Sharīʿa responsibility; conditions and conflicts

The Al-Mahdi Institute’s 2nd Annual Contemporary Fiqhi Issues Workshop

3rd – 4th April 2014
Sharīʿa responsibility; conditions and conflicts

Contributors Workshop
3rd – 4th April 2014, Birmingham

Convenor: Dr Ali-Reza Bhojani
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60 Weoley Park Road, Birmingham, B29 6RB
The dominant fiqhi reading of Sharīʿa perceives a system of orthopraxic precepts (ahkām) in the knowledge of God that regulate every aspect of the lives of humankind. The all inclusive scope of this regulative system is held to include personal and interpersonal realms as well as Human-Divine relations. Central to the fuqahā’s vision of this regulative system is a body of religious duties or responsibilities that apply to all who meet the inferred criteria for the endowment of such Sharīʿa responsibility. These conditions for Sharīʿa religious responsibility are listed to include considerations such as sanity, capacity, maturity and in some cases a prior acceptance of Islam- notwithstanding the considerable intricacies of the debates in each case, generally speaking at least, those who do not meet the conditions are not deemed to bear Sharīʿa responsibilities.

The basis and implications of the various conditions for religious responsibility have been subject to debate and discussion throughout much of the history of the traditional Muslim scholarly discipline of fiqh. Yet due to a multitude of factors the current circumstances in which Muslims find themselves raise many new questions in this regard. For instance, developments in medicine and psychology have revealed the complexity, diversity and prevalence of mental health issues in societies offering a new prism of analysis to the traditional criteria of sanity. Modern notions of the inherent worth of autonomy and self determination resonate with the traditional conceptions of capacity as a criteria for religious responsibility, yet how such criteria may help negotiate challenges arising from fiqhi regulations apparently conflicting with the competing legal frameworks that Muslims find themselves in is still an open question. Prominent cases of such conflicts include situations where parents may assert the authority to marry off their daughters or where regulations require circumcision of male infant children. What’s more the traditional notion of maturity, which has been identified as being as early as nine years in girls and thirteen years in boys, is itself highly contentious when viewed in light of the changing sociological and legal considerations which inform the basis for considerations of the boundaries between childhood and adulthood adopted in most other normative frameworks throughout the world.

The 2nd annual fiqhi workshop at Al-Mahdi Institute aims to facilitate scholarship directly addressing questions surrounding ‘Sharīʿa responsibility; conditions and conflicts’
Thursday 3rd April 2014

2:15 – 2:30 Welcome note
Panel ONE (2:30 – 3:45)

The tensions between Shari’a and international law through the lens of CEDAW
Dr Anicée Van Engeland, (SOAS, University of London) Two Shi’i Jurisprudential

Methodologies to Address Contemporary Challenges: Traditional Ijtihad and Foundational Ijtihad
Prof. Hamid Mavani, (School of Religion, Claremont Graduate Studies)

Panel TWO (4:00 – 5:15)

Sharīʿa: Legislative Delegation to the Prophet or the Word of Allah?
Shaykh Komail Rajani (Al-Mustafa International University)

Non-Muslims and Sharīʿa responsibility, between Imāmi fiqh and ‘Adliyya theology
Dr Ali-reza Bhojani (Al-Mahdi Institute)
Friday 4th April 2014

Panel ONE (9:30 – 10:15)

**The basic subject (the axis) of Shari'a Responsibility**
Prof. Ayatollah Seyed M Mohaqiq Damad (Faculty of Law, Shahid Beheshti University)

**Capacity and Authority in Western and Ja'fari Law**
Prof. Haider Ala Hamoudi (University of Pittsburg)

Panel TWO (10:30 – 11:45)

*Of Higher Intentions and Lower Expectations – A report about a failed comparative survey project on maqasidi approaches to Shari'ah responsibility*
Prof. Micheal Bohlander (Durham Law School, Durham University)

**Towards a Diverse and Gradual Concept of Maturity (bulugh) in Shi'i Jurisprudence**
Dr Rahim Nobahar (Faculty of Law, Shahid Beheshti University)

Panel THREE (12:00 – 1:15)

**The role of ‘aql as a general and specific condition for religious obligation**
Dr A. Fanaei (Al-Mahdi Institute)

**The Age of Responsibility**
Shaykh Abdoulrahim Marvdashti (Al-Tanweer, Kuwait)

Salat 1:30

Lunch 2:15

Panel FOUR: (3:15 – 4:30)

