

# Of Higher Intentions and Lower Expectations – A report about a failed survey project on using *maqāṣid al-shari'ah* as a means of comparative governance research

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## Introduction

Governance is a concept that comprises a number of issues. It is not only about laws or policies and their enforcement but also about underlying societal attitudes as the milieu in which the above operate. This is especially true when we are looking at a system that is based on an entirely different ontology such as Islamic law. Here the societal attitudes are heavily influenced by and overlap with religious principles. It is obvious that addressing these underlying religious issues is bound to cause tensions, especially when the interrogation of the system is done from a secular point of view. My approach to circumventing this hurdle was to look at the so-called Higher Intentions in Islamic law, the *maqāṣid al-shari'ah*. The *maqāṣid*, while ultimately based on religious primary sources, the Qur'an and the practice of the Prophet Muhammad, the so-called *Sunna*, have undergone a centuries-long refinement process through continuous efforts in Islamic jurisprudence. They have in fact almost become ethical principles in their own right, supported by second-order ethical implementation principles such as benefit for the public good, public policy etc. which one would also find in secular contexts. The idea was therefore to use the *maqāṣid* as a comparator reservoir of rules for comparison with secular ethical principles and second-order implementation rules, and so to avoid the religious-secular antagonism. The way the research project developed and ultimately failed is an object lesson about the differences of approach and attitudes to mutually relevant academic research and its significance for practical governance in two very different research environments.

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\*Chair in Comparative and International Criminal Law, Durham University. – I am grateful to the many people who attended the three talks where I spoke about the topic of this paper, at Old Dominion University/Norfolk, the Al Mahdi Institute in Birmingham and the Institute of Advanced Legal Studies in London, and who gave or wrote individual comments on the project. I am very grateful to Dawn Rothe and Helen Xanthaki for arranging my talks in Norfolk and London. I am particularly indebted to Ali-Reza Bhojani and Sheikh Arif Abdul Hussain of the Al-Mahdi Institute for inviting me to speak at their conference on *Shari'a Responsibility; Conditions and Conflicts* at the Institute from 3 – 4 April 2014. There was a palpable spirit of wisdom, curiosity and goodwill among all participants, and the milk of human kindness – notwithstanding that Lady Macbeth so despised it in her husband – was flowing freely. In such an environment, there is no place for the *futur al-shari'ah*. – I am also grateful to Aurelia Colombi-Ciacchi, Rijksuniversiteit Groningen, for inviting me to speak to the topic of my research on *maqāṣid al-shari'ah* at the 6<sup>th</sup> Annual Conference of the NILG at Groningen. See for the thoughts expressed in that lecture the article in footnote 1 below. All views and errors are mine alone.

For my research leave period 2013/14 at Durham University I had planned to work on a monograph related to the potential of using the *maqāṣid* in Islamic jurisprudence, uncoupled from their religious foundations, as a tool for the conversation with secular law and legal thinking, which by and large has shed its own religious roots and proceeded to an ethics-driven approach based on public policy or interest and/or systemic logical coherence. What do we mean by *maqāṣid*? Every community at some stage develops fundamental guiding principles that inform the interpretation and application of morals and laws. In Islam we have the so-called five higher intents or *maqāṣid*, related to protecting five basic values in society, namely religion, life, lineage, intellect and property, including ethical principles for the implementation of the five ideals, such as *maṣlaḥah murṣala*, i.e. enhancing the benefit for the public interest, *istiḥṣan* (juristic preference) the ‘blocking of means’ (*sadd al-dhari’ah*) and the ban on manipulation (*tahayyul*) if using lawful means could lead to an unlawful or immoral effect, the idea of necessity (*ḍarūrāt*), etc. Most secular systems do no longer recognise the protection of religion and lineage as legitimate purposes per se but are, for example, providing for the protection of freedom of religion and speech or the protection of children’s inheritance rights even if born out of wedlock. They contain rules for the protection of sexual self-determination, life and property. Protection of the intellect aspects can be found in laws regulating drug and alcohol consumption, the dissemination of (hard) pornography, depictions of violence, etc. Secular systems possess similar ethical implementation rules mirroring those in Islamic law, for example, the principle of protecting the public interest or public policy, the ban against abuse of formal legal positions, necessity, etc.

My experience from discussions with Muslim friends and colleagues at conferences, symposia, lectures and in private conversations also gave me the impression that there was a somewhat unfortunate tendency of preferring abstract theorising over practical application, and that the conversation was mostly an exchange of monologues about the respective legal systems and their theoretical building blocks, rather than a discussion of individual problem scenarios where these building blocks could have been observed in action<sup>1</sup>, and a comparative evaluation of their

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<sup>1</sup> I have explained the ideas and the related problems of such a discourse at length in Michael Bohlander, *Sisters in Law – Using Maqāṣid al-Shari’ah to Advance the Conversation between Islamic and Secular Legal Thinking*, (2014) *Arab Law Quarterly*, 257, to which the reader is referred for reasons of space and from which the above paragraph has been taken as a modified excerpt. – Further readings on *maqāṣid al-Shari’ah* in English can be found e.g. in Muhammad Ayub, *Understanding Islamic Finance*, (Chichester: Wiley, 2007); Muhammad al-Tahir Ibn Ashur, *Treatise on Maqāṣid al-Shari’ah*, translation by Mohamed el-Tahir el-Mesawi, (London/Washington: The International Institute of Islamic Thought, 2006); G.E. Attia, *Towards Realization of the Higher Intents of Islamic Law*, (London/Washington: The International Institute of Islamic Thought, 2007); Yasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London/Washington: The International Institute of Islamic Thought, 2008); Adis Duderija (ed.) *Maqasid al-Shari’a and Contemporary Reformist Muslim Thought: An Examination* (London; Palgrave MacMillan, 2014); [Ibrahim Ibn Al-Shatibi](#), *The Reconciliation of the Fundamentals of Islamic Law: v. 1: Al-Muwafaqat Fi Usul Al-Shari’a* (transl. by [Imran Ahsan Khan Nyazee](#)) (Reading, Garnet Publishing, 2012); [Ahmad Al-Raysuni](#); *Imam Al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law* (London/Washington: The International Institute of Islamic Thought, 2005).

reasoning. Case-based discussions very often referred to clearly definable stances of the Qur'an, especially when it could be shown that the Islamic era brought in positive innovations, such as for example, in the treatment of prisoners of war etc., even if those innovations had in the centuries since the composition of the Qur'an and the Sunna been overtaken, for example, by the ethical principles in international law. The exposition from the Muslim side was almost invariably uncritical, if not apologetic, possibly since the ethical foundations of the modern developments seemed to bear the stamp of the Judaeo-Christian tradition.

