CONSIDERATION OF CONSEQUENCES IN IMPLEMENTING SHARĪʿAH LAWS

BY

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ABSTRACT

It is contended that the laws of the Sharīʿah are intended to secure benefit for and repel harm from humanity. In certain cases with unusual features, even though the general wording of a relevant text apparently applies to them on the basis of purely linguistic considerations, a particular law may not achieve the objectives for which it was legislated. In such circumstances a *mujtahid* needs to consider the probable consequences of applying a given rule before delivery of any judgment that that rule is the Sharīʿah law for that situation. The validity of this proposition needs to be investigated and, if it is found to be endorsed by the Sharīʿah in general, the methodology for its application has to be precisely identified in order to prevent its haphazard application or its manipulation by parties with hidden agendas. The research was conducted by reading classical Arabic texts in *uṣūl al-fiqh* as well as contemporary Arabic and English texts in the field and, in addition, English works on the relevant methodologies of the social sciences. The research reached the following conclusions: The laws of the Sharīʿah have a rational basis, i.e., to secure human benefit and repel harm. This theme is indisputably established through inductive reading of the Qur'an and Sunnah. Inductive reading of the Qur'an and Sunnah further reveals that provision is made in the texts for exceptions to general rules when their application leads to consequences different from those intended by their legislation. Recognition of this principle is amply evident in the *ijtihād* of the Ṣaḥābah. Prohibiting what is normally lawful cannot be justified unless the act in question leads to unlawful consequences in a majority of cases. Pressing needs (*ḍarūrāt*) can override any text, but intermediate needs (*ḥājāt*) can only override secondary prohibitions that have been legislated to protect primary prohibitions or weak general texts. Social sciences can be of some use in assessing the consequences of acts and policies, but their conclusions regarding the future are usually too speculative to justify overriding established Sharīʿah laws. Their conclusions are more reliable for assessing existing conditions.

ملخص البحث

قد زُعم أن الهدف العام من أحكام الشريعة هو جلب المنفعة للبشرية ودرء المفسدة عنها ، ولكن في بعض القضايا ذوات أوصاف غير عادية — رغم تناول عموم النص لها حسب النظر السطحي باعتبار لغوي مجرّد — تطبيق الحكم فيها قد لا يحقق المقصد الذي شرع الحكم من أجله . ففي مثل هذه الظروف يحتاج المجتهد إلى النظر في مآلات تطبيق حكم ما قبل التقرير بأنه هو حكم الشرع في تلك القضية . مدى صحة هذه الأطروحة أمر تستدعي البحث والنظر ، وإن توصلنا إلى ثبوتها في الشريعة جملةً ، فهناك حاجة إلى تعيين الضوابط التي تمنع من الاختباط في استخدامها والتستر بها لأصحاب الأغراض السيئة . تم هذا البحث عن طريق القراءة في مجموعة من مصادر أصول الفقه المعتبرة مع قراءة كتب معاصرة ، بعضها بالعربية وبعضها بالإنجليزية ، وكذلك قراءة بعض الكتب في مناهج البحث في العلوم الاجتماعية الحديثة ذات الصلة بالموضوع . من أهمّ نتائج البحث ما يلي: أحكام الشريعة معللة في الجملة ؛ مبناها جلب مصالح العباد ودرء المفاسد عنهم . ثبت هذا الأصل ثبوتا قطعيا عن طريق استقراء نصوص القرآن والسنة . ثبت كذلك باستقراء الوحيين أن الشرع يراعي ظروف استثنائية لعموم أحكام جزئية إذا ترتب على تطبيقها في تلك الظروف مآلات غير التي استهدفت من تشريعها . اعتبار المآلات ظاهرة ملموسة في اجتهاد الصحابة . لا مبرر لسد الذريعة إلا إذا أدى الفعل إلى الحرام غالبا . شأن الضرورات أنها ترفع أي نص كان ، ولكن الحاجات لا ترفع إلا عمومات ضعيفة أو ما حرم من أجل غيره . يمكن الاستعانة ببعض العلوم الاجتماعية لقياس مآلات أفعال وسياسات ، ولكن نتائجها ظنية لا تصلح غالبا لإلغاء أحكام شرعية ثابتة ، ولكن يمكن الاعتماد عليها أكثر في قياس ظروف راهنة .