**Meta-legal discussions on the nature of taklif and their implications for Shari’a responsibility**
Shaykh Arif Abdul Hussain (Al-Mahdi Institute)

**When and why is one responsible for what? A Quranic, mystical, ethical and fiqhi notion of taklif**
Prof. S. Mohammad Ghari. S. Fatemi (Al-Mahdi Institute)

Discussion Panel (5:00 – 5:30)
Anicée Van Engeland is a lecturer in law at SOAS. Before entering academia, Anicée worked 7 years in human rights and humanitarian organisations. Anicée’s main areas of research and practice are Iranian law, Afghan law Shia law, Islamic law, international humanitarian law, international human rights, Islamic human rights and Islamic humanitarian standards. Her main field work is the Islamic Republic of Iran. **Abstract:** The tensions between Shari’a and international law through the lens of CEDAW

The difficulty of reconciling duties and rights of a Muslim believer with international obligations are obvious in the field of human rights. Indeed, for several Muslim scholars and clerics, a Muslim believer’s responsibility towards Shari’a supersedes commitment to international human rights. As a result, Muslims find themselves caught between ethical rules guiding their lives bearing the weight of law on the one hand and international law as positive law on the other hand. This tension is obvious in the field of women’s rights. The depth of the issue is embodied by the debate on the ratification and the enforcement of CEDAW. The tension exists at a double level: there is potential for conflict between domestic law as inspired by Shari’a and international law; then there are tensions between Shari’a responsibility of a believer which feed culture and traditions, and international law. Saudi Arabia has sorted these two tensions by emitting several reservations to the Convention: the convention is only applicable if and when it does not contradict Shari’a. This reservation is problematic as the content of Shari’a has not been defined and this flexibility could impact women negatively. The prohibition for women to drive which is based on a custom is an example. Another instance of the tension between Shari’a and universal human rights is caused by Article 16 of CEDAW. Its paragraph c (which states that women and men have the same rights and responsibilities during marriage and divorce) is the source of a clash between domestic law inspired by Shari’a and international law. The same article in its paragraph b illustrates the second level of tension: it says that women have the right to enter marriage on their free and full consent. This right is in contradiction with some traditional and cultural practices which rely on arranged and forced marriages. CEDAW has therefore been a recipient for the tension between Shari’a, domestic laws and international law. The presentation will illustrate this tension, looking at comparative Islamic and Shari’a in different countries and schools; the purpose is to understand the root of the differences, analyse the impact of the tension and suggest different solutions to bridge Shari’a and international law. The main argument will to plead for a distinction between Shari’a, domestic laws and international law. The presentation will illustrate this tension, looking at comparative Islamic and Shari’a in different countries and schools; the purpose is to understand the root of the differences, analyse the impact of the tension and suggest different solutions to bridge Shari’a and international law. The main argument will to plead for a distinction between Shari’a and Shari’a law from Islamic law which would then be associated with positive law. The medium to transfer from Sharia to positive State law would be the use of different legal principles and instruments (ijithad, mashaha, darura and others).
Two Shi‘i Jurisprudential Methodologies to Address Contemporary Challenges: Traditional Ijtihad and Foundational Ijtihad