Hence I wanted to initiate a different sort of dialogue that would try to skirt the foundational conflict of religious vs. secular and rely only on factual scenarios to which each system, Sunni as well as Shi'a Shari'ah<sup>2</sup> on the one hand, and two secular systems – Germany and England – on the other, would contribute its own case-based answers. The idea behind this was to trace differences and similarities in the argument made by the scholars from the respective systems, not so much the outcome of it. The premise of the research project, which it meant to verify or falsify, was that lawyers largely think the same thoughts and that they use different building blocks to construct rather similar-looking houses. The main instrument of the research was a survey questionnaire (see Annex I) with a series of case-based scenarios which I sent to a number of Islamic scholars to provide the answers to the scenarios from the Shari'ah perspective, since that was clearly outside my area of expertise, both in substance and linguistically. There was a possibility to state if a respondent was willing to be interviewed. The survey failed in its entirety because I did not get (sufficient) answers, both quantitatively and qualitatively. The monograph project was dead on arrival, as it were, and so I turned the research into an attempt to find the reasons for the failure – in other words, into an attempt of snatching victory from the jaws of defeat. This paper will set out the process of preparing the survey and the reflections on why it went wrong. It will reflect on comments I received from a number of Muslim and non-Muslim scholars. I do not deny that it also reflects my individual reaction to the developments and may from time to time convey a certain *souçon* of personal frustration; however, I feel that in a sense this is a relevant aspect in its own right for the future discussion between academics on all sides to the conversation: The willingness from any one side to engage in such modes of collaborative research depends on the clarity of communication from potential respondents and the openness as well as the sincerity of the discourse.<sup>3</sup> It is thus important to address matters which may not appear at first glance

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<sup>2</sup> We should disabuse ourselves of the idea that there is such a thing as “the” Shari'ah in either of the two major Islamic sub-religions, if one wanted to call them that. For a brief modern overview over the different conceptualisations in Sunni and Shi'a schools see Jan Michiel Otto (ed.) *Sharia Incorporated – A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden, Leiden University Press, 2010) 23 ff.

<sup>3</sup> Due to the personal nature of the communications, the authors have not been identified but given acronyms. Their emails are on file with the author.

straightforwardly academic in nature but which have – through their wider cultural encoding – a direct bearing on the inter-subjectivity of the envisaged research strategy, especially in the context of future joint research projects in this area.

### **The preparation phase**

The project was the object of a funding application to a UK sponsor institution – which was ultimately unsuccessful: with hindsight clearly a blessing given the effect the failure would have had on the funding arrangements. In the preparation of the funding application, the project justification went through a peer review process within my university. I obtained comments from two reviewers, among them a Muslim colleague at Durham, MS1<sup>4</sup>, who stated:

Many contemporary Muslim scholars are grappling with identifying the appropriate legal theory to develop Islamic laws for modern times. One key debate relates to the use of maqasid based approach focussing on the *maslahah* compared to the traditional legalistic approaches that at times fail to consider new realities and values. While there is a large literature on maqasid based approach (including some contemporary ones mentioned by Michael), the implications of using the principles of maqasid during contemporary times is often not clear. Given this context, the research proposed by Michael will be a useful contribution on an important topic. What is distinct about Michael's proposal is that he intends to conduct a comparative study on the maqasid-based Islamic legal theory and Western legal approaches. I am not aware of anyone who has done a similar comparative work. In this sense, the proposed research is novel. ...

I think one of the strengths of Michael's proposed research ... would be to examine how the principles/concepts that are common in both legal systems (such as blocking the means' and 'precautionary principle') are applied in Western legal regimes to give clues to how these can be applied in the Islamic legal environment.

Overall, I think the proposed research will help fill gaps on two fronts. On the one hand, it will increase the understanding of Islamic legal theory among the Western scholars and on the one other hand the research will provide insight to Islamic jurists on how the maqasid related concepts are used in modern Western legal thought and practice. This will be possible not only in terms of papers/articles that will result from the research, but also through his interaction with Muslim scholars while carrying out the work.

The other, non-Muslim, reviewer provided mainly comments on the presentation of the research topic but not on the substance as such. Another Muslim colleague and expert in maqasid research from a Persian Gulf institution, MS2, wrote:

Your research proposal is very much needed for both worlds, Islamic and Western, and I am certain it

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<sup>4</sup> MS = Maqasid Survey.

will have a good impact, God willing.

This was echoed by yet another Muslim colleague from a UK university, MS3:

It is a very important project.

After submission of the funding application and obtaining ethics approval by my research committee, I began dissemination of the questionnaire to Muslim colleagues, the vast majority of whom I had met personally or even knew very well. The text of the accompanying email read as follows:

Dear ...

please find attached a questionnaire for the research project I am conducting on maqasid al shari'ah and secular legal theory.

I am aware that questions 6 and 7 around the issue of sexual relationships out of wedlock may be somewhat awkward, but these relate to cases decided in European jurisdictions and there has been a long development, so it would be very interesting to see the Shari'ah reaction to them.

I'd be very grateful if you could fill it in or refer it to (a) colleague(s) at your institution who could – the more the better. You would help me enormously.

I received the following comment from a Muslim colleague at another UK institution, MS4:

I wish you best of luck with the project.

