

SHARI'AH: BETWEEN POSITIVISM AND NATURALISM THEORIES

BY
M.K. IMAM TAMIM*

Introduction

Shari'ah is the most misunderstood and misinterpreted concept in the world today. While some consider it as a legal system, others regard it as a mere ideology. The reason for the misconception may not be too far fetched. The concept, '*shari'ah*', is such encompassing and elaborate that it finds in itself, difficulty to distil its elements – legal concept and moral values.

The world today, has been swept over by various developments within the legal jurisprudence domain and this should not exclude *shari'ah*. From the jurisprudential point of view, 'occidentalists' and 'orientalists' have tried in vain to pick holes in the *shari'ah*. Their orientation about the idea of their own laws – Civil law, Common law, Roman law, etc., had pushed them toward viewing *shari'ah* in their own misconceived peculiar way. They had unfortunately but understandably taken *fiqh* (Islamic jurisprudence) as the 'real' *shari'ah*. They believed that the divergent opinions of the jurists form the conflicts and tensions in the law itself and pass sweeping remarks that *shari'ah* is a "jurists' law",¹ "a speculative essay"² and so on and so forth. To the occidentalists and orientalists, those treatises of the Islamic jurists, which contain their opinions, are the books of law. They also declared that the *shari'ah* is mere idealistic with no element of positivism in it.

It is also beyond contention that the *shari'ah* is an outright divine law. But whether this appellation will qualify it for a natural law is one question that begs for examination.

* DIL, LL.B (Hons) (Nigeria) B.L., Associate Counsel, Mamman Nasir & Co., Kaduna, Nigeria

¹ Coulson, *Conflicts and Tension in Islamic Jurisprudence* (n.d.) p.3

² Ibid p.41

It is therefore against this background that this paper seeks to find its way to beam a floodlight on the status of the *shari'ah* as a unique theory of law that should be disjointed from other theories of law in the study of legal jurisprudence in order to avoid any further contortion.

Positivism Theory of Law

The agitation for the theory of positivism came afloat in the nineteenth century through the works of the English jurist, Jeremy Bentham (1748-1832) and his disciple, John Austin (1790-1859). The theory was developed as an assailant against the theories of naturalism, which they believed were froth with inconsistencies and uncertainties because they derive their universal validity from the dictates of nature and reason. The focus of Bentham was to found a society with a codified, reformed and reformatory law, which bars any chaos and disorderliness, which is the bane of the kind of theory of law as the natural law.³

The main concern of these positivists is finding a means to viewing the law and its operation from an empirical and scientific perspective. They are obviously out to determine the practicality of the law. Thus, they considered it as 'neat, tidy and convenient to separate "what the law is" from "what the law ought to be".⁴

Expectedly, over the times some further explorations in the field of legal theory have succeeded in producing other positive jurists who see positivism from their respective perspectives: There had appeared several positivists' theories but the most paramount of which include the Austin's analytical theory of positivism, Kelsen's pure theory of law,⁵ as well as the pragmatic theory of positivists.⁶ But the analytical theory seems to be the most pragmatic positive theory in study and the most relevant to the scope of this paper.

³ Dias, *Jurisprudence*, 4th ed. (London: Butterworths, 1976) p.457

⁴ Adaramola F., *Jurisprudence*, (Illinois, 1992) p.82

⁵ Dias, Op.cit, Chapter 16; Adaramola Ibid, Pp.94-106; Elegido, *Jurisprudence* (Ibadan: 1994) Pp.84-94

⁶ See Muslehuddin M., *Philosophy of Islamic Laws and The Orientalists* (Delhi:1986) Pp.40-41

The Austin's analytical positivism duly portrayed in the works of John Austin identifies law in terms of 'a command set by a superior being to an inferior being and enforced by sanctions'.⁷ Austin's idea of what law is, is that it is "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him".⁸

Basically, from the Austin's conception of the law, no legal norm will attain the standard of law except it contains certain underlying factors, to wit, *command and sovereignty*.

Command

In Austin's law, 'a law strictly so called' must be an imperative command as opposed to a persuasive or moral command, which characterized what he regarded as 'other human law'.⁹

Austin expresses his idea of command in the lucid words of "if you express or intimate a wish that I shall do or forbear from some act and if you will visit me with your wish, the expression or intimation of your wish is a command".¹⁰ Thus, Austin made it clear that the command must unilaterally impose a duty on its subjects¹¹ and the failure to oblige the duty would definitely invoke a sanction. He introduced sanction because he believes it is the only element that distinguishes a command from other expressions of desire. As Austin puts it:

⁷ Sanni A.O. Introduction to Nigerian Legal Method (Ile-Ife: 1998) p.6

⁸ Dias, Op.cit, p.470

⁹ "Law strictly so called" arises from Austin's distinction of law to "law properly so called", which he says includes God's (divine) law and Human law and "law improperly so called", which comprises of law by analogy (e.g. constitutional law, industrial law, etc.) and law by metaphor (e.g. scientific law). However, Austin's idea of positive law is purely focused on the Human law, which he subdivided into "law strictly so called" (i.e. laws set by political superiors in a political society) and other laws set by men who are not political superiors (e.g. commands of parents to children, master to servant, etc.). Note that Austin considers only "law strictly so called" as positive law while other "laws not set by political superiors" are labeled 'positive morality'. He uses "morality" to distinguish such rules from the positive law, and "positive" to denote that the law emanate from human source.

¹⁰ John Austin, *The Province of Jurisprudence Determined*, ed. Hart, (1954) p.14

¹¹ Dias, Op.cit., p.471

A command is distinguished from other significations of desires, not by the style in which the desire is stipulated, but the power and the purpose of the party commanding to inflict evil or pain in case the desire be disregarded".¹²

Hence, howsoever a desire may be politely phrased; it will still pass for a command if its obedience is staked on a sanction. The sanction must be conceived and can never take the form of a reward or benefit for the latter would neutralize the imperativeness of the duty to obey the command. The person commanded to obey will only have an option whether to qualify for the reward or not. And to Austin, duty forms an essential part of the law. Command and duty are correlative terms; and whenever a command is signified, a duty is imposed¹³ upon the person commanded.

Sovereignty

The affirmation that law is a command flowing from a sovereign body presupposes the existence of a real, existing commander, because "no indeterminate party can command expressly or tacitly, or can receive obedience or submission".¹⁴ Therefore, "if a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society; and independent".¹⁵ The backdrop against which Austin considers sovereignty as an essential part of the law can be found in its obedience on its subjects. No command, according to Austin, will be uniformly obeyed except it comes from a superior body (or being) whose authority, nobody must question.