Dr. Hamid Mavani – Claremont, California, USA

Professor Mavani obtained his graduate degrees from McGill University at the Institute of Islamic Studies. His expertise in Islamic Studies stems from not only academic training but specialized theological training at the traditional seminaries in the Muslim world. His primary fields of interest include Shi‘i law and gender justice, Islamic theology and political thought, Islam and secularity, transnational Islam in Asia, intra-Muslim discourse, and Muslims in North America. He is the author of a book recently published by Routledge titled, Religious Authority and Political Thought in Twelver Shi‘ism: From Ali to Post-Khomeini (Routledge, June 2013) under Studies in Political Islam series. Professor Mavani’s scholarship also includes translations of Islamic texts from Arabic and Persian into English. His most recent translation from Persian to English is a work on jihad by Ayatullah Salehi Najafabadi, providing a novel and a creative re-reading of this much misunderstood concept. Abstract: Two Shi‘i Jurisprudential Methodologies to Address Contemporary Challenges: Traditional Ijtihad and Foundational Ijtihad This paper will examine the positions of Shi‘i jurists and religious scholars who advocate “traditional ijtihad” and contrast them with those who opine that it has reached its limits of flexibility and thus can neither resolve contemporary challenges in areas such as medical and bioethical domains nor address other pressing issues as the compatibility between Islam and human rights, gender equality and in defining the age of responsibility. The second approach, known as “foundational ijtihad” (ijtihad dar usul), which stands in contrast to derivative ijtihad (ijtihad dar furu‘), is best characterized by the jurist Dr. Mohsen Kadivar and, to a lesser extent, Ayatollahs Muhammad Husayn Fadlalla (d. 2010), Mohagegh Damad, and Bojnordi. In the latter approach to ijtihad, the revelatory texts are read with an appreciation that some of the legal rulings, viewed as unjust today due to a different historical and social context, were meant to be of a temporary nature and not permanent and fixed, based on the principle of gradualism and the notion of justice. It clearly distinguishes those principles and values that are unchanging and immutable from those that are historically and socially conditioned, and thus relative or contingent without relegating the moral imperative to a secondary status or compromising the moral universals. Foundational ijtihad attempts to reconstruct an Islamic thought that is indigenous to the Islamic tradition, a system of thought that encompasses philosophy, theology, morality, and fiqh. It is also characterized by an organic relationship among reason, theology, law and ethics, history, modern sciences, fundamental principles of Islamic legal theory, and fiqh. Partisans of both approaches largely agree that certain essential aspects of the Islamic creed/dogma ought to remain constant, unchanging, and immutable regardless of time and location. Moreover, they acknowledge that there is a specific separation among religious rituals (‘ibadat), the belief system (‘aqida), and explicit injunctions on the one hand and human inter-relations and social affairs (mu‘amalat) on the other. In general, the former are constant, immutable, essential, and trans-historical rulings that leave little or no room for contextualization or creative reinterpretation when faced with novel and unexpected contingencies. But the latter, which consist of rules of conduct and behavior, are open to public negotiation in a space that accommodates civic pluralism.
Sharī‘a: Legislative Delegation to the Prophet or the Word of Allah?

Shaykh Kumail Rajani – Al-Mustafa International University

Kumail Rajani, a PhD student in Comparative Hadith Sciences, has been a student at the religious seminary of Qum (Hawza) since 1997 and has been attending Dars al-Kharij since 2008. He has been teaching different Islamic sciences and comparative religions in the Hawza of Qum and other institutions for the last 8 years. He was awarded the best teacher’s award at Imam Khumaini College at Al Mustafa International University in 2008. His major interest lies in Comparative Religions, Islamic Jurisprudence, Shiite Hadith and Khoja history. He has been advisor and supervisor for more than thirty BA and MA dissertations. 

Abstract: Sharī‘a: Legislative Delegation to the Prophet or the Word of Allah? Legislative delegation, Tafwīḍ al-Tashrī’, to the prophet of Islam is widely narrated in Shi‘ite traditions. Based on this kind of delegation, a wide range of Islamic laws are attributed to prophet Muḥammad. This right is justified as a blessing from his Lord due to his noble character. Such laws are referred as Sunan, unlike Farāīḍ laws which are absolute revelation from God. Almost every chapter of Islamic Jurisprudence encompasses large amount of Sunan, for instance; last two units of daily prayers, timings of prayers, testimony in the second and fourth units of prayers, stated places for wearing garments for Ḥajj, jogging between Safā and Marwah mountains in Ḥajj rituals, prohibition of non-alcoholic intoxicants, few cases of blood money, share of grandfather in inheritance, age of puberty, etc. Interestingly, there is a clear distinction between these two types of laws. Farāīḍ receive a very special treatment compared to Sunan which is a mere sanction and clearance for the prophet to express different rulings based on religious dissimulation or according to his understanding of the targeted audience and thus is subject to change based on time and occasions. There are numerous traditions supporting the view that Sunan are discountable, compensable, and amendable in comparison to Farāīḍ. In the contemporary Muslim world, the biggest challenge for the Sharī‘a is to assert that it is compatible with the modern world. Sunan being variable secondary laws compared to Farāīḍ, can be modified and justified for the various conditions to meet the new challenges.