I don't think you will find two similar answers even from followers of one school of thought for number of reasons. Even if they the conclusion may not convey what you wish to see. There are no hard and fast rules which follower of particular school of thought would apply when write an answer. The situation could be the same even in English law, though would be clearer but not definite. You will notice this when you would ask the respondent to explain the reason for answers.

I have forwarded your questionnaire to a few of my students and staff as well. Let's see if they respond or not.

Neither he nor any of his colleagues did respond, despite a polite reminder. However, this was the first inkling I had that there might be a problem with the cooperation from Muslim colleagues. This may have had to do partly with a concern that cooperating with a Western institution was fraught with potential for the unwelcome attention of the authorities. A colleague from Iran, MS5, replied:

I refer the questionnaire to a group of Iranian lawyers – among them PhD candidates of international law-, and then after filling, they will be forwarded to your email.

Unfortunately, as the infortune consequences of former president and the security approach taken by government bodies toward academic staff, some of the respondents prefer not to fill the questionnaire. This is the condition for productive academic relations that Mr. Ahmadinejad promised the people. Still there are here academics who try to be positive.

One of the scholars I had sent it to in the UK, MS6, forwarded it to a number of people in his own research institution, but already then sounded a note of caution which should be repeated afterwards in various fora:

It looks very interesting- although personally I am sceptical about the notion of pure sharia law!

For me to respond would take me some considerable time - the last five years or so I have been focussing on *usul al-fiqh* rather than *fiqh*, and I would need to do some serious work on applying my methodological ideas across the breadth of questions you are posing.

But for sure I will forward to other members of our faculty for whom it may be more straightforward to respond- although to be honest all may feel that they would have to take out some considerable time to do so. Having said that I hope at least one of us can participate.

Since responses were slow in forthcoming, on 11 December 2013 I sent a reminder to the people I had approached so far, and included a few new names:

Please find attached (again) the questionnaire for the research project I am conducting on *maqasid al shari'ah* and secular legal theory. Some of you I will be asking for the first time.

So far I had only one response from a Shi'a scholar.

I know that filling in a questionnaire of case-based questions of law is unusual and will take some time, but without the questionnaires the research findings will be severely limited.

I need the input from scholars versed in Islamic law since I have had no formal training in it. The survey is an ideal opportunity to move beyond theoretical comparisons to actual case-based work.

I'd be very grateful if you could fill it in (in English or French) until 15 January 2014.

If you feel your expertise covers only certain areas of law, then please fill in only the related questions.

Partial returns are better than none at all.

You would help me enormously. I repeat that the evaluation will be entirely anonymous.

Overall I had sent the questionnaire<sup>5</sup> directly to 25 persons, some of whom had offered to pass it on to their colleagues; some did pass it on and copied me in, however, I am unaware of the actual numbers of referrals to other people. I got responses on the questionnaire as such from three people, who happened to be all Shi'a Muslims, and all Iranians: MS5, one of MS5's colleagues to whom the survey had been distributed, both from Iran, and from another Iranian colleague, MS7, from a UK

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<sup>5</sup> One of the anonymous reviewers made the suggestion that instead of sending a questionnaire I could have used other means of communication, such as Skype or phone conversations etc. While that would in principle have been possible with a number of persons – not all respondents will have had a Skype account – the comment does not detract from the simple fact that the respondents would still have had to prepare for the conversation because they could not have answered the questions off the cuff in any meaningful manner. In addition, using Skype or phone interviews would have raised additional research ethics questions because one would have had to record the conversations in order to transcribe the material at a later stage, and consequentially it would have created additional problems of anonymity and security of data storage etc., not to mention, as we will see below, questions of covert surveillance of the conversation by intelligence services and the potential for repercussions from that.

institution. No Sunni answered the questionnaire<sup>6</sup>. Apart from a Turkish colleague, who had misunderstood the substance of the survey and MS4, no-one expressed any concerns, their inability or unwillingness; some addressees promised to facilitate a response but never did. The vast majority of colleagues did not respond at all. The following table sets out the background and form of reaction of the direct addressees.

Table 1  
Regional backgrounds of direct addressees and type of reaction<sup>7</sup>

Background	Total number	No reaction at all	Reaction to email*	Apology	Answered survey
Arab	12	11	1	0	0
Iran	4	1	1	0	2**
South East Asia	5	3	2	0	0
Africa	2	2	0	0	0
Europe	2	1	1	1	0
Total	25	18	5	1	2

\* Means addressees who responded to my email(s) but did neither give an apology nor fill in the questionnaire.

\*\* One Iranian contact of the direct Iranian addressee also filled in the questionnaire but only gave “Yes” or “No” answers without any reasoning, making their response in essence useless.

### Post-failure analysis

This outcome called for an attempt at explanation. Not least because from a European collegial perspective, the behaviour of the large number of Muslim colleagues who simply did not send any reply at all could be considered as bordering on rudeness, or at the very least displaying a lack of professionalism. In order to find a range of possible interpretations of this state of affairs and to obtain reactions from uninvolved but knowledgeable colleagues, I presented the development of the survey, the reactions I had had so far and my own ideas for the reasons at three symposia in 2014, one at Old Dominion University in the USA to a non-Muslim sociologist audience, one at the Al Mahdi Institute in Birmingham (UK) to an all-Muslim and overwhelmingly if not entirely Shi’a law/philosophy audience, and finally at the Institute for Advanced Legal Studies in London, to a mixed but Muslim majority audience. The comments I received<sup>8</sup> are set out in Table 2.

<sup>6</sup> It would be spurious at this stage based on the available anecdotal evidence to speculate any further about reasons for this related to the question of whether the respondents were Shi’i or Sunni.

<sup>7</sup> The fact that the majority of the questionnaires went to Sunni Muslim countries was determined by the simple fact that the persons I had had previous personal contact with were mostly Sunnis. As explained elsewhere in the paper, personal contact is a main determinant for obtaining access to local institutions and colleagues.

