NATURAL LAW AND *SHARIʿA*, A QUEST FOR THE UNIVERSAL IN THE PARTICULAR

Mustapha Tajdin

ABSTRACT

In a world replete with religious rigidities, one witnesses an increasing interest in the role religions might play to mitigate tensions and bridge the gaps between different communities and cultures. modern context provides unprecedented opportunity for those longing for peace and coexistence to go back to the sources and search for common ideas which transcend cultural particularities and exclusive theologies of salvation. for this purpose, an attempt is made here to revive a long debated legal and philosophical topic of natural versus divine law. the aim here is to argue for the compatibility between Islamic law and natural law being the repository for global ideas on equality, human rights, and liberal democracy. Since Islamic law is commonly divided into practical/positive law called Fiqh and general/universal rules of interpretation known as Uṣūl Al-Fiqh, our focus here would be on the latter rather than the former for many reasons, the most important of them is the comprehensiveness and abstract nature of Uṣūl Al-Fiqh compared to the particularity or Fiqh. Muslim Scholars have been involved in fiery discussions on the place of human nature and reason in the construction of legal injunctions. Thus, one may identify two main schools of thought within Islam. The Muʿtazila who played a tremendous role in the formulation of Uṣūl Al-Fiqh. They believe that law can be based solely on reason given the fact that God has endowed humans with the ability to distinguish the good from the evil. The second school is represented by the Sunni Ashʿarites who argue for the inability of human reason to, independently, build a system of legislation, since God is the only one who can distinguish between good and evil and thus, it is revelation that forms legal imperatives and regulates human conduct not reason. However, this paper is going to move away from the complexities of theology to avail itself of an area of Uṣūl Al-Fiqh seldom connected in academia with natural law. This area is the objectives of Islamic law especially what Shāṭibī calls kulliyāt or universals of law.

Keywords: reason, revelation, natural law, Islamic law, objectives of *Shariʿa*

INTRODUCTION

The Term Islamic Law is by no means a simple coinage. Names usually point to entities outside the mind by the help of their position in the outside world. Unfortunately, the process does not go this way as far as abstract concepts are concerned. As an intellectual construct, a single concept often means different things to different people. However, there are some central terms and concepts which exert on us a powerful pressure in order to locate their meanings within a general frame of reference known, even in varying degrees, to everyone. Islamic Law is no exception. For experts and laity, it refers to a body of laws for which Islam is the source. The majority of Muslims and westerners believe that Islamic Law or *Shariʿa* is a religious law in the medieval Christian sense of the term. In the Christian context, when Pauline views on Judaic law prevailed over those of James and new Christians of gentile descent were, hitherto, no more required to follow the Old law, faith begun to be the first preoccupation of early Christians leaving legal issues to the discretion of political authority. The separation between temporal and religious authorities form the early beginnings of Christian theology played a pivotal role in the process of strengthening the doctrine even outside the direct influence of the state. Islam's fate has been quite different. Religion or faith has always been at the core of political agendas, and states building. Political authority has perpetually relied on religion for stability and legitimacy. Therefore, one might say that, for Christians, religion is the moral and ethical substance of law. But for Muslims, religion is the moral as well as the form and method of the law. If it is true that naming, as a linguistic process, is an arbitrary act, it follows that many disagreements over given terms are nothing but disagreements over the form not substance. Thus, Islamic law can signify, with varying degrees of precision, what natural law means. In other words, it is the meaning and application of natural or Islamic law that decide their congruences and/or disparities.

At the core of Islamic system of belief lies the concept of revelation. there is a constant up-down dialogue between the divine and the human. For this reason, all Muslims firmly admit that *shariʿa* comes from above, from the sacred to the profane. Therefore, Islamic law, for many, is divine in essence and stands distinct from natural law which is believed to be discoverable by human reason. This view is in fact simplistic as it overlooks the complexities of application of legal injunctions which entail an effort of interpretation aiming at contextualizing the divine within the confines of the profane. The construction of legal rules within Islamic Jurisprudence and the erection of a systematic science of legal interpretation called *Uṣūl Al-Fiqh,* indicate that *Shariʿa* just like any other legal tradition involves human reasoning. Thus, the distance between *Shariʿa* and natural law shrinks. Since "the central claim of natural law political philosophy is that law has this reason-giving force through the common good of the political community"[1]. It appears that no significant differences exist between the two concepts if we avoid, at least provisionally, theological as well as eschatological considerations. In fact, any attempt to theologically equate Islamic law with

