhtilaf* in Islamic law to the effect that Islamic law never achieved unity but expressed itself in, at least, four surviving schools. More interestingly, contemporary Muslim communities are still

divided among themselves on a number of issues related to their laws.

Weber's remark poses a number of significant and challenging issues for this book to address. As far as I am concerned, it appears that the whole submission and arguments of Weber, as will be shown later, are related heavily to Islamic legal theory whose function is to discover the law of Allah. It is my submission that Islamic legal theory is a subject which is not only of scholarly interest to classical Muslim usulists but also of essential, practical importance to the contemporary Muslim usulists to solve new problems from within this methodology of interpretation.

The more deeply we study Islamic legal theory, the more successful and valuable will be our attempts to contribute to the development of Islamic law significantly. Modern Muslim jurists may agree or disagree with the framework of Islamic legal theory as laid down by classical and medieval usulists but many of the methodological issues that were considered systematic and workable for their times have not lost their essence today.

As the *raison d'etre* and sole purpose of Islamic legal theory was the formulation of Islamic positive law[14] the issue of both the rationality and practicality of Islamic law should be sought from the discipline of Islamic legal theory and not from elsewhere since Islamic legal theory, as stated elsewhere, is an Islamic legal theory which provides methodologies from which rules might be legitimately derived. In other words, Islamic legal theory deals with legal theories, principles in the interpretation of legal texts, methods of reasoning and the deduction of rules and other such matters.[15]

To illustrate the idea of Weber[16] comprehensively, we have little choice but to quote his original writing either from his book entitled Economy and Society[17] or from other books which offer a substantial analysis of, and comment on, the idea of Weber.[18] The major question which occupied Weber's attention is the degree of

rationality contained in the Islamic legal system. Weber started by stating that there was a clear distinction between Oriental and Occidental societies in the sense that the law governing the Oriental societies or patrimonial societies of Asia, Africa and the Middle East were predominantly arbitrary.[19]

In the context of economic growth, in Weber's view, only the West enjoyed economic stability and growth as the West has a systematic, rational and abstract legal code compared to the law prevailing in the Oriental societies.[20] Weber has attributed the reason for the inconsistency of law in the Muslim world to *'qadi-justice'* to the effect that the decisions of the *qadis* were often informal judgments rendered in terms of concrete ethical or other practical valuations lacking the knowledge of rational "rules of decision" (*Urteilsgrunde*).[21]

John Makdisi has summarised the hypothesis of Weber, as far as the rationality of law - both in law making and law finding - is concerned, in the following manner. Legal reasoning, according to Weber is classified into four different categories; rational, irrational, formal and substantive.[22] Formal irrationality takes place when the law is made or found in a manner that is not conceivable by reason, such as by oracle, ordeal or appeal to a prophet. A striking example of this kind of law existed in the 'oath - and - ordeal' procedure in some jurisdictions; the oath procedure required the correct words to be spoken without mistake and the proper ceremonial acts to be studiously performed and the ordeal sought to establish guilt or innocence based on whether one sank in water or one's hand blistered from the hot iron.[23]

The second category of legal reasoning is substantive irrationality which refers to lawmaking and lawfinding process based on arbitrariness, emotions, or evaluations which are made without any reference to rules or general norms.[24] According to Weber, *qadi-justice* was conducted in terms of subjective

decisions rather than in terms of rules.[25] He has the following to say regarding the practice of law making and law finding of the *qadi-justice;*

"A typical feature of the patrimonial state in the sphere of lawmaking is the juxtaposition of inviolable traditional prescription and completely arbitrary decision-making (*kabinetts justiz*), the latter serving as a substitute for a regime of rational rules".[26]

Weber, in the above quotation, was referring to both the institutions of *fatwa* and *qada'* in Islamic law respectively. Both these institutions are the very opposite of the legal stability which characterised formal rational law and Occidental legal administration. According to Weber, Islamic law became absolutely fixed around the seventh or eighth century of Islam (13 or 14th century A.D.).[27] Legal reasoning was subordinate to both fixed interpretative methods and vague authoritative commentaries. Innovation, if it took place, was through disputatious theoretical casuistry without contact with life.[28] Weber concluded:

"As a consequence of these factors, together with the already mentioned inadequacy of the formal rationality or juridical thought, systematic lawmaking, aiming at legal uniformity or consistency was impossible. The sacred law could not be disregarded; nor could it, despite many adaptations, be really carried out in practice. As in the Roman system, officially licensed jurists can be called on for their opinions by the Khadis, or parties, as the occasion arises. Their opinions are authoritative, but they also vary from person to person; like the opinions of oracles, they are given without any statement of rational reasons. Thus, they actually increase irrationality of the sacred law rather than contribute, however slightly, to its rationalisation".[29]

It is obvious from the quotation that Weber thought that both *muftis* and *qadis* had unlimited discretion in their manner of law-

opinion and judgment-making and this practice and attitude would likely fit the substantively irrational law best.[30]

The reason behind the instability of Islamic law was the inflexible content of the Shari'ah. The Shariah was perceived by Weber as the product of the speculative labours of the *faqih.* (jurist). It is for this reason that Weber termed the sacred law a 'specifically "jurist's law" '. Once the details of the law had been elaborated by the jurists, the Shariah was sanctioned by the notion that the door of *ijtihad* is closed.[31]

As the legal tradition theme to be regarded as sacred and immutable, the only official and legitimate legal activities were those of memorising legal traditions and law finding without having any concern with real legal problems.[32] This was the result of the nature of the legal education prevalent in Islamic societies which remained limited to empirical and mechanical memorization and theoretical casuistry,[33] thus impeding legal unification and consistency.[34]

Put differently, the instability and inconsistency of law making and law finding in Islamic law originated from the syllabus and methods of legal training in Islamic Colleges of Law or "Islamic Inns of Court". The judges who graduated from these legal training centres were unable, compared to the judges and lawyers of the common law, to conceive the logical derivation of concepts and rules from legal propositions as well as from existing legal premises. Therefore, the judgments of Muslim judges are irrational and arbitrary since the decision makers, the *qadis*, deliberately appeal to emotions instead of rational values to justify the judgements.[35]

The remaining two categories of legal reasoning, according to Weber, consist of substantive and formal rationality which are absent in Oriental societies. Substantive rationality is the category of legal reasoning which appeals to general principles of a system external to the legal system, such as religion, ethical

thought, power policy or some other clearly conceived and articulated system.[36]

Formal rationality which is the highest rank of legal reasoning finds its basis in the logical derivation of concepts and rules from existing legal premises.[37] In other words, formal rational law is based on the abstract concepts of jurisprudence without reference to extra-legal sources. Rational law of this type is found 'where the legally relevant characteristics of facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied'.[38]

In another perspective, Lawrence Friedman, has also classified Islamic law as non-innovative since Islamic law is a closed set of premises denying innovation. Once the sacred text was fixed, "there should be no new premises; the gates of legislation were closed".[39] This conclusion was actually in line with Friedman's initial classification of legal systems. His approach of investigation was based on whether a legal system has an open or closed canon of legal prepositions and according to whether innovation is denied or accepted within the system.[40]

A closed system exists when the decision makers distinguish between legal propositions and non-legal propositions, then base their decisions only on the former. An open system makes no distinction between the two. The term 'innovation' is used in the sense that new legal premises may be expected to arise.[41]

Therefore, according to both Weber and Friedman, Islamic law, unlike the common law, had no growth potential and therefore, was inferior to the common law simply because the discovery, perfection and analysis of legal propositions which led to growth were absent in Islamic legal theory.

Having said this, it is now pertinent to pose the question which is central to the above description that "is it true that Islamic law was irrational and non-innovative or whether, is it true that Islamic law is not only aimed at consistency but also

has always been able to discover new propositions, improve old ones and bring about formal rationality and consistency?". The answer to this question is rather complicated to which this book is devoted to discussing and enlightening.