Generally from the understanding of the Austin's conception of sovereignty, before any being, body or person can lay claim to the

sovereign authority of a political society, these requirements must have been gathered:

- a. There must be a political and independent society or community;
- b. There must be a determinate human superior who is sovereign in that society or community;
- c. This determinate human superior or sovereign must receive habitual obedience from the majority of the society;
- d. He must not be limited by the law in his society or community.¹⁶ This is against the contention of Austin that "supreme power limited by positive law is a flat contradiction in terms"¹⁷

Strictu sensu, the sovereignty postulated by Austin is that authority which has no superior, the ultimate legal authority, whether it is an individual person or a collegiate body.¹⁸

Austin also believes that the sovereign being that the supreme authority must possess must have the attribute of unity – whereas the sovereignty will be exercised by a single person or a single body – as well as the attribute of continuity.

Naturalism Theory of Law

Philosophically, natural law can be defined as a law or body of laws that derives from nature and is believed to be binding upon human actions apart from or in conjunction with laws established by human authority.¹⁹ Generally, it is a rule or body of rules of conduct inherent in

¹² Austin, Op.cit., Pp.9-15

¹³ Austin, Ibid

¹⁴ Austin, Ibid, p.183

¹⁵ Austin, *Province of Jurisprudence*, p.198

¹⁶ See generally, Adaramola, Op.cit, Pp.87-88

¹⁷ Austin, Op.cit, Pp.253-254, see also Lloyd & Freeman, *Introduction to Jurisprudence*, 5th ed. (1985), p.308; and Dias, Op.cit., p.476.

¹⁸ Elegido, *Jurisprudence*, ed. Aguda, (Ibadan: Spectrum Law Publications, 1994) Pp.50-51

¹⁹ *The American Heritage Dictionary of the English Language*, 4th ed. (Houghton Mifflin Co., 2004). Available on <http://www.answer.com> assessed on 8/2/2005.

human nature or essential to or binding upon human society.²⁰ But technically, the concept of natural law can be described as a body of law or a specific principle of law that is held to be derived from nature and binding upon human society in the absence of or in addition to positive law.²¹

As a general term, the concept has often been construed in the picture of an operative law of nature constraining to a certain pattern of behaviour with believe in higher purpose inherent in such a law.²² In other words, it could be depicted as superior system of law (to human laws), which is supposed or deemed to lay down general principles of behaviour for the guidance of the human race. The system of law is found to be uniquely common among all people in all places and at all times and in identical circumstances and situations.²³ Natural law may thence be conceived, following Kelsen's words, as "a universal pattern of action applied to all men everywhere, required by human itself for its completion".²⁴ Thus natural law is not the law of any nation but universal. The natural law advocates have from time to time conceive and presents natural law as a model to which state law (i.e. positive law) must conform to derive its validity.²⁵ If such laws do not conform to the natural law, then it becomes ingenuine and a mere conjecture of rules. This assertion is fundamentally borne out of the advocacy of St. Thomas Aquinas (1224-1274 A.D.). He laid down the universal recognition that civil law was subservient to natural law and invalid, if it infringed it.²⁶

Meanwhile, in a bid to determine and explain the relationship between natural law and positive law, he stumbled on the distillation of

law into four kinds: The Eternal, the Devine, the Natural and the Human laws.²⁷

The Eternal law (*Lex Aeterna*), according to Aquinas, is the law of God, which has the force and quality of law.²⁸ While he described the Divine law (*Lex Divina*) as the part of the eternal law that is revealed to man through the Holy books and interpreted by the prophets.²⁹ Some other jurists described it as "Divine positive law" which is a "part of eternal law which pertains to the sacraments and ordinances necessary to the attainment of mankind's supernatural ends made known by revelation".³⁰ The third category is the Natural law (*Lex Naturalis* or *Jus Naturae*) which is the law revealed unto mankind, though as part of eternal law, but discoverable only through the exercise of his REASON. Hence the fountain of natural law is reason.³¹ And the last in the hierarchy is the Human law (*Lex Humana*) invariably the positive law, which is man-made law, which Aquinas said must be made in conformity with reason and thus to the natural law. He considered the positive law as dispositions arrived at by effort of human reason.³²

It is thus discernible that the natural law doctrine implied that there are objective moral values, which can be given a positive content and expressed in normative form and that any man-made law, which deny or reject this value, is self-defeating and nugatory.

The natural law was inherently teleological in that it aimed at human happiness. The state in being bound by the natural law was conceived as an institution directed at bringing its subjects to true happiness. It is pertinent therefore to know that natural law jurists of different ages and outlook have all identified the idea natural law as a social contract³³ which lays claim to the promulgation of (man-made)

²⁰ See Wordnet 1.7.1 ©2001 by Princeton University, www.answers.com assessed on 8/2/2005

²¹ See Merriam-Webster's Dictionary of Law (Merriam Webster, Inc., 1996)

www.answers.com assessed on 8/2/2005

²² Ajjola A.D., *What is Shariah?* (Kaduna: Straight Path Publications, 1998) p.65

²³ Adaramola, Op.cit, p.11

²⁴ Kelsen, "A Dynamic Theory of Natural Law" in *What is Justice?* (n.d) p.174

²⁵ A.O. Sanni (ed) *Introduction to Nigerian Legal Method* (Ile-Ife: Kantel Publishing House) p.4-5

²⁶ Ajjola A.D., Op.cit., p.50

²⁷ C.S. Hawkins & D.H. Parker, "Devind and Eternal Law" in *Encyclopedia of Mormonism*, Vol.2 (Macmillan Pub. Co., 1992); also, Adaramola, Op.cit, p.14.

²⁸ Aquinas, *Summa Theologica* (Translated by J.G. Dawson) Qu.91.

²⁹ Adaramola, Op.cit., p.15

³⁰ Hawkins & Parker, Op.cit, n.27 infra.

³¹ Aquinas, Op.cit., 1,2 Q.91, Art.2

³² Adaramola, Op.cit., p.15

³³ Ijalaye D.A., "Natural law and the Nigerian Experience" in Elias and Jegede (eds), *Nigerian Essays in Jurisprudence* (Lagos: MIJ Pub. Ltd., 1993) Pp.25-26. The Jurists

laws for the benefit and overall interests of all. That is, the law must have its focus on upholding justice and enforcing the natural rights among its subjects because a sage maxim says, "*Lex injusta non est lex*."³⁴ The content of natural law was invariably determined by a conception of what things constituted happiness. And to determine these, the jurists had prescribed certain standards of moral objectives and validity, such as morality and ethics, which man-made law must meet before it could be acclaimed a true worthy of respect of its subjects. Aquinas had stated in clear terms "...to be just, positive law must be virtues, necessary, useful, clear and for the common good".³⁵ And there is no common goodness if it does not subscribe to "fairness, justness, justice and rightfulness". These are the only factors that give optimum happiness to people in the society, even according to Bentham in his theory of utility.

