

## ***Classical Works on Islamic Political Order:*** Critical Evaluation of the Methodology of the Modern Scholars

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### **Abstract**

*As Muslim scholarship generally treated with the issues relating to rebellion in the manuals of creed, Western scholars and many modern Muslim scholars generally overlooked them. Moreover, when some of them focused on manuals of law-proper where the rules for regulating the conduct of hostilities during rebellion are elaborated, they pick and choose between the views of the jurists belonging to various schools presuming that jurists of various schools followed a common legal theory. The present paper after critically evaluating the methodology of these scholars concludes that every school of law represents a distinct and internally coherent legal theory and as such mixing the views of the various schools leads to analytical inconsistency. Hence, it suggests that scholars working on the legality of rebellion from the perspective of Islamic law should focus on proper legal sources and should adopt a principle-based approach instead of mixing the views of the various schools which are founded on different, sometimes, conflicting legal principles.*

*Keywords: Politics, Islamic Political system, Political Order*

### **Introduction**

Scholars working on issues about Islamic polity in the modern world have generally ignored books of law-proper (*fiqh*) and instead focused either on works of political theory – titled as *al-Ahkam al-Sultaniyyah* – or literary works (*adab*), while the fact remains that books of *fiqh* as well as of greater *fiqh* (*al-fiqh al-akbar*), i.e. theology and scholastics, contain rich treasures of rules and principles about Islamic polity. Hence, this paper first categorizes the various sources on Islamic polity into four basic categories and gives a brief review of some the major works in all these categories. After this, it identifies problems in the methodology of the modern scholars working on Islamic polity and explains the methodology preferred in the present paper for

deriving detailed rules of Islamic law from the books of Islamic law-proper and for extending them to contemporary issues.

### **1. Four Kinds of Works on Islamic Political Order**

Orientalists who worked on Islamic polity did not use the “proper” legal sources.<sup>1</sup> Ann Lambton (d. 2008), the famous British historian, divides the literature on Islamic polity into three categories:

Broadly speaking three main formulations can be distinguished; the theory of the jurists, the theory of the philosophers and the literary theory, in which I would include primarily, mirrors for princes, but also the expositions of the administrators, since these are put forward mainly in literary works, and the scattered observations of historians on the theory of state.<sup>2</sup>

This categorization has generally been accepted by modern scholars.<sup>3</sup> Now, the fact is that books titled *al-Ahkam al-Sultaniyyah*, such as the one written by Mawardi, are not books of law proper even when their authors were great jurists in their own right.<sup>4</sup> Abou El Fadl rightly asserts that the proper sources for understanding the views of the jurists on rebellion are sections on *Ahkam al-Bughah* in the classical manuals of *fiqh*, which have generally been ignored by the scholars.<sup>5</sup> Moreover, works of creed and theology – *al-fiqh al-akbar* – also contain significant discussions on the issue of *imamah* (polity), conditions for the *imam* (ruler), multiplicity of rulers, rebellion and the like. Hence, the present Section shall briefly review some of the major works in all these four categories.

#### **1.1 Literary and Philosophical Works**

Since the classical work of Marshall Hodgson (d. 1968), presumably the most influential American historian of Islam, titled *The Venture of Islam: Conscience and History in a Civilization of the World*,<sup>6</sup> modern scholars have paid attention to the study of the works of *adab* (literary works).

Set over against the ideals especially of the Shari’ah-minded Muslims was what may be summed up under the heading *adab*, the worldly culture of the polite classes. While the Muslim courtier, administrator, or intelligent landowner paid due honour to the aspirations of the professional Muslims, most of their efforts were devoted to living out a very different pattern from what the latter approved. Their etiquette, their conversation and fine arts and literature, their ways of using poetry and music and even religion, and their whole social pattern of position and privilege, with its economic and political institutions and its politics, formed a distinct set of genteel standards, prevailing among Muslims and non-Muslims of wealth and position.<sup>7</sup>

Hodgson has given interesting details about how the *adab*-genre came into existence in the form of poetry, prose and works about courts' etiquette.<sup>8</sup> As a part of the same series, some works of the nature of "mirrors for princes" also appeared. Hodgson traces its origins to Ibn al-Muqaffa' (d. 760) who not only translated from Persian into Arabic some interesting related works, such as *Kalilah wa Dimnah*, stories of two jackals who would advise the lion-king,<sup>9</sup> but also suggested to the 'Abbasid Caliph Abu Ja'far al-Mansur to establish orders of the religious scholars and the political leaders headed by the Caliph.<sup>10</sup>

*Siyar al-Muluk* of Nizam al-Mulk Abu 'Ali Hasan b. 'Ali Tusi (d. 1092)<sup>11</sup> and *Nasihah al-Muluk* of Abu Hamid Muhammad b. Muhammad al-Ghazali (d. 505/1111),<sup>12</sup> both in Persian, represent good examples of this mode of writing. Ghazali's book, for instance, is divided into seven chapters and an appendix. The first three chapters are about the conduct and character of the rulers, ministers and officers, respectively.<sup>13</sup> The fourth chapter talks about the courage and bravery of the rulers<sup>14</sup> while the fifth and the sixth chapters deal with wisdom and wise people.<sup>15</sup> The last chapter talks about the good and bad women<sup>16</sup> while the appendix explores the nature and instincts of women.<sup>17</sup>

Another significant - though non-legal - genre was that of *falsafah* (philosophy). Hodgson asserts:

Independent, both of the prophetic-monotheistic and of the imperial traditions, was the highly self-conscious tradition of *Falsafah*. This was an inclusive term for the natural and philosophical learning of the Greek masters. Some other elements from the Greek traditions had a place in the developing Islamicate culture, but it was only in this intellectual sphere that Greek tradition was supreme.<sup>18</sup>

Leading figure among the *faylasufs* (philosophers) for the purposes of works on political order was Abu Nasr al-Farabi (d. 950). His *Ara' Ahl al-Madinah al-Fadilah wa Mudaddatuha* (Opinions of the Inhabitants of the Virtuous City and Their Opposites) was influenced by Plato's *Republic* though he tried to make it somewhat acceptable to Islamic ideals.<sup>19</sup>

Works on *falsafah* are also related in another way: their influence on *kalam*, the branch of knowledge that deals with issues of creed, faith and theology. Thus, Muslim scholars generally discuss questions about political system within the manuals of *kalam*, also called *al-fiqh al-akbar* or greater law.