[1] Mark C. Murphy, *Natural law in jurisprudence and politics* (Cambridge: Cambridge University Press, 2009), 1.

natural law is outside the scope of this paper. To illustrate this seemingly delicate relationship between the two laws, we may say that there is, indeed, a fundamental conflict between Muslims' faith in *shari'a* as a way to eternal salvation and natural law. But this cannot in any way purge natural law from its very function of protecting human interests. From this perspective, both Islamic and natural laws, as they are both devised to protect human interests, converge in this world although they diverge in the world to come.

NATURAL LAW IN CHRISTIAN CONTEXT

The term natural law suggests the existence of constant principles built in nature which may be translated into legal imperatives through human reasoning. Therefore, one can identify two key concepts: nature and reason. The first refers to the original state of things. That is the inner form of a concept or situation before being affected by any outside artificial cause (artificial here excludes any natural cause which is part of the laws of nature). The second alludes to the human universal logos or intellect in its unbiased or objective search for natural norms and universal principles of human conduct. For some scholars, the natural and the divine are one or at least come from the same source. Grotius defines natural law as, "a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that in consequence such an act is either forbidden or enjoined by the author of nature, God"[2]. In the Christian context, natural law became a familiar concept, albeit pagan in origin, because the fathers of the church saw no contradiction between nature, human reason, and divine will. Thomas Aquinas for instance has been quoted over and over on issues pertaining to natural law, and referred to as "the paradigmatic natural law theorist"[3]

Christian scholastics have successfully incorporated Greek philosophy of legal norms and that of ethics within a more comprehensive theology of God's will and grace based on human rational ability to distinguish between good and evil. They believed that natural law is "fundamentally a capacity or power to distinguish between good and evil; it is intrinsic to the character of human soul as made in the image of God, and therefore, it cannot be altogether obliterated; and it is expressed or developed through moral precepts which are confirmed, as well as being completed and transcended, through the operation of grace … [T]he natural law more broadly understood does include specific norms as well as fundamental capacity for moral judgment, although there is plenty of room for both legitimate variation and sinful distortion at the level of particular norms"[4]

Not only are there commonalities between Christianity and natural law, some Scholars like David Novak go even as far as to assert that most theorists of natural law regard it as a subset of divine law[5]. From Philo to Aquinas down to modern times, there has been continuous efforts invested in the project of actual or potential compatibility between religious traditions and universal norms. It seems as if human nature, if any such a concept could be accurately grasped, were the norm for establishing universal imperatives and not religions. However, to do justice to divine revelations, history stands as a witness to the struggle of different religious communities towards justice, equality, and compassion against the atrocities of customary and conventional laws devised by the powerful to subjugate the weak. From this perspective, what is natural is a creation of God, and since God made us aware of our nature, it follows that we have the capacity to formulate norms for ethical behavior and criteria for distinguishing what is bad from what is good. But if this is true, then why do we need revelation or divine instructions? For Thomas Aquinas, there are four types of law: 1- Eternal law or God's reason which governs the world. 2- Divine law found in the scripture. 3- Natural law is the divine law revealed to man through human reason. 4- Human law which is constructed by men[6]. To Aquinas, both divine law and natural law are part of eternal law[7]. Because natural law follows rational principles, manmade law, as long as it aims at justice, is binding irrespective of religious considerations. It is this seemingly secular stand which gives Aquinas' scheme the universal flavor transcending historical contexts. Aquinas argues that the end of law is associated with the will. However, the status of a law is independent from the will as long as it accords with some rules of reason[8]. Such being the case, religious scholasticism as represented by Aquinas, one of its paragons, can be considered the starting point for modern views on

---

[2] A. G. Chloros, "What is Natural Law?" *The Modern Law Review*21, no. 6 (1958): 609, accessed September 26, 2017, doi:10.1111/j.1468-2230.1958.tb00498.x.

[3] Murphy, *Natural law in jurisprudence and politics,*

[4] Mattison William C, III, "The Changing Face of Natural Law: The Necessity of Belief for Natural Law Norm Specification," *Journal of the Society of Christian Ethics* 27, no. 1 (2007): 252, accessed September 15, 2017, http://www.jstor.org/stable/23561864.