The understanding of 'common good' as a purpose of law and as a factor that prioritize natural law over man-made law would pave way for us to identify the basic theses of natural law, i.e. what the natural law stands for:

Firstly, the idea of natural law postulation is that men are imbued with certain basic moral principles, which have common objectives and universal validity.³⁶ The protagonists of natural law posited that there are certain objective principles in everyman, no matter his race or colour telling him what is "fair, just or right" and motivating him to do what is good and abhor what is evil. Aquinas, Finnis and other natural law jurists maintained that there are some basic moral principles of natural law, which are identical for all human beings. This is what Professor Okunniga was illustrating in one of his treatises where he said: "if ten men from different countries (or even hundred) are put in

affected by this assertion include Hugo Grotius (1583-1645), Thomas Hobbes (1588-1649), John Locke (1632-1704), Jean-Jacques Rousseau (1721-1778) et al.

³⁴ Salmond on Jurisprudence, 12th ed., (1966) Pp.15-16. This is a natural law battle cry, which denotes that "an unjust law is not a law". See also the article, "Natural Law" published by Wikipedia on www.answer.com (as at 8/2/2005).

³⁵ Finnis, *Natural Law and Natural Rights* (1980); also Dias, Op.cit., 5th ed. (1988) Pp.471-475

³⁶ Elegido, Op.cit., p.19

separate rooms and each of them is asked in the language that he understands, whether it is good to steal, majority will say NO".³⁷

Secondly, most natural law jurists have asserted that there is an inviolable existence of natural rights. This is undoubtedly a consequence of the first thesis. Taking as an example the illustration of Professor Okunniga, that it is a universal common principle that it is not good to steal. This postulates nothing than that everybody has the strict duty not to unlawfully trespass on another's property and this is definitely accompanied by a correlative Universal right of a person not to be deprived of his lawful benefit and enjoyment of his chattel. These universal rights are accruable to all human beings notwithstanding their economic, physical or social circumstances. These classes of natural rights have been implicitly reformed by the modern day jurist and accorded another nomenclature – human rights – that have now graduated to fundamental human rights. Though all these are conjectures of semantics, creating a distinction without a difference. The nature of these "modern" natural rights has been succinctly described by Eso JSC in *Ransome-Kuti v. A.G. Federation*³⁸ thus:

"But what is the nature of fundamental right? It is a right which stands above the ordinary laws of the land which in fact is antecedent to the political society itself. It is a primary condition to civilized existence..."

Another thesis of natural law worthy of mention is the conscientious obligation of citizens to be bound by the laws of their society. Thus there is a duty to keep the laws of one's community particularly borne out of the universal precept of natural law.³⁹ The jurists of natural law however staked this duty on the condition of whether such laws are just or unjust. They maintained that no upright member of a society would be compelled to obey a law that is just as his conscience

³⁷ Italics mine. A.O. Okunniga, *Jurisprudence* (unpublished) cited in A.O. Sanni (ed), Op.cit., p.4

³⁸ (1982) 2 NWLR (pt.6) 211 at p.230

³⁹ Elegido, Op.cit., p.21

would oblige him to obey the law but where it is unjust, no rational person would feel bound by conscience to follow the law.

However, an indispensable character of natural law worthy of mention is REASON. It is wholesomely accepted by natural law jurists that natural laws are revealed to man through his reasoning faculty. Dias brilliantly illustrated the circumstances calling for this postulation thus:

"Man, unlike the rest of creation, is free and rational and capable of acting contrary to eternal law. Therefore the law has to be promulgated through reason ... 'The natural law is nothing but ...the dictates revealed by reason reflecting on natural tendencies and needs'. The primary precept of the law is that good should be pursued and evil avoided... By reflecting on his own impulses and nature, man can decide what is good ...In addition, reason reflecting on experience yields further, more detailed precepts..⁴⁰

Also, while justifying his conception of law, Aquinas described law as "nothing else than an ordinance of reason for the common good..."⁴¹ Simply put, to serve the common good, a law must be a product of reason.. Because it is reason 'which can design a plan or measure so that a certain end (in this case the common good) will be attained'.⁴² Thus, if a law is unreasonable, it will be automatically devoid of moral authority and liable to be disregarded.⁴³

⁴⁰ Dias, Op.cit., p.657

⁴¹ Aquinas, *Summa Theologica*, Op.cit, Q.90, Article 4.

⁴² Elegido, Op.cit, p.35

⁴³ Note further that the precept of natural law has been described as "the laws, which are basic and fundamental to human nature and are discoverable by human reason without reference to specific legislative enactments or judicial decisions". (See: *The Columbia Electronic Encyclopaedia*, 6th ed., Columbia University Press: 2003), also available on www.cc.columbia.edu/cu/cup/ assessed on 8/2/2005). It is also described as "the doctrine that human affairs should be governed by ethical principles that are part of the very nature of things and that can be understood by reason". (Sec: E.D.

SHARI'AH, POSITIVISM AND NATURALISM: The Relationship

This discourse is likely to fall into utter evasiveness if an attempt is not made at discussing 'Shari'ah' in a concise form that will commensurate the theories above.

This part will strive to identify shari'ah as a distinct concept of law. Consequently, we shall look into the relationship between shari'ah as a system of law and theories of positive and natural laws: whether the conceptualization of shari'ah as a system of law can be said to have germinated from the seeds of either positive or natural law concepts/theories. That is whether shari'ah as a system of law is borne out of any of the theories of positivism or naturalism.

Shari'ah, from its understanding by contemporary scholars and even the populace has taken on the toga of an octopus whose hydra-headed tentacles have made it a bit slippery and difficult for the non-shari'ah learned scholars to grasp. Anderson had let the cat out of the bag when he disclosed that the nature of shari'ah could not be fully conceived by both the occidental and oriental jurists who are puzzled whether it is divinely revealed or socially grounded, whether it is positive or supernatural, immutable or adaptive.⁴⁴ It is instructive for us to note that shari'ah is one system (or theory) of law that enjoys an absolute perfection and sublimity, which are eternally everlasting.⁴⁵ This is the more reason why shari'ah aptly is the only system of law, which has never been froth with variation or modification.