APPROVAL PAGE

I certify that I have supervised and read this study and that, in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh & Usul al-Fiqh).

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Supervisor

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Human Science

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Mir Riaz Ansary

Signature …… Date ……..

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CHAPTER ONE

INTRODUCTION

We live in an age in which the Sharīʿah has been displaced as the highest authority and point of reference in Muslim societies. This historical phenomenon has, in turn, given rise to a grassroots movement to reimplement the Sharīʿah, but the movement faces a number of challenges. Many non-Muslims, particularly those most in control of the forces shaping globalization, look upon such calls with apprehension, perceiving the prospect as a threat to their interests. The political will among Muslims to implement Sharīʿah has been ambivalent and divided. Attempts to implement Sharīʿah in the last quarter century have been characterized by a certain clumsiness, lack of political astuteness and lack of insight into the priorities of the Sharīʿah. This is, perhaps, due in part to a general decline in Muslim scholarship. Centuries of *taqlīd* would be expected to predispose the Muslim mind to a cookbook, off-the-shelf approach to Sharīʿah; i.e. a ready-made set of rules that are to be applied unwaveringly to all situations. However, the Sharīʿah is more subtle and fine-tuned than that, and the early centuries of Islamic civilization bear testimony that Muslim scholars understood that no judgment could be passed regarding the application of a given rule in a given situation without taking into consideration the expected consequences. There has never been a greater need for a concerted effort to make the general Muslim public aware of this aspect of the Sharīʿah.

PROBLEM STATEMENT

The dominant (and most correct) point of view among Muslim scholars is that the laws of the Sharīʿah are intended to secure benefits for humanity and repel harm. Because of this intent, the Sharīʿah consistently gives consideration to the consequences of people's acts in assigning legal values to them. Another feature of the Sharīʿah (or any legal system, for that matter) is that it lays down general laws and principles, while every individual case in the real world has its own unique characteristics. A number of different laws and principles may apply to a given case, and they may indicate opposing rulings. The unique characteristics of a given case may cause application of a general law to bring about results opposite to those intended by the Lawgiver. Therefore, there is a need to consider the probable consequences of applying a given rule in a given situation before delivery of any judgment that that rule is the Sharīʿah law for that situation. Moreover, the methodology for weighing consequences needs to be refined, further developed and made a central part of the education of anyone attempting *ijtihād*.

RESEARCH QUESTIONS

1. What is the Sharīʿah evidence for the principle that the consequences of implementing Sharīʿah laws in a given context must be considered before implementing them?
2. What is the relationship between the principle of consideration of consequences and other principles of the Sharīʿah?
3. To what extent have scholars in the past, from the Companions of the Prophet (pbuh) onward, used the principle of consideration of consequences in passing legal judgments?

4. Are there any useful principles to be learned and applied from Western social sciences in making predictions about the consequences of particular social policies?
5. What are the regulatory details to be used for proper application of the principle of consideration of consequences in legal reasoning?
6. What are some of the contemporary problems for which the principle of consideration of consequences can be a useful aid in evaluating their possible solutions?

OBJECTIVES OF THE RESEARCH

1. To analyze the extent to which the Sharīʿah gives weight to the consequences of acts in assigning a legal value to them and to the principle of consequences in deciding whether or not to implement a given rule.
2. To determine the relationship between the principle of consequences and other principles of the Sharīʿah.
3. To critically examine the use of this principle by Muslim scholars of the past.
4. To derive guidelines for regulating the principle of consequences that will ensure its proper use and prevent its misapplication.
5. To investigate the role of modern social science instruments of analysis and prediction in applying the principle of consequences.
6. To apply the principle of consideration of consequences to a range of contemporary issues and problems.

