CHAPTER THREE

ISLAMIC PHILOSOPHY OF LAW
IN RELATION TO ISLAMIC INTERNATIONAL LAW

1. Introduction

We look here at the theories of Islamic law only and not any political or other interpretations and applications of the law. It has frequently been seen that the pure theory of Islamic jurisprudence pragmatically differs from its origin and various political authorities have taken different advantages and benefit from that division in the system.

In this chapter, as other chapters of this book, we deal exclusively with questions affecting the philosophy of Islamic law in the system of Islamic international law and thus do not bring into consideration political factors and the misuse of the sources of the law by those who commit serious crimes under the shadow of the umbrella of Islam. Although, we do not oppose the fact that the origin of Islam is the law of struggle against inequalities and immoralities, the same law has, in some countries, been the tool of certain authorities in order to monopolize the mechanism of the law for their own personal intentions. Therefore, the chapter exclusively throws some light on the principles of the Islamic philosophy of law and its peculiarities, framework, juridical validity and flexibility in order to adapt itself to changes of time.

2. Internationalization

Islam is in essence the philosophy of universal natural existence which also includes our global relations with one another.\(^1\) The juridical philosophy of Islam is one of the most recognised subjects within Islamic law and has been treated by Islamic jurists in various ways. This philosophy essentially bases its values on various sources of Islamic law and in particular on the framework of the Qurʾān constituting the basic source of

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\(^1\) For some aspects of Islamic philosophy see W. Montgomery Watt, *Islamic Philosophy and Theology* (1962).

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Islamic jurisprudence. The Qur’ān is a philosophy of social sciences for the rightful direction of mankind, pointing to and preventing unlawful and immoral acts which do not coincide with spiritual values.2

The Islamic philosophy of law in relation to the Islamic international law must be seen from the perspective of the internationalization of the conduct of Muslim nations in their external relations with other nations of the world. This philosophy cannot, in general, easily be separated from its historical evolution and evaluation, concepts of control of power and jurisprudence in Islamic world. This is because both—Islamic law and Islamic international law—have basically similar sources for the interpretation, application and enforcement of their provisions. And as a whole, Islamic law has had the purpose of internationalizing law and legal order and creating universal justice based on the principles of human rights. Therefore, the maintenance of human rights depends on two key elements. These are the international character of the principles and equal treatment of those principles concerning all nations of the world.

3. Sui Generis

The Islamic philosophy of law is based on the theory that Islamic legal obligations are formulated in accordance with the substance and nature of human beings. These must rely on the guidance and commands of divine jurisprudence.3 In other words, legal obligations must correspond to the nature of man and should create equality, justice, brotherhood and peace at any level of human society. These are some of the most important principles of Islamic law and accordingly, no juridical system can be comprehensive if it does not fulfil these preliminary conditions of

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2 It is to be emphasised here that we are only dealing with the concept of Islamic law and jurisprudence and do not in any way present the exercise of the above values by individuals or Islamic states.

3 “The motto of Islam is summed up in the expression of the Qur’ān, ‘well-being in this world and well-being in the Hereafter’. Islam will certainly not satisfy the extremists of either school, the ultra-spiritualists and the ultra-materialists, yet it can be practised by an overwhelming majority of mankind, which follows an intermediate path, and develops simultaneously the body and the soul, creating a harmonious equilibrium in man as a whole. Islam has not only insisted on the importance of both these constituents of man, but also on their inseparability, so that one is not sacrificed for the benefit of the other. If Islam prescribes spiritual duties and practices, these contain also material advantages; similarly if it authorizes an act of temporal utility, it shows how this act can also be a source of spiritual satisfaction.” Publications of Centre Culturel Islamique—Introduction to Islam, p. 34.
juridical order. In other words, Islam puts emphasises on natural law *sui generis*. This means that Islamic law including Islamic international law is, in its own sense, mostly the presentation of natural law combing its rules into positive law in connection with its sources.

The peculiarity of Islamic philosophy of law arises from “the relatively limited range of explicit divine ordinances as compared to the whole edifice of Islamic law, particularly, Muslim international law, however, induces us to conceive of these ordinances in terms of what modern writers define as rules ‘*ordre public*’.” Thus, an important aspect of Islamic philosophy of law is that it is a legal system which calls upon natural law, a law serving exclusively those rights which are a part of the natural rights of man. It is therefore asserted that “the idea of ‘*ordre public*’ is comprehensive in Islamic legal theory, whereas it is rather unfamiliar to modern international law owing to the present international community’s lack of a higher authority endowed with supreme powers. We have seen that in Islamic legal theory these sovereign powers reside ultimately in God. God has the power of imposing imperative rules, i.e. rules of ‘*ordre public*’ in Islamic legal theory, the concept of ‘*ordre public*’ overlaps with its basis of obligation. This is natural law *sui generis*.”

