

THE NATURE AND SOURCES OF INTERNATIONAL LAW
COMPARATIVE STUDIES OF ISLAMIC AND CIVIL LAW

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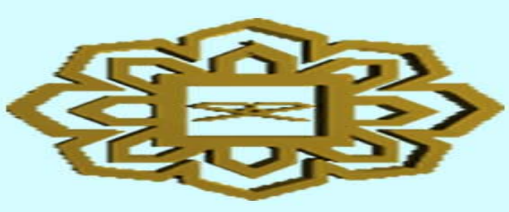
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**THE NATURE AND SOURCES OF
INTERNATIONAL LAW
A COMPARATIVE STUDIES OF ISLAMIC AND
CIVIL LAW**

a

Master of Comparative Laws dissertation

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SYNOPSIS

The Islamic law embraces practically all the affairs of human life, material as well as spiritual and national as well as international. Islamic international law being an integral part of the Islamic law is perhaps the most neglected field of research among Muslim scholars. Islamic international law is an expression which may sound unfamiliar with the current trends of thought since there has been a lot of confusion to the Islamic legal system which has been represented as a barbarous system of law which is totally impracticable in the modern age.

This research is intended to examine the 'classical traditional doctrine' of the Muslim law of nations and try to focus its interpretation as regards to its capacity to cope with the international life and relations. Muslim law of nations is based on the same sources and maintained by the same sanctions of the Islamic law and hence has developed a comprehensive obligations which a Muslim *de facto* or *de jure* State observes in its dealings with other *de facto* or *de jure* States.

The form of my research will fall into four chapters. The first two will survey the basics of the Islamic international law. This part will begin with a glance at the classifications of the Islamic law where there remains no doubt that international law forms part of the ordinary Islamic law. We will also outline the nature of the Islamic international law and compare it with the modern international law.

In the third chapter, we will concentrate the discussion on the sources of international law. Here we will prove that in the Islamic international law, the question of sources has not suffered the classification and hierarchy as the modern international law.

In the fourth chapter, we will start the discussion of the principal subjects of the Islamic international law; States. International law is primarily concerned with the rights and duties of states. Islam divides the world into the entities of the *Dar al Islam* (the world of Islam) and the *Dar al Harb* (the world of war). This temporary division will end by the termination of its reason which is the application of the *Shariah* system. I have also included topic such as the Islamic concept of diplomatic immunity where we will look at how Islam is always ready to establish peace and good conducts in its international relations. There is also a discussion on the concept of *Jihad* , one of the most confused terms which is related to Islamic foreign relations.

In the final part of this study I will come to a conclusion that in order to tackle the entire range of human problems especially in the current international conflicts and relations, a solution which proceed from religious beliefs is of vital importance. Islam is unique in its ability to provide guidance in the international relations and I will prove in this research how the classical and traditional doctrines of the *Shariah* legal system is able to contribute in solving the current crises of the modern world.

CHAPTER ONE

Introduction

Islam and international law is perhaps the most neglected field of research among Muslim scholars. Much has been written in recent years concerning the current state of the international affairs. For too long there has been a tendency to state that the rules of international laws and relations are exclusively of western origin. The Islamic theoretical perspective has never been examined or even recognised in resolving the current crisis of the world.

Historically, the Muslims were solely tried by the crushing defeat they suffered following the First World War when the Khilafah was dismantled, and they were forcibly divided and grouped into little states, or colonies, or protectorates, where they came under the rule of non Muslims imperialist. Thus began the feud between Muslims and Islam. Indeed, the greater part of the blame for defeat fell upon the Shariah and Fiqh. It was this mistaken and misguided sentiment that paved the way for acceptance of non Islamic intellectual, academic, cultural and organisational alternatives. And this has become the reality that contemporary Muslims complacently live.¹

One of the most prevailing reason for the backwardness of the Muslim in the international arena is due to the rejection of the so called 'classical and traditional doctrine of the Shariah'. Being one of the most misunderstood system

¹ Al Alwani, Taha Jabir . *Al Ijtihad*. A Paper Presented at the International Summer School on Islamic Thought. Oxford. 1990.p.3.

in the world, the Shariah was perceived as an outdated system of ruling which is claimed to be anti establishment, anti development and anti modernisation.

There is an urgent need to reform the methodology of understanding the Islamic legal system. The Shariah, for many years has been represented as a barbarous system of law which is totally impracticable in the modern age. The first thing that will come to mind of those who are opposing this system, even among the Muslims themselves is the *Hudud*² section of the Islamic Law. It is perceived that Islamic law is only concerned with punishment for theft by the amputation of a hand or punishment for fornication or adulter by stoning till death for a married person or one hundred lashes for an unmarried person.