JUSTIFICATION OF THE PROBLEM

We live in an age of ever-increasing complexity in technology and social organization. The pace of change continues to increase, and the need for foresight in assessing the consequences of acts, particularly those which affect societies as a whole, has never been greater. Non-Muslims have done a considerable amount of work in the last forty years in attempting to develop a methodology for studying the future impact of contemporary trends and phenomena, a field of study to which the Muslim contribution has been negligible. At the same time, Muslims seem to have almost forgotten their own methodology for weighing the consequences of acts. The systematic Arabic efforts to revive the methodology of weighing consequences have not done much to assess the possible usefulness of the tools of Western social sciences regarding the issue. More work also needs to be done to apply the theoretical methodology to contemporary issues. Finally, although the effort of reopening this domain of knowledge has begun in Arabic, very little has been written about it in English.

METHODOLOGY OF RESEARCH

The methodology of this research is qualitative, based upon classical Arabic texts in *uṣūl al-fiqh* as well as contemporary Arabic and English texts in the field and, in addition, English works on the relevant methodologies of the social sciences.

LITERATURE REVIEW

Scholars of *uṣūl al-fiqh* began to explore issues related to the objectives of legislation in the context of identifying the occasioning factor (*ʿillah*) of Sharīʿah rules for the purpose of legal analogy (*qiyās*). One of the methods for doing so is suitability

(*munāsabah*). A feature of a case is proposed as being the occasioning factor of the rule because the implementation of a rule when that feature is present will actualize "something that may properly be regarded as the purpose underlying the establishment of that rule."[1] This requires identification of the purposes behind rules. One of the first scholars to write about this issue was Imām al-Ḥaramayn al-Juwaynī[2] in his *al-Burhān fī uṣūl al-fiqh*. His student Abū Ḥāmid al-Ghazālī[3] expanded on it further in *al-Mustaṣfā*. Fakhr al-Dīn al-Rāzī[4] repeated some of that discussion in his *al-Maḥṣūl*. All three of these were Shāfiʿī scholars, who discussed *al-maṣlaḥah al-mursalah* and *istiḥsān* as unacceptable classes of legal evidence. A Mālikī response to their arguments is Shihāb al-Dīn al-Qarāfī's[5] *Nafā'is al-uṣūl fī sharḥ al-Maḥṣūl*. English treatments of suitability (*munāsabah*) can be found in Bernard Weiss's *The search for*

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[1] Bernard Weiss, *The search for God's law* (Salt Lake City: University of Utah Press, 1992), 609.

[2] Imām al-Ḥaramayn, ʿAbd al-Malik ibn ʿAbd Allāh ibn Yūsuf al-Juwaynī (419-478 AH); a major Shāfiʿī scholar, particularly noted for his *al-Burhān fī uṣūl al-fiqh* and his *al-Irshād* in scholastic theology. A Seljuq prime minister's hostility to Ashʿarī theology caused al-Juwaynī to leave his home in Nishapur, Persia, settling for a time in Makkah and Madīnah (hence his nickname). When Niẓām al-Mulk became prime minister, he reversed the earlier policy and suppported the Ashʿarīs. Al-Juwaynī returned to Nishapur, where he became director of a famous madrasah. His most illustrious student was al-Ghazālī. Murād, 27; See Bernard Lewis, et. al., editors, *Encyclopaedia of Islam* (Leiden: E.J. Brill, London: Luzac & Co., 1986), 2:605.

[3] Muḥammad ibn Muḥammad al-Ghazālī, Abū Ḥāmid, Hujjat al-Islām (450-505); a major all-round scholar, born in Iran; most famous for his defense of Sūfism as consistent with orthodoxy and his refutation of the Muslim philosophers; author of three books on *uṣūl al-fiqh*, the most famous being his last, *al-Mustaṣfā*. See Muḥammad ibn Aḥmad ibn ʿUthmān al-Dhahabī, *Siyar aʿlām al-nubalā'*, ed. Shuʿayb al-Arnā'ūṭ and Muḥammad Naʿīm al-ʿArqasūsī (Beirut: Mu'assasat al-Risālah, 9th edn., 1413 AH/1992 CE), 19:322 passim.