Key words: delegation, legislation, Sunan, Farāīḍ, traditions.
Non-Muslims and Sharī‘a responsibility, between Imāmi fiqh and ‘Adliyya theology

Dr Ali-reza Bhojani– Al-Mahdi Institute

Ali-reza is currently a post-doctoral fellow at the Al-Mahdi Institute. After completing his professional qualifications in Optometry, he enrolled on to the Four Year Hawza Programme at the Al-Mahdi Institute in 2004. On graduating from the programme he won a scholarship from the Centre of the Advanced Study of the Arab World to pursue his research for a further four years at Durham University. As part of this programme he read for an MA in Research Methods, for which he was awarded a distinction, and completed a PhD. He is currently lecturing on the Four Year Hawza programme in subjects including Theology, uṣūl al-fiqh and Fiqh and sits on the Institute’s Education and Research Board. Abstract: Non-Muslims and Sharī‘a responsibility, between Imāmi fiqh and ‘Adliyya theology The dominant position amongst Imāmi fuqahā is that non-Muslims are endowed with the responsibility of discharging the practical duties of Sharī‘a (al-kuffār mukallafūn bil furū‘), and hence Islam is not a general condition for taklīf. Despite claims that this has been a point of consensus there is an alternative trend amongst Imāmi scholars, including Sayyid Abul Qāsim al-Khū‘ī and al-Shaykh Yūsuf al-Baḥrānī, which holds Islam is a condition for taklīf and hence non-Muslims are not subject to Sharī‘a responsibility. This paper will examine the jurisprudential debates between those arguing for and against Islam as a condition for taklīf with a view to discussing whether or not, and to what extent, non-Muslims are responsible to the precepts of Sharī‘a. After reviewing the key jurisprudential arguments presented in Imāmi fiqh, the paper will explore how the ‘Adliyya theological picture of the relationship between scriptural and non-scriptural taklīf may offer a new prism through which to assess this question. Fundamental to classical Imāmi theology is an ‘Adliyya moral rationalism, a position that holds that the morally blameworthy and the morally praiseworthy can be understood independently of revelation. This position acts as a corner stone for much of the Imāmi belief system with important implications across the breadth of the uṣūl al-din (The principles of religious belief). These implications include the manner of Imāmi arguments for the value and necessity of God’s sending Prophets. Despite the range and variety of benefits described as being accrued by humankind through Gods sending of Prophets, when it comes to the question of why this sending was necessary for God only one reason is cited by classical Imāmi scholars. This justification offers much insight into the concept and nature of taklīf within an ‘Adliyya framework. Classical Imāmi theologians held that the sending of Prophets was necessary for God because the scriptural responsibilities elucidated through the Prophets are forms of lutf (Divine assistance) that aid humankind in fulfilling non-scriptural or rational responsibilities, where lutf is defined as a specific form of Divine assistance that is not necessary for the attainment of its ends. The paper will argue that these ‘Adliyya theological premises can allow Imāmi fuqahā to reframe the question of Islam being a condition for Sharī‘a responsibility through distinguishing between rational/non-scriptural responsibilities, which do not require Islam as a condition, and those particular scriptural duties of Islam that may indeed do so.
The basic subject (the axis) of Shari’a Responsibility

Seyed M Mohaqiq Damad – Faculty of Law, Shahid Beheshti University

Grandson of late great Ayatollah Abdul-Karim Ha’eri Yazdi - The founder of the Hawza of Qum- Ayatollah Mohaghegh Damad had two separate courses of education. He first attended the renowned Fayzieh School at Qum, Iran, where he received his traditional Islamic education in Arabic language and literature, Qur’an and hadith, Islamic philosophy, theology and jurisprudence. On this background he achieved the status of Mujtahid (Ayatollah) in 1970. Abstract: The basic subject (the axis) of Shari’a Responsibility The spectrum of conditions for Shari’a responsibility mentioned by the fuqahā can all be justified, or documented, to one of two reasons—either they are rational or they are Quranic. In fact the Quranic justification itself can be seen as rational, where the entire spectrum of other relevant textual sources found in the aḥādith regarding the conditions of responsibility are simply an interpretation and explanation of the Quranic premise that is directive (irshādī) to the judgment of rationality in this regard. The rational parameters for Shari’a responsibility stem from a theological argument. al-ʿAql judges that imposing responsibility to one who is incapable is a discreditable (qabih) act. This forms the minor premise for a deductive syllogism whose major premise holds that it is impossible for any discreditable act to emerge form Allah. Accordingly, an imperative addressing one who is incapable is impossible. The Quranic parameters for responsibility can be seen in the expressions that follow;

