

On Natural Law and Shari`ah

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Introduction

Contemporary writers are sharply divided on the issue of the compatibility of the notion of "natural law" as it is contemplated in the West with the Islamic concept of shari`ah. This issue was highlighted in last year's IIIT summer seminar in contesting perspectives offered by a number of panelists, most notably in the views of Mahmood Ayoub and Robert Crane. I shall outline the historical development of both of these notions, explore the points of congruence and tension, and offer tentative conclusions about their reconciliation that should make a fertile starting point for continued discussion and analysis.

A principle issue is the fact that the understanding of natural law itself changed in the West between the time of the ancient Greeks and modern times. I shall argue that the stereotype of a "Western" understanding of natural law that has been uniform through time is fallacious and that, to the contrary, ancient and modern Western conceptions of natural law are in tension with one another in ways that parallel the debates in Islam between, for example, the philosophers and al-Ghazali.

I shall propose an analytical framework for understanding the issue in which we segregate the notion that natural law constitutes principles about nature that are logically unavoidable (epistemological rationalism) from the notion that it constitutes principles that are God-given (divinely dictated). I shall attempt to adduce Qur'anic textual support for the latter conception and then to demonstrate that this understanding is found in Islamic scholarship in opposition to epistemological rationalism. Further, by comparing the writings of al-Ghazali and Ibn Tufayl with modern Western writers like John Locke I shall argue that modern Western natural law theory is closer to the view of law as God's word than to the ancient Greek notion of axiomatic truth.

Finally, I shall argue that not only is the debate of natural law vs. Shariah misframed, but that it is misguided in that the important debate today is between natural or divine law on one hand and positive or man-made law on the other. The important question is the one put to us by the Qur'an: Shall we be ruled by Allah or by men?

The Evolution of the Notion of Natural Law

There are, and have been since the death of the Prophet, arguments within Islam, between Muslims whose piety should not be questioned, disputes over the Shariah. Muslims often try to deny the existence of such disputes, or to minimize their significance out of an understandable desire for unity, but we should not lose sight of the unintended and undesirable consequence that an artificial pretense of unity constitutes a betrayal of truth. The tendency to homogenize all Muslim thought into a single position that is then juxtaposed against an equally artificial homogenization of Western thought not only oversimplifies complex ideas but distorts history until we lose sight of the evolution of ideas within a culture, the spread of ideas across cultures, and ultimately of the great truth that the important intellectual battle is not between a community called Muslims and a community called the West, but between truth and error.

Turning to the issue of natural law, we must recognize that the understanding of this concept in the West has changed with time. In my talk at the 2008 IIIT scholars' institute¹ I discussed how much the notion of science changed from the way it was practiced in ancient Greece to the way it is practiced in the West today, and to the fact that Islam played a vital role in that transition. The methodology of science requires some notion of natural law as the object of its inquiry. To the ancient Greeks that law was axiomatic, unavoidable, and could not conceivably be different from what it is. In modern times, we recognize that there are multiple paradigms within which self-consistent natural laws can exist. The particular set of natural laws that governs the universe in which we live, in the sense of the hard sciences, cannot be determined by sheer logic from some abstract and self-evident set of principles. Therefore, science must have an empirical side that, as I have explained elsewhere,² was unpalatable to the Greeks.

The notion of natural law that may apply in the social sciences is subject to a completely analogous analysis. The laws of social science, even if we stipulate them to have a normative component, must be related in some way to human nature. Human nature is what it is, but it is what it is by the will of God. Yet even someone who denies the existence of God must confess that human nature could have been otherwise and man's DNA could have been different had the evolutionary steps which gave rise to his existence had been different. Therefore the laws that govern human behavior cannot be known *a priori* and they can only be derived if one has some clear understanding of human nature. Such an understanding of human nature may be revealed to us by God or may be arrived at by a systematic and careful study of human society and human psychology, or both, but it cannot be deduced logically from some simple set of axioms about human behavior.

The change in the understanding of natural law in the West is clearer if one compares the empiricism of David Hume against the rationalism of Aristotle, the methodology of Isaac

¹ Imad-ad-Dean Ahmad, "Qur'an and Science," IIIT Summer Institute 2008
<http://www.minaret.org/quranandscience.pdf>. Accessed 8/2/09.

² Imad-ad-Dean Ahmad, *Signs in the Heavens*, 2nd ed. (Beltsville, MD: amana, 2006).