[4] Muḥammad ibn ʿUmar Fakhr al-Dīn (died 606 AH in Herat, now part of Afghanistan); a major Shāfiʿī scholar of *kalām*, *uṣūl al-fiqh* and *tafsīr*; author of *al-Maḥṣūl fī ʿilm uṣūl al-fiqh* and *al-Tafsīr al-kabīr*; engaged in polemics with many opposing schools of thought, especially in theology. His disputes were particularly fierce with the Karrāmiyyah, an anthropomorphic sect, who are suspected of having poisoned him. See al-Dhahabī, 14:354.

[5] Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī (died 684 AH); born in Egypt of Berber lineage; a prominent Mālikī scholar of *fiqh* and *uṣūl al-fiqh*; he also studied with al-ʿIzz ibn ʿAbd al-Salām; famous for *al-Furūq* on *fiqh* maxims and for *Nafā'is al-uṣūl*, his critical commentary of al-Rāzī's *al-Maḥṣūl*. See Khayr al-Dīn al-Zirikli, *al-Aʿlām* (Beirut: Dār al-ʿIlm li al-Malāyīn, 14th edn., 1999), 1:94-95.

God's law, a loose translation and meditation upon Sayf al-Dīn al-Āmidī's[6] *al-Iḥkām fī uṣūl al-aḥkām,* and in Imran Nyazee's *Theories of Islamic law: The methodology of ijtihād*.

A number of scholars of the seventh century AH further explored the objectives of Islamic Law. Among the most prominent was al-ʿIzz ibn ʿAbd al-Salām[7] in his book *Qawāʿid al-aḥkām fī maṣāliḥ al-anām*. He devoted a great deal of discussion to criteria for choosing between conflicting and competing benefits and harm. His student al-Qarāfī made an original contribution in *al-Furūq,* in which he discussed the subtle differences that distinguish legal principles of outward similarity. Among the topics he discussed were the differences between need and pressing necessity and the Mālikī principle of prohibiting what is in itself lawful but likely to pave the way for illegal acts (*sadd al-dharīʿah*). Ibn al-Qayyim[8] in his *Iʿlām al-muwaqqiʿīn ʿan Rabb al-ʿālamīn* extensively discussed *sadd al-dharīʿah,* legal stratagems and the need to alter *fatwās* due to changes in times and circumstances.

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[6] Sayf al-Dīn ʿAlī ibn Muḥammad al-Āmidī (551-631 AH); a major scholar of *uṣūl al-fiqh*, born in Āmid, the ancient name for Diyārbakir, in what is now the Kurdish part of Turkey; he started out as a Ḥanbalī, then switched to the Shāfiʿī *madhhab* while studying in Baghdad. He taught in Egypt and Syria but kept running afoul of religious authorities who treated his predilection for rational sciences as a cause for suspicion regarding his religiosity. One of his contemporaries who praised him highly was al-ʿIzz ibn ʿAbd al-Salām.al-Dhahabī, 2:364 passim, *Encyclopaedia of Islam*, 1:434.

[7] Al-ʿIzz ibn ʿAbd al-Salām, ʿAbd al-ʿAzīz al-Salamī (died 660); a Shāfiʿī *faqīh* from Syria, nicknamed "the Sulṭān of Scholars" for his assertiveness in enjoining good and forbidding evil; a pioneer in the field of *al-maqāṣid*. See ʿAbd al-Wahhāb ibn ʿAlī ibn ʿAbd al-Kāfī Ibn al-Subkī, *Ṭabaqāt al-Shāfiʿiyyah al-kubrā*, ed. Maḥmūd Muḥammad al-Ṭanāḥī and ʿAbd al-Fattāḥ Muḥammad al-Ḥalū (Cairo: Dār Iḥyā' al-Kutub al-ʿArabiyyah, n.d.), 8:209.

[8] Muḥammad ibn Abū Bakr Ibn al-Qayyim (691-751 AH); a Ḥanbalī scholar, Ibn Taymiyyah's most devoted student, who did not disagree with him on any point of note; a prolific writer on theology, *fiqh* and *uṣūl al-fiqh*, among many other subjects. Born in Damascus, son of the director of a famous *madrasah* known as al-Jawziyyah, from which he derived his nickname. See Murād, 280-281.