[5] David Novak, "Is Natural Law a Border Concept Between Judaism and Christianity?" *Journal of Religious Ethics* 32, no. 2 (2004): 243, accessed September 15, 2017, doi:10.1111/j.1467-9795.2004.00164.x.

[6] Meirav Jones, "Philo Judaeus and Hugo Grotius's Modern Natural Law," *Journal of the History of Ideas* 74, no. 3 (2013): 341, accessed September 15, 2017, doi:10.1353/jhi.2013.0025.

[7] Ibid.

[8] Ibid.

natural law and not secular views as a manifestation of anti-religious sentiments of modern enlightenment. Even those who want scholastic ideas on natural law dead, could not justify a radical break from scholasticism because, natural law for them remains "a purely rational construction, though it does not refuse to pay homage to some remote notion of God"[9] and thus, most radical secular attempts, such as that of Grotius in his so called 'impious hypothesis', are still "reconcilable with the categories Aquinas bequeathed to his followers"[10].

ISLAMIC THEOLOGY AND NATURALISM

If early Christian theology has expressed its leanings against strict legalism and literalism, Islamic *Kalām* or theology has, in general, gone in a different course. It appears that for a religion based essentially on a text, it would be difficult, at the outset, to hope for an intellectual activity independent from the dictates of revelation. Muslim scholars, therefore, demonstrated an ambivalent attitude towards the place of human reason in the quest for knowledge. Islamic theology, although stimulated by many political factors, struggled with many ideas pertaining to human nature and as such, was able to reiterate philosophical concerns other developed civilizations had dealt with. The first debate which can be called a purely Islamic debate, centered around the concept of divine justice and human responsibility[11]. With the spread of Greek philosophical works, through massive state oriented efforts of translation, Islamic theology took a new turn marked by more sophistication and depth leading to the emergence of speculative theology. One might be surprised at the firm spirit of free quest for truth displayed by early Muslim theologians. *Mʿutazila* happens to be the first theological faction which contested both anti-Islamic ideas curried out by Christians and Manicheans as well as conservative literalism of Muslim traditionists. They argued for a universal theology rooted in the principles of divine justice and human rationality. For them the former refers to God's perfect attribute of justice, while the latter means the ability of human reason to formulate moral norms even in the absence of scriptural evidence. Thus, *Muʿtazila* ushered in what Fakhry calls "a positive advance in the direction of naturalism"[12] while remaining impervious to the lures of speculative skepticism. Being the heirs of *Qadaris*, *Muʿtazila* doctors emphasized human free will as a pre-requisite for legal responsibility. For them, it is absurd to believe that a Muslim is responsible for his own actions if he/she is deprived of the right to choose one action and not the other. Consequently, if God condemns men to Hell for acts for which they are not responsible, He is acting unjustly[13]. Since revelation consists of what Muslims ought to do, and since they can, by virtue of free will, choose what to do, it follows that the transition from what is good to what ought to be good is a smooth movement and a paved way taking into consideration human rational ability to identify the good. Therefore, natural predisposition and divine revelation are on the same page and speak the same language. Against this stand, the Sunni *Ashʿarites* developed a seemingly anti-rational theology. They argued that the criterion for distinguishing the good and the evil is revelation. reason alone cannot comprehend divine wisdom and thus is incapable of building a legislative system solely on human reasoning. According to them, human nature and cosmic laws are in the hands of God. So, it would be daring to claim that reason alone is equipped with tools sufficient to understand the ultimate wisdom behind nature. This strict voluntarist position adopted by the Sunni *Ashʿarites* marked a turn against reason in the history of Islamic theology. Because, "Good is what God has prescribed, evil is what He has prohibited"[14], it follows necessarily that reason has only a subsidiary role to play in acquiring knowledge and thus, revelation as displayed in Qur'anic texts and prophetic traditions, is the only trusted source of knowledge while reason is nothing but a wary device for interpretation, categorization, and prioritization of knowledge for which revelation is the only legitimate source. Why *Ashʿarites* were so hostile to the concept of unaided reason? And What compelled them to adhere to some extreme ideas to the extent of boldly accept to believe in a precarious God capable of doing evil?[15] The answer is two main concepts which influenced radically Muslims worldview to date. These concepts are: God's omnipotence and God's sovereignty. For the former, they assumed that giving reason an independent role in knowledge and, thereby, in legislation is tantamount to putting restrictions on God's will and thus infringing on His omnipotence. As for the latter, allowing reason to be independent from revelation, is conducive to *Shirk* or polytheistic association, since reason would share with God some of His attributes. Their line

[9] Ibid., 342.