<sup>8</sup> It was not the intention to ascertain the educational and cultural background at these meetings – another suggestion by one of the anonymous reviewers – first of all because it would have hindered the free discussion and secondly because it would have raised additional research ethics hurdles the efforts at compliance with which would have been out of proportion to the potential additional background information, if it had then been provided at all.

Table 2  
Responses from the audience at symposia

	ODU	AMI	IALS
Academic		<ul style="list-style-type: none"> <li>• Systemic approach may not have been compliant with Shari’ah justice<sup>9</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Survey involves assumptions about systemic coherence, does not take into account ambiguity of systems</li> <li>• “further distance to travel if outside family law” (↔ focus of academic work on specific fields of practical interest)</li> </ul>
Practical	<ul style="list-style-type: none"> <li>• Make Shari’a scholars perceive it as their own project</li> <li>• Get Muslim scholars to send the survey to other Muslim scholars</li> <li>• Arrange interviews with a few individuals</li> <li>• Maybe concern over how to guarantee anonymity</li> </ul>	<ul style="list-style-type: none"> <li>• Pay respondents for answering questionnaires</li> <li>• Too much effort</li> <li>• No kudos for respondents regarding their own research credit</li> <li>• Muslim scholars as gatekeepers</li> </ul>	<ul style="list-style-type: none"> <li>• Questions too difficult</li> <li>• Too much effort asked</li> <li>• Should have asked Muftis as practitioners, not scholars</li> <li>• Should have used tick-box version</li> <li>• “person to person” contact better, not abstract approach via cold letter</li> <li>• Academic competition ↔ should have offered co-authorship</li> <li>• Different format may have been required, with more explanations</li> <li>• Refer to collections of <i>fatawa</i></li> </ul>
Religious/cultural		<ul style="list-style-type: none"> <li>• Phrasing of questions may have touched sensitive areas (e.g. “prostitute” ↔ short-term marriage)</li> </ul>	<ul style="list-style-type: none"> <li>• Culture precludes saying “I don’t know”</li> <li>• “does not surprise me” – lack of reflection among Muslim scholars</li> <li>• Wording of questions may have been offensive (e.g. “prostitute” offensive to women)</li> <li>• Shi’a Muslims following Ayatollahs, esp. on fixed marriage</li> <li>• Alternative dispute resolution very much alive in Muslim world, possibly opposed to imposed, non-negotiated decision</li> </ul>

Note: ODU = Old Dominion University; AMI = Al-Mahdi Institute; IALS = Institute of Advanced Legal Studies The

<sup>9</sup> Meaning that the secular/Western epistemological framework may not have been suited for Muslim scholars to respond in.

types of comments which I received can summarily be classified as belonging to either an academic, practical and/or religious or cultural category. The cultural responses were to a large degree, but not only, noticeably focussed on the sexual behaviour questions related to prostitution and cohabitation out of wedlock, which chimed to some extent with a comment a Sunni colleague from the UK, MS8, had made when commenting in the draft stage on the questionnaire, namely that answering these questions might be “embarrassing for younger Islamic scholars”. Muslim members of the audience both at AMI (all Shi’a) and IALS took particular issue with the question related to prostitution since mainly certain schools of Shi’a law – despite some confusion about its practice in the early Islamic period<sup>10</sup> – allow for short-term or fixed marriages, the so-called *nikah mut’ah*, that could and often are<sup>11</sup> phenotypically considered as cases of providing sex for money, in other words prostitution, from a European perspective. The concern of the members of the audience certainly did *not* relate to the increasing practice of the rebranding of this particular trade under the new, neutral and apparently politically correct term “sex work”, which tries to avoid attaching any moral opprobrium to these activities. This reaction is rather interesting since all Shari’ah schools clearly forbid prostitution as such, most probably even as a *hadd* crime, so why people picked up on the word so strongly is somewhat unclear. Apparently, there was a certain sensitivity among the Muslim members of the audience themselves that the use of the fixed-term marriage is in fact nothing short of a fig-leaf for allowing otherwise prohibited conduct.

Taking the issues raised by the various comments in turn, the main academic concerns related to the question that the survey may have proceeded from a Western or secular epistemological paradigm, i.e. it did not take the Islamic system idiosyncrasies into account. This concern is, however, in my view unfounded since all I did was to present factual scenarios and to ask the respondents how they would solve them in relation to specific legal consequences of those actions, i.e. would there be an obligation to pay the contract price or damages etc. The survey did not proceed from any normative conception but from the simple assumption that such cases can occur frequently in any jurisdiction, and are thus maybe even part of the so-called “textbook scenarios” used in legal education. Hence, the questions were entirely open-ended as far as the manner of treating the scenarios was concerned. Incidentally, no such comment had been made in the preparation phase of the questionnaire. It was precisely in order to avoid engaging with Islamic law directly on a normative or epistemological level of debate why the survey was cast as it was, i.e. a sequence of factual scenarios with questions attached about a particular legal consequence. The aim was simply to hear how an Islamic scholar would argue his or her way through the case and what the outcome would have been, but of those

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<sup>10</sup> See Susan A. Spector, *Women in Classical Islamic Law*, 2012, 92 ff.

<sup>11</sup> See e.g. the findings of a 2014 parliamentary report in Iran, summarised at [www.economist.com/news/middle-east-and-africa/21611117-official-report-blows-lid-secret-world-sex-throwing](http://www.economist.com/news/middle-east-and-africa/21611117-official-report-blows-lid-secret-world-sex-throwing).

two, the argument was the more important part. If the Islamic law approach did not provide any solution for the questions asked, then that could have been flagged up and would have provided an interesting answer in itself. Therefore, the fact that Islamic legal culture may be in practice more negotiation-oriented, as one person suggested, is neither here nor there: Such an answer would also have been open to the respondents, and in any event the idea that a legal system may in practice be in favour of alternative dispute resolution mechanisms does not absolve that legal system from providing a solution if the decision has to be made on a contentious basis because the parties do not wish to come to an understanding. For the same reasons, the provision of a tick-box (multiple choice?) format, as suggested by one practical comment, was not feasible because a mere Yes or No answer would have been useless for the survey's intentions and open answer text fields would still have been required to get at least an idea of the reasons for the answer.