The single most important work on the topic of consideration of consequences in applying Sharīʿah laws is Imam al-Shāṭibī's *al-Muwāfaqāt*.[9] Al-Shāṭibī provided a detailed theoretical framework for understanding the *maqāṣid* (higher objectives) of the Sharīʿah and its application as a tool of legal reasoning. He devoted about fifteen pages of his four-volume work specifically to the principle of consequences. After justifying the principle, primarily on the basis of the goals of Sharīʿah legislation, al-Shāṭibī identified four major legal principles that fall under this rubric. He did not invent some new principle in this section; he merely identified the common theme that united principles with which the scholars of *uṣūl al-fiqh* had been familiar for centuries:

- *Sadd al-dharāʾiʿ*[10]
- Legal stratagems (*ḥiyal*) are related to the first category in that the acts in question are themselves legal, but the objective of the actor in doing the deed is at odds with the intent of the Lawgiver in legislating them.[11]
- *Murāʾāt al-khilāf* is the recognition of variant legal opinions issued by recognized scholars. Al-Shāṭibī's discussion of the principle is limited to

[9] Ibrāhīm ibn Mūsā al-Shāṭibī (d. 790 AH) One of the greatest and most original theoreticians of Islamic law; he lived and worked in the waning days of Muslim rule in Spain, dying about a century before the final defeat; most famous for his book *al-Muwāfaqāt fī uṣūl al-Sharīʿah*, in which he presented his theory of Sharīʿah objectives, and *al-Iʿtiṣām*, in which he presented a theoretical structure for the parameters of unlawful innovation. Yaḥyā Murād, *Muʿjam tarājim aʿlām al-fuqahāʾ* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1425 AH/2004 CE), 164; Muhammad Khalid Masud, *Shāṭibī's philosophy of Islamic law* (Kuala Lumpur: Islamic Book Trust, 2000), 69-83.

[10] Ibrāhīm ibn Mūsā al-Shāṭibī, *Al-muwāfaqāt fī uṣūl al-Sharīʿah* (Beirut: Dār al-Kutub al-ʿIlmīyah, 1411 AH/1991 CE) 4:143-4.

[11] Ibid., 4:145-6.

ex-post facto acknowledgment of the validity of a transaction that would be considered unlawful in a specific school of thought.[12]

- The fourth relevant principle is *istiḥsān*, which al-Shāṭibī defined as giving precedence to a particular benefit over a general rule or principle.[13]

Al-Shāṭibī explained each of these principles and its relevance to the principle of consideration of consequences, but his treatment is brief.

Al-Shāṭibī's work went largely ignored by succeeding generations of Muslim scholars until the 20th century CE. One of the more influential scholars to realize the value of al-Shāṭibī's contribution and further develop it was Muḥammad al-Ṭāhir ibn ʿĀshūr[14] in his *Maqāṣid al-Sharīʿah al-Islāmiyyah*. He discussed ratiocination in the Sharīʿah, *al-maṣlaḥah al-mursalah, sadd al-dharīʿah, al-ḥiyal,* exceptional dispensations (*rukhaṣ*) and a methodology for identifying objectives of the Sharīʿah. The English translation, published in 2006, has made these concepts available to English readers for the first time.

An ever-increasing number of graduate students are writing theses on topics relevant to the principle of consequences. Aḥmad Raysūnī's master's thesis *Naẓariyyat al-maqāṣid ʿinda al-Imām al-Shāṭibī* (*Imām al-Shāṭibī's theory of the higher objectives and intents of Islamic law*) made al-Shāṭibī's theory accessible to the educated Arab lay reader. An English translation has been recently published.

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[12] Ibid., 4:146-8.

[13] Ibid., 4:148-51.