Issues such as the necessity of political order, whether the ruler is Divinely appointed or by the consent of the people, multiplicity of the rulers, conditions for the ruler, lack of an essential condition by an existing ruler or an aspirant, are discussed in the books of creed although to a modern reader they may not seem to be theological issues.<sup>20</sup>

## **1.2 Works on Political Theory**

Apart from the works on *adab* and *falsafah*, there are works on political theory whose authors were well-known jurists but still they are not books of law-proper; they may be called books of 'political theory'.

Three important works may be briefly referred to here: two works bearing the same title *al-Ahkam al-Sultaniyyah* by Abu al-Hasan 'Ali al-Mawardi (d. 1058), a Shafi'i jurist, and Abu Ya'la, a Hanbali jurist, who were contemporaries, and the third one titled *al-Siyasah al-Shar'iyyah fi Ahkam al-Ra'i wa al-Ra'iyyah* by Ahmad Ibn 'Abd al-Halim Ibn Taymiyyah al-Harrani, again a Hanabli jurist.

Al-Mawardi, like other jurists generally, presumes that appointing a ruler is a legal requirement<sup>21</sup> and that the law allows only one caliph.<sup>22</sup> Further, in line with the tradition of the jurists, he mentions conditions for the caliph<sup>23</sup> and modes of his appointment deemed valid by the law.<sup>24</sup> However, keeping in view the existence in his age of the various autonomous sultans who owed formal allegiance to the caliph, Mawardi goes into details of how this could be deemed justified within the constraints of the law.<sup>25</sup> Almost the same line of argument is adopted by Abu Ya'la.<sup>26</sup>

By the time of Ibn Taymiyyah, however, the caliphate had already been demolished and there were numerous autonomous rulers in different parts of the Muslim world. Hence, Ibn Taymiyyah had to come up with a solution that could be acceptable to those who wanted to work within the constraints of Islamic law.<sup>27</sup>

An important work of this genre by a great jurist which discusses various aspects of the *jus ad bellum* of rebellion is *Ghiyath al-Umam fi Iltiyath al-Zulam* by Imam al-Haramyn al-Juwayni (d. 578 AH/1085 CE), the great Shafi'i jurist who revived the Shafi'i School and reformed its legal theory.<sup>28</sup> Juwayni gives too many details about the prerequisites and qualification of the ruler, multiplicity of rulers, resistance and rebellion against an unjust ruler and other related issues. This work contains invaluable material about the legal status and consequences of rebellion and needs separate detailed analysis.

As works of this genre were not books of 'law-proper', they lack so many important details which the jurists discuss in the manuals of *fiqh* or greater *fiqh*. For instance, while Mawardi negates the legality of multiplicity of caliphs and as such disallows rebellion, he does not discuss the details of conduct of hostilities in case of rebellion; they are discussed in books of *fiqh* in the Chapters on *Siyar* or Chapters on *Baghy*.

### 1.3 Manuals of Islamic Law (*Fiqh*)

Imam Abu Hanifah al-Nu'man b. Thabit (d. 150/767), the founder of the Hanafi School, is credited with systematically developing the discourse on Islamic law and getting prepared the manuals of Islamic law dealing with all the branches of the legal system. As Abu Hanifah had a specific position about the conditions and qualification of the ruler and about resistance and rebellion, his views as recorded by his disciples in the manuals of Islamic law need detailed analysis.

The Hanafi sources, as well as some historical sources, narrate that Abu Hanifah got recorded his views about relations of Muslims and non-Muslims as well as Muslims *inter se*, particularly in times of war, in manuals titled *Siyar*.<sup>29</sup> These views of Abu Hanifah were not accepted by all. In particular, his opinion about the legality of armed resistance against the usurpers was the target of criticism.<sup>30</sup> Imam 'Abd al-Rahman al-Awza'i (d. 157 AH/774 CE), the great jurist of Syria who also had close links with the rulers, wrote a detailed critique of the *Siyar* of Abu Hanifah.<sup>31</sup> In response, Imam Abu Yusuf Ya'qub b. Ibrahim al-Ansari (182 AH/798 CE), the great disciple and successor of Abu Hanifah in his School, wrote a rejoinder to Awza'i under the title of *al-Radd 'ala Siyar al-Awza'i*.<sup>32</sup> Imam Muhammad b. al-Hasan al-Shaybani (189 AH/805 CE), the second great disciple of Abu Hanifah who compiled and recorded the basic texts of the Hanafi School, gave more time and energy to the study of *Siyar* and wrote at least three specific books on *Siyar*. Later, jurists of other schools also concentrated on this area of Islamic law and now almost every manual of Islamic law has a chapter or chapters dealing with issues of *Siyar*. Some of the significant works on *Siyar* will be briefly reviewed here.