Newton against that of Claudius Ptolemy, the historical approach of Toynbee against that of Herodotus, the psychological analyses of Freud against those of Hippocrates, or the governance theories of Locke against those of Plato. Changes in the understanding of Shariah may be more difficult for Muslims to acknowledge, despite their undeniable reality. Muslims want to depict the historical debates over fiqh as being centered on minor juridical differences, for example, between Imam Malik and Imam Shafi as to where one puts his hands during prayer. The serious fundamental disputes, as between the Mu`atazila and the Asharites are condemned to obscurity by branding the Mu`atazila as heretics. I take exception to such evasion and invoke no less an authority than al-Ghazali in support of my exception:

[E]very group accuses those who hold views contrary to its own of being unbelievers and of deeming the Prophet to be a liar... The Asharite brands the Mu`atazilite an Unbeliever, claiming that the Mu`atazilite deems the Prophet to be a liar when the latter informs us of the beatific vision (*ru`yat Allâh*) and of God's knowledge, power, and (other) attributes. The Mu`atazilite brands the Asharite an Unbeliever, claiming that (the latter's) belief in the divine attributes constitutes (belief in) a multiplicity of eternals and the denial of the truth of what the Prophet taught in the way of monotheism (*tawhîd*). And nothing will free you from the likes of this dilemma save a firm grasp of the meaning of the "deeming to be a lie (*takdhîb*)" and "deeming to be true (*tasdîq*)", and the reality of how these designations apply to statements by the Prophet. But once this becomes clear to you, so too will the extremism of those groups that go around branding each other Unbelievers.³

Al-Ghazali's explanation as to why such radical disagreements do not necessarily mean that one of the disputing groups is engaged in heresy lies in his insight that the disagreements are over the differing interpretation of the Prophet's dicta rather than in differences over their veracity.⁴ Thus holding a variant, or even incorrect, interpretation of a Qur'anic verse does not necessarily constitute heresy. Once we accept this fundamental principle of tolerance we are free to take a meaningful look at the differences in interpretations between the scholars. When we do that, we are able to see that differences in the understanding of what constitute Shariah can be as significant as differences over what constitutes natural law. Indeed, I shall argue that the discourse between ancient and modern Western conceptions of natural law parallel the debates in Islam between, for example, the philosophers and al-Ghazali.

³ Sherman A. Jackson, *On the Boundaries of Theological Tolerance in Islam: Abu Hamid al-Ghazali's Faysal al-Tafriqa* (Oxford: Oxford Univ. Press), p. 93.

⁴ Jackson, pp. 93-96, with examples on pp. 96-100.

Framing the Discussion

I now propose an analytical framework for understanding this issue. Specifically, I wish to consider two opposing notions of natural law. In one case, which I shall call epistemological rationalism, natural law is conceived as principles about nature that are logically unavoidable. In the other, which I shall call the tawhidi, natural law constitutes principles that are God-given (divinely dictated). Both are opposed to the notion that there is no natural law of any sort.

I begin by considering verses of the Qur'an that bear on these questions. I will not bother to demonstrate that the Qur'an supports the notion of *some* kind of God-given law. This is too obvious a point to waste effort on it. However, it is instructive to ask whether the law which the Qur'an addresses is the law of epistemological rationalism, tawhidi, or some other sort? The natural law of epistemological rationalism is fixed and absolutely unavoidable. Not only does it bind God, but God himself could not make it any other way. The tawhidi law binds God not because He cannot have made the law differently, but because He chooses to bind himself. For example,

When those come to thee who believe in Our Signs say: "Peace be on you: **your Lord had inscribed for Himself (the rule of) Mercy**: verily if any of you did evil in ignorance and thereafter repented and amended (his conduct) lo! He is Oft-Forgiving Most Merciful."⁵[Emphasis added]

Allah is bound to the rule of mercy not by His nature, but by His choice. Nonetheless, bound He is, and humans may rely upon His mercy when they repent and amend their conduct.

Another way of looking at it is that if Allah makes a promise in His revelation, then we may be certain that His promise is true. Certainty that a promise of future action is true means the Lord is bound to His promise. Thus, for example, as Allah has promised paradise to the martyrs, we may be certain that the martyrs will achieve paradise, giving this promise the power of law. We may then say that the attainment of paradise is in the nature of martyrdom. However, we are not claiming that Allah could not, had He willed, made no connection between martyrdom and paradise. The natural law of epistemological rationalism would require that God is *a priori* obligated to send martyrs to paradise, while the tawhidi natural law makes such an obligation *a posteriori* to God's will that martyrdom lead to paradise.

I want to make clear that I am not using the term "natural law" here in some metaphorical sense. I am not saying that because Allah has linked paradise to martyrdom, it is "as if" paradise is natural to martyrdom, for I use the same language in speaking of the physical laws which Allah has decreed. In other words, a God-given natural quality is

⁵ Abdullah Yusuf Ali, *The Holy Qur'an: Text Translation and Commentary* (New York: Tarique Tarsile Qur'an, 2nd ed. 1988), 6:54.

ontologically inherent rather than *logically* inherent This is found in the Qur'an as well in the story of Abraham:

So also did We show Abraham the power and the laws [*malakût*] of the heavens and the earth that he might (with understanding) have certitude.

When the night covered him over he saw a star: he said: "this is my Lord." But when it set he said: "I love not those that set."

When he saw the moon rising in splendor He said: "This is my Lord." But when the moon set he said: "Unless my Lord guide me I shall surely be among those who go astray."

When he saw the sun rising in splendor he said: "This is my Lord; this is the greatest (of all)." But when the sun set he said: "O my people! I am (now) free from your (guilt) of giving partners to God.