The meaning of wus’a mentioned here is ability, and through its mention the Qur’an identifies the same condition for responsibility as identified by rationality. Despite the broader range of conditions of responsibility mentioned by fuqahā, which stem from their reading of aḥādith, I will argue that these are all instances of the subject of ability. In other words the non-mature, the insane, and the sleeping person are all simply instances of one who has no ability. Through identification and analysis of the axis for Sharia responsibility being simply ‘ability’, this paper will conclude that ‘ability’ has no recognized legal meaning and thus can differ with regards different people and in different cases. Furthermore the meaning of ‘ability’ is not restricted to the physical, it is a general notion that may also include awareness and understanding of duty as a necessary constituent element of responsibility.
Age, Capacity and Authority in Western and Islamic Systems

Prof. Haider Ala Hamoudi – University of Pittsburgh

Abstract: Age, Capacity and Authority in Western and Islamic Systems

The common belief is that Islamic law generally, and Ja'fari fiqh in particular, deems individuals to be adults before Western legal systems do, and that this is the cause for some level of legal dissonance between the two. The paradigmatic story, surely common in almost any jurisdiction with Muslim immigrants, involves a father jailed for arranging a marriage for his daughter at an age before it would be legal for her to marry. Yet the dissonance as between fiqh and law is of an altogether different quality upon a deeper introspection of Western legal thought. The fact is that both Roman and common law historically resisted easy classifications of child and adult. Blackstone, for example, was outspoken in his criticisms respecting the assignment of an age for criminal responsibility. The earliest Romans provided a rule that mitigated the punishment for certain crimes when the offender was a child without defining what a child was. Eventually, ages were set, but they were far from universal. The common law age for majority may have been twenty one, but the age to marry and the age at which criminal responsibility attached were considerably lower. With criminal responsibility, the matter was even more muddled, with children deemed to lack the capacity to form the necessary mens rea, and juveniles capable, but in a diminished fashion, so as to justify a reduction in punishment. In modernity, this complexity has been amplified to a much greater extent, giving rise to rules that in some permutations are positively incoherent. But the core conception remains the same—the reaching of adulthood for legal purposes is attained incrementally, and some flexibility must therefore be allowed in the assignment of rights and obligations. This general conception sits awkwardly alongside fiqh not necessarily because fiqh provides for maturity at younger ages, but because the fiqh is far more universal in its determination of adulthood as occurring at once, at bulugh. There is some sense in this, given the universal nature of fiqh relative to state law. After all, “diminished capacity” is a far more difficult concept to sustain as an incremental one when included within it are matters of virtue and sin, and obligation to the Divine. Of course, one cannot discount the cultural and social constructions of adulthood that establish themselves around these disparate legal foundations. The matter is not merely one of failing to realize that arranging a marriage for a 15 year old son is illegal, for even awareness of that does nothing to clarify for the believer why his 13 year old can be tried as an adult for murder. If anything, he is left even more confused. The matter, rather, has to do with acculturation into another form of understanding adulthood, not as immediate but incremental and largely contextual, entirely different from the conceptions of the fiqh. This is not easy to do.
Towards a Diverse and Gradual Concept of Maturity (bulugh) in Shi‘i Jurisprudence

Rahim Nobahar – Faculty of Law, Shahid Beheshti University

Dr Rahim Nobahar is assistant Professor at Shahid Beheshti university. He holds an LLB, LLM and a PhD in Law, Criminal Law and Criminology. Prior to which he attended the religious seminary in Qum for over 20 years studying Arabic Literature, Logic, Theology, Islamic Philosophy, Islamic hermeneutics, Jurisprudence, Qur’anic Studies reaching the degree of Ijtihad. His current teaching and research interests span across the fields of Human Rights in Islam, Islamic Family Law, Islamic Inheritance Law, Islamic Criminal Law, the Rules of Islamic Jurisprudence, Qur’anic Exegesis and he has published extensively across these fields. Abstract:

Towards a Diverse and Gradual Concept of Maturity (bulugh) in Shi‘i Jurisprudence

Traditional Shi‘ite jurists consider females of nine and males of fifteen lunar years to be legally mature and thus addressed by the Holy Legislator in all fields of individual and social behaviors. The basis of their opinion seems to be the literal connotation of certain ahadith narrated from the infallible Imams (A. S.). Based on a Qur’anic verse regarding orphans’ properties and some traditions, economic maturity is, however, excluded. The main focus of this investigation is on two different yet related perspectives: First the relationship between age and maturity and then the possibility of considering maturity as a gradative (moshakkek) concept so that maturity for ritual worship, economic issues and social-political affairs can be separated from one another. Even amongst ritual worship itself, the maturity for prayer and fasting might be different from the maturity for doing pilgrimage which requires more awareness.