CHAPTER TWO

Law Making Process in the Common Law System

The issue in question is related to the process of law making and law finding in two legal systems, namely the Islamic Law and Common Law. Therefore, it concerns the sources of law and the legal techniques in comprehending the sources in order to justify the law or the rule given and passed by the respective authorities in both two systems. As far as Common Law as applied in England is concerned, notwithstanding a vast post - World War II legislative production, it remains basically judge-made and continues to be case-law. Under English law, the sources of law may be classified into three categories:

(1) Primary sources, which consist of :

   (a) legislation which now also includes European Community laws, and

   (b) judicial precedent which now includes binding decisions of the Court of Justice of the European Communities (the European Court of Justice)

(2) Supplementary sources which, next to primary sources, have a binding force and comprise :

   (c) custom as considered in various contexts; and

(d) books of authority, being certain authoritative accounts produced over past centuries

(3) Ancillary sources with varying degrees of persuasive force, which may be said to consist of:

(a) non-binding judicial decisions of English courts or judicial decisions of foreign common-law courts;

(b) law reform recommendations ;

(c) legal writings and unofficial compilations ; and

(d) European Community guidelines and decisions not being Community laws.[42]

Hence, English law is essentially a case-law system and has remained, notwithstanding its present vast legislative product, case-law-oriented. In other words, although English law is increasingly governed by statute, the doctrine of precedent still plays a major role. Historically, case law, the source of law in the English legal system, is older than legislation and it continues, as it has done through the centuries, to make an important contribution to the English legal system.

True that legislation has been the main instrument of reform now for over a century, yet the overall approach to statutory law is rooted in and affected by the consciousness of the continuing role of judicial process. This may be noted both in the so-called traditional and novel areas of the law.

In traditional areas, statutory compilation of the sale of goods provides a good example. Sale of goods was, in a sense, codified first under the Sale of Goods Act 1893 and then re-enacted under the Sale of Goods Acts 1979. Neither Act, however, proved a break with its respective judicial past. Rather, both Acts preserved the continuity and each has been interpreted and applied in the light of the preexisting case-law.[43] The same applies to the laws in the novel areas of development such as

welfare-state, consumer's protection, fair trade, environmental and technological fields, etc., in which the case-law rather than the legislation is preserved.[44]

Thus, the most significant source of English law, in terms of its overall contribution to and influence on the legal system as a whole, is still case-law rather than legislation. Some branches of English law have been painstakingly built up over the years by the gradual application of case decisions, contract and tort in particular are substantially derived from the principles established by hundreds of judgments in actual cases. Even those branches of the law which are based on statute are nonetheless vitally affected by case decisions, since these decisions add substantially to the statutory rules of law in question.

The foregoing illustration of English law leads us to many interesting issues insofar as the rationality of law making and law finding is concerned. Among other striking issues is the application of analogy. English law is widely known as case-law which reflects that the court decisions always contain the rules which are mostly detailed and particular out of which general rules are to be inferred.[45] Therefore, the logical method used in such a process will be inductive i.e., extracting general rules out of particularities of individual decisions.[46]

The extension of a judgement to cover other cases in the future is unavoidable in English law, as well as in other legal systems including Islamic law simply because the respective legislations, precedents, sources of law, as the case may be, are surely limited but the incidents of daily life are unlimited and therefore, it is impossible for something infinite to be enclosed by something finite.[47] The question arises on how the extension of a precedent is made in English law orientation and to what extent, the method of extension reflects the rationality and the systematic lawmaking and lawfinding in English common law.

To begin with, it is worth mentioning that the landmark feature

of English law is the doctrine of *stare decisis* or strict following of judicial precedent. Therefore, English judges, generally speaking, enjoy relatively limited discretionary powers by virtue of the above doctrine. The doctrine of *stare decisis* (to stand upon decisions), in its simplest form, means that when a judge comes to try a case, he must always look back to see how previous judges have dealt with such cases (precedents) which involved similar facts in that branch of law. In looking back in this way the judge expects to discover those principles of law which are relevant to the case which he has to decide. The decision which he makes will thus seek to be consistent with the existing principles in that branch of law, and may, in its turn, develop those principles a stage further.