It is debatable if Abu Hanifah, indeed, wrote a manual on *Siyar*. It is, however, definitely established that he dictated his views to his disciples who recorded them in their own way. As far as the *Siyar* of Awza'i is concerned, passages of this work are found in the rejoinder written by Abu Yusuf as well

as in the work of Imam Muhammad b. Idris al-Shafi'i (d. 204 AH/819 CE), the great jurist who founded his own school of law.<sup>33</sup>

When Khadduri compiled and translated some of the works of Shaybani on *Siyar*, it was generally believed that it was the work on which Imam Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi (d. 483 AH/1090 CE), a great jurist of the Hanafi School whose work is deemed the most authentic exposition of the Hanafi law, wrote his detailed commentary under the title of *Sharh Kitab al-Siyar al-Kabir*.<sup>34</sup> One reason for this common belief was the fact that Khadduri gave the sub-title of "*Shaybani's Siyar*" to his work. As the commentary of Sarakhsi and the text extracted by Khadduri do not match in order and presentation, many scholars doubted the authenticity and status of the work of Sarakhsi. Khaled Abou El Fadl is one of them. This issue will be taken up later in this paper.<sup>35</sup>

It may be noted at this point, however, that what Khadduri edited and translated was part of one of the works of Shaybani: *al-Asl*.<sup>36</sup> Khadduri's work contains three chapters from this great compendium, and on many counts the oldest complete manual, of Islamic law.<sup>37</sup>

Many scholars believe that *al-Siyar al-Saghir* was written earlier but a comparison of the texts of this work and that of the Chapter on *Siyar* from *Kitab al-Asl* shows that the former is a summary and précis of the latter.<sup>38</sup> This work has been edited and translated by Mahmood Ahmad Ghazi (d. 2010), a great Pakistani scholar who remained the President of the International Islamic University Islamabad, under the title of *Shorter Book on Muslim International Law*. Sarakhsi's commentary on this work of Shaybani is found in the tenth volume of *al-Mabsut*.

As far as *al-Siyar al-Kabir* is concerned, it is a separate work of Shaybani which he wrote in the final years of his life.<sup>39</sup> Sarakhsi dictated a detailed commentary on this work which is published in five volumes.

Each of these works contain discussions on various rules about rebellion and civil wars, but they generally deal with the *jus in bello* or *adab al-qital* (rules governing the conduct of hostilities) while issues of *jus ad bellum* or *'illat al-qital* (ratio or legality of war) are seldom discussed in these manuals. For instance, the legality or prerequisites of armed resistance are only briefly touched in these manuals while rules about the enemy persons and property, rules of engagement, conquered or occupied territory, captives and other related issues are discussed at length in these manuals.

#### 1.4 Over-skepticism of Khaled Abou El Fadl

The work of Khaled Abou El Fadl is marred by over-skepticism mars about the manuals of *fiqh*, particularly of the Hanafi School. Thus, he is not sure if Shaybani indeed wrote the chapter on *Siyar* in *Kitab al-Asl*.<sup>40</sup> For this, he relied heavily on the work of Khadduri.<sup>41</sup> The arguments, or the doubts, are summarized below:

1. The oldest existing manuscript of the chapter on *Siyar* is from 638/1240.
2. Some of the views are too advanced to have been written in Shaybani's time.
3. Sarakhsi wrote a commentary on the *Siyar* of *Kitab al-Asl* under the title of *Sharh al-Siyar al-Kabir*, but Sarakhsi was dictating from his memory while in prison.
4. Discrepancies in Khadduri's text and Sarakhsi's text are too great to consider these as one text.

His conclusion is that "additions have been made to the original text representing late Hanafi legal views."<sup>42</sup>

This view cannot be accepted by any serious student of Islamic law. *Kitab al-Asl* is one of the sixth texts known as the *Zahir al-Riwayah* and the jurists of the Hanafi School have always considered these texts as the most authentic record of the legal position of the School. Non-existence of earlier manuscripts is not an argument, particularly when generations of jurists throughout Muslim history always deemed Shaybani to be the author of these texts without any shadow of doubt. Moreover, there is a heap of corroborative evidence about the authorship of Shaybani. These include Shaybani's other texts, particularly *al-Siyar al-Saghir*, which is an exact summary of the chapter on *Siyar* of *Kitab al-Asl*. Importantly, Abou El Fadl does not doubt Abu Yusuf's authorship of *Kitab al-Kharaj*,<sup>43</sup> and the text of this book records the views of the Hanafi School similar to those found in the *Siyar* of *Kitab a-Asl*.<sup>44</sup> Similarly, Abou El Fadl is sure that Shafi'i wrote *al-Kitab al-Umm*.<sup>45</sup> This book also records the views of the Hanafi School prevalent at the time of Shafi'i, which corroborates the views expressed in the *Siyar* of *Kitab al-Asl*. Hence, the view expressed by Khadduri and Abou El Fadl that some of the views in *Siyar* of *Kitab al-Asl* are highly developed and as such could not have been written by Shaybani is not tenable. It not only underestimates the genius of that great jurist but also ignores the way schools of Islamic law developed.<sup>46</sup>

It is also strange that Abou El Fadl would repeat the mistake committed by Khadduri in considering the *Siyar* of *Kitab al-Asl* as *al-Siyar al-Saghir* and Sarakhsi's *Sharh* as its commentary. This wrong supposition led them reach the wrong conclusions. It is true that Khadduri's text is different from Sarakhsi's text, but the reason is obvious: Sarakhsi's *Sharh* is not the commentary on the *Siyar* of *Kitab al-Asl*. As noted earlier, there are three different works of Shaybani on *Siyar* which have somehow been confused here:

1. Chapter on *Siyar* in *Kitab al-Asl*. Khadduri edited this text and translated it into English.
2. *Al-Siyar al-Kabir*. This is a detailed and comprehensive treatise on all the important aspects of the law of war. The text of this book is preserved in Sarakhsi's *Sharh*.<sup>47</sup>
3. *Al-Siyar al-Saghir*. When al-Hakim al-Shahid al-Mirwazi (d. 334 AH/945 CE), a famous Hanafi jurist of the fourth/tenth century, edited the six books of *Zahir al-Riwayah* and came up with an abridged version – *al-Kafi fi furu' al-Hanafiyah* or simply *al-Mukhtasar al- al-Kafi* – he actually summarized the four of these texts and instead of summarizing the two books on *Siyar* he preserved the text of *al-Siyar al-Saghir*.<sup>48</sup> Sarakhsi dictated to his students a detailed commentary – *al-Mabsut* – on *al-Kafi*. Thus, *Kitab al-Siyar* in *al-Mabsut* contains the commentary of Sarakhsi on Shaybani's *al-Siyar al-Saghir*.<sup>49</sup> Ghazi extracted the text of *al-Siyar al-Saghir* from various manuscripts of *al-Kafi* and edited and translated it into English. As pointed earlier, a comparison of the text of *al-Siyar al-Saghir* and that of the *Siyar* of *Kitab al-Asl* proves that *al-Siyar al-Saghir* is a precise summary of the *Siyar* of *Kitab al-Asl*.