Shari'ah in one of its contemporary form has been described as "the laws and rules of god, which Muhammed received through revelations for his own people, but which gained validity for the entire world with the emergence of Islam".⁴⁶ This description is a manifestation of the author as regards what shari'ah is. Even though the author is considered a 'Muslim'

Hirsch Jr. et al (Eds). *The new Dictionary of Cultural Literacy*, 3rd ed (Houghton Mifflin Co., 2002) as at 8/2/2005).

⁴⁴ See J.N. Anderson, *Reflections on Law, Natural, Divine and Positive* (Lecture held at the 940th ordinary meeting of the Victoria Institute at the Caxton Hall, Westminster, December 10th, 1956) p.14

⁴⁵ Ajijola, Op.cit., Pp.8-9

⁴⁶ See "Islamic Jurisprudence and its sources" adapted from Christine Schirmacher's *Der Islam 1 - Geschichte, Lehre, Unterschiede zum Christentum*, Hanssler-Verlag Neuhausen/Stuttgart, 1994 published on www.steinigung.org/artikel/ 8/2/2005.

scholar⁴⁷ the will necessarily. It is the end of the constitutionally sanctioned by humanity. *Shari'ah* is a concept of law that has evolved right from the creation of the universe. Thus the date of its validity for the entire world could not be restricted to the emergence of Islam which the author sought to put at the prophetic era of Muhammad (S.A.W). *Shari'ah* Islam has been the same religious message with which Adam has sent several prophets before Muhammad (S.A.W).⁴⁸ Since it is believed to regard *shari'ah* as a law revealed to Muhammad by his own people since Muhammad was sent to the whole world (Quran Chapter 3 verse 78-81). Perhaps, the author intends to describe *shari'ah* as 'the command of god revealed to the prophet Muhammad'⁴⁹ for the guidance of the entire world. It is a divinely ordained system governing the Islamic state and not promulgated by it, controlling the Islamic society and not controlled by it.⁵⁰

Shari'ah though has different sources, the two major sources of *shari'ah* to which any other source must conform are the *Qur'an* and *Sunnah*.⁵¹ These two legislative foundations are since put not to the survival and validity of other sources.

Shari'ah, like any other law, is established for the overall good and benefit of its subjects. However, the main objective of the *shari'ah* is to comparatively regulate the conduct of mankind with a view to constructing a society founded on the basis of *ma'rifat* (ethics) and to observe it of the *mu'amalat* (values).⁵² The term *ma'rifat* denotes all the virtues and good qualities that have always been accepted as 'good' by the human conscience, while the term *mu'amalat* conversely means all

the evil and evils that have always been condemned by human nature as 'bad'.

Shari'ah has consequently categorised the mankind into three as the mandatory (*Fard* and *Wajib*), i.e. various acts whose observance is obligatory on Islamic society and for which *shari'ah* has given clear and binding directions. The Recommended (*Mandub*) i.e. those acts which the *shari'ah* wants that a Muslim society should observe and practice, some of which are recommended explicitly while others are merely required by implication. The third category is the prohibited (*haram*), which comprises of any act which has neither been explicitly nor implicitly prohibited.

The *mu'amalat* is only categorised into two: The Prohibited (*haram*), which are the acts of mankind that have absolutely been prohibited by the *shari'ah* and the *Halal* (*Wajib*) which are the acts that are simply observed by *shari'ah*.⁵³ These categorizations are in the theological parlance referred to as the rulings (*ahkam*) of *shari'ah*.⁵⁴

These categorizations, however, laid for us, the foundation for our following discussion. It is from them we would extract the legal contents of *shari'ah*, as we are to discuss below. It emerges by virtue of the above categorization, we will presently examine the legal characteristics of *shari'ah* vis-à-vis its affinity or otherwise with the theories of natural law and positive law.

THE FETTER OF POSITIVISM IN *SHARI'AH*

Granted that *shari'ah* is the command of God containing the injunctions of His Divine will as applicable to every situation in life.⁵⁵ This is the law according to which God wants man to live. It is therefore a guide of human action and pervades all facets of human life.⁵⁶ We already know that the crux of positivist theory is the proposition that a

⁴⁷ Professor Gerdemeier (Ph.D in Islamic Studies) is the head of "Islamology" at the University of Mannheim (Germany) (www.islamology.de). He is a speaker in Islamic Studies at the Vienna Islam Conference, www.islamology.de/conference and the author of several Islamic books.

⁴⁸ The message carried from Adam (a.s.) and passed through all prophets up to Muhammad (S.A.W).

⁴⁹ Wahneema Lubiano, VI, *Philosophy of Islamic Law and the "Prophetic" Call*, by C.A. (2000), p. 15.

⁵⁰ Just like also "The Constitution itself is evidence Islamic is more aware of law" in *The Financial Express*, August 15, 2005 and Nov. 2, 2005.

⁵¹ And it is Wahneema, *The Islamic Law and "Prophetic" Call*, by C.A. (2000), p. 20.

⁵² Ibid, p. 20, 21.

⁵³ See Professor Gerdemeier, *ibid*.

⁵⁴ Wahneema, *The Islamic Law and the "Prophetic" Call*, by C.A. (2000), p. 20. She also states that "The Islamic Law and the "Prophetic" Call" is a book by C.A. (2000), p. 20.

⁵⁵ Wahneema Lubiano, *Ideals and Functions of Islamic Law*, *Muslims: A Guide*, p. 20.

⁵⁶ Ibid.

law worthy of any legal efficacy must be accounted in the toga of a COMMAND flowing from a SUPREME/SOVEREIGN being and must be embroidered with SANCTION. This theory is in concomitance with the *shari'ah* concept of law only to the extent that the law must be a command of a supreme being made for the obedience of his subjects. But the theory falls out of the realm of the *shari'ah* concept of law in the aspect of sanction as a bait for obedience.

Shari'ah, being the law of God (Allah), who is always referred to as the 'uncommanded commander' has ascribed to itself, the attributes of a positive command. In the presence of God, there is a ruling for every instance of human behaviour.⁵⁷ As a result, God has decreed various legal provisions in the Qur'an, which is one of the two major sources of *shari'ah*. In fact, majority of Muslim jurists concur that out of the over six thousand verses in the Qur'an, there are five hundred verses with legal pronouncements in the Qur'an become immutable and foreclosed to any modification. Hence, there is no room for any change in the general principles of *shari'ah*. It is expressly stated in the words of the Qur'an itself, that, "there is no change for the words of Allah".⁵⁸ The Qur'an has succinctly portray *shari'ah* as a command of Allah when it states that:

"Allah commands justice, the doing of good, and giving to kith and kin and He forbids all indecent deeds, and evil and rebellion: He instructs you that ye may receive admonition".⁶⁰

It is not unknown to any of us that the objective of *shari'ah* is to uphold justice among mankind and to forbid all evils. Hence, the law strictly laid down by God, as *shari'ah*, is nothing but "the doing of good" and avoidance of evil, in whatever words they may be couched.