It seems that natural law appears to be the basis of obligations under Islamic international law. With the expression of natural law in Islamic international law, we mean necessary and obligatory rules for human conduct revealed by the divine jurisdiction which are basically considered essential to the development and consolidation of peaceful international relations. Consequently, in Islam, natural law which is expressed as divine law has been a decisive factor in its promulgation. The sole purpose of natural law has also been to create peaceful relations between humans whether in an individual capacity or a state personality as a whole.

### 4. Fixed Framework

Within Islamic law certain principles must always be respected and agreements ignoring these important principles are incomplete. Although certain norms of Islamic law must always be fulfilled, there are

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4 Al-Ghunaimi, *The Muslim Conception of International Law and Western Approach*, p. 104.
rules and obligations which have, in practice, quite powerful characterizations and may widely be interpreted in different countries. This means that Islamic law may be interpreted differently due to the circumstances of each case. The aim is to adapt the provisions of Islamic law to the needs of the time.\(^6\) According to one writer, ‘this theoretical aspect of rigidity becomes in practice quite elastic in Islam, in order to permit men to adapt themselves to exigencies and circumstances.’\(^7\) This is called the flexible value of Islamic law orienting itself to the needs of the time.

It must, however, be emphasised that the principles of Islamic jurisprudence or *shari’ah* cannot be abolished or completely modified by inferior authorities. This is because Islamic law is, generally, a divine revelation and the assumption that mankind can abolish its principles is, in essence, against the constitution of Islamic law i.e. the *Qur’ān*. However, this does not prevent its interpretation and development of case law. The position may be compared with a Common law system which originally modifies itself based on cases of a modern understanding of the law.

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\(^6\) *Publications of Centre Culturel Islamique—Introduction to Islam*, p. 104.

\(^7\) *Publications of Centre Culturel Islamique—Introduction to Islam*, pp. 103–104. According to one writer there are several essential reasons why Islamic law can adapt itself to the change of time and yet to be enforced. These are the following: a) One of the strongest reasons for the adaptability of the law is that divine laws and those established by Sunnah are not all together of the same degree or level. This is because some laws under the Islamic framework are compulsory; these are very few in number. Other laws which are recommendatory according to Islam are quite considerable in number. There are still other rules under Islamic law which are neither obligatory nor recommendatory, but are left to the discretion of individuals. These are the most important rules and one of the special characterizations of these rules is that they are often ‘silent’ in the text. b) One of the special characterizations of Islamic laws is that every individual has the right to interpret the laws but not to alter them. Thus, the right of interpretation or the power to interpret rules cannot by any means be monopolized by any person, although a person interpreting a rule must have the basic knowledge. Any interpretation by those who have no knowledge of Islamic laws may only be valid exclusively for their own use. c) Moreover, the Prophet of Islam announced an important rule which has a significant function in the interpretation and the adaptability of Islamic law to new circumstances and situations. The Prophet stated that ‘My people shall never be unanimous in an error’. This means that ‘Such a consensus has great possibilities of developing Islamic law and adapting it to changing circumstances.’ Id., p. 104. d) In certain circumstances where the *Qur’ān*, the *Sunnah* and the other sources of Islamic law do not provide any provision, it is assumed that one may work out the relevant provision in accordance with other rules of Islamic law. This was accepted by the Prophet also. Id. e) When the interpretation of a sacred text consensus is achieved among Islamic jurists with due regard to its process, such interpretation may be modified and changed by a new consensus with similar process. Id.
Although the Islamic system of law is codified and cannot be altered from a constitutional point of view, its principal philosophy of law is that a law must be flexible and for this reason, the original source of the law, not only respects other legal systems, but also, encourages the adaptability of the law within the requirements of modern legal philosophy. Under the Islamic principles of law, one can enter and conclude different agreements for a variety of purposes. Thus, when one speaks about a codify framework, one does not necessarily mean that rules and obligations of Islamic law are unsympathetic and cannot be interpreted in view of the needs of the time. A codify framework for a law does not necessarily mean a limitation for the scope of applicability of the law based on the jurisprudence of the law and its different sources.