Nevertheless, adaptability of the judges for achieving an equilibrium, aimed at finding suitable answers to each questions either by restriction of the materials available in primary source(s), or by deletions, or by modification of the rules is granted through an essentially discretionary mechanism known as 'distinguishing'.[48] The process of distinguishing goes in effect through several complex stages:

(i) analysis of the facts of and the legal issue(s) involved in the case;

(ii) the search for *prima facie* of similar decided case(s);

(iii) analysis of each of such cases as found in terms of the correlation of facts and the legal issue(s) as decided ;

(iv) classification of judicial pronouncements into descriptive and normative statements; and

(v) disregard the issues that are not relevant to the facts of the case (*obiter dictum*) and uphold what is determined to be related to the facts of the case (*ratio decidendi* of the case).[49]

The process of distinguishing helps a judge to undertake the extension and application of the decision contained in one case to the facts of another case and this is done through analogical reasoning. The process of distinguishing is also important to maintain a uniform *ratio decidendi* to ensure stability and systematic manner of law finding. To arrive at a judgement, the judge is to decide the particular case in favour of the plaintiff or the defendant based on the reason of the decision which is known as '*ratio decidendi*' (the title of this book is taken or adopted from the term of *ratio decidendi*). Then, the remainder of the judgement, which deals by way of explanation with cases cited and legal principles argued before the court which are non-directly relevant to the decision is called "*obiter dicta*" or "things said by the way". The whole of a dissenting judgement is "*obiter dicta*".

It is the "*ratio*" of a decision, which constitutes the binding precedent; or "*rationes*" if there is more than one reason. So that when a judge is referred to a precedent, the first task of the court is to decide what was the "*ratio*" of that case, and to what extent it is relevant to the principle to be applied in the present case. Whilst an "*obiter dictum*" is not binding, it can, if it comes from a highly respected judge, be very helpful in establishing the legal principles in the case under consideration.[50]

Although in principle, a judge is bound by the doctrine of *stare decisis*, the English judges have also pointed out that a strict adherence to precedent may lead to injustice in a particular case. Until 1966, by reason of the binding nature of judicial precedent, a decision of the House of Lords, once made, remained binding on itself, as well as on all the courts, lower in the hierarchy. In 1966, by a formal Practice Statement, the House of Lords judges announced that in future they would not regard themselves as necessarily bound by their own previous decisions. The Practice Statement said:

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely on the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and while, treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House".[51]

CHAPTER THREE

The Features of Quranic Legislation

Having explained the process of extending the law beyond the precedent to cover a new case as applied in English common law, we may question whether Islamic law which has been described as arbitrary and unprincipled knows nothing about legal reasoning in both law making and law finding. As will be argued later, the fourth source of Islamic law, namely *qiyas*, is an effective tool for analogical reasoning which comprises of deduction, analogy, *a fortiori* argument in both its forms, namely the a *minori ad maius* and a *maiori ad minus,* induction and *reductio ad absurdum.*

However, it is respectfully submitted that the discussion of *qiyas* in Islamic legal theory could not be dealt with in isolation from the general framework of the sources of Islamic law on which law - be it in juristic writings, *fatwa* compilation and judgments in the Islamic courts - are based. Moreover, as previously highlighted, Islamic law has been perceived by some of the Western scholars in many different perspectives from which they draw their conclusions when describing the Islamic law making process.[52]

This would require a satisfactory response from the Islamic

legal perspective because otherwise, the point of departure of the present study will be unclear and uncertain from the research methodology's point of view. In other words, one ought to be certain, at the outset, of the very nature of Islamic law particularly of the role of logic and rationale before one could satisfactorily attempt to present the 'Islamic *stare decisis, obiter dictum* and 'distinguishing' in a comparative manner particularly to common law practitioners.