Hence, there is no reason to doubt Shaybani's authorship of the *Siyar* of *Kitab al-Asl*. Moreover, we find no reason to consider the views expressed in Sarakhsi's commentary as the solitary views of Sarakhsi. Rather, Sarakhsi's commentary is an authoritative description of the principles of the School. Sarakhsi was among the *mujtahidin fi 'l-masa'il*<sup>50</sup> whose task was to elaborate the principles established by the earlier jurists and to bring new cases under these principles. Therefore, the Hanafi jurists have always deemed his commentary to be the authoritative statement of the principles of the School.<sup>51</sup>



## **2 Issues of Methodology**

After this brief overview of the various genres of works on the Islamic law of rebellion, it is time now to settle some of the issues regarding methodology for examining these works and for drawing certain conclusions. This Section will first briefly review the methodology used by the Western scholars after which it will examine the methodology adopted by Khaled Abou El Fadl in his monumental work on the Islamic law of rebellion. Finally, it will explain the methodology of the jurists which can still better serve the purpose of the scholars who want to do legal analysis of the issues.

### **2.1 Methodology of Western Scholars**

The first thing that mars the works of most of the Western scholars on Islamic political theory and system is the influence of their preconceived notions and biases. As Edward Said (d. 2003) has shown,<sup>52</sup> the tradition of Orientalism was closely linked with the larger enterprise of colonialism and as such classical works of Orientalists on Islamic law, such as those of Ignaz Goldziher, Joseph Schacht and N. J. Coulson,<sup>53</sup> have characteristics of that colonial mindset and traces of Orientalist stereotypes about Islamic law.

One example of this mindset is that of the presumed 'evolution' and 'historical development' because of which sometimes these scholars raise doubts about the authenticity of the some of the works of the earlier jurists.<sup>54</sup> They just cannot believe how a jurist of the eighth century could come up with a refined legal argument which by the norms of evolution could not be possible before the twelfth or thirteenth century.<sup>55</sup>

Moreover, as noted earlier, most of the Western scholars while working on the Islamic political system have focused on a few selected works and developed the thesis "passive obedience" to authority ignoring the works of other jurists who argued for resistance against unjust rulers and usurpers.

This trend continues in the modern world where another factor has further caused problems, namely, mixing the views of the jurists belonging to various schools on the presumption that all the various schools of Islamic law followed one "common legal theory".<sup>56</sup> This has resulted in causing analytical inconsistencies as well as misgivings about Islamic law and jurisprudence.<sup>57</sup>

Apart from these problems in the treatment of the Islamic legal literature, the works of many of the Western scholars are based on doubts about not only the interpretation of the Qur'anic verses and Prophetic traditions but also about the authenticity of the Qur'anic text and the historicity of the Prophetic traditions. Resultantly, doubts have also been

raised about the authenticity of the manuals of *fiqh* and, thus, every foundation of the “Muslim perspective” has been shaken.

Influence of these various traits of the Orientalist approach is found not only in the Western tradition of the so-called “academic” and “objective” study of the Islamic literature but also in the works of many renowned Muslim scholars in the contemporary world. Khaled Aboe El Fadl is an example.

## **2.2 Presumptions of Khaled Abou El Fadl**

One of the most serious problems with the work of Khaled Abou El Fadl is that he is over-skeptical about the *Sunnah* of the Prophet as an authentic source of law. Although he does not accept the theory of Joseph Schacht regarding the fabrication of the *ahadith* by the later generations,<sup>58</sup> yet he does seem influenced by some of the components of Schacht’s theory when he says: “It is certainly true that jurists are painfully dependant on precedent and authority. However, while they may reorganize, and *selectively* emphasize and deemphasize certain precedents over others, they do not *usually* invent them.”<sup>59</sup>

As this passage shows, he does believe that Muslim jurists sometimes, though not usually, invented precedents.<sup>60</sup> It is, perhaps, this over-skepticism regarding traditions which led him to declare that there are two sources of the Islamic law of rebellion: the conduct of ‘Ali b. Abi Talib (God be pleased with him) and the Qur’an.<sup>61</sup> He does not cite the *Sunnah* of the Prophet (peace be on him) as a source of law. Of course, this position is not acceptable to Muslim jurists.

Moreover, the idea that Muslim jurists *selectively* emphasized or deemphasized precedents is also misleading because it suggests that they did this on subjective basis. The fact is that the various schools of Islamic law had developed various principles for preferring one precedent to the other and for reconciling between apparently conflicting precedents. The Hanafi School in particular developed a coherent theory of general principles of law. Unfortunately, as noted earlier, scholars have paid very little attention to the methodology of the jurists before Shafi’i.

It was also noted above that Abou El Fadl, relying on the work of Khadduri, raises doubts about the authenticity of the manuals of the Hanafi School. Apart from over-skepticism about the *Sunnah* and the manuals of *fiqh*, there is a serious problem in the methodology adopted by Abou El Fadl as his thesis is primarily based on the notion of “historical development” or

“evolution”, which overlooks the nature of the “schools of law” (*al-madhahib al-fiqhiyyah*). This point is explained below.