5. Classification

While certain principles of law are codified within Islamic law, its juridical interpretation governs one of the most important aspects of the law. This is because Islamic law has developed from various forms of interpretations deducted by specialists having the knowledge and capacity to interpret the law. Thus, the extension of Islamic jurisprudence largely depends on the capacity of those who are familiar with the law and have radical views for the development of the norms of Islamic law.

Within Islamic law and Islamic international law acts of individuals, groups and states may be divided into three categories. Those which are permissible or are, according to Islamic sources, of a good nature and acts where the abstentions from them are, in one way or another, encouraged. Thus, one must fulfil the ma‘ruf and abstain from the munkar. The former denotes the appropriate and good nature of an act which must be fulfilled in the social or international relations of man and states while

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8 According to one writer, the judgement of history “demonstrates the flexibility and adaptability of Islam, both as a religion and as a State, throughout the ages. Accommodating itself to the needs of the time, Islam could never come into conflict with civilization, if by civilization we mean spiritual development, intellectual growth and material progress.” Al-Ghunaimi, The Muslim Conception of International Law and Western Approach, p. 3. See also Khuda S. Sukhash, Contribution to the History of Islamic Civilization, 1st ed. (1930), vol. II, p. 41; See also Publications of Centre Culturel Islamique—Introduction to Islam, p. 104.

9 This aspect of the law has largely been developed and there are a number of doctrines of Islamic law which interpret it differently, but, whose arguments are, principally, based on similar sources of Islamic law.
the latter implies acts, the fulfilment of which are not recommended in Islamic law. There is also a third category of norms, the fulfilment of which has been left to the decision of the individual himself/herself.

5.1. Permission

The ma’ruf is characterized as those acts which are good for a person to fulfil and are also good contributions to the structure of social developments. This contains the norms which are well recognised and consolidated within the law. They are the absolute duties and obligations of mankind towards the law. The Qur’ān has, in many instances, referred to ma’ruf and its significant value for collective and social interests. Acts which fall under ma’ruf demonstrate also the moral values which are recognised by the shari’ah as permissible according to their reasons. Thus, Ma’ruf guides a person towards conducts that are permitted and encouraged by their nature. Therefore, it helps to a better understanding of the legal development of national and international rules and their respects.

Ma’ruf also means the right things that are commanded by divine law. It is the basic philosophy of Islamic morality encouraging all individuals to approach happiness, justice and clarity of vision, to make a distinction between right and wrong. Acts which come under ma’ruf are just in all aspects of social life, for example, one should assist and contribute to the elimination of starvation, to keep the natural environment from any type of harm, assist oppressed people, continuously lend a hand to the improvement of the conditions of children who do not have access to social services and developments and also give donations to the poor.

5.2. Abstention

Abstention is those norms of the law which seriously prohibit the commission of certain acts or violations of the law. In other words, prohibitive norms under Islamic law may be identified under the term “munkar”. These norms denote acts that are considered evil and are not encouraged. The purposes of abstention may vary from one subject to another and are, on the whole, for the good of both individuals and social interests. Cases that come under abstention or munkar are very rare in the Qur’ān.

The most known cases are such cases as the prohibition of alcoholic drinks and gambling. Both these are prohibited. Even though, the Qur’ān refers to the good utility of certain alcoholic drinks, it makes it clear that
the disadvantages of these drinks are much greater than their utility. It must however be emphasised that cases of abstention also depend on wisdom, a mature mind and the intelligence of the individual. In Islamic international criminal law, the principle of *munkar* may be applied to the prohibition of many international crimes such as crimes against humanity, war crimes, genocide, aggression, torture, rape, trafficking and slavery.

### 5.3. Discretion

The third is that categories of norms by reason being between the first two categories have neither the nature of the first category nor the second. These are chosen due to the discretion of the relevant individual. These norms can even be altered from time to time depending on the circumstances.\(^10\) In the system of Islamic international law, discretion also has a significant function. The interpretation is that states should not conclude treaties which may solely be useful for themselves and harmful for other nations. In other worlds, any treaty which brings financial benefits to a nation, but cause, in one way or another, devastation for other nations should be abstained and not be encouraged in international relations of states. Clear examples of these treaties are treaties permitting the sale of weapons or treaties permitting the building of water dams between two nations and destroying agricultural production for a third nation.\(^11\) In another words, even if ratifying certain treaties may not be prohibited by national or international rules, this non-prohibition should not be interpreted as permission to cause damage to other nations of the world.