The second academic comment related to the prevalence of work done in a certain field, i.e. family law, which is, of course, one of the most relevant as far as modern applications of Shari'ah are concerned, along with the law of succession. The idea behind that comment was that many or most Islamic scholars worked in those practically relevant fields and thus had no easy way of referencing Shari'ah sources in other, less relevant fields of law and to produce answers to the questions within an acceptable amount of time and effort. There is naturally a degree of plausibility to that, yet it is open to question whether that specialisation should have had the effect of extinguishing any and all knowledge of basic principles of the law of contract, tort or criminal law. One outcome of the survey, even though not contemplated as such, thus seemed to be that the average Muslim scholar does not have such scenarios either at their fingertips or easy access to reference materials, such as, for example, meticulously and extensively annotated academic and practitioner codification commentaries in civil law jurisdictions, most prominently in Germany. From this point of view, it is then unclear what advantage could have been gained from referring to any collections of *fatawa*, as advised in the session at the IALS by way of a practical comment. Would these collections have contained annotated entries listed along the abstract and systemic criteria underlying such scenarios at all? Or would they just have represented more or less unrelated lists of *fatawa* loosely put together under a general area of law, as one can find often in the traditional *hadith* collections such as Bukhari or Muslim? Only in the former sense would they be of real use. This may be one of the fields where Wael B Hallaq's critique of Shari'ah as not possessing a sufficient degree of abstraction may be relevant<sup>12</sup>. That would also resonate with the one rather blunt cultural comment which said "does not surprise me" based on an alleged lack of reflection among Muslim scholars.

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<sup>12</sup> See Wael B. Hallaq, *Shari'a – Theory, Practice, Transformations* (Cambridge, Cambridge University Press, 2009) 500.

Moving on to the practical comments, one of those most frequently given was the combination of “too much effort” or “too difficult”, as well as lack of ownership by or academic research kudos for the Muslim respondents. Tied to this was also the suggestion of either paying them for answering the survey or offering co-authorship. Taking the last matter first, one can say that while author lists of 20 or more persons are no rarity in scientific publications, they are rather unusual in social sciences and particularly so in law; in any event merely answering the survey would not have meant involvement in the evaluation of the answers and the drafting of a coherent manuscript as opposed to an edited collection of all questionnaires. Co-authorship with 25 persons, had everyone merely answered the survey, was thus not a realistic option. The other remarks which basically say you cannot ask academic colleagues to waste a major amount of time on supporting another academic’s research, especially if they themselves are labouring under the regime of research assessment exercises such as the REF (Research Excellence Framework) in the UK, without getting academic recognition themselves they could profitably use in the REF etc., or at least some other form of (pecuniary) consideration or compensation, are in substance unanswerable from an analytical point of view: It may really have been asking too much, and given the related issue of the apparent absence of ready-made sources that my Muslim colleagues could have used to answer the survey, there may be a systemic reason for it, too. This may also apply to the contention that what I had asked them to do was “too difficult”. However, it does not really explain the lack of any kind of reply by the vast majority of colleagues: The polite and even in a European context completely acceptable response would in my view have been to say something along the lines of “this project is fascinating and I wish I could help you but alas I am snowed under with numerous other commitments” or words to that effect. We all get requests from time to time that we feel we cannot or do not want to fulfil because we do either not have the time and/or resources or simply are not interested; that is nothing unusual in an academic’s life. Whether there was an unspoken cultural reservation or reluctance to state this so openly at work is again not clear; from personal experience especially in the (Gulf) Arab environment it is apparently not uncommon there to employ total silence as a supposedly non-confrontational way of saying “thanks, but no thanks”, so one cannot deny that there might have been an element of that involved. This would match the one cultural comment that saying “I don’t know” was not part of Muslim culture. A different issue is what this says about the styles of as well as the potential and the range of fields for cooperation by and with Muslim colleagues in cross-cultural projects in general. The suggestion that a different format with more explanations might have been required was unclear: More explanations would one the one hand have meant that the respondents would have had to read even more text, with the exact aim and substance of that text left uncertain, and on the other hand it would not have changed any of the burden of answering all the questions in the survey.

Another mixed practical/cultural aspect was the comment that in Muslim and particularly in Arab environments, person-to-person contact is vital if not indispensable if one wants to achieve results effectively. One comment aptly named this: “Muslims scholars as gatekeepers”. “Cold letters” were thus considered inadvisable. That fact had been known to me and was borne in mind from the beginning. The overwhelming majority of direct contacts who were sent the questionnaire were known to me previously and I to them, from conferences, seminars, research group membership etc. Hence this aspect cannot have had a major impact on the outcome. In itself, this cultural trait can nonetheless present an obstacle to setting up research networks with colleagues in the Muslim/Arab world. It does, of course, also militate in principle against the concern expressed by the non-Muslims at ODU that respondents may have been worried about how their anonymity would be safeguarded. Nothing would have prevented any respondents from sending a hard copy or USB version in an unmarked postal envelope. In any event, although from a research ethics perspective these days more precautions are taken than was previously thought necessary, it bears remembering that what the respondents were asked to do was not to divulge sensitive personal data but to answer hypothetical legal scenarios. Anonymity, as mentioned above, was more of an issue when it came to evading the attention of the state authorities; yet even then I was not entirely certain how answering legal matters under Shari’ah law could be seen as a subversive activity, even if it involved engaging with a Western, non-Muslim person or institution. Indeed, one Iranian colleague had repeatedly corresponded with me openly by email lambasting the situation in Iran – if anything, that colleague would by then already have been in the cross-hairs of any Iranian intelligence service unit. But then the general level of fear pervading these countries is something one cannot accurately judge as an outsider who lives and works in safety.