### 2.3 Methodology of the Jurists

The methodology which the present paper prefers is based on the presumption that every school of Islamic law represents a distinct legal theory and system of interpretation and that the jurists of a school work within a coherent and internally consistent legal system.<sup>62</sup> In every school of Islamic law, particularly in the Hanafi School, there are grades of jurists so that the jurists of a lower grade have to accept, and build upon, the principles established by the jurists of the upper grades.<sup>63</sup> Hence, contrary to what Abou El Fadl and some contemporary scholars believe, the later jurists of the Hanafi School could not deviate from the principles established by the earlier jurists.

In the Hanafi School, for instance, Abu Hanifah, the founder of the School, is on the top of the hierarchy and is called *mujtahid fi 'l-Shar'* or *mujtahid mutlaq*.<sup>64</sup> Abu Yusuf, Shaybani and a few other jurists are included in the second grade of jurists and are known as the *mujtahidin fi 'l-madhhab* who were to exercise *ijtihad* within the confines of the *madhhab* (school).<sup>65</sup> Jassas and Sarakhsi are among the *mujtahidin fi 'l-masa'il* or *ashab al-takhrij*.<sup>66</sup> Their task was to explain the principles established by the *mujtahid fi 'l-shar'* (Abu Hanifah) and *mujtahidin fi 'l-madhhab* (such as Abu Yusuf and Shaybani). They also had the authority to ascertain the established and preferred opinion (*zahir al-madhhab*) if there were more than one opinion reported from the earlier jurists.<sup>67</sup> Thus, these jurists stand between the earlier and the later jurists. The *ashab al-takhrij* also further extended the principles established by the earlier jurists through the methodology of *takhrij* or “reasoning from principles”.<sup>68</sup>

As such, if by development it is meant that the principles are further refined and extended to new cases, such developments did take place in the Hanafi School, or in any other School for that matter. However, if development means that the later jurists changed the well-established principles of the school, this notion cannot be accepted.

Another point worth consideration is that mixing of the opinions of the jurists belonging to different schools leads to analytical inconsistency as each school represents a full-fledged and internally coherent legal theory and system of interpretation. For instance, the Hanafi theory deems the implications of the general word (*'amm*) definitive (*qat'i*) while the Shafi'i theory deems it probable (*zanni*).<sup>69</sup> The Hanafi theory deems *istihsan* a valid tool for resolving conflicts within the legal system while the Shafi'i theory

does not accept it.<sup>70</sup> Tacit consensus (*ijma' sukuti*), particularly of the Companions (God be pleased with them), is a binding source of law in the Hanafi theory while the Shafi'i theory does not deem it a valid consensus.<sup>71</sup> There are hundreds of other principles which collectively result in reaching a particular conclusion on a particular legal issue. Hence, accepting the Hanafi view in one case and taking the Shafi'i view in another, and sometimes doing this in the components of a single issue, violates the virtue of integrity.<sup>72</sup> Scholars who do this "pick and choose" generally accept the two basic presumptions of the Orientalists, namely, that the various schools of Islamic law followed a "common" theory and that *Usul al-fiqh* had no influence on the development of *fiqh* as much of *fiqh* was developed by Abu Hanifah and other jurists before even Shafi'i was born whom they deem as the "master-architect" of *Usul al-fiqh*.<sup>73</sup>

One last point about the methodology is the difference between the sources of law for the *mujtahid* (the jurist who lays down the law for the first time) and for the *faqih* (the jurist who extends the law already expounded by the *mujtahid* on the basis of the principles used by the *mujtahid*).<sup>74</sup> The sources of law generally mentioned in the books of *Usul al-fiqh*, such as the Qur'an, the *Sunnah*, consensus of the jurists, analogy and so on, are sources for the *mujtahid*, while the sources for the *faqih* are the manuals of the school which, like the jurists of the school, have its own hierarchy and grading.

Thus, in the Hanafi School the most authentic manuals of law are those titled *Zahir al-Riwayah*.<sup>75</sup> These are six books composed by Shaybani, the disciple of Abu Hanifah.<sup>76</sup> The most authentic and authoritative commentary on the *Zahir al-Riwayah* is *al-Mabsut* of Sarakhsi.<sup>77</sup> Then, there are various *mutun* (authoritative texts) of the School composed by great jurists of the School.<sup>78</sup> The most authoritative *matn* is that of *Bidayat al-Mubtadi* composed by Burhan al-Din 'Ali b. Abi Bakr al-Marghinani (d. 593 AH/1197 CE) who then also wrote brief notes for explaining this *matn*.<sup>79</sup> These notes are called *al-Hidayah*.<sup>80</sup> Then, there are various commentaries (*shuruh*) on these *mutun* and on *al-Hidayah*.<sup>81</sup> After these texts and their commentaries, there are glosses (*hashiyah*) on the various commentaries.<sup>82</sup> While glosses and commentaries help in understanding the texts – and the official position of the School – in case of a conflict the text has priority over the commentary and the commentary has a priority over the glosses.<sup>83</sup>

The most preferred works for legal analysis are *al-Mabsut* of Sarakhsi, *al-Hidayah* of Marghinani and *Bada'i' al-Sana'i' fi Tartib al-Shara'i'* of 'Ala' al-Din Abu Bakr b. Mas'ud al-Kasani (d. 587 AH/1191 CE). For ascertaining the

views of the other schools, an attempt should be made to use similar manuals which these respective schools consider as authentic.

## Conclusions

Questions about Islamic political system have been examined from various perspectives and have been recorded in literary works, philosophical treatises, works on political theory and works on theology as well as works on law-proper. In these classical works, issues of the *jus ad bellum* of rebellion have generally been discussed in books of theology while those of the *jus in bello* of rebellion have been examined in the books of law-proper. However, Western scholars and many modern Muslim scholars generally overlooked the manuals of theology as well as those of Islamic law proper and have focused on works of other genres. Even when books of law-proper have been used sometimes, the presumption of these scholars is that jurists of various schools followed a common legal theory and as such they pick and choose between the views of the jurists belonging to various schools. The present paper suggests presuming every school of law as representing a distinct and internally coherent legal theory and disapproves mixing the views of the jurists of the various schools as this leads to analytical inconsistency.