⁵⁷ See the article, *Lessons in Islamic Jurisprudence* published on www.oneworldpublications.com/samples (assessed on 8/2/2005)

⁵⁸ See *Lessons in Islamic Jurisprudence*, Op.cit.; also, Waliullah M., Op.cit., p.6

⁶⁰ Holy Quran, Chapter 16 verse 90

There are other verses of the Qur'an indicating that God issues commands onto mankind whom he created as His subjects. Allah said in the Qur'an that:

"Glorify the name of thy Lord, the most High, who had created, and further, given order and proportion; who hath measured (pre-ordainments for everything) and granted guidance"⁶¹

Abdullah Yusuf Ali, while commenting on the above verses, particularly verses 2 and 3 explained clearly that it is God who brings man into being and endows him with faculties exactly suited to what is expected of him, that is, maintaining orderliness and proportionality in his environment. To achieve this, He ordained laws and decrees, by which man can develop himself.⁶² It should be noted that the second to the Qur'an, acquires its authority from God. God maintained in the Qur'an that men should "take what the prophet gives you and refrain from what he prohibits you".⁶³ Remember that it is not necessary in the positivism theory, that the command qualifying as a law must issue directly from the sole law-making body of the state, i.e. the sovereign, but may proceed from an official organ to which law-making authority has been delegated by the sovereign. This is exactly what has happened.

However, matters that have no direct legislation from God or His prophet, have been left to the appropriate authorities,⁶⁴ which are duly constituted to legislate upon, using the reasoning with which they are endowed by God, albeit, their laws must have its root in the Qur'an and sunnah and must be in conformity with the *shari'ah* procedure of law making. For instance, Qadi-made law would be law in the true sense of

⁶¹ Qur'an Chapter 87, verse 87 – verses 1-3

⁶² Abdullah Yusuf Ali, *The Holy Quran: English Translation of the meanings and commentary* (Revised and Edited by the Presidency of Islamic Researches, Ifta, Call and Guidance, Kingdom of Saudi Arabia, 1413 (AH) footnotes 6081 – 6082 at p.1938

⁶³ Qur'an, Chapter 59 verse 7

⁶⁴ These include *shurah*, *Ijma'* and other for a law making in accordance with *shari'ah*

positivism, since the Qadi (Judge) has the power of Qiyas⁶⁵ and Ra'i,⁶⁶ which derive their authorities or validity from the main *shari'ah*. In fact, an Egyptian scholar, Abd-Wahab Ibn Khaliat has noted that there are two hundred and fifty-eight judicial principles in the Qur'an and these matters are left to the discretionary judgement of the Qadi, although through the guidance of the Qur'an and Sunnah. These matters, as noted by Ibn Khaliat, ranged between family law, jurisdiction and procedure, international relations, civil law, constitutional law and economic and financial order.⁶⁷

Another positivism postulation is that the command must descend from a supreme/sovereign being. We can still remember that Austin's conception of sovereignty is of human nature and restricted to a given society.⁶⁸ Hence, I would prefer Hugo Grotus' conception of sovereignty, which he described as the **supreme political power in him whose acts are not subject to any other and whose Will cannot be overridden.**⁶⁹ While I still give this idea, a preference over other juristic conceptualization of sovereignty, I will like to consider the comment of Dr. Muslehuddin on the concept of sovereignty. He said:

God's sovereignty is much superior to the above definition of Austin and to all definitions that the modern political science can think of. No word other than 'Rabb' can encompass the meaning of God's sovereignty. He is at once a Sovereign ...Regulator ...He alone is the creator and the real Ruler of this universe ...He cannot be compared to the sovereigns of the world, *nor is the Islamic state similar to a democracy wherein sovereignty vests in the people. It is a state ruled by Divine laws which*

⁶⁵ This means the deduction of legal prescriptions from the *Qur'an* and *Sunnah* by reasoning by analogy.

⁶⁶ This means independent opinion that may be deduced suo motu from pre-existing laws and applied to a novel case if it appears to be just.

⁶⁷ See Abd-al-wahab Khaliat, *Ilm Usul Al-fiqh*, 7th ed., (Cairo: 1956)

⁶⁸ See footnotes 14 and 15 ante

⁶⁹ Muslehuddin M., Op.cit., p.56

precede it and to whose dictates it has ideally to conform.⁷⁰

This assertion has put any argument concerning the conception of sovereignty beyond any further comment.

In shari'ah, God is the Sovereign and in Him vests the supreme controlling power. In fact, God has repeatedly asserted his sovereignty. The Qur'an lays down that God is the Sovereign lawgiver and His revealed law must be adopted as the law of the land.⁷¹ The above assertion was replete in the Qur'an in a myriad of verses:

"The command is for none but God: He hath commanded that ye obey none but Him"⁷²

"And none can command except God"⁷³

"He is the best to command"⁷⁴

"He is sovereignty of the Heavens and the Earth"⁷⁵

"Blessed is He whose Hands is the sovereignty and He over all things hath power"⁷⁶

"Verily, His the creation and His is the Law"⁷⁷

There are many other verses abound in the Qur'an where God establishes His sovereignty.

- However, consequent upon the fact that shari'ah do leave certain matters to mankind to legislate upon for their own benefit, Islam thus allows political sovereignty in order to reform the society and prevent it from degenerating into a state of anarchy. This particular point finds its footing in the authority of the Qur'an where the prophet was required to pray thus:

⁷⁰ Muslehuddin M., *Philosophy of Islamic Law and the Orientalists*, Op.cit., Pp.56-57

⁷¹ Abu A'la Maududi, Op.cit., p.4

⁷² *Qur'an* chapter 12 verse 40

⁷³ *Qur'an* chapter 12 verse 67

⁷⁴ *Qur'an* chapter 12 verse 80

⁷⁵ *Qur'an* chapter 12 verse 5

⁷⁶ *Qur'an* chapter 12 verse 1

⁷⁷ *Qur'an* chapter 7 verse 54

"Say: O my Lord! Let my entry be by the Gate of Truth and Honour and likewise my exit by the Gate of Truth and Honour; And grant me from Thy presence a ruling authority to aid me" (underlining mine).⁷⁸

In the words of Abul A'la Maududi and supported by other mafassirin (jurists on interpretation of the Qur'an) like ibn kathir, ibn jarir, Hassan Basri and others, the verse could be explained thus:

"That is either grant me power on earth or make any ruling authority, any state, my supporter, so that I may, with the force of the coercive powers of the state, establish virtue, eradicate evil, put an end to the surging tide of corruption, vulgarity and sin, set at right the disruption which has engulfed life and administer justice according to your revealed law".⁷⁹

The prophet led credence to this interpretation when he said in a hadith that: "Allah through state power puts an end to that what He does not eradicate through Qur'an".⁸⁰ This is the more reason why we find some countries adopting shari'ah as the major source of their law,⁸¹ while some regard it as one of the sources of their law.⁸²

The third indispensable characteristic of positivism is sanction which is considered the only means (i.e. a coercive power of the

⁷⁸ Qur'an chapter 17 verse 80

⁷⁹ Abul A'la Maududi, *Tafhimul Qur'an*, Vol.II. (Lahore: 1954) p.618

⁸⁰ Quoted in Abul A'la Maududi's *Islamic Law and Constitution* (Delhi: 1986) p.5

⁸¹ The countries that fall within this category include: Saudi Arabia, Iran, Iraq, Mauritania, Qatar, Syria and most Gulf nations. See "Iraq's Constitution likely to enshrine Islam as main source of law" in *Financial Express*, Vol.No.1589 of Monday August 01, 2005 available on www.financialexpress.com (visited on 10th August 2005). See also Christine Schirrmacher, *Op.cit.*, p.13

⁸² e.g. Kuwait, Bahrain, Egypt etc.

sovereign) by which a positive law will be enforced and which can stimulate the obedience of the law.

This is outrightly untrue of shari'ah, which is highly reversed by its subjects. Shari'ah is the law of God who can never be described as a tyrant. God is the most merciful. There is no element of coercion in the Shari'ah as handed down by God and the prophet. God Himself, in the Qur'an disapproves coercion. The Qur'an states that "if any do fail to establish and decide by what God hath revealed, they are the unbelievers... the unjust... the evildoers".⁸³ God did not promise to punish the defaulters. Shari'ah, decreed by God is always based on Islamic tenets and principles, which are used to mould the words, deeds, conduct, ethics, habits, etc. of mankind. Hence the shari'ah law works on the minds of the people and later translated in their actions. Thus shari'ah creates for man, a dual responsibility: one in relation to God and the other in relation to society.⁸⁴ Shari'ah, decreed by God, remains the law of God even though there is no to enforce it.⁸⁵ The believers, even if they reside outside the territory of Islam, are bound by the law, for the law was revealed to bind the believers wherever they may be.

Note that though I am not unmindful of the fact that God's law is partly coercive but mainly it is corrective and persuasive. It allows time for penitence and amendments. We have example in the story of a man who committed adultery and reported himself to the prophet but the prophet refused to punish him until he confessed for the fourth time. But we should also note that it is only such crimes as are of grave nature, e.g. murder, adultery, theft, highway robbery, intoxication etc. that are severely punished and this is done to maintain peace and order in the society.

I will also like to add that political states may necessarily employ force of compulsion for the enforcement of its laws. These are extraneous elements like punishment, penalty, fines etc., which depends on jurists and governmental machinery. This also traces its authority to the Qur'an, which state that:

⁸³ See Qur'an chapter 5 verse 44,45 and 47

⁸⁴ Jackson, foreword to *Law in the Middle East*, ed. Khaduri and Lebesny (Washington, 1955) p.8

⁸⁵ Fitzgerald, "Nature and Sources of Law" in *Law in the Middle East*, p.85

"We verily sent our messengers with clear proofs, and revealed with them the scripture and the balance, that mankind may observe the right measure; and He revealed iron (i.e. coercive power) wherein is mighty power..."⁸⁶

Interpreting this verse in line with and in the light of Qur'an chapter 17, verse 80⁸⁷ will give us the true understanding of it. This verse is a correlative of the latter wherein the prophet sought power of a ruling authority, the force of whose coercive power he wishes to use to establish virtue and eradicate evil. But the ultimate target of this power is not to punish the wrongdoers rather to correct the anomalies in them and prevent a recurrence of such odious acts in the society.

I therefore submit that even though the command of God is positive (only to the extent of the abominable crimes (kabair)), it is still not bereft of justice and is made to ensure welfare of all. This is unlike the oriental and occidental man-made laws, which take the welfare of the subjects of the law with a pinch of salt but rather focus more on the coercive sovereign power of the commander, which makes such laws tyrannical.

THE THEORY OF NATURALISM IN SHARI'AH

Right from the period when the concept of natural law was given human thought by the Greeks, it has been regarded as a legal appeal to something of higher status than human laws.⁸⁸ It has generally been described as a law that is rooted in human nature and at the same time has a binding effect on human actions. Such laws are elicited for human guidance towards justices, peace, order and happiness of human. But what is most worthy of understanding is the fact that natural law is clouded in the ovary of certain theses, which give it the ability to enjoy the benefit of certain characteristics. The natural law is a basic moral principle possessing a common objective and enjoying a universal

⁸⁶ *Qur'an* chapter 57 verse 25

⁸⁷ See footnote 78 ante

⁸⁸ Friendman, *Legal Theory* (1960) p.95; Adaramola, *Op.cit*, p.14; and Cicero, *Republic*, 211, III, Pp.22-23

command but Him.⁹⁰ To further stamp the divinity of shari'ah, God decreed that whoever "fails to establish and decide by what God Hath revealed, they are the believers... the unjust... the evildoers".⁹¹ These laws are usually revealed to prophets to interpret to mankind. We will find in the provision of Qur'an chapter 5 verse 44 where God said:

"in truth we have revealed the Torah in which is guidance and light, by which the prophets who submitted to God judged the Jews, and the rabbis and sages judged by such of God's Book as they were bidden to observe..."

A similar provision is also entrenched in Qur'an chapter 11 verse 44 and 64.

By the description of Hawkins and Parker, the Divine Law is meant to attain a supernatural end for mankind. What constitutes the supernatural ends had been a source of discussion amongst Muslim jurists. Some jurists especially ibn Taymia (661-728 AH/1263-1328 AD) pointed that shari'ah being a divine law was revealed by God in order to achieve justice.⁹² Others said it is for the purpose of achieving happiness.⁹³ Still some others said it is only for the achievement and realization of the very benefit of man on earth.⁹⁴ From a close examination, we will not but find that the three approaches to shari'ah are complements on each other: **happiness** of mankind cannot be achieved at large without **justice** and justice is one of the essential **benefits** and interests of people on earth.