Insofar as comments advised having used practitioners – such as muftis – instead, and not scholars, I found that comment partly self-defeating since the same commentators acknowledged that practitioners would very likely have a more limited understanding of the Shari’ah because in their daily practice the state-sponsored laws may have played a larger role than the Shari’ah law proper; in addition, the comment above regarding the relative prominence of family law in the daily practice even of academic scholars would certainly have had an impact in this context as well. Last but not least, since I did not know any muftis personally I would have run afoul of the above-mentioned personal contact barrier unless I would have used my personal contacts to approach muftis known to them. However, given that even the colleagues of the academic contacts who had passed them on within their networks failed to react to this sort of personal recommendation I remain unconvinced that the indirect personal avenue would have had promising results.

So, to sum up, the only comment category that would produce an unanswerable picture is the one where the Muslim colleagues thought it was too much to ask without some form of either academic or pecuniary compensation, or could not be interested for other, unknown reasons. None of the other reasons that appeared to find crucial flaws in the survey seem ultimately convincing as a sufficient explanation for the failure of the vast majority of respondents to reply at all, although I admit that I am, of course, somewhat biased in that respect.

### **Individual pre- and post-symposium comments**

A number of people sent emails before or after the IALS presentation, and they shed further light on the matter. I will reproduce them here without further comment, since they are themselves thoughtful comments on the presentations or on related issues as such, they speak for themselves and lastly they do not highlight anything with which I would either disagree or which I have not already addressed above. One non-Muslim Islamic scholar working in the UK, MS9, who could not attend, wrote the following shortly before the IALS symposium:

I am so sorry I am going to miss your paper at the IALS .... However, I find your efforts very exciting, and the results unsurprising, as you are asking people to address the key issue that many of us are struggling with: in law. For, at the end of the day, where is the boundary of the 'intolerable' as identified by Twining in his 2009 book on Human Rights, *Southern Voices* (p. 218), as in a secular context we are constantly demanding that Muslims put God's law below the state's law?

That, I found, is the boundary that many people as individuals are not willing to cross, and are not addressing as professionals as a result. Hence, I guess, the purposeful – not perplexed I assume - silence of your intended respondents. And in our secularism-dominated, even atheism-inclined environments, we forget all too fast that denying the existence of any higher entity (however named, that is a different controversy and problem) is what is really intolerable to many people.

I engaged for the past few years with Muslims in debates about their understanding of 'haram' – that did not help, at first, as many Muslims say drinking is haram, and then drink. So the question became: what is really really haram – and we know the answer: getting stone drunk and forgetting God exists! So here is the boundary.

I tested this in a different cultural context and asked Japanese colleagues what their language has as tools to express something totally unacceptable and completely obnoxious and intolerable. To my surprise, without me prompting in any form, what came out from those discussions with people who allegedly have no religion was that the Japanese terms for intolerability all link in some form to a denial of connectivity, in other words, the rejection of a basic perception that we humans are not completely autonomous and that there is something higher 'out there'!

In a recent conference at the new MPI department on Law and Anthropology in Halle, we connected this to the debates about individual agency. Out came some really interesting findings, at least for me: individual agency is located on a spectrum between the theoretical possibility of absolute autonomy

on the one side and the theoretical possibility of complete predetermination on the other side. Reality is somewhere in between. So neither are humans devoid of agency, nor is God, however imagined, completely in control. It is *this*, I suspect, that your respondents avoid addressing through their silence.

Two Muslim scholars working in the UK and who attended the IALS seminar, MS10 and MS 11, sent separate remarks by email. MS10 wrote:

I enjoyed your presentation very much and learned a great deal from it. I have worked with communities globally for over a quarter century. While I agree with what [MS11] says, one thing to keep in mind is that your form asks for people to respond on Sharia applications. While this may be possible for some academics to answer, I am not sure that many Muslim lawyers on the ground will have thought it through that way or whether they would know who to ask for help in order to answer this question. According to my experience people respond better to personal questions but are very lackadaisical about filling forms. The culture is more oral than written. Also, Muslim clerics do not, to my knowledge, make this distinction between Sharia and law. In my interviews, I found a great deal of confusion about these issues in the field. Generally, people in those cultures do not respond readily to filling forms. I feel sad because it represents a lost opportunity. From my own research on my doctorate, I found that meeting people personally and following them each time yielded the best results. Often people would give me appointments and not turn up. In other cases a number of requests were met with non-responses. This was not only with Muslims but also other non-Western institutions and individuals.

MS11 had written prior to that the following email, to which MS10 referred:

Your lecture continues to reverberate in my mind for several reasons – but mostly because of the resonances I felt about your complaints regarding the Muslim religious scholars. I thought the man at the end of the table who spoke about "epistemological" and "ontological" problems and issues concerning overweening cultural differences between the West and the Islamic world, was wordy (I always feel insecure when the **e** and **o** words are used - having to remind myself about their meaning and not being sure that the person using them means the same!) and possibly over-defensive, it had some merit although you seem[ed] not to think so at the time. However, overall I am entirely with you when you expressed your frustration and puzzlement at the lack of response from the scholars. I don't think academic competitive zeal or the use of certain words are sufficient reason for the silence. There is something else going on here that needs to be thought through [...].