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## References

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<sup>1</sup> I have undertaken a brief review of their works in: "Modern Discourse on the Islamic Law of Rebellion" (forthcoming).

<sup>2</sup> Ann K. S. Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford: Oxford University Press, 1981), xvi.

<sup>3</sup> See, for instance, John Kelsay, *Arguing the Just War in Islam* (Cambridge: Harvard University Press, 2007), 43-44.

<sup>4</sup> Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamabad: Islamic Research Institute, 1994), 12 at fn 12.

<sup>5</sup> Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), 8.

<sup>6</sup> Much of the material of this work was initially published in 1958 in *A History of Islamic Civilization* and in a three-volume work titled *An Introduction to Islamic Civilization* published in 1958-59. Later, the work was published with the title of *The Venture of Islam* in 1961. The edition used in this paper contains three volumes published in 1974. Sub-title of the first volume is: *The Classical Age of Islam*; sub-title of the second volume is: *The Expansion of Islam in the Middle Period*; while sub-title of the third volume is: *The Gunpowder Empires and the Modern Times*. The discussion on the *adab* is found in the first volume.

<sup>7</sup> Marshall G. S. Hodgson, *The Venture of Islam: Conscience and History in a Civilization of the World* (Chicago: The University of Chicago Press, 1974), 1:239.

<sup>8</sup> *Ibid.*, 1:444-472.

<sup>9</sup> The work which was originally composed in Sanskrit was translated into Persian perhaps in the era of Nushirvan (d. 579 CE), also known as Khosrow I/Chosroes I, the famous Prsian Emperor of the Sasanid dynasty. Later, it has been translated into many languages.

<sup>10</sup> Hodgson, *The Venture of Islam*, 285.

<sup>11</sup> Nizam al-Mulk Abu 'Ali Hasan b. 'Ali Tusi, *Siyar al-Muluk*, ed. Hubert Darke, (Tehran: Tarjama-wa-Nashr-e-Kitab, 1962).

<sup>12</sup> Abu Hamid Muhammad b. Muhammad al-Ghazali, *Nasihah al-Muluk*, ed. Jalal Huma'i, (Tehran: Kitabkhana-e-Tehran, 1950).

<sup>13</sup> *Ibid.*, 39-105.

<sup>14</sup> *Ibid.*, 106-119.

<sup>15</sup> *Ibid.*, 120-143.

<sup>16</sup> *Ibid.*, 144-150.

<sup>17</sup> *Ibid.*, 151-159. The famous Shafi'i jurist Abu 'I-Hasan 'Ali b. Muhammad b. Habib al-Mawardi (d. 450 AH/1058 CE) is more famous for his work on political theory titled *al-Ahkam al-Sultaniyyah*. Although he also wrote a book of the literary genre under the title of *Nasihah al-Muluk* (Kuwait: Maktabat al-Falah, 1403/1983).

<sup>18</sup> Hodgson, *The Venture of Islam*, 239.

<sup>19</sup> See the introductory note of al-Bir Nasri Nadir, Professor of Philosophy in the University of Lebanon to Farabi's book: *Ara' Ahl al-Madinah al-Fadilah wa Mudaddatuha* (Beirut: Dar al-Mashriq, 1968), 11-23.

<sup>20</sup> I have examined some of the important works of creed dealing with such in a separate paper: "Discourse on the Legality of Rebellion in the Hanafi Theology and Law" (forthcoming).

<sup>21</sup> Abu 'l-Hasan 'Ali b. Muhammad b. Habib al-Mawardi, *al-Ahkam al-Sultaniyyah wa al-Wilayat al-diniyyah*, ed. Ahmad Mubarak al-Baghdadi (Kuwait: Maktabat Dar Ibn Qutaybah, 1409/1989), 5.

<sup>22</sup> Ibid., 10-11.

<sup>23</sup> Ibid., 5.

<sup>24</sup> Ibid., 6-7.

<sup>25</sup> Ibid., 27-29.

<sup>26</sup> Abu Ya'la al-Farra' Muhammad b. al-Husayn al-Hanbali, *al-Ahkam al-Sultaniyyah* (Makkah: Jami'at Umm al-Qura, 1432/2011).

<sup>27</sup> Ahmad Ibn 'Abd al-Halim Ibn Taymiyyah al-Harrani, *al-Siyasah al-Shar'iyyah fi Islah al-Ra'i wa al-Ra'iyyah*, ed. 'Ali b. Muhammad al-'Imran (Jeddah: Majma' al-Fiqh al-Islami, n. d.).

<sup>28</sup> Nyazee has shown that it was Juwayni who reconstructed and revived the Shafi'i and made it possible for his student Ghazali to expound the concepts of *maslahah* and *maqasid al-shari'ah*. *Theories of Islamic Law*, 189-230.

<sup>29</sup> For a detailed analysis of this issue see the introduction to the chapters on *Siyar* taken from Shaybani's *Kitab al-Asl* by Majid Khadduri (d. 2010), the famous Iraqi-American Christian scholar of Islamic International Law: *The Islamic Law of Nations*, 22-26. For critical evaluation of some of the views of Khadduri see the introduction written by Mahmood Ahmad Ghazi (d. 2010) to *al-Siyar al-Saghir* of Shaybani: *Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998), 31-32.

<sup>30</sup> See for details: Sadia Tabassum, "Recognition of the Right to Rebellion in Islamic Law with Special Reference to the Hanafi Jurisprudence", *Hamdard Islamicus*, 34:4 (2011), 55-91

<sup>31</sup> The text of Awza'i's work is found in the form of excerpts in the works of Abu Yusuf and Shafi'i mentioned below.

<sup>32</sup> Abu Yusuf Ya'qub b. Ibrahim al-Ansari, *al-Radd 'ala Siyar al-Awza'i*, ed. Abu 'l-Wafa al-Afghani (Hyderabad: Lajnat Ihya' al-Ma'arif al-Nu'maniyyah, n.d.).