[14] Muḥammad al-Ṭāhir Ibn ʿĀshūr (1879-1973 CE); perhaps the foremost Tunisian scholar of the twentieth century; rector of al-Zaytūnah University and Shaykh al-Islām, a title granting him official recognition as the leading Islamic authority in Tunisia. He wrote *al-Taḥrīr wa al-tanwīr*, a celebrated Qur'anic commentary, and *Treatise on maqāṣid al-Sharīʿah*, a thematic analysis of the objectives of Islamic legislation. See the forward to *Treatise on maqāṣid al-Sharīʿah*, translated by Muhammad El-Tahir El-Mesawi (Herndon, Va.: International Institute of Islamic Thought, 1427 AH/2006 CE), xiii-xv.

Raysūnī traces the history of the development of the stream of thought that led to al-Shāṭibī's theory of *al-maqāṣid* and does a good job of explaining the controversy over the role of ratiocination in guiding *ijtihād*. He also devotes a portion of one chapter to the principle of consequences, making it, perhaps, the first English work to explain the topic, although briefly.

A more recent work which picked up where al-Shāṭibī left off is a Ph.D. thesis by 'Abdul-Raḥmān ibn Muʿammar al-Sanūsī: *Iʿtibār al-ma'ālāt wa murāʿāt natā'ij al-taṣarrufāt*. The book is essentially an expansion of al-Shāṭibī's fifteen-page section on consequences in *al-Muwāfaqāt*. The core central section of al-Sanūsī's work is an exposition of the four principles earlier identified by al-Shāṭibī as the main constituents of consideration of consequences.[15] This is prefaced by a lengthy introduction to the principle of consequences, starting with definitions[16] and a classification scheme of consequences based on the level of certainty in the link between cause and projected effect.[17]

He has a useful section on the textual bases for the principle of consideration of consequences from the Qur'an and Sunnah and legal rulings of the Ṣaḥābah.[18] He seeks theoretical justification for the principle on the basis of two primary preoccupations of the Sharīʿah: justice and securing benefit and repelling harm.[19] He discusses the link between the principle of consequences and Islamic legal maxims

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[15] ʿAbdul-Raḥmān ibn Muʿammar al-Sanūsī, *Iʿtibār al-ma'ālāt wa murāʿāh natā'ij al-taṣarrufāt: dirāsah muqāranah fī uṣūl al-fiqh wa maqāṣid al-sharīʿah* (Dammām: Dār Ibn al-Jawzī, 1424 AH), 241-346.

[16] Ibid., 15-24.

[17] Ibid., 25-32.

[18] Ibid., 121-168.

[19] Ibid., 176-214.

(*al-qawāʿid al-fiqhiyyah*).[20] Finally, he discusses rules to regulate application of the principle of consequences.

Al-Sanūsī devotes a section of his book to means of determining consequences, which are the effective cause for the judgment in consequence-based *ijtihād*.[21] One of the means he mentions is the methodology of modern social science, but he does not even identify its various methods, much less discuss them in any detail.[22] This research will endeavour to fill in that lacuna by critically examining some of those methods.

Over the last decade, the Institute for Islamic Research in Dubai has produced a valuable series of works which explore the key principles of legal theory in the Mālikī *madhhab*. Titles of the series include two works on *al-maṣlaḥah al-mursalah* and *istiḥsān*: Muḥammad al-Nūr's *Raʾy al-usūliyyīn fī al-maṣāliḥ al-mursalah wa al-istiḥsān min ḥayth al-ḥujjiyyah* and Muḥammad Būrikāb's *al-Maṣāliḥ al-mursalah wa atharuhā fī murūnat al-fiqh al-Islāmī*. The Institute has also published two books on consideration of juristic differences of opinion: Muḥammad al-Amīn's *Murāʿāt al-khilāf fī al-madhhab al-Mālikī wa ʿalāqatuh bi baʿḍ uṣūl al madhhab wa qawāʿidihi* and Muḥammad Shaqrūn's *Murāʿāt al-khilāf ʿind al-Mālikiyyah wa atharuhā fī al-furūʿ al-fiqhiyyah*. All the books have similar structures. They define the topics and present their bases in the texts of the Qur'an and Sunnah; then they discuss controversies among scholars related to the topic. Būrikāb explores some of the contemporary ramifications of *al-maṣlaḥah al-mursalah*.

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[20] Ibid., 64-74, 215-237.

[21] Al-Sanūsī, 380-395.