The relevance of the principle of discretion within the law of armed conflict and international humanitarian law of armed conflicts is that certain activities may not be prohibited by the law of armed conflict, but, this should not interpreted as permission to conduct those activities. Atrocities and massive killing did not constitute genocide during the Second World War, but, the principle of discretion or good judgment did not permit its commission either. Accordingly, the perpetrators of the crimes against the innocent Jewish population of Europe should

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\(^{10}\) Although, one cannot deny that Islamic jurisprudence of law is divided into several branches by Islamic jurists and therefore has different interpretations of the law, these divisions do not mitigate the value of Islamic jurisprudence as a whole.

\(^{11}\) A clear example is the destruction of food during the administration of the Prime Minister Margaret Thatcher which could be tackled under the principle of discretion.
have been given sufficient attention and care to the consequence of their serious criminal behaviours.

5.4. International Application

As a result of the above, norms or obligations of Islamic law including Islamic international law may be interpreted according to the given case and due to the circumstances of the given time. For this reason, Islamic international law tends to have a functional approach to the system of public international law governing the interpretation and application of the law in particular circumstances. This means that as long as, the rules of international law are not contrary to its basic principles of jurisprudence, they can coincide with the legal system of Islamic international law. For our purpose here, acts which are regulated, adopted or recommended in the instruments of international human rights law have the character of ma’ruf norms. They must be carried out by all Muslim nations and should not be violated. Acts of genocide, apartheid, crimes against humanity, war crimes, torture and similar acts may be categorized under the classification of munkar which means that they should not be committed by any Muslim nation. It is a traditional order under Islamic international law that nations must act against unjustified and unlawful acts. As it is stated by hadith, constituting one of the sources of Islamic international law “He who amongst you sees a Munkar should change it with his hand; and if he has not enough strength to do so, then he should change it with his tongue; and if he has not enough strength to do so, he should change it with his heart, and that is the weakest of faith.” A close interpretation of the above statement means that it is the duty of every nation in the world to act against immoral and unjustified acts which are against the generation of mankind and harm every human being.

6. Judicial Validity

Islamic law has been basically developed within the process of juridical conclusions and not statute law. A state may accept its principles and derive legal sanctions from them. The state should not however interfere in shaping the law in legal practice and neither should it determine

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12 Islamic law is a written law and has the character of Anglo Saxon laws simultaneously.
its methods and decisions. These are the duties of jurists and juridical courts. The radical extension of Islamic law is principally based on case law and whether conclusions of relevant juridical tribunals can reach the essence of the law for the adaptation of its norms to given circumstances.13

Accordingly, ‘the Islamic ideal is, in its conception of Justice itself, nearer to the Equity of the English common law than to the Roman statute law, in that while the rights of the individual are fully recognised, the claims of the common good are always kept within view.’14 Some of the Islamic jurists have however criticized this conception latter. Nevertheless, it implies the broad juridical validity of the Islamic system and the virtue of the development of the system which surely adapts itself to changes of the time.

7. Universality

One important characteristic of the Islamic philosophy of law is that the law and its subjects not only serve one another simultaneously, but are also bound to the universality principle of a central jurisdiction. Thus, Islamic law sees every legal system as an integral part of one legal system and all legal systems should correspond to the requirements of the basic system of law and order. This is the divine law and for the purpose of this book, the philosophy of Islamic international law.15 “We may argue, from a philosophical viewpoint, that Islam, as a universal religion, laid emphasis on individual allegiance to a faith which recognised no boundaries for its kingdom: for under a system which claims to be universal, territory ceases to be a deciding factor in the intercourse among people. Piety and obedience to God were the criteria of good citizen under the Islamic ideology, rather than race, class, or attachment to a certain home or country.”16 It is on the basis of this universality principle and/or international community interests that the Qur’ān reads

13 In fact “Muslim law began as the law of a State and of a ruling community and served the purposes of the community when it ruled supreme from the Atlantic to the Pacific. It had an inherent capacity to develop and to adapt itself to the exigencies of time and clime.” Publications of Centre Culturel Islamique—Introduction to Islam, p. 111.
that “There is not a thing that moves on the earth, no bird that flies on its wings, but has a community of its own like yours. There is nothing that we have left out from recording.”