There is also an urgent need to reform the methodology of presenting this system. The rejection of the so called 'classical doctrine of the Shariah' has resulted to a lot of confusion in implementing the law with all its branches. Among the confusion that has resulted towards this rejection are;

1. By implementing the Shariah system and the Islamic Law, the position of the minorities, and in the case of the Islamic world; the non Muslims, will be subjected to a system which is alien to their religion and culture. They will then be forced to adapt a religion which is against their will and this will then create disharmony and misunderstanding between Muslims and the non Muslims.

This point was answered by the Shariah when it is to be understood that the implementation of the Shariah comes under two categories:

² The word *hudud* is the plural of an Arabic word *Hadd*, which means prevention, restraint or prohibition. It is a restrictive and preventive ordinance, or statue, of Allah concerning things lawfull (Halal) and things unlawful (Haram).

i. The theological aspects of the Shariah.

This part of the Shariah is only applicable to the Muslims alone since Islam means the full submission to the will of Allah, it is a duty incumbent upon all Muslims to obey and undergo the whole process of their life with the guidance of the Qur'an and the Sunnah.

ii. The political and judicial aspects of the Shariah.

As any other system of government and law, the purpose of this part of the system is to ensure the stability and harmonisation of those who are governed under the system. The main functions of this part of the Shariah is to maintain the stability of the state through the divine law of Islam. The duty of those governed under this system is to obey and bound themselves with the law.

Islam has preceded all international treaties with legislation for the full protection, social autonomy, liberty and integrity of all subjects of the Islamic State, Muslims and non Muslims alike. By virtue of its basic principles, Islam not only discarded the very concepts of "majority" and "minority" as contrary to the principle of the equality of all men before divine justice, but it further administered this justice in terms of positive law which is applicable to all citizens, except in cases where the probity of conscience demands a specific differentiation based upon reciprocal rights and duties.³

2. The second point of misunderstood to the Shariah system is the saying that this system being a divine guidance, is stagnant in its nature and is not applicable to a society which keep on changing and revolving. This dichotomy will then results to a society which will never be able to run along the modernisation of the existing world.

³ Ramadan, Said. *Islamic Law Its Scope and Equity*, p 159.

Islam has also includes many excellent provisions about international law, international relations, treaties, diplomatic envoys, international dispute settlement and other related fields which regulates the relations between states in the international arena. Being part of the Islamic legal system (as will be explain in the next chapter), this research is meant to give a brief introduction to the Islamic law of nations concentrating its discussion on the sources and concepts with a comparative approach with the modern international law. Before embarking on the contents of this research, it is felt appropriate to have a general idea of the Islamic concept of the world order, since the Islamic international law is part of the comprehensive approach of Islam towards maintaining international peace and security.

The Islamic World Order

The world today is in need of a new system of international order based not only on the dominant role of power and national self interest.

There is a great need of the world today for an international order which would establish a just and permanent peace without tyranny, one which recognises the differences and distinctions-religious, cultural, social and economic of the people of the world as legitimate, and founds its law upon their common need to order their lives as they wish in justice and freedom. Such world order would establish a federal or confederal world government with the executive and police machinery necessary for implementation. It would be back by an international law and a system of courts that would place international justice within reach of all-

governments, institutions, communities and individuals. Without such an order, the world will not find peace.⁴

Peace is fundamental and basic to life in Islam and war comes only as matter of necessity, when there is no other way or alternative course of action. Diplomatic relations and understanding has been the practice of the prophet, his companions and Muslim rulers (The Khalifah). The signing of treaties and the importance of fulfilling it has been repeatedly mentioned in all the Islamic Law sources, showing the importance of maintaining international peace and security. War is permissible only as a defensive action against any tyranny and any forms of offensive methods of war are not permitted and are against the basic norm of 'Islam' which means peace.

The world order that Islam seeks is one from which war is banished and it's commitment to peace is absolute, universal and comprehensive. The covenant of peace under which no dispute or claim may be settled except through adjudication, arbitration or negotiation, must be offered to all peoples. Every people is entitled to it, as well as obliged, to join it. To reject adjudication under international law, or the invitation to enter the covenant of peace, is indeed to opt for war or isolationism, neither of which is rationally or morally tenable.