[22] Ibid., 395.

Ṣāliḥ Būbashīshah's *al-Ḥiyal al-fiqhiyyah* is another graduate thesis. He focusses on legal stratagems, discusses the scholastic controversy over their use, and provides regulatory guidelines for preventing their abuse.

Fatḥī al-Duraynī's *Naẓariyyat al-taʿassuf fī istiʿmāl al-ḥaqq fī al-fiqh al-Islāmī* explores many of the sub-topics related to the principle of consequences, particularly those related to the misuse of legitimate rights and the provisions provided by the Sharīʿah to prevent and ameliorate such abuses. He provides textual bases for his principle, extensive analysis of that evidence and proposes regulatory principles for its application.

ʿAbdul-Majīd al-Najjār's *Fī fiqh al-tadayyun fahman wa tanzīlan* explores the relationship between understanding the rules of the Sharīʿah in the abstract and applying them to concrete situations, each with its own particularities, which calls for *fiqh al-wāqiʿ* (understanding the world as it is). In the second volume he attempts to draw up a preliminary methodological framework for diagnosing real-world situations and then prescribing and implementing Islamic solutions for the problems of society. The influences of al-Shāṭibī, Ibn al-Qayyim and Ibn ʿĀshūr are manifest in his formulation, but his discussion is somewhat amorphous, with overlap and interpenetration between some of his categories.

Muḥammad al-Zuḥaylī's *Al-tadarruj fī al-tashrīʿ wa al-taṭbīq fī al-Sharīʿah al-Islāmiyyah* deals specifically with the issue of gradualism as a strategy for transition from the present circumstances to wholesale Sharīʿah implementation. His most interesting theoretical contribution is in classifying the different types of gradualism.[23] He discusses the regulatory principles that must be borne in mind in

[23] Ibid., 33-35.

attempting to navigate the process of *tadarruj* as well as dangers to be guarded against.[24]

Maḥmūd Ḥāmid ʿUthmān's *Qāʿidat sadd al-dharā'iʿ wa atharuhā fī al-fiqh al-Islāmī* is a systematic and exhaustive discussion of *sadd al-dharā'i*. He devotes a 10-page section to the relationship between *sadd al-dharā'iʿ* and the principle of consequences, but he borrows heavily from al-Shāṭibī with little fresh insight.[25] He also discusses *al-ḥiyal*, *īstiḥsān* and *murā'āt al-khilāf*.[26] He devotes almost 200 pages to a systematic presentation of classical *fiqh* issues in which some scholars used *sadd al-dharā'iʿ* to support their positions.[27]

Yūsuf ʿAbd al-Raḥmān al-Farat's *Al-taṭbīqāt al-muʿāṣarah li sadd al-dharīʿah* applies the principle to certain contemporary issues, such as the Ṭālibān's destruction of the Buddha statues at Bāmiyān, surrogate motherhood and organ transplants.[28]

There are a whole series of books which discuss Islamic legal maxims (*al-qawāʿid al-fiqhiyyah*). One of the best in clearly explaining the scope of application of each maxim is Muḥammad Shabīr's *al-Qawāʿid al-kulliyyah wa al-ḍawābiṭ al-fiqhiyyah fī al-Sharīʿah al-Islāmiyyah*.

Muḥammad Hāshim Kamāli's *Istiḥsān (juristic preference) and its application to contemporary issues* is a good introduction to the most abstruse, controversial and misunderstood principle of *uṣūl al-fiqh*. It is probably the only book available on the

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[24] Ibid., 109-126.

[25] Maḥmūd Ḥāmid ʿUthmān, *Qāʿidah sadd al-dharā'iʿ wa atharuh fī al-fiqh al-Islāmī* (Cairo: Dār al-Ḥadīth, 1st edition, 1417 AH/1996 CE), 209-219.

[26] Ibid., 248-267.

[27] Ibid., 321-326.