## **Conclusion**

The survey project was intended to find common ground, if possible, between Islamic and secular legal scholars in order to arrive at common approaches to the same problems that beset every society, and increasingly also the inhabitants of the global village. A conversation of sensible minds

on all sides is more necessary than ever to pave the way for an admittedly slow, arduous but steady march to a better understanding between our societies and moral as well as legal reference systems, and someday, maybe, to a state approaching polyphonic harmony. The constant news, for example, about the atrocities committed by a band of criminals who do not shrink from committing the blasphemy of trying to erect an Islamic Caliphate in Syria and Iraq through the use of unimaginable cruelty that would have made Muhammad weep (who himself was no stranger to taking military action in the name of Islam in its early days), the reports about Islamist unrest in Egypt and its brutal repression by the new regime, and not least the accounts of recurring global Islamist terrorist scares have – and it must be said here so bluntly – poisoned the relationship between the Muslims and the rest of the world. Because of the actions of a relatively small number of reckless, socially disenfranchised and often criminal hotheads who use Islamic scriptures, both the Qur’an and the Sunnah, for their immoral purposes, and not least because of the perceived absence of vociferous public protests in many Muslim communities against such deluded ideas, all Muslims have now been put under general suspicion. The voice of the moderate section in Islam needs to be heard much louder, and at root level. Muslims should not simply rely complacently on their senior religious figures to issue some well-grounded *fatawa* when some new disaster has struck, nor would it be wise of them to risk the non-Muslim scholars of Islamic law and culture explaining their world to the outside for them.

However, if and when they want to talk to non-Arabic speakers and non-Muslims, they need to speak their language, not just in the literal sense, but also in the conceptual meaning. This in turn requires a dialogue that does not stop at taboos as mentioned in the email by MS9 above. The discussion between religious and secular participants to the conversation cannot take place solely on the ground of one side: The Muslims cannot simply argue the sanctity of the Qur’an and the Sunnah as a non-negotiable factum to avoid any sort of critique, nor can the secularists refuse to engage with religion-based laws. This is why the *maqāṣid* and the related rules under Islamic jurisprudence are so important, because they embody the essence of the *ethical* principles of Islam, and this allows a direct *ethical* comparison to secular *ethics-based* rules, obviating the otherwise unhelpful emphasis on first and last questions of religion and secular – or indeed non-Muslim religious – ideologies.

The violence which currently and regrettably dominates the global public impression of Islam in the 21<sup>st</sup> century will probably not abate soon. It is thus imperative that like-minded people of all walks of life from the different communities join efforts to clear a common ground from the rubble of sectarianism and violent discord, on which the defunct and destroyed house of wisdom, the *bayt al-*

*hikma*, can be rebuilt as a new home of wisdom for all. There is a lot of debris to be cleared away before that can happen, and some will try to tear down the new foundations before the work is done. Yet, there is no alternative to keeping on hoping and working for a new house under the roof of which we can all find shelter and peace, to turn our minds away from the frailties and imperfections of human nature and towards the Perfection that we all strive and seek to find, each in our own ways. I shall therefore end this paper with an Arab proverb in point:

*Success is never final, failure is never fatal. It is courage that counts.*<sup>13</sup>

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<sup>13</sup> Hussain Mohammed al-Amily, *The Book of Arabic Wisdom*, 2005, 161.

# Annex I

## Research project

### Maqasid al-Shari'ah and general principles of law in secular legal systems

Dear Respondent,

This questionnaire is meant as a case-based contribution to a wider research project on the topic of whether Shari'ah law solutions to common scenarios in private, criminal and public law differ in argument and/or result from those reached in secular legal systems, and if so, how. The secular jurisdictions I will look at are Germany and England & Wales. To my knowledge, nothing like this has been undertaken before and you would be participating in an effort to enhance the mutual knowledge about the respective systems.

In this questionnaire I have omitted any questions which relate to the obviously controversial fields such as the position of women or anything to do with freedom of religion and expression. The scenarios are taken from everyday situations as they can arise in any legal system and have a bearing on the way that system's general legal principles affect the solution to a case. Some of them are based on real cases decided in Germany and/or England and Wales.

This survey is entirely anonymous. The data will be collected, stored and used in a way which is intended to make it impossible to trace answers back to any individual who participated in the survey. In any event, the raw data will be treated in strict confidence and the materials will be stored in a secure location. You may declare whether you are available for a possible follow-up interview (in English) – but that is entirely voluntary.

Please read the problem scenarios below carefully and answer the questions under pure Shari'ah law, NOT the law of the state you live or work in, giving a brief indication of how you arrive at the conclusion, and the result. Please assume that only Shari'ah law applies in all of those cases. If there are alternative answers depending on certain circumstances or based on different legal reasons, please give all possible answers pointing out which circumstances/reasons are relevant. Enter the answer directly under each question.

The results of the research will be published in due course and your institution will receive a copy of the publication which it may make available to anyone interested in the outcome, whether they participated in the survey or not.

Thank you very much for your support.

Professor Michael Bohlander  
Chair in Comparative and International Criminal Law  
Director of Islam, Law and Modernity  
Durham Law School

## General issues

1. Country/ies where you received your training in Shari'ah:

2. Which school of law did you generally follow in your answers (Please tick)?

Hanafi       Maliki       Hanbali       Shafi'i       Jafari       Other:

I used various schools – in this case please mention the school(s) used under each question.

3. I am available for interview:                       Yes – please give your email address:

No

## Private Law

4. A and B agree that A sells 500 kg of “Whitefish” to B for a price of 1,000 \$. Both A and B think that Whitefish is a seawater fish. However, in reality Whitefish is a freshwater fish and as such unusable for B's purposes. B refuses to pay the purchase price. Can A demand the purchase price from B?

5. A is visiting a flower auction in Tuliptown. At the auction, he sees his friend B and waves his hand at him. The auctioneer thinks A has made a bid on the current lot and awards the lot to A, because bids are made by raising one's hand. A did not know that. The auctioneer demands payment of the lot price of 10,000 \$ from A. Does A have to pay?

6. A and B have been living together in the same house as a couple without being married for 30 years. A wants to make sure that B is financially independent when he dies and assigns her an endowment of 1,000,000 \$ in his will. When A dies, his heirs refuse to pay the endowment to B. Can B demand payment?

7. A is a prostitute. She agrees with B to spend a night with him for a price of 1,000 \$. The next morning, B refuses to pay. Can A demand payment?

8. A enters B's grocery shop. At the entrance door a salad leaf lies on the floor and A slips on it, breaking his leg. Can A demand payment of damages for a) the medical bills and b) for pain and suffering?