[10] Ibid.

[11] Majid Fakhry, *A history of Islamic philosophy*, 3rd ed. (New York, NY: Columbia University Press, 2004), xx.

[12] Ibid., 95.

[13] William Montgomery Watt, *Islamic philosophy and theology*, 2nd ed. (Edinburgh: the University Press, 1985), 51.

[14] Fakhry, *A history of Islamic philosophy, 218*

[15] This extreme subjectivist opinion was upheld by many Muslim scholars like *Ibn Hazm*, *Ashʿari*, and *Ghazali*. They did not hesitate from accepting the bold claim that if God had commanded some evil acts, it would have been *ipso facto* right for man to commit them. See, George Fadlo. Hourani, *Reason and tradition in Islamic ethics* (Cambridge: Cambridge University Press, 2007), 59.

of argument looks valid but not sound using logic terminology. Their definition of the word 'independent' is not precise. The independence of reason is taken by the *Ashʿarites* in its ontological sense as if rationalists were pitting reason against God as two opposite ontological entities. Instead, early Muslim rationalists' definition for the term, especially that of moderate *Mu'tazilis* like *Abū al-Ḥassan al-Baṣrī* and to some extent *al-Qadi Abd-al-Jabbār*, is related to a functional independence rather than to an ontological one. To rescue the substance of the debate from the flood to empty verbiage, we can say that since God is the creator of reason and the source of revelation, both of them can, functionally, undertake the task of legislation jointly or independently, for they both, at least theoretically, aspire for the wellbeing of humanity. From this perspective, reason is not granted any ontological position but it is God Himself who has delegated to man the power to decide[16].

Apparently, even ardent advocates of the existence of natural law ideas in pre-modern Islamic literature like Avner M. Emon concede the fact that a faith in reason as an ontological entity is found nowhere in Islamic legal tradition. However, this is not sufficient to dismiss this existence as some Islamists like Patricia Crone and George Maksidi would have us believe[17]. Emon argues that scriptural positivism is enshrined in Islamic legal tradition putting reason in no position to establish legal norms in the absence of scripture. This is because Muslim "jurists argued that all determinations of God's law must find expression, either directly or indirectly, from scripture. Extra scriptural indices, whether in the form of rational proofs or references to nature, do not provide a proper basis or foundation for asserting the divine law"[18]. Nevertheless, the *Ashʿarite* theology at one point of Islamic history is going to experience a new turn. Traditional theology came under massive attack from highly influential philosophers like *Farābī* and *Ibn Sīnā*. Political turmoil, and the disintegration of the social fabric of the Islamic societies after the swift victory of Mongol army and its march towards Baghdad, the heart of Islamic civilization, brought about new realities and fresh approaches to theology and law. With *al-Juaynī* and his famous disciple *Ghazālī*, one notices the emergence of a sweeping feeling among Muslim intellectuals that traditional *Ashʿari* theology is no more able to face the raids of philosophy. It is true that *Ghazālī*'s celebrated refutation of philosophy in his book '*tahāfut al falāsifa'* (lit. the inconsistency of the philosophers) has successfully brought back some faith in the ability of theology to support revelation against peripatetic reason. But this came about at a heavy price. A new theology of *Ashʿari*sm is now unfolding. One of the great champions of this new theology is *Fakhr al-dīn al-Rāzī*. His contribution revolved around the articulation of a Sunni theology capable of absorbing the gist of rational thinking with unprecedented intellectual courage. He coined a new term very relevant to our purpose in this paper, a term he calls: *Qānūn Kullī* or a universal law based on which we can reconcile revelation with reason. He states:

> "know that if definitive rational proofs establish a truth and we encounter some revealed proofs outwardly indicating the opposite, we face exactly four scenarios: either we believe in both of them and this is a contradiction which is impossible [both p & $\neg p$ are true] or we reject them both and this means rejecting two contradictory statements which is also impossible [both p & $\neg p$ are false] or we falsify the outward meaning of revelation and confirm the outward claims of reason or we falsify the outward claims of reason and confirm the outward meaning of revelation and this is incorrect, because we are incapable of knowing the veracity of the outward meanings of revelation unless we know, through rational proofs, the existence of the creator, His attributes, the way miracles indicate the truthfulness of the messenger (PBUH), and the occurrence of miracles at his hands. If definitive rational proofs were denigrated, reason would be a suspect and its testimony unacceptable. If this were the case, reason's statement about these principles would be meaningless. Consequently, it becomes an established fact that degrading reason in order to confirm revelation leads to degrading both of them which is erroneous. Since all four scenarios are wrong, we are left with only one option that through decisive rational proofs one must assess revealed proofs (suggesting anthropomorphism) as either false or true but with inward meanings different from the outward ones. If we allow interpretation, we volunteer to figure out potential meaning in detail. But if we prohibit interpretation, then we should abstain from assigning them meanings and leave it to God Exalted is He. This is ***the universal law*** to which we have to refer we have in all ambiguous texts."[19]

Rāzī, here, makes full utilization of Aristotelian logic in order to establish the supremacy of reason over revelation. But this supremacy should not be understood in its ontological sense, rather, what a Sunni *Ashʿari*te like *Rāzī* intends is a functional priority of reason as a tool to understanding and interpreting revelation. The astonishing conclusion we arrive at based on *Rāzī*'s account is that revelation alone cannot establish creedal ideas and that its need for reason is mandatory. The way *Ibn Taymiyya* interpreted *Rāzī*'s universal law is highly significant for our search for the kernels of a theory of natural law in pre-modern

[16] Hourani, *Reason and Tradition in Islamic Ethics,* 7

[17] Anver M. Emon, "Natural Law and Natural Rights in Islamic Law," *Journal of Law and Religion* 20, no. 2 (2004): 351, accessed September 15, 2017, doi:10.2307/4144668.

[18] Ibid.

[19] Fakhr al-ddīn al-Rāzī, *Asās al-Taqdīs,* ed. Ahmad hijāzī al-Saqqā (Cairo: Maktabat al-Kulliyāt al-Azhariyya, 1986), 220-221. *Emphasis added*.

Islam[20]. According to *Ibn Taymiyya*, *Rāzī*'s universal law entails that revealed truth can only be established through reason. Being a *ḥanbali*, he believes that *Rāzī* and his followers along with their master *Ghazālī* are responsible for formulating such a dangerous law which is similar to what Christians had done within their own theology[21]. *Ibn Taymiyya* states that this universal law is a corrupt concept which stands between the believers and their understanding of the realities of scriptural proofs[22]

NATURAL LAW IN ISLAMIC LAW

At the philosophical level, reason and rationality deserve more elaboration given their ideological charge. In the west, the heir of Greek rationalism, reason is able to prove everything including God. This is the legacy of the philosophers like Plato, Aristotle, and others. But for the Semites God is not an intellectual or epistemic problem, for it is simply found in revelation[23]. The ontological existence of reason outside the control of higher divine power seems to be a western legacy. This rational tradition, although challenged in the west in this very ontological way, cannot be accepted by an oriental tradition known for its mystic and super-natural tendencies. However, rationality is not alien to Semitic cultures. Reason is a tool, an instrument, and an act but not an independent entity. God created it and gave it the ways and abilities to operate within its dominion. Amazingly, eastern and western traditions experienced a productive encounter during the Hellenic period. It is the Neoplatonic outlook that brought these two distinct traditions to terms. Western Aristotelianism and Skepticism made a step towards mysticism, while eastern philosophy began enjoying the blessings of systematic thinking. For this reason, a functional approach to the place of reason in relation to revelation provides a solid ground for a marriage between rationalism, naturalism and revelation.