Such an issue cannot be a matter of faith - be the legislator divine or secular. Maturity seems to rest on biological facts so it is a natural phenomenon rather than an ontological religious norm. Plus, it is gradual rather than an instantaneous phenomenon. Age, at most, is a sign, which the law turns it into a legal presumption. In a plausible legal system, legal presumptions are treated as no more than means, which in factual cases they supposedly reveal facts. Accordingly, narrations considering girls of nine and boys of fifteen years old as mature do not seem to correspond to the real facts in all societies. So, they cannot be referred to as the basis of the law for all societies in a permanent sense. Shi‘ite jurists seem to be in need of reinterpreting such narrations by contextualizing their contents. The role of age in maturity must be argued more in light of the basic elements of obligation (taklif) which are sanity and ability.

In this line of thought, the age of maturity for each part of life can be determined by considering fundamental Islamic teachings as well as scientific achievements proposed by experts in various related fields such as biologists, physiologists and sociologists.
The Role of Reason in Religious Obligation

Dr Ali Fanaei – Al-Mahdi Institute

Dr Ali Fanaei completed 17 years of seminary studies in the Hawza Ilmiyya of Qum. His teachers included; Ayatullah Sayyid Muhaqheqh Damad, Ayatullah Tabrizi, the Ayatullah Haeiri, Ayatullah Vahid, Ayatullah Montazeri, and the Ayatollah Ahmad Mianeji. He has an MA in Islamic Theology from the University of Qum taking special interest in modern theology and philosophy of religion. He then moved to the UK to conduct research at the University of Sheffield where he was awarded an Mphil for research on Moral Scepticism and Realism and a PhD for research regarding the epistemic justification of moral beliefs. Alongside training students at Al-Mahdi Institute, he has also published a number of influential works in Farsi, through which Dr Fanaei is becoming known as one of the most important of a select group of roshan fikri ('enlightenment thinkers') whose engagement with questions pertaining to the modern world is informed with the deepest Hawzawi credentials.

Abstract:
The Role of Reason in Religious Obligation

All religious obligations are conditional; however the conditions that should be satisfied are of two kinds: general and specific. One of the general conditions is that every religious obligation is qualified with ‘aql (sanity). Although this condition is acknowledged by nearly all Shi‘ite jurists, it seems that the current conception of the nature of this condition is not up-to-date, and due to this, its theoretical and practical implications are not fully realised and appreciated. The aim of this article is to elaborate on the idea that ‘aql as a general condition for all religious obligations means that rationality is a framework for Sharia, as a whole. In fact, the real condition is that the duty-bound individual should be a rational agent, which means that rationality is independent and prior to religion. This is because ‘aql does not merely refer to the ability of discriminating between commands and prohibitions. Rather, it means that there is a set of rational norms and values that the owner of the faculty of ‘aql would respect in deciding what to believe and what to do. Therefore, to declare ‘aql as a general condition for religious obligation is to address, and hold responsible, only those individuals who are rational. However, the question is: what is the nature of rational agency, and who is a rational agent? And the answer is: a rational agent is someone who has a rational justification and motivation for believing something or doing something. Therefore, in the context of religious obligation, it means that the agent should have four types of rational reasons for believing or doing something. These reasons are as follows:

1) A rational justification for believing that there is such an obligation
2) A rational motivation for believing that there is such an obligation
3) A rational justification for fulfilling that obligation
4) A rational motivation for fulfilling that obligation

This paper will elaborate on the defining features of the rational agency and their implications on the understanding and fulfilment of religious-based duties.
Of Higher Intentions and Lower Expectations – A report about a failed comparative survey project on maqasidi approaches to Shari’ah responsibility

Prof. Micheal Bohlander – Durham Law School, Durham University

Prof. Michael Bohlander is a former German judge with a particular interest in comparative and international criminal law. He joined Durham Law School in 2004. From 1999 until 2001 he served as the Senior Legal Officer of a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the Hague. He also helped train the judges of the Iraqi High Tribunal which tried Saddam Hussein. His publications have been widely cited by courts of several domestic and international jurisdictions. Professor Bohlander’s main research interests lie in international and comparative criminal law, including their linguistic and cultural aspects. His most recent research project investigates the use of the maqasid al shari’ah for a practical conversation between Islamic and secular legal thinking.