[28] Yūsuf ʿAbd al-Raḥmān al-Farat, *al-Taṭbīqāt al-muʿāṣarah li sadd al-dharīʿah* (Cairo: Dār al-Fikr al-ʿArabī, 1st edn. 1423 AH/2003 CE), 87-92, 96-106, 118-141.

topic in English. He discusses its definitions and types, the controversies surrounding it, the evidence in favor of its suitability as a legal tool and, finally, some contemporary issues to which it may be applied.[29] Finally, he presents an incisive overview of the history of the related but separate disciplines of *uṣūl al-fiqh* and *maqāṣid al-Sharīʿah* and explores the role of *istiḥsān* in bridging the gap between them.[30]

Lee Ellis's *Research methods in the social sciences* is an excellent introduction to the topic referred to in the title. C. J. Barrow's *Social impact assessment: an introduction* provides an overview of a methodology for combining those methods in practical attempts at public policy planning.

Everett Rogers' *Diffusion of innovations* has a useful section on studies of the consequences of innovations. Of particular interest are case studies that illustrate the frequent manifestation of unanticipated consequences of innovation.[31]

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[29] Muḥammad Hāshim Kamāli, *Istiḥsaan (juristic preference) and its application to contemporary issues* (Jeddah: Islamic Research and Training Institute, Islamic Development Bank, 1417 AH/1997 CE), 23-28, 43-66, 67-71, 73-79.

[30] Ibid., 133-139.

[31] Everett Rogers, *Diffusion of innovations* (New York: The Free Press, 3rd edn., 1983), 372-374, 389.

ORGANIZATION OF THE STUDY

The study is organized into seven chapters, starting with the introduction. Chapter Two attempts to establish the place of the principle of consequences within the broader category of *ijtihād*, particularly its relationship to the objectives of Sharīʿah laws. Evidence from the Qur'an and Sunnah is provided for the Sharīʿah's general consideration of human benefit in legislation and its specific consideration of the principle of consequences.

Chapter Three examines use of the principle of consequences to relieve hardship. Attention is focused upon textually unspecified benefit (*al-maṣlaḥah al-mursalah*), its use to override general rules (*istiḥsān*), and acknowledgment of scholarly differences of opinion after an act has been performed (*murāʿāt al-khilāf*).

Chapter Four treats invoking the principle of consequences to prevent misuse of Sharīʿah rights. This involves consideration of means and their consequences, both the blocking of lawful means that lead to unlawful acts and the opening of unlawful means that accomplish Sharīʿah objectives. The related case of legal stratagems is also studied.

Chapter Five attempts to provide some regulatory guidelines to prevent misuse of the principle of consequences. Chapter Six applies the principle of consequences to a few contemporary problems. Chapter Seven provides conclusions and recommendations.

CHAPTER TWO

THE POSITION OF THE PRINCIPLE OF CONSEQUENCES IN THE BROAD OUTLINES OF *IJTIHĀD*

THE TWO MAIN TYPES OF *IJTIHĀD*

Ijtihād has two main areas of application. The first is understanding the texts of the Sharīʿah, while the second is understanding how to apply them to individual cases that arise in the real world. The emphasis in the first area is epistemological and linguistic. Before analyzing individual texts for meaning they must first be evaluated for authenticity. Based upon the results of this process, texts are hierarchically ranked according to the level of confidence they inspire that they did indeed issue from the Lawgiver. The next step is linguistic analysis of individual texts to derive their meanings. They must be arranged hierarchically as to the definitiveness or ambiguity of their wording and as to the breadth or narrowness of their scope.

A central feature of textual *ijtihād* is defining the basis (*manāṭ*) of each law derived from the texts. The *manāṭ* is primarily the attribute that is the effective cause (*sabab*) for the ruling, further modulated by conditions (*shurūṭ*) which must be present for the rule to come into effect. A third essential consideration is the absence of preventive factors (*mawāniʿ*, plural of *māniʿ*). The parameters of the *sabab* are defined through linguistic analysis. For instance, regarding theft (*sariqah*), which is the *sabab* for cutting the hand of a thief, *ijtihād* is required to determine whether purse-snatching, embezzlement and grave-robbing fall within the boundaries of the definition of *sariqah*. The same process is used for defining *shurūṭ* and *mawāniʿ*, which are also identified by Sharīʿah texts.