However, at the level of jurisprudence, the analysis has to take a different course. Why is that so? The answer is simple. The legal reasoning aims at solving real problems of law. Thereby, there must be reference to a generally accepted source of legal norms otherwise a *mufti* or a judge will have to suspend the verdict until the issue is theoretically solved. This is, in fact, impractical and threatens the very existence of the social fabric. In order to overcome the reality of revelation being finite while real cases are infinite, Muslim scholars had to give room to reason to derive laws under the ambit of revealed universals which must in turn be interpreted from particular texts via reason. Thus, we may talk of two different types of reason in Islamic legal reasoning: 1- functional reason, and 2- textual reason. The former enjoys more freedom in the derivation of legal injunctions in the absence of revelation, while the latter uses revelation itself in order to construct some general normative rules. *Istiḥsān* or legal preference and public interests of *Maṣāliḥ* are reflective of the functional reason; and the universals of *shari'a* provide a relevant example for the textual reason.

Since *Maslaḥa* as theorized by *Shāṭibī* is our focus here, we may start first by elaborating on *Istiḥsān* in order to grasp more accurately the place of reason in Muslim legal thought and check the extent to which Islamic law and natural law conflate.

Muslim scholars came to agree on four authoritative sources of law usually called primary sources. They are: Qur'an, Prophetic tradition or *Sunna*, consensus or *Ijmāʿ*, and analogy or *Qiyās*. Other sources are relegated to the rank of ancillary sources having no independent authority. Legal preference or *Istiḥsān* and public interests or *Maṣāliḥ* are examples of them. When a law reflects the personal choice of the lawyer guided by his idea of appropriateness, Schacht states, it is called *Istiḥsān*[24]. *Istiḥsān* may also be called equity[25]. Although equity and *Istiḥsān* are not identical, they share many similarities. In western tradition, equity is related to fairness and conscience and derived from the belief in natural rights beyond positive law[26]. In this, *Istiḥsān* is the same, although not theoretically associated with natural rights in Islamic law but with public interests derived from the universals of *Shariʿa*. Kamali, in his discussion of *Istiḥsān*, believes that both Islamic and Natural laws insist on the validity of going beyond positive law rules when their enforcement leads to unfair results[27] and hence, both laws uphold concurrent values despite their philosophical differences. Unfortunately, Kamali echoes exactly what Hourani noticed as Muslim jurists' fear of such a latitude

[20] For natural law theory in modern Islam, see, e.g., Frank Griffel, "The Harmony of Natural law and shari'a in Islamist Theology," ed. Abbas Amanat and Frank Griffel, in *Shari'a: Islamic Law in the Contemporary Context* (Stanford, California: Stanford University Press, 2007).

[21] Taqī al-Dīn Aḥmad Ibn Taymiyya, *Darʾ Taʿāruḍ al-ʿAql wa al-Naql*, ed. Mohammad Rashād Sālim (Riad: Mohammad Bin Saūd University Press, 2nd ed, 1991), 1: 6.

[22] Ibn Taymiyya, *Darʾ, 1: 20*

[23] A. J. Arberry, *Revelation and reason in Islam* (London: George Allen & Unwin, 1957), 9.

[24] Cited in, Hourani, *Reason and Tradition in Islamic Ethics,* 60

[25] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Kuala Lumpur: Ilmiah Publishers, 1998), 245.

[26] Ibid.

[27] Ibid.

Istiḥsān might lead to in case of misuse[28]. For this reason, Kamali maintains that while western notion of equity regards natural law as superior to any other legal rule, *Istiḥsān* operates only under the dominant dictates of the divine law[29]. This reservation is pointless given the fact that nature is nothing but a physical revelation of God. What is authored by God in nature is supposed to be the same as what God has incorporated in scripture. Since equity and *Istiḥsān* are believed to prevent injustices emanating from the enforcement of some rules of law, and since fairness is an absolute value in itself, it follows that any legitimate tool used to accomplish it must be superior to any other tool albeit a revealed text because the text is open to interpretation and does not, in matters of law, express its import directly. *Istiḥsān*, literally, means to deem something good. Technically, it refers to a juridical method of reasoning whereby the jurist is compelled to prefer a new ruling for a case over an existing one fitting the same case if the latter's enforcement leads to injustice. This implies that the new ruling comes after a reconsideration of the case and that the jurist uses his discretion to depart, justifiably, from a juridical opinion to another in order to achieve justice and equity; and avoid unfairness. *Istiḥsān* has been subject to continuous attacks from *Shāfiʿī* and his followers on the ground that juristic preference means playing the role of a lawgiver. Their argument goes on to maintain that since only God and His prophet have the primary authority to establish laws, *Istiḥsān* is nothing but interfering in the business of authoritative lawgiver and thus, should be discredited as a source of law. *Shāfiʿī* position, in jurisprudence, echoes well the *Ashʿarite*'s theological attack on the ethical objectivism of *Mu'tazila* by ridding human reason off any independent authority to formulate laws outside the dictates of scripture. *Shāfiʿī*'s line of reasoning appears to disfavor juristic discretion as a method of inference since it is based on an independent consideration of utility. *Istiḥsān* as a Hanafi tool of legal reasoning refers to the act of dismissing a result reached by analogy when the jurist finds that it hinders the achievement of something he deems useful. The criterion here is the general human interest which operates as a corrective instrument in legal reasoning. Therefore, *Istiḥsān* is, according to Goldziher, similar to the Roman legal principle of *utilitum publicum*[30]