The prophet of Islam has also repeatedly emphasised the value of the principle of universality in the relations of mankind. He pointed out the importance of faithfulness and the good morality of man and woman. In one of his very significant speeches, he stated that ‘O people, verily your Lord is one and your father is one. All of you belong to Adam and Adam is (made) of earth. Behold, there is no superiority for an Arab over a non-Arab and for a non-Arab over an Arab; nor for a red-coloured over a black-coloured and for a black-skinned over a red-skinned except in piety. Verily the noblest among you is he who is the most pious.’

The theory of Islamic law is considered by many writers of Islamic law to have substantive juridical value. Accordingly, this is on the basis that God anticipates its legal philosophy and its elements of jurisdictions are not therefore influenced, monopolized or selected by individuals for their own interests. This has therefore been recognised as a valuable aspect of pure Islamic law. It was on the basis of this theory that Islamic law developed into the civilisations of different nations and states. One cannot however disagree with the fact that this theory has been violated and been employed in the interests of states or individuals under most states’ political jurisdiction claiming to respect and apply Islamic rules. The historical background of Islamic law also demonstrates the fact that Islamic believers and fighters, in many aspects, imposed its rules by armed forces on the disbeliever who could not express their free consent. It is also worth mentioning here that the provisions of public international law have not come into effect voluntarily between states of the world and are not necessarily formulated for the interests of all states. On the contrary, a large number of provisions have entered into public

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17 The Qur’an, 6:38.
19 According to one writer, “To judge Islamic expansion fairly, it is vital to look at it from the right angle. Islam … is a reformatory revolution to be counted among the great revolutions in the history of humanity. Islam, like both the French and the Russian revolutions, is a revolution based on particular dogmas and theories addressed to humanity as a whole and claiming universality. Such revolutions tend to prevail by their very nature and have a predestined role to enforce their philosophy upon the opponents of the new ideas, otherwise they betray their aim and ‘raison d’être.’” Al-Ghunaimi, The Muslim Conception of International Law and Western Approach, p. 20.
international law in accordance with the circumstances of that particular time. Consequently, many of its rules are the effect of monopolization of this legal discipline and the military power of a state over another. Thus, the system of consistency in the international law of today is the result of the inconsistency of international law of yesterday formulated during or after armed conflicts.

8. Legality

Significantly, the Islamic system of law places a high value on the principle of *de lege lata*. This means that the value of law is estimated on the basis of its general explanatory power or legality. Whilst the unchangeable characterization of Islamic law is an important element of the law of *Shari’ah*, new rules and obligations that are not against its fundamental elements can easily be exercised and may not be considered against its eternal characterization. It is for this reason that states which have regulated provisions of Islamic law into their legislations or definitely implement *Shari’ah* enter into the ratification of numerous international agreements.

The Islamic philosophy of law principally rests on the value of an individual’s rights, duties and obligations. The application of the retroactivity principle is prohibited in the Islamic legal system. The jurisdiction in Islamic system is therefore based on quality and the application of norms which are already well-recognised within its system. This means that the enforcement of retroactive provisions which are not part of already recognised rules of Islamic jurisdiction is not permitted. It is in this relation that Islamic law has a different legal characterization governing principles of *jus cogens*.

According to the Islamic law, force must not be employed in the practice of individuals or states for the purpose of implementation of the principles of the *Qur’ān*.20 Under Islamic law force may not be used for the purpose of implementing its principles on non-Muslims.21 Similar to the provisions of Islamic international law, the provisions of public international law have to be of *de lege lata* nature. This means that the

20 Although certain versions of the *Qur’ān* denote the enforcement of its rules on unbelievers, these should be read in relation to historical events and in the context of other versions which definitely prohibit the use of force between Muslims and non-Muslims.

21 However, the practice of many Islamic states has been different from its basic rules and this creates conflict and contradiction between theory and the practice.
principle of legality has long been accepted within the system. However, despite this fundamental principle, one cannot ignore the fact that the provisions of public international law have not always been based on the legality principle. The principle of *de lege lata* has therefore been violated whenever such violation has been seen as a necessary condition for the maintenance of peace and justice.22

22 A clear example of this violation occurred in relation to World War II. In fact, the International Military Tribunal in Nuremberg and Tokyo applied a number of rules of criminal jurisdiction and statutes that had the character of *ex post facto law*. One of the basic reasons for the use of this retroactive law was the gravity of the crimes during the war and therefore the importance of the implementation of the principles of natural law. The maintenance of human dignity took priority to the provisions of positive law or *de lege lata*. This means that the genocide of the Jew created more attention to humanity than to the content of the law itself.