The Shari'ah also possesses the attribute of natural law, most particularly the use of reason to decipher the will of God upon mankind. We need no scientific breakthrough to tell us that reason via intellect

⁹⁰ See Qur'an chapter 12 verse 40; 67 v.80; 57 v.5 and 7 v.54

⁹¹ Qur'an chapter 5 verse 45 and 47

⁹² Andrew Wilson (ed), *World Scripture: A Comparative Anthology of Sacred Texts* (Int'l Religious Foundation, 1991). See also the article, "Government by Divine Law" published on www.unification.net/ws/theme154.htm (last updated on 5th September 2005).

⁹³ Ibid

⁹⁴ Ibid

the greatest asset with God accorded mankind. This places mankind on a higher pedestal in the hierarchy of animals.

Meanwhile, shari'ah, true to its nature as a natural law is imbued with a common objective and it enjoys a universal validity. Shari'ah, like any other law is oriented towards certain purposes, which it seeks to implement. The supreme end of shari'ah is to ensure justice, peace and order in the society. We have read that the chief attribute of shari'ah is to establish peace on earth by controlling society and imparting justice to it in fairness to all.⁹⁵ Hence, order and justice are both the primary objective of shari'ah. Consequently, they serve as the main of achieving happiness for the benefit of man on earth. ⁹⁶ Also, the universality of shari'ah is unequalled among any law ever in existence. It is the only law that successfully traversed all continents of the world and still maintains its original form (immutability). Various jurists and writers have attested to its universality. Charles Gide and Charles Rest speak eloquently of Divine law (which is one of the characteristics of shari'ah) in the following terms:

"We may say that the 'natural order' was that order which seemed obviously the best, not to any individual whomsoever, but to rational, cultural and liberal minded men... This order was supernatural and so raised above contingencies of everyday life, with its double attributes of universality and immutability. It remained the same for all men. ⁹⁷ Its fiat was unique, eternal, it was universal in scope."⁹⁸

Jackson also contributed that:

⁹⁵ Muslehuddin, Op.cit., 98

⁹⁶ Refer to the arguments between the Muslim jurists on what constitutes the supernatural ends for mankind. See footnotes 92-94 ante.

⁹⁷ Underlining mine for emphasis

⁹⁸ Gide and Rest, 'A History of Economic Doctrines', p.29 quoted in Muslehuddin Op.cit., p.59

"Islamic law... contemplates one community of the faithful, though they may be of various tribes and in widely separated locations. Religion, not nationalism or geography, is the proper cohesive force."⁹⁹

Also, Gibb explained that:

"At the root of all Islamic political concept lies the doctrine of the umma, the community of Muslims. In its internal aspect, the umma consists of the totality (ijma) of individuals bound to one another by ties, not of kinship or race, but of religion, in that all its members profess their belief in the one God, and in all their revelation to Him, all are equal, without distinction of rank, class or race. ... In its external aspect, the umma is sharply differential from all other social organizations. Its duty is to bear witness to Allah in all the relations to its members with one another and with all mankind. They form a single indivisible organization, charged to uphold the True faith, to instruct men in the ways of God, to persuade them to the good and to dissuade them from evil by word and deed."¹⁰⁰

In the same token, Honourable Justice Uthman Mohammed, in his article, 'The Shari'ah and the Western Common Law: A comparative analysis' clearly quoted Professor Wigmore, as describing Islamic law, and if the complaint cannot prove his allegation with all evidence at disposal, the defendant will be acquitted. 'Umar, the second caliph, terms:

"... It has proved itself, as an instrument of social order adaptable to do justice for hundreds of communities of variant local customs and institution"¹⁰¹

Capping it all, I refer you to the recommendation by God: "ye are the best community sent forth unto mankind; ye enjoying the right conduct and forbid the wrong: and ye believe in Allah"¹⁰²

From the opinions delineated above, suffice it to say here that shari'ah knows no bounds in its application. That is why Muslims residing outside an Islamic state is liable to be punished for an offence he must have committed while in the non-Islamic state.

Shari'ah, being a law enunciated for the happiness and overall interest and benefit of mankind, recognized every right attributable to men regardless of their caste or creed. That is if the enjoyment of that right will not interfere with that of others or override the public and general interest of other citizens. Shari'ah does not look at religious inclination before enforcing the rights. However none of the rights will be enforced if they seek to legalise what is forbidden or prohibit what God has ordained.

The first rights of mankind enshrined in shari'ah are the protection of their life, property and honour. The prophet is reported to have said concerning this that: "your lives, your properties and your honour are as this day (of the hajj)".¹⁰³ There are also copious provisions in the Qur'an seeking to protect these rights.¹⁰⁴

Another important right recognized by shari'ah is the protection of personal freedom. Imam Abu Yousaf, in his Kitab al-Kharaj, said that nobody could be imprisoned on false or unproved charges. Any complaint under shari'ah will require that both parties should appear in court and if the complaint cannot prove his allegation with all evidence at disposal, the defendant will be acquitted. 'Umar, the second caliph, terms:

¹ M. Oloyede Abdul-Rahmon (ed.), Op.cit., p.20

² Qur'an chapter 3 verse 110; Q.2 verse 213, also Q.10 verse 19.

³ Reported by Muslim in "The Book of Farewell Pilgrimage" on the authority of Ibn Isham, Pp.389-391

⁴ See Qur'an chapter 17 verse 33 - 35

⁹⁹ Jackson, foreword to Law in the Middle East, Op.cit., Pp. VI-VIII

¹⁰⁰ Gibb, "Constitutional Organization" in Law in the Middle East, Op.cit., p.3

was reported to have said: "in Islam, no one can be imprisoned without due course of justice".¹⁰⁵

Shari'ah also makes it a duty to protect the right to freedom of opinion and belief. Thus any group of people can organize themselves and establish any idea(s) and peacefully practice them. The Islamic state need not raise an eyebrow or hinder them from so doing provided they do not foist that ideology on others by violent means, which by so doing would endanger the security of the state and its administration. In fact the Qur'an expressed this in an unalloyed terms thus:

"Let there be no compulsion in Religion: Truth stands out clear from error..."¹⁰⁶

Also, 'Ali, the fourth caliph, was reported to have enforced this right on a group which revolted against his administration. He sent a message to them that:

"You may live wherever you like, the only condition between us being that you will not indulge in bloodshed and will not practice cruel methods".¹⁰⁷

Therefore, everybody is entitled to this freedom as long as this is not aimed at actual disruption and discovery of the society.