Despite the pioneering status of *Shāfiʿī* as the founder of *Uṣūl Al-Fiqh*, other Islamic schools of law were adamant in accepting *Istiḥsān* as a legitimate source of law allowing the jurist to avail of his own discretion in issuing legal rulings.

SHĀṬIBĪ ON NATURAL LAW

Shāṭibī's contribution to Islamic law has been unique and remarkable. Although a devout *ashʿarite*, he seems to depart a great deal from the extreme views of his predecessors. This is evident from his methodological approach in which he was able to distance, as Emon argues, "the theological implications from his legal philosophy"[31] allowing him to "elaborate on his legal theory and the authority of reason without running into any problematic theological implications"[32]

Part of *Shāṭibī*'s project in his *magnum opus Al-Muāfaqāt* is the place of reason in the formulation of legal rulings. In fact, it would be an exaggeration to claim with Emon that this was his central aim[33]. *Shāṭibī* begins his analysis with a significant idea. He argues that the principles of Islamic law are definitive given their universal aspect (*Kulliyāt*). According to him the universality of *Shariʿa* and its definiteness are predicated on induction which leads to certainty or on rational principles which are in turn definitive[34]. He adds that had the universals of *Shariʿa* been speculative, they would have not been derived from reason[35]. He divides rational knowledge into three categories which he calls values of reason (*Aḥkām Al-ʿaql*): 1- what is dictated by reason as necessary. 2- what is possible or probable. 3- what is impossible. These three categories, being mental constructions, must be consolidated by their materialization in reality[36]. This means that what is rationally possible may not take place in reality and what is mentally impossible may turn out to be a reality. These rational premises of *Shāṭibī* seem to be promising for the aim of establishing a legal theory rooted in human rationality. Unfortunately, as he refers to theology for the first time, he leaves much to be desired. He, like his *Ashʿari* predecessors, argues that the activity of reason is allowed only under the ambit of revealed proofs (*Adilla Samʿiyya*)[37] and thus, reason based proofs cannot inform us independently, because "reason

[28] Hourani, *Reason and Tradition in Islamic Ethics,* 60-61

[29] Kamali, *Principles of Islamic Jurisprudence*, 245-246

[30] Mushammad Khalid Masud, *Shāṭibī's Philosophy of Islamic Law* (Kuala Lumpur: Islamic Book Trust, 1995), 129.

[31] Koujah, Rami, "A Critical Review Essay of Anver M. Emon's *Islamic Natural Law Theories*. *Journal of Islamic and Near Eastern Law*, 14(1), 2015, 14 uclalaw_jinel_29066. Retrieved from: http://escholarship.org/uc/item/6vh2f829

[32] Ibid.

[33] Ibid., 13

[34] Abū Isḥāq Al- Shāṭibī, *Al-Muāfaqāt fī Uṣūl* Al-Sharīʿa. ed. Abdallah Darraz (Cairo: Al-Maktaba Al-tijāriyya Al-Kubra), 1: 29

[35] Ibid., 30

[36] Ibid.

[37] Ibid., 35

is not a legislative agent as it is made clear in theology"[38]. The vexing question here is: why would *Shāṭibī* advocate two contradictory positions without even noticing that? He begins with granting reason the attribute of definiteness as one tool establishing the universals of law. But, later on, he recants this position arguing that reason cannot act as a legislative agent independently from revealed texts. How can a universal be dependent on another universal? And why would one of them be subjugated to the other had it not been for theological concerns which are supposed to be distanced from legal analyses? *Shāṭibī,* himself, asserts that what is based on a speculative proof is also considered speculative[39]. Should not this imply that what is based on a definitive proof must be definitive as well?