Abstract: Of Higher Intentions and Lower Expectations – A report about a failed comparative survey project on maqasidi approaches to Shari’ah responsibility

The paper will address a failed questionnaire survey with Muslim scholars planned to allow a case-based approach to comparing the so-called higher intentions of Islamic law with the guiding principles of secular legal systems, at the example of German and English law, as opposed to the much more theoretical and even philosophical discussions that pervade the debate so far. This questionnaire was 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. To my knowledge, nothing like this has been undertaken before and the Muslim colleagues would have been participating in an effort to enhance the mutual knowledge about the respective systems rather than merely presenting one’s own system as is mainly the case so far. In the questionnaire I 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. Apart from three Iranian Shi’a scholars, not one of my Sunni Muslim colleagues answered the questionnaire and hardly anyone reacted to the request for support at all. The answers from the three Iranian colleagues were rather brief, however, and did not allow for a proper reference to Shari’ah sources. I have tentative ideas about why this might have happened. The paper will present the research project and offer a tentative diagnosis why it failed. It is hoped that the discussion will help develop alternative explanations. The paper is thus very much meant to be interactive.
When and why is one responsible for what? Historical deconstruction of the legal notion of taklif

Prof. Sayedd M Ghari S Fatemi – Al-Mahdi Institute

Sayed Fatemi spent thirteen years studying to the highest level in the traditional educational seminaries of Qum under the direct instruction of some of the leading scholars of the present day. Alongside his traditional education Seyed Fatemi was also trained in Public Law at Tehran University, receiving the award of both an LLB and an LLM. In 1999 Seyed Fatemi was awarded with a PhD from the Faculty of Law at the University of Manchester for research engaging with Comparative Human Rights. Seyed Fatemi’s teaching and research interests include; the Philosophical foundations of human rights, International and comparative Human rights, Islam and Human Rights, Usul al-Fiqh and Hermeneutics, the History and Development of Fiqh, and Muslim Theology. Abstract: When and why is one responsible for what? Historical deconstruction of the legal notion of taklif

The Quran on various occasions uses derivatives of the word taklif. It does not, however, find it necessary to clarify the notion. Verses dealing with the management of orphans property also do not seem intent on offering objective clear cut legal criteria to define the notion. The ambiguity of the Quranic notion seems to be inevitable, even deliberate, creating considerable ground for further deliberation and aiming for future universalization of historically contextual concepts. Mystics and Adliyya were the first among Muslims to take advantage of such an ambiguity to advance their hermeneutical approach, the former by offering an allegorical notion of the term taklif, and the latter by their tropological interpretation of the ethical concept of the responsibility- not being worried about literalists’ rejection thanks to that Quranic ambiguity. Nevertheless, neither mystical, nor ethical interpretations of the notion, offer a clear-cut objective criteria applicable across the board. Jurists, historically in charge of court rooms as well as ordinary individuals’ practical rituals, had different concerns. Juristic interpretation of religion changed the nature of religion from a mystical/ethical way of life to a comprehensive legal order. It is obvious that law aims for order, and order calls for objectivity. The founders of Islamic fiqh lived in the age and atmosphere of slavery, so they adopted master/slave paradigm in fiqh, portaging God/human relationship to a type of master/slave relationship ending with an obligation based normative system. Man, in this portrayal of religion, is no more than a responsible, accountable and obligation holder slave to God- a major theological presumption disguised in a jurisprudential assumption. An obligation based legal reading of religion inevitably would create a fundamental notion of an obligation holder (mukkallaf); with the need for objective criteria to define who s/he is thus becomes obvious. This paper will bring to attention that religion no longer serves order, at least for the modern societies. The logic of order creation by fiqh needs to be reconsidered, the result of which would be a fundamental change of the hermeneutical paradigm from an order creating literal reading of the historical sources to allegorically tropological hermeneutics.
Meta-legal discussions on the nature of taklif and their implications for Shari’a responsibility