Islam demands that all nations and all peoples enter the realm of peace, and it commands its adherents to do so with enthusiasm. It justifies coercive action by the whole (i.e., by those who have entered the order of peace) against the recalcitrant nation. If a nation repudiates the peace accepted by everyone else on the same universal terms, Islam understands this to be a declaration of war.

⁴ Faruqi, Ismail. Introduction in Abu Sulayman, AbdulHamid. *The Islamic Theory of International Relations*. p xxiii.

CHAPTER TWO

Part One

INTRODUCTION TO ISLAMIC LAW

Shariah is an Arabic word meaning the straight path to be followed¹ or the way to a watering place². *Shariah* is therefore the whole teachings of Islam - the whole system of Allah that was revealed to the Prophet Muhammad (P.B.U.H.) which includes the teachings of faith (*Aqidah*), law (*Fiqh*) and all other aspects of life and it is only by implementing this whole comprehensive system that one is in full submission to the will of Allah.

The Qur'an has clearly stated this when Allah said :

يَأْتِيهَا الَّذِينَ ءَامَنُوا أَذْخُلُوا فِي السِّلْمِ كَآفَّةً
وَلَا تَتَّبِعُوا خُطُوَاتِ الشَّيْطَانِ. ﴿٢٠٨﴾

¹ Al Mukhtar Min Sihah Al Lughah, 265 (ud)

² Al Qurtubi, *Al Jami'e lil Ahkam Al Qur'an*, 10 vol. 16 (ud)

" O ye who believe, enter into Islam comprehensively and never to follow the steps of the Syaitan..."³

THE ISLAMIC LAW (*FIQH*)

The word '*Fiqh*' literally means to understand⁴ and is variously defined as the knowledge of what is *for* and *upon* one. According to Al Zarqa, *fiqh* is: 'A collections of religious commands regarding *practical affairs* of life which is legally bound in Islam. The legality of the commands is derived from the Qur'an, or statements made by the Prophet Muhammad (P.B.U.H) through his traditions, or the Islamic scholars consensus, or the analogical deduction by the Islamic law scholars from the Qur'an, the Prophet's traditions or the Islamic legal maxims and purposes of the *Fiqh*'.⁵

³ The Qur'an 2 : 208.

⁴ Badran, Abu Al Aynain. *Tarikh Al Fiqh Al Islami*, 10 (ud).

⁵ Al Zarqa, Mustapha Ahmad. *Al Madkhal Al Fiqhi Al 'Aam*, 54 (1967 - 1968).

Looking at these definitions it is clear that the word *Fiqh* is entirely different from *Shariah*. *Fiqh* is a set of regulations which is concerned with the practical affairs of life, whereas *Shariah* is the whole comprehensive teachings of Islam, but the link between the two systems is unseperable. Law in Islam is not valid unless it is connected with faith and faith that is not bound by the *Fiqh* is a distortion of the straight path.

From these observations it will be seen that the *Shariah* is not, strictly speaking, a legal system, for it reaches much deeper into thought, life and conduct than a purely legal system can aspire to do..... It places the individual in his relationship to society, the universe and his creator.⁶

Islamic law (*Fiqh*) was divided and classified into seven different categories:

1: Rules that are concerned with ways of worshipping Allah from prayers, fasting, alms giving, performing the pilgrimage to Mecca etc. These rules are known as '**Ibadat**'.

2: Rules of family affairs which deals with marriage, dowry, divorce, succession etc. These rules are known as '**Al Ahwal Asshakh' siyah**' (**Islamic Family Law**)

⁶ Weeramantry, C. G. *Islamic Jurisprudence An International Perspective* . 1 (1988).

3: Rules of contracts, trade, commerce and transaction which are known as '**Al Muamalat**' (**Islamic Law of Transaction**).

4: Rules of the duty of the government to rule with justice and fight all forms of oppressions, the duty of those being govern to obey and respect the government as long as it is not going astray from the path of Allah. This part of Fiqh is known as '**As Siyasa Ash Syar'iah**' (**Islamic Political System**).

5: Rules of crime and punishment, maintenance of peace and justice which are known as '**Al Uqubat**' (**Islamic Criminal Law**).

6: Rules of international relations, war and peace, international disputes settlements, law of sea etc which are known as '**As Siyar**' (**Islamic International Law**).

7: Rules of good conduct which are known as '**Adab**'.⁷

A glance at the classifications of *Fiqh* reveal that they embrace practically all the affairs of human life, material as well as spiritual. By looking at the definitions and in the face of the contents of the classifications there remains no doubt that international law form part of the ordinary Islamic law.