One of the basic tenets of natural law theory is that any legal ruling is binding only when it protects human interests. Utilities are essentially communal and occasionally individual. This is emphasized in order to prevent the crafting of laws for the purpose of serving some individual or group interests at the expense of common goods. *Shāṭibī* clearly subscribes to this thesis. He claims, like all Muslim scholars preceding him, that Islamic law is there to serve and protect human interests. These interests he classifies in three main categories: the necessities *(ḍarūriyyāt),* the complementary *(ḥājiyyāt)*, and the embellishments *(taḥsīniyyāt)*. The necessities are five: faith, life, procreation, property, and intellect[40]. *Shāṭibī* claims that the five necessities are known to the Muslim Ummah through consensus and that they cannot be proven via solitary texts but by way of a corpus of texts or the intent of the lawgiver[41]. Thus, human interests are religious givens and not natural or rational constructs. For this reason, *Shāṭibī,* drawing from his *Ashʿari* theology, confidently, maintains that the only interests to be considered in Islamic law are those given by the lawgiver as such[42]. In other words, interests which are not intended by revelation and known only through reason are not regarded as legal interests to be protected by law. Many evident proofs go against his assertion. Take for example the protection of human life. This public interest is self-evident and requires no revelation to establish it as an ultimate purpose of law. There should be no argument about this interest being encouraged or confirmed by revelation. Cicero, a pagan Roman, had already articulated different ultimate aims or objectives of law. According to him, life, procreation or family, knowledge, friendship, quest for excellence, and beauty are basic goods[43]. Cicero had no revelation on the basis of which he had been able to theorize on public interests in a way very similar to what Muslim scholars, later, called the objectives of Islamic law. In fact, since Plato and why not even before him, human nature abhors, at least theoretically, any inclination towards violating basic goods. Platonic wisdom reads, "one should never do what one knows to be wrong, even for the sake of some greater good, or even if one has been wronged"[44]. The basic dictates of what ought to be good is, therefore, self-evident and known even to those who reject revelation. In logical terms, some mathematical self-evident truths are accepted by everybody because they are intelligible and require no further demonstration. Two distinct entities when added to each other sum up in two. Likewise, if good is what should be done, it follows that doing good in order to violate good results in a clear contradiction[45]. For instance, to kill is bad and under no sound reasoning could it be good even in a situation of self-defense as the aim here is not to kill but to protect a life. What *Shāṭibī* and all adherents to Sunni *ashʿari* theology miss here is that the universals of *Sharīʿa*, as moral absolutes, are supposed to be human universals and not merely or solely predicated on some revealed injunctions. But human universals are practically non-existent given the conventionality of law. That is to say that what is a law in a given society might be an immoral and therefore, illegal act in another society. Why would we, then, want *Shāṭibī* to go beyond the confines of his own religion to embrace humanity as a whole? The answer is that *Shāṭibī*'s book *al-Muāfaqāt* is not merely a book of law in its positivist meaning. Rather, the book aims at constructing a general and comprehensive theory of higher order objectives of law. Practically, the separation between law and morality is instrumental for compliance. In other words, law is devised to be applied and individuals are supposed to obey the law even when they have reservations as to whether or not it is the best law to comply with. However, a theory about the objectives of law is different. For, the objectives of law are structurally related to a higher ethical theory. For instance, justice, as an objective, is not contextually contingent and thus, although different laws may diverge in the way justice is administered or the extent to which it is properly served, justice as an objective of law remains the same regardless of applications and contexts.

[38] Ibid.

[39] Ibid., 35

[40] Ibid., 38

[41] Ibid., 41

[42] Ibid.

[43] Brown, Montague. "Islam And The Natural Law." *The Levantine Review* 4, no. 1 (2015): 23. doi:10.6017/lev.v4i1.8718.

[44] Ibid., 25

[45] Ibid., 24

Mustapha Tajdin
Khalifa University for Science and Technology,
Abu Dhabi-UAE
Email: mtajdin@pi.ac.ae ; tajdinmustapha222@hotmail.com