The first issue which poses itself is the very character of Islamic law. The question arises of how the Muslim jurists have defined the Islamic law and to what extent this definition is really understood and appreciated by non-Muslim lawyers and scholars. It is not an exaggeration to say that Islamic law is incomparable to any other legal systems since it is an all-embracing and encompassing law which covers every conceivable human act; from liturgical forms to neighbourly conduct, to partnership and homicide. In other words, Shariah, the Islamic term which is commonly rendered in English by 'law' is, rather, the whole duty of man, which can be summarised as a doctrine of duties.[53] It is the totality of rules which Allah has laid down for the governing of man's behaviour.[54]

Obviously, some parts of the law are enforceable by the courts while some parts are not. For this reason it is not 'law' in the modern sense. To the Westerner, however, law is a system of commands enforced by the sanction of the state. Law, in any sense in which a Western lawyer could recognise the term is a system of law in which every legal relationship is given a precise and technical definition, such as the types of system now dominant in the West.

Professor Coulson, for example, even though he fully appreciated that the binding force of Islamic law derives from its being the expression of God's will and so an integral part of Muslim belief,[55] failed to understand the very nature of Islamic law. Thus, we find him making the literally outlandish comparison with the Twelve Table of Roman Law, with whose legal comprehensiveness and the '*ad hoc solutions*' of the Qur'an

are unfavourably contrasted.[56]

Therefore, he has no hesitation to write that; "For those who were pledged to conduct their lives in accordance with the will of God, the Qur'an itself did not provide a simple and straightforward code of law".[57] Instead, the legal requirements in the Qur'an are devoid of precise and technical definitions and legal consequence. In short, the Qur'an is not primarily a code of law. For example, wine drinking and usury are simply declared to be forbidden without any legal sanction being attached for the practices. Also, the husband is enjoined to treat his several wives with impartiality but nothing is said as to any remedies if he does not.[58]

According to one scholar, the source of Coulson's misunderstanding is that Coulson has the tendency to look at the Qur'an as if it were any corpus of laws. Hence, it would require that it "covers all the basic elements of a given legal relationship" and then concludes by saying; "the basic notions underlying civilised society.....(such as) compassion for the weaker members of society, fairness and good faith in commercial dealings, incorruptibility in the administration of justice are all enjoined as desirable norms of behaviour without being translated into any legal structure of rights and duties".[59]

This remark has led one scholar to react, saying that al-Qur'an, as a matter of fact "is primarily a book of guidance, not a book of jurisprudence, or law, or history, or any other specialization. It is absurd to expect that a book whose purpose is guidance and whose means is inimitable eloquence should use the language of a textbook of law. Muslim jurisprudents have long recognised that the Qur'an does not deal with every legal subject in one particular style as ordinary legal textbooks do".[60]

The Qur'an in the eyes of the Muslim jurists is the very word of Allah revealed to the Prophet Muhammad (s.a.w.) and as such constitutes the primary source of Islamic law. The correct method of introducing a quotation from the Qur'an is not (as in the case of the Old Testament) "It is written" but "God said!". The Qur'an is not and does not profess to be a code of law or even a law book

nor was Prophet Muhammad (s.a.w.) a lawgiver in any Western sense.[61]

Despite this fact, the Qur'an or rather the sacred texts do contain the law because the law is implied, as it were, within the (legally) broad and general and sometimes ambiguous language of the sacred texts.[62] The influence of the Qur'an on law making and law finding can be perceived, *inter alia*, from two perspectives;

First: In the Qur'an, there are commonly said to be five hundred such texts with legal ingredients, but most of these deal with the ritual law, and there are no more than about eighty which deal with subjects which Western lawyers would regard as legal material. These eighty verses have been construed, by a method of statutory interpretation which Anglo-American lawyers might well find congenial, so as to extract the utmost ounce of meaning from them. For example, the complete legal system of inheritance in Islam was basically based on only about half a dozen verses of the Qur'an.