<sup>33</sup> Muhammad b. Idiris al-Shafi'i, *Kitab al-Umm* (Beirut: Dar Qutaybah, 2003), 15:237-325.

<sup>34</sup> Two editions of this work have been published so far. The first one is edited by Salah al-Din al-Munajjid (Cairo: Matba'at Misr, 1957). The second one is edited by Hasan Isma'il al-Shafi'i (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997). The present paper uses this latter edition.

<sup>35</sup> See Section 1.4 below.

<sup>36</sup> These are chapters on *Siyar*, *Kharaj* and *'Ushr*.

<sup>37</sup> Books written before *al-Asl* were either not books of law-proper (such as *al-Muwatta'* of Imam Malik b. Anas) or did not contained all chapters of law (such as *Kitab al-Kharaj* of Abu Yusuf). Some of the chapters of *al-Asl* were edited by Afghani and were published in Hyderabad, India, in five volumes. A chapter on *hiyal* (legal

devices) was edited by Joseph Schacht. The chapters on sales were edited by Abraham L. Udovich. A few chapters were edited by Shafiq Shahatah. However, the whole compendium was not edited till quite recently. Muhammad Boynukalin has recently edited the whole of *Kitab al-Asl* in thirteen bulky volumes. (Qatar: Ministry of Religious Affairs, 2012).

<sup>38</sup> Imran Ahsan Khan Nyazee (b. 1945), a great contemporary scholar and authority on the Hanafi law and jurisprudence, has shown that *al-Siyar al-Saghir* represented an earlier example of the special genre of law manuals which were later called *mukhtasar* or *matn*. (See his Introduction to the English translation of Marghinani's *al-Hidayah: The Guidance* (Bristol: Amal Press, 2006), xiv.

<sup>39</sup> Sarakhsi, *Sharh Kitab al-Siyar al-Kabir*, 1:3; Mahmood Ahmad Ghazi, *Shorter Book on Muslim International Law*, 321-32.

<sup>40</sup> Abou El Fadl, *Rebellion and Violence*, 144.

<sup>41</sup> *Ibid.*, 144-145.

<sup>42</sup> *Ibid.*, 145.

<sup>43</sup> *Ibid.*, 141.

<sup>44</sup> *Ibid.*, 142-144.

<sup>45</sup> *Ibid.*, 147.

<sup>46</sup> See Section Two below.

<sup>47</sup> Ghazi says that a on the orders of the Ottoman Caliph Sultan Mahmud Khan, a Turkish jurist Muhammad Munib Ayntabi translated *al-Siyar al-Kabir* into Turkish language and wrote a short commentary on it as well. (*Shorter Book on Muslim International Law*, 32). He asserts that the commentary entitled *al-Tafsir al-Masir fi Sharh Kitab al-Siyar al-Kabir* is found in manuscript form in the library of Shaykh al-Islam 'Arif Hikmat and that the Turkish translation of the text was published in 1825. (*Ibid.*) It is also worth noting that in *al-Fatawa al-Hindiyyah*, the chapter on *Siyar* heavily relies on the text of *al-Siyar al-Kabir*. Hasan al-Shafi'i generally gives references to the relevant passages of *al-Fatawa al-Hindiyyah*.

<sup>48</sup> Ghazi, *Shorter Book on Muslim International Law*, 33-34.

<sup>49</sup> At the end of this chapter, Sarakhsi says: "Here ends the commentary on *al-Siyar al-Saghir*." (*Al-Mabsut*, 10:151).

<sup>50</sup> See Section 2.3 below for brief description of the various grades of jurists in the Hanafi School.

<sup>51</sup> Moreover, it also seems unrealistic to assume that Sarakhsi dictated from his memory his thirty-volume commentary on the text of *al-Kafi*, five-volume commentary on the text of *al-Siyar al-Kabir* and two-volume description of the principles of the School. (*Usul al-Sarakhsi*). As Ghazi suggests, his students might have gathered around his prison cell with books in their hands and they might have been reading the text and Sarakhsi would give his explanatory comments. (*Shorter Book on Muslim International Law*, 32). The same practice still prevails in the traditional *madaris*.



<sup>52</sup> See the monumental work of Edward Said (d. 2003), *Orientalism* (London: Penguin, 2003). The book was first published in 1978 by Routledge & Kegan Paul Ltd.

<sup>53</sup> Ignaz Goldziher, *Introduction to Islamic Law and Theology*, trans. A. R. Hamori (Princeton: Princeton University Press, 1981); Joseph Schacht, *Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1953); *idem*, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964); Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964); *idem*, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: University of Chicago Press, 1969).

<sup>54</sup> This is evident in the work of Abou El Fadl. See Section 2.2 below.

<sup>55</sup> As shown above in Section 1.4, it is on this presumption that Abou El Fadl doubts the authorship of Shaybani for the chapters on *Siyar* edited by Khadduri.

<sup>56</sup> For views of Orientalists on mixing the views of various schools, see: Schacht, *Introduction to Islamic Law*, 106; Coulson, *A History of Islamic Law*, 196-201. For detailed criticism on this issue from the perspective of legal theory, see Imran Ahsan Khan Nyazee, *The Secrets of Usul al-Fiqh: Rules for Issuing Fatwas* (Islamabad: Advanced Legal Studies Institute, 2013), 68-77.

<sup>57</sup> Nyazee, *The Secrets of Usul al-Fiqh*, 9-18.

<sup>58</sup> "The type of reconstructive or revisionist work that Schacht and others have done and do with Islamic law is not consistent with the way law develops." (*Ibid.*, 22, fn 59).

<sup>59</sup> *Ibid.* (emphasis added).

<sup>60</sup> Thus, while discussing the "obedience and counter-obedience traditions", he says: "it is very likely that both types of tradition *appeared* contemporaneously." *Ibid.*, 120 (emphasis added). At another place, he observes that the tradition about disobedience to unlawful commands "was put into the form of an interesting narrative." *Ibid.*, 121.