Shaykh Arif Abdulhussein – Al-Mahdi Institute

Shaykh Arif founded the Al-Mahdi Institute in 1993, and currently serves as its Director and Senior Lecturer in usūl al-fiqh and Muslim Philosophy. He has been at the forefront of developing and delivering Advanced Islamic studies for over twenty years and is committed to sharing the Human face of Islam at all levels of society through a combination of public lectures and intra and inter faith dialogue. Shaykh Arif was educated at the Madrassah Syed Al-Khoei, London and graduated with Honours in 1988 where he also taught Grammar, Logic, Islamic Law and Usul al-Fiqh. He then travelled to Iran to further his studies and received his training at Hawza Ilmiyyah of Qum. He also attended private training and research studies with leading scholars of Qum. Alongside these studies he was also teaching in Qum across a wide spectrum of the traditional Muslim scholarly disciplines. On his return to the U.K. after founding the Al-Mahdi Institute he continued his graduate (kharij) training in Usul al-fiqh and fiqh under Ayatullah H. Amini.

Abstract: Meta-legal discussions on the nature of taklif and their implications for Shari’a responsibility

The notion of Taklif (Shariá Responsibility) as encompassing all spiritual and non-spiritual aspects of human life in line with the objectives anticipated by God from persons deemed responsible, needs to be understood more fully within a broader context before any meaningful discussions can be had regarding its conditions and conflict within the contemporary setting. This paper will explore such meta-legal deliberations and argue that such an approach is pivotal in the creation of a hermeneutical framework through which we are able to interpret and adequately apply the idea of Taklif within contemporary contexts. Through evidence from primary sources, the paper will discuss assumptions about the purpose intended by God from human existence, the nature of human existence and the approach Islam has taken in applying the idea of Taklif to human life, arguing for the following premises; 1. Islam in view of its eschatology, which forms an inextricable part of its teaching and shapes its overall outlook, considers actualisation of human potential in the fullest and multi-faceted sense as an objective of human life. Islam sees this process of actualisation within humans as a gradual one, moving from a point of weakness to strength as a part of its natural makeup. 2. The process of actualisation is entailed within fluid vertical and horizontal trends where the vertical is an internal trend contingent on physio-biological factors while the horizontal is an external trend contingent upon social circumstances. 3- Taklif (responsibility) as a means for the actualisation of the objective listed in 1, through due consideration of points 2, is the placing of responsibility on human subjects in accordance with varying vertical and horizontal capacities within a workable pragmatic setup in a balanced state between the mind and body. The culmination of these meta-legal premises offer an understanding of the Muslim religious conception of Taklif as a means of directing human beings to attain the fullness of their humanity - in a fluid vertically and horizontally relativistic framework that works for the majority. Vertical relativity suggests imposition of different responsibilities at different stages of life in accordance with growing capacities in terms of the internal human constitution. Horizontal relativity brings the idea of the contingent nature of certain vertical responsibilities to growth of the collective human capacity in accordance with external social human circumstances. The implication of the above allows for the re-evaluation of the notion of Shariá responsibility in differing contexts; both in terms of era and region in both a fluid and a gradational manner.
The workshop addressed the conditions of Shari‘a responsibility and how these considerations impact the practice of fiqhi norms in the contemporary world. For instance, developments in medicine and psychology have revealed the complexity, diversity and prevalence of mental health issues in societies offering a new prism of analysis to the traditional criteria of sanity. Modern notions of the inherent worth of autonomy and self-determination resonate with the traditional conceptions of capacity as a criteria for religious responsibility, yet how such criteria may help negotiate challenges arising form fiqhi regulations apparently conflicting with the competing legal frameworks that Muslims find themselves in is still an open question. Prominent cases of such conflicts include situations where parents may assert the authority to marry off their daughters or where regulations require circumcision of male infant children. What’s more the traditional notion of maturity, which has been identified as being as early as nine years in girls and thirteen years in boys, is itself highly contentious when viewed in light of the changing sociological and legal considerations which inform the basis for considerations of the boundaries between childhood and adulthood adopted in most other normative frameworks throughout the world.

The workshop benefited by the attendance of international research specialists from various educational institutes from around the UK and the globe, students and faculty of the Al-Mahdi Institute and other Institutions alike, as well as interested members of the public.

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