⁷ Al Zarqa. op. cit. 55 - 56. Also see, Abdul Karim Zaidan, *Al Madkhal Li Dirasaat Al Syariah Al Islamiyah*, 58 - 59 (1986).

It is merely an extension of the sacred law, the *Shariah* , designed to govern the relations of Muslims with non-Muslims, whether outside or inside the territory of Islam. In a word, an Islamic law of nations does not exist as a separate system in the sense that modern municipal (national) law and international law, based on different sources and maintained by different sanctions, are distinct from one another.

The *siyar*, if taken to mean the Islamic law of nations, is but a chapter in the Islamic *corpus juris* , binding upon all who believed in Islam as well as upon those who sought to protect their interests in accordance with Islamic justice. But just as the *jus gentium* , an extension of the *jus civile* , was designed by the Romans to regulate their relations with non-Romans, so was the *siyar* , an extension of the *Shariah* , designed to govern the relationships of Muslims with non-Muslims at a time when Islam came into contact with them. The *siyar*, in other words, was the *Shariah* writ large.⁸ Islamic Law in general, and the Muslim law of nations in particular differ from the modern international law which has since Grotius been based on the secular natural law.

⁸ Khadduri, Majid. *The Islamic Law of Nations*, 6 (1966).

This was clearly mentioned by Akehurst when he writes that the theory of natural law has a long tradition with leading writers such as Dutchman Hugo Grotius (1583 - 1645), who is often regarded as the founder of modern international law and other important naturalists writers agreeing that basic principles of all law (national as well as international) were derived, not from any deliberate human choice or decision, but from principles of justice which had a universal and eternal validity and which could be discovered by pure reason; law was to be found not made. Natural law was originally regarded as having a divine origin, but Grotius wrote that natural law would still have existed even if God has not existed. Instead Grotius considered that the existing of natural law was the automatic consequence of the fact that men lived together in society and were capable of understanding that certain rules were necessary for the preservation of society.⁹

In the western legal theory, when they speak of law, they think of it in terms of national or municipal law, and, consequently, judge the nature of international law by the same standards. This analysis convinced some to deny international law the definition of law since the international society lacks the three indispensable elements required for producing a rule of law; namely the legislature, the executive and the sanction. Others endeavour to prove that the international society combines the three premises, and, thereby, the phenomena of international law could be described by rules by which

⁹ Akehurst, Michael. *A Modern Introduction to International law*, 13 (1987).

national law may be described. A third group, among whom is Kelsen, try to compromise by advocating a common criterion for the concept of law.¹⁰

This has thus created two different school of thoughts with regard to international law in the western legal theory; the dualistic view and the monistic doctrine. This phenomena was further explained by Al Ghunaimi when he mentioned that according to the dualistic view, the two institution are distinct from each other. They differ as regards: (i) their sources since international law regulates the relations between states whereas municipal law functions within the boundaries of a particular state, (ii) their subjects; States are mainly the main subjects of international law. Municipal law deals with individual in general; (iii) their substance, for international law is a law of coordination among sovereigns. Municipal law is concerned with a sovereign dominating individuals. This dualistic view engenders that the law of nations *per se* is a part of municipal law. Therefore, International and Municipal Law are two different realms of law. The three premises of the dualistic view were rejected by another doctrine, i.e., the monistic doctrine. The monistic doctrine holds that law as such, in the ultimate analysis, regulates the conduct of the individuals, and, its commands are binding upon its subjects regardless of their will. Hence both international and municipal law are two manifestation of an intergral conception of law.¹¹

¹⁰ Al Ghunaimi, Mohammad Talaat. Muslim Conception of International law and The Western Approach, 89 (1968).

¹¹ *ibid* at 89 - 90.

In contrast, Islamic law is of a divine origin. In other words, it is law based on belief in God. The conducts of individuals or nations should be based according to the Shariah, as the whole comprehensive system of life, and to the fiqh, being the law that regulates every aspects of the practical affairs of men.

PART TWO

Is International Law Really Law?

The popular belief in the discussion of international law is the question is international law really law ?

Unlike other areas of law such as contracts, delicts and property, international law has had to justify and rationalise its existence because it is popularly believed that an international legal order does not exist. This scepticism arises because there is no international legislature and no supranational system of sanctions that can be imposed on lawbreaking nations. The conclusion reached by sceptics is that international law is not "real law" as such, but rather "mere morality".¹²

¹² Jensen, Erik G. Introduction to International Law in Sri Lanka, 3 (1989).