<sup>61</sup> *Ibid.*, 34.

<sup>62</sup> For this, the present paper primarily relies on the work of Nyazee, particularly his *Theories of Islamic Law, Islamic Jurisprudence* and *The Secrets of Usul al-Fiqh*.

<sup>63</sup> Nyazee, *The Secrets of Usul al-Fiqh*, 24-26. See also: Muhammad Amin Ibn 'Abidin al-Shami, *Sharh 'Uqud Rasm al-Mufti* in *Majmu'at Rasa'il Ibn 'Abidin* (Damascus: al-Maktabah al-Hashimiyyah, 1325 AH), 1:48.

<sup>64</sup> The task of *mujtahid mutlaq* was three-fold: to identify the sources of law and to ascertain the priority order of the sources; to develop a coherent theory of interpretation based on various principles of interpretation (*qawa'id usuliyyah*); and to derive detailed rules of law from the determined sources through the use of *qawa'id usuliyyah*. These detailed rules would be covered by general principles of law (*qawa'id fiqhiyyah*). (Ibn 'Abidin, *Majmu'at al-Rasa'il*, 1:49 ff. See also Nyazee, *Islamic Jurisprudence*, 333-353).

<sup>65</sup> Thus, they could not disagree with Abu Hanifah on the sources of law or on the priority order of these sources. Had they disagreed with him on this issue, they would not have remained Hanafis. Similarly, they followed Abu Hanifah in most, if not all, of the principles of interpretation. However, they could disagree with him on the detailed rules of law and as such on the *qawa'id fiqhiyyah*. For instance, Abu Yusuf and Shaybani agreed with Abu Hanifah that the courts of the Islamic states lacked jurisdiction to punish a person for violation of the rights of a citizen of the Islamic state beyond its territorial limits. (Sarakhsi, *Al-Mabsut*, 10:104). Abu Yusuf, however, disagreed with Abu Hanifah and Shaybani on the liability of a Muslim for violation of Islamic law beyond the territorial limits of the Islamic state. While Abu Hanifah and Shaybani were of the opinion that the courts of the Islamic state lacked jurisdiction in this case, Abu Yusuf held that the courts could exercise jurisdiction. One may say that Abu Yusuf acknowledged the principle of active nationality in this case. (Ibid.)

<sup>66</sup> Ibn 'Abidin, *Majmu'at Rasa'il*, 1:49; Nyazee, *Islamic Jurisprudence*, 335.

<sup>67</sup> Ibn 'Abidin, *Majmu'at Rasa'il*, 1:50.

<sup>68</sup> See for details of the methodology of *takhrij*: Nyazee, *Islamic Jurisprudence*, 339-353.

<sup>69</sup> Sarakhsi, *Usul al-Sarakhsi*, 1:132-51; Abu Hamid Muhammad b. Muhammad al-Ghazali, *al-Mustasfa min 'Ilm al-Usul* (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.), 2:20-48.

<sup>70</sup> Sarakhsi, *Usul al-Sarakhsi*, 2:200-206; Ghazali, *al-Mustasfa*, 1:213-222.

<sup>71</sup> Sarakhsi, *Usul al-Sarakhsi*, 1:303-310. Ghazali, *al-Mustasfa*, 1:160-162.

<sup>72</sup> See for details the monumental work of Ronald Dworkin (d. 2014): *Law's Empire* (London: Harvard University Press, 1986).

<sup>73</sup> Coulson, *A History of Islamic Law*, 53-62. See for criticism on this issue: Nyazee, *Theories of Islamic Law*, 175-76.

<sup>74</sup> This distinction is based on the work of Nyazee: *Islamic Jurisprudence*, 335-42.

<sup>75</sup> Ibn 'Abidin, *Sharh 'Uqud al-Rasm al-Mufti*, 6-8.

<sup>76</sup> These are: al-Asl, al-Ziyadat, al-Jami' al-Kabir, al-Jami' al-Saghir, al-Siyar al-Kabir, al-Siyar al-Saghir.

<sup>77</sup> Ibn 'Abidin, *Sharh 'Uqud al-Rasm al-Mufti*, 15-16.

<sup>78</sup> Ibid, 11-15. See also: Nyazee, *The Guidance*, xix-xxiii.

<sup>79</sup> In this *mutn*, Marghinani combined the two earlier – and most authentic – *mutun*, namely, *al-Jami' al-Saghir* of Shaybani and *Mukhtasar al-Quduri* of Abu 'l-Husayn Ahmad b. Muhammad al-Quduri (d. 428 AH/1036 CE).

<sup>80</sup> Marghinani also wrote a detailed commentary on his *mutn* under the title of *Kifayat al-Muntahi*, but it is not published. It said that Marghinani summarized *Kifayah* for his grandson and gave it the title of *al-Hidayah*.

<sup>81</sup> Among the numerous commentaries of *al-Hidayah*, the later jurists generally preferred the one written by Kamal al-Din Ibn al-Humam al-Iskandari (d. 861 AH/1457 CE) titled *Fath al-Qadir* (Cairo: Dar al-Kutub al-'Arabiyyah, 1970).

<sup>82</sup> For example, Muhammad b. ‘Abdillah al-Tamartashi (d. 1004 AH/1596 CE) wrote the *mutn* called *Tanwir al-Absar*. On this *mutn*, ‘Ala’ al-Din Muhammad b. ‘Ali al-Haskafi (d. 1088 AH/1677 CE) wrote commentary titled *al-Durr al-Mukhtar*. Later, Ibn ‘Abidin (d. 1252 AH/1836 CE) wrote glosses on this commentary under the title of *Radd al-Muhtar*.

<sup>83</sup> At another place, I have examined some of the issues on which Haskafi disagreed with Tamartashi and then Ibn ‘Abidin wrote detailed glosses on those issues: “Discourse on the Legality of Rebellion in the Hanafi Theology and Law” (forthcoming).