Shari'ah also emphasizes one other right; and that is the provision of basic necessities of life to all citizens without distinction of caste or creed. As a result, Zakat was mandated upon Muslims so that the prophet said, "it shall be taken from the rich and distributed among the poor and the needy".¹⁰⁸ At another forum, the prophet enunciated the principle when he said:

"The government is the guardian (helper) of everyone who has no guardian".¹⁰⁹

He was still reported to have said:

¹⁰⁵ Imam Malik, *Muwatta*, "Baab Sharaat al-Shahid, Kitab Ahkam al-Khilafat"

¹⁰⁶ *Qur'an* chapter 2 verse 256

¹⁰⁷ SHaukani, *Nail al-Autar*, Vol.III, p.139.

¹⁰⁸ Related by *Bukhari* and *Muslim*

¹⁰⁹ Related by *Abu Daud* and *Tirmidhi*

"Whoever leaves liabilities (such as debts or destitute families at the time of his death), the burden (of all such liabilities) is upon us (i.e. the state)"¹¹⁰

This right has been rightly enforced by several companions of the prophet who had at one time or another been the leader of the Muslim community.

We are now left with the most important characteristic of natural law, which also has bearing on shari'ah. And that is REASON. We agree that all the principles enunciated above are inherently laid in human nature. They are intrinsic and latent in our sub-consciousness.

According to A.D. Ajijola, in his book, *What is Shariah?* Shari'ah is rooted in the traditional concept of natural law because its directions and injunctions have to be viewed and interpreted in the light of current information available to man.¹¹¹

Shari'ah itself has always given room for the exercise of considerable freedom of interpretation and the use of ingenuity in arriving at a conclusion by applying both *ijtihad* (independent judgment) and *qiyas* (analogical reasoning). The Qur'an has stated in **chapter 2 verse 230** concerning shari'ah that: "... these are the laws of God; He makes them clear to a people who understand".

As I have pointed out above, the scope of reasoning in shari'ah is covered by the use of *ijtihad*, *qiyas* and *Ra'i* (independent opinion), which all bordered on the ability of jurists in deciphering a rule through the effort of their intellectual exercise. Where these reasoning tools variously used by different jurists to expound a legal principle that is unanimously acceptable to and accepted by them all, they would be referred to as *ijma'*. Despite certain disparities in the use of these tools of reason, one thing that is instructive is the fact that apart from the Qur'an and sunnah, other sources of shari'ah are discovered through the use of human reason. This undoubtedly is an attestation that shari'ah had all along placed a high premium on the use of reason.

¹¹⁰ Related by *Bukhari* and *Muslim*

¹¹¹ A.D. Ajijola, *Op.cit.*, p.111

Let's pause here to intimate ourselves with how prophetic Muhammad (SAW) endorsed the use of reasoning in shari'ah. The prophet was about to send Mu'adh bn Jabal to Yemen as a qadi (judge). He asked him: "How will you decide when a question arises?" Mu'adh replied: "according to the book of Allah?" "Then according to the sunna of the prophet of Allah." "And if you do not find the answer in that either?" "Then I shall come to a decision according to my own opinion without hesitation". Then the prophet patted Mu'adh on the chest with his hand saying: "praise be to Allah who has led the messenger of the messenger of Allah to an answer that pleased Him."¹¹²

Many companions of the prophet had exercised considerable freedom of interpretation of rules of shari'ah and have exhibited much ingenuity in arriving at just conclusions by applying both ijtihad and qiyas in the light whatever situation was current. Their decisions have culminated in enunciations of new principles of law, which are universally respected throughout the Muslim world. The later jurists also followed suit. In fact the use of reason has contributed immensely to the formation of Islamic law.¹¹³ The one major characteristic of this aspect of shari'ah is that it is not immutable (like Qur'an and sunnah), thus making it subject to modification according to the need and requirements of the changing times and it is this part of the Islamic law, which endows it with wide possibilities of growth and advancement and makes it fully capable of fulfilling all needs of an expanding human society in every age.¹¹⁴

CONCLUSION

Now that we have been able to traverse the theories of positivism and naturalism, and the shari'ah, we would have found that the gross misconception of the occidental and oriental jurists on the status of shari'ah is a clear highlight of the level of their ignorance. The described shari'ah as being far from realism. That is, it is obsolete and has lost touch with the present condition of the society. They therefore reason that shari'ah should be determined by social facts. They have

¹¹² This narration is related in various authoritative ahadith books of Abu Dawud, Tirmidhi, Darimi and others.

¹¹³ A.D. Ajjola, Op.cit., p.23.

¹¹⁴ Abul Ala Maududi, Op.cit., p.60.

the above opinion of their ignorantly view shari'ah in terms of man-made laws, which would be subservient to the society and change with it. But from what we have seen about shari'ah, its chief purpose is to control the society and not to be controlled by it. Moreover, why must shari'ah be expected to fluidly swim with the tide of the changing society when its uncompromising principles are broad enough to accommodate the ever changing and growing needs of the society?

Characteristically, shari'ah, unlike the man-made law is neither too rigid nor too flexible. Being the command of God who is the ultimate sovereign, shari'ah is considered positive, a principle associated with stability and rigidity. Though, shari'ah is immutable, it is not strictly rigid. And with justice as the supreme end of shari'ah, it is an ideal law. Therefore, shari'ah can be deservedly described as 'positive law in ideal form'. I say this bearing in mind that the word 'positive' means 'definite' pointing to the stability in the law and the word 'ideal' means 'perfect'. Therefore, shari'ah can inversely be described as 'a stable and perfect law'.

From the foregoing, we could conclude that the occidental and oriental jurists are already lost in the mist of their ignorance of the true facts and status of shari'ah. These are fellows who still have a long way to go in mastering their own laws let alone shari'ah whose language they don't even understand (mind you I'm not speaking of Arabic language). One should thence be less perturbed on seeing the remark of Mahmassani when he was commenting on the works of these set jurists on the shari'ah. He remarked thus:

"we have been accustomed to seeing these people write about subjects whose language they have not mastered and of primary sources of which they are ignorant. It is inexcusable to hide or to disfigure established scientific facts, no matter what the reason for doing so may be. It is irrelevant whether the reason be a mistake, a result of haste, the lack of diligence,

ignorance, bias, or a mixture of all these factors".¹¹⁵

INTR

been
The i
Islam
Antiq
also
conce

bene
and c
the F
Decla
Right
Univ
Cove

INTE

War,
prov
the L
fair t
to e
colo

¹¹⁵ Mahamassani, *Falsafa*, p.ix quoted in Muslehuddin, M., *Philosophy of Islamic Law and the Orientalists*, p.xv.

LL.
Pro
Persi
p.77