9. A lends his friend B a hedge-trimmer. B takes it home and the next day, when C comes to visit him, he sells the hedge-trimmer to C, saying that it is his own, which C believes.

a) Can A demand the hedge-trimmer back from C?

b) Would it make a difference if B had stolen the trimmer from A's house?

10. A and B agree that A should redecorate B's living room with new wallpaper for a price of 500 \$. A sends one of his employees, C, to do the job. C has a reputation as a very trustworthy and competent worker. By accident, he hits a Ming Vase which was standing on a table in B's living room; the vase is worth 20,000 \$. The vase is destroyed. Can B demand damages to the amount of 20,000 \$ from A?

11. A owns a marketing firm. For one of his projects, he uses B's picture on an internet page without B's consent. B is a famous TV celebrity. Can B demand damages from A for the use of his picture?

12. A sells B a painting called "Sunset over the fields", which both think is by the famous painter John Smith, for 100,000 \$. A has a report from an expert stating that it is from that painter. However, after B has paid the price and taken the picture home, it emerges that the picture was in fact painted by George Smith, a much less famous nephew of John Smith, something which neither A nor B knew. Can B demand the purchase price back from A?

13. A and B agree that B will cut down the trees in A's garden for a price of 1,000 \$. While B's employee C is cutting down a large oak tree, some little children are playing in the garden, among them A's 8-year-old nephew D, who is on a visit. D is hit by a large branch which C had not cut down properly. By the time the cause is established the limitation period of liability in tort has expired; however, the limitation period for liability under contract has not. Can D (through his legal guardian) demand damages for a) medical bills and b) for pain and suffering from B?

## **Criminal Law**

14. A wants to import illegal drugs into the country. He takes a suitcase with the drugs to the customs area at the airport. While he waits, B exchanges the suitcase with his own which looks exactly alike, at a moment when A is not looking. B then takes the drugs through customs. Is A liable for importing illegal drugs?

15. A has a fight with B and wounds him seriously. B is taken to hospital in an ambulance. Is A liable for B's death in the following scenarios?

- a) The ambulance is hit by another car by accident.
- b) The ambulance is hit by another car whose driver intentionally drove into the ambulance in order to kill himself.
- c) B is treated for the wounds but develops an infection which is overlooked by the doctors due to lack of proper regular checks, and it results in his death.
- d) B is treated for the wounds. A doctor tries out a new antibiotic which he knows has not yet been officially approved; B has an allergic reaction and dies.

16. A shoots B, thinking he is C. Is A liable for the murder of B?

17. A shoots at B with intent to kill; due to being a poor marksman he misses and hits C, who stands next to B. C dies. Criminal liability of A?

18. A and B are drug users. Both are fully aware of what they are doing. A fills a syringe with heroin and gives it to B, who injects himself. Is A liable for B's death in the following scenarios?

- a) B dies from the injected heroin directly after injecting himself.
- b) B becomes unconscious and A leaves him alone in the flat. B dies an hour later from the injected drugs. Had A called an ambulance, B could have been saved.

19. A and B are members of opposing gangs. One day they have a shootout in a parking lot when they try to kill each other. One of A's bullets hits passer-by C and kills him. A can escape, but B is arrested. Is B liable for C's death?

20. A tells B to kill C for him. What is the liability of A in the following scenarios?

- a) B shoots at C, but misses and hits D, who is killed.
- b) B shoots at D, whom he thinks is C. D is killed.
- c) As in b), yet when B realizes his error, he seeks out the real C and kills him, too.

21. A wants to kill B. What is the liability of A in the following scenarios?

- a) A takes aim at B, takes the safety off and puts the finger on the trigger. However, he then has second thoughts and gives up.
- b) A takes aim at B, takes the safety off and puts the finger on the trigger. Just when he is about to pull the trigger, he hears a police siren and thinks he has been found out. He gives up.

22. A has killed B in a car accident. He is convicted of negligent homicide and given a fine. After the judgment has become final and the fine is paid, it emerges that A had actually intended to kill B by staging the accident. Can A be tried again for intentional homicide, which carries a mandatory life sentence?

## **Public Law**

23. A applies in good faith to the government for a large grant of money to start a business. The government approved the grant and paid the funds into A's account. A spends all the money on materials needed for the business and sets up his business as planned. Three months later, the government realises – correctly – that it made an error and that A was not eligible to obtain funding under its business promotion programme. It asks him to pay the money back. Does A have to return the funds?

24. A has a house on a piece of land which has its own water supply from a well on the same land. The land is not connected to the public water supply or sewerage system. The local public water authority asks A to pay water and sewerage charges. A argues he does not have to pay because he is not connected to the public system. Does A have to pay?

25. As in question 24., but now the public water authority demands that A connect his land to the public water supply and sewerage. Does A have to comply?

26. A's house stands on a hillside right next to an electric power station. In cases of heavy rain, the water from the roof of A's house flows directly into the basement of the power station, causing the danger of an electricity outage for the entire town; this has already happened once. The local government decides to tear down A's house to stop the danger of a recurrence of such an event. A objects. Can the local government tear down the house nonetheless?

27. The town of Amalgam has a large plot of land which it wants to sell to a developer who will build a supermarket for the local community on it. It opens a public bidding process. Several people apply, among them A, who is the brother of town councillor B who sits on the panel that decides who is to be awarded the bid. A does not live in Amalgam. A's bid is exactly the same amount and quality as that of C who has lived in Amalgam all her life. A is awarded the plot. C asks for judicial review of the award and argues that the award was unlawful because B should not have been a member of the panel. Will she be successful?

28. A has been in negotiations for some time with the town of Anywhere over the purchase of a large plot of land which is meant to be developed into a residential area. The mayor of Anywhere has consistently assured A that the planning process to dedicate the land for building homes was almost finished. A buys a number of properties which he intends to develop and sell for a profit. A few months later the town council decides not to develop the land after all. The plots which A had bought at a price that reflected their potential for development are now essentially worthless. Can A demand damages for his financial loss from the town?