Second: Non-legal texts in the Qur'an, moral exhortations, and even Divine promises have been construed by analogy to afford legal rules. For instance, it has been argued that Quranic texts proclaiming that Allah the Almighty will not punish any man save for his own sins have been applied to the debts which he leaves unpaid at his death with far-reaching results in the law of the administration of estate.[63]

Likewise, the organisation of legal materials in the books of *fiqh* is not compatible to the common understanding of the Common Law lawyers. Juristic writings are often all-embracing and not systematic compared to the modern 'code of law'. Although this has been the salient feature of *fiqhi* literature, it deserves no criticism because the very purpose of writing such books was not to state the law in a strictly legal sense, in the sense that a code or similar instrument states the law. Instead, the purpose of those books was to offer a complete guidance to the Muslims.

Above all, it is respectfully submitted that, the best illustration of those *fiqhi* books is that they actually resemble the legal writings and unofficial compilations prevalent in the common law system. No doubt just as a common law lawyer would consult those legal writings to substantiate his legal arguments, should the need arise, the Muslim lawyer would do the same. *Fiqhi* books are full of interesting and convincing arguments which might be useful in the Islamic courts of law.[64]

The decline of the Muslim political power did complicate the matter further because the Muslims of certain ages, instead of resorting to the Muslim legal heritage to govern the worldly affairs, they started to follow the ready-made codes of law from the Western countries. It is respectfully submitted that the changing circumstances on the eve of the colonialism has hampered the development of the codification of Islamic law. This is relatively justified by the development within the Islamic law itself as far as the codification is concerned.

It is an undeniable fact that in Islamic *fiqh* literature, every school of law has its respective summaries or abridgements (*mukhtasar*) which can be said to function as a code; *Mukhtasar al-Tahawi* (d. 321 A.H.) and Quduri (d. 428 A.H.) in the Hanafi law and *Mukhtasar al-Muzani* (d. 264 A.H.), a resume of Imam al-Shafi'i's *Umm*, which represented the summary of law in the Shafi'i school of law. In the Maliki school of law, Khalil's *Mukhtasar* represented the best precis of the Maliki law. Likewise, the Hanbalis are proud of the work of al-Khiraqi (d. 334 A.H.).

If Western scholars were to perceive the idea of codification of law in Islam in the Western sense, the above types of precis of law could have the same utility as that of a modern code.[65] The *Mukhtasar* is a very useful book to scholars of Islamic law. It throws light on the substantive law of Islam as it treats the Islamic procedural law in detail, *inter alia*, it shows that cross-examination of witness is allowed in Islamic courts during oral testimony.[66] It also shows that the *qadi* (judge) has certain discretions to decide cases as he may feel logical and sound on some subject-matters.[67]


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CHAPTER FOUR

Rules of Legal Interpretation in Islamic Law and Common Law

Islamic law is distinct from the Common Law because the discovery of Islamic law, as will be seen later, is always based on the text-oriented approach. Therefore, classical Islamic legal theory is very source-based and its main concern is simply how to derive rulings from the existing divine sources. However, Islamic rulings are not given ready-made, to be passively received and applied; rather, the law is to be actively constructed on the basis of the sacred texts. This will surely pose another interesting question in terms of interpretation of the law in both Islamic and Common Law.

Islamic Law has been described as jurists' law and therefore, it is similar to Roman Law.[68] This description gives an impression that the authority to expound the law belonged to the legal specialists, the jurists, rather than to the courts, the judges, as is the case in the Common Law. In the history of Islamic law, as well in the Roman law, the great bulk of positive law was the outcome of juristic interpretation. Judges, litigants and other concerned persons went to the jurist for a statement of the law.[69]

I would personally agree with that description but in a qualified sense. While the judges are primarily responsible for

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Finding the Causation (Ta'lil) of Islamic Law

Contrary to the belief of many, Islamic law has been very coherent, systematic and logical. All of these stem essentially from the rationality component of Islamic legal theory. The core foundation of Islamic legal theory is the concept and practice of ratiocination.

Ratiocination (*ta'lil*) always seeks to discover and uphold the valid and correct cause or basis of the revealed law to be further extended to a new case when both share the same basis of law (*'illah*).

In the process, Islamic law algorithm is being compared to the Common Law and Civil Law systems respectively from rationality viewpoint. Find out more about both the similarities and distinguishing points between these three major legal systems of the world.

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