"For me I have set my face firmly and truly toward Him Who created the heavens and the earth, and never shall I give partners to God."⁶

Yusuf Ali here translate *malakût* as "power and laws" instead of as "dominion" (as Muhammad Asad does in his translation) because of the context of the succeeding verses. The references in those verses to the natural phenomena of the setting of these heavenly bodies imply their subjugation to the laws Allah has decreed for them. Allah's dominion is our natural law because Allah has in His mercy made the order of nature abide by coherent principles and not made it it subject to the arbitrary caprice that the ancients attributed to the pagan gods and goddesses. Indeed, the existence of natural law is a demonstration of Allah's unity, for "If there were in the heavens and the earth other gods besides God there would have been confusion in both! But glory to God the Lord of the Throne: (high is He) above what they attribute to Him!"⁷ The universe is not a place where your wife may turn into frog at any moment, but a place where "It is not permitted to the Sun to catch up the Moon nor can the Night outstrip the Day: each (just) swims along in (its own) orbit (according to Law)."⁸

This general applicability of natural law is not restricted to the laws of physics but applies to the laws of human intercourse. I shall limit myself to a single demonstration, the laws of sociology alluded to in the Qur'an and subsequently discovered by Ibn Khaldun, as accounting for the rise and fall of civilizations.

And how many cities with more power than thy city which has driven thee out have We destroyed (for their sins)? And there was none to aid them.⁹

⁶ Ali, 6:75-79.

⁷ Ali, 21:22.

⁸ Ali, 36:40.

⁹ Ali, 47:13.

There is no need to quote at length the many places in which the Qur'an emphasizes the fall of great civilizations for their defiance of God's law. Instead, I wish to give Ibn Khaldun as an example of a classical Islamic scholar who elaborated on this phenomenon of natural law as sign of God's dominion in the book of history. His scientific examination of history lead him to pronounce, in his *Muqaddamah* ("Introduction" to history) the discovery of the particular laws by which dynasties, indeed civilizations rise and fall. Briefly, he argued that dynasties are established by men of "Bedouin" inclinations, meaning with no taste for luxury, who are motivated by a sense of social solidarity (*'asabiyya*), seeking what is best for the group. This results in sound policies that make the dynasty successful. This very success, however, brings about a rise of urbanization and luxury, and future generations of rulers, raised in this luxury, acquire the belief that the purpose of their rule is the distribution of luxuries to their favorites rather than the perpetuation of sound policies for the general welfare. This causes a decline in the civilization, which the luxury-addicted rulers attempt to reverse by increasingly shortsighted and unsound policies that exacerbate the situation until the civilization, or at least the dynasty, collapses. Consider this specific example from Ibn Khaldun's insights: although the use of sound currency helps the economy of the nation to thrive, later rulers, desiring a greater abundance of luxury goods, debase the currency in order to increase their ability to acquire luxuries, and undermine the economy's ability to create them in the process.

It should be clear, then, that the tawhidi view of natural law is not a denial of natural law, but only an emphasis that this law exists by God's will. Further, the success of Ibn Khaldun in founding the science of sociology (let alone the success of the Muslim astronomers, physicists, geographers, opticians, physicians, etc., whose works brought into being the modern scientific method)¹⁰ is sufficient refutation of the claims of Western secularists that the Islamic view that things are what they are by God's will rather than by the inherent and unavoidable nature of material reality makes it impossible for Muslims to engage in serious scientific research. What remains is for us to clarify the parallel the rejection of the epistemological rationalism of the Greek notion of natural law by al-Ghazali with the views of modern natural law advocates like Locke.

It is by an acknowledgement of the connection between human nature and the laws governing man that reason can be understood to play a role in the understanding of the law. In Shia jurisprudence, reason is identified as a source of the law.¹¹ Like the Shia, the Maturidi branch of the Hanafi school acknowledges the ability of reason to discern the law, but unlike the Mu'tazila, both reject the notion that nature binds God, but rather hold that it is God Who binds nature.¹² Thus, the Maturidi are moving away from the epistemological rationalism of the philosophers in the direction of a divinely ordained natural law.. It is al-Ghazali, however, who carries the argument to its full conclusion.

¹⁰ See Ahmad.

¹¹ Bernard G. Weiss, *The Spirit of Islamic Law* (Athens, GA: Univ. Of Georgia, 1998), p. 36.

¹² *Ibid.*

Let us then turn to al-Ghazali's monumental attack on epistemological rationalism, *The Incoherence of the Philosophers*.¹³

This book had a completely destructive agenda. (Al-Ghazali's constructive epistemology is the subject of *The Deliverance from Error*.) In *The Incoherence* he restricts himself to demolishing the pretensions of epistemological rationalism, in large part by using the philosophers' own tools. Although al-Ghazali's main target is the claim that reason is a sufficient guide to knowledge of God, his demonstration applies equally well to all claims of the validity of pure reason as a guide to certain knowledge beyond purely theoretical realms such as mathematics.¹⁴ Al-Ghazali argues that the knowledge of the divine is unattainable by pure logic. The knowledge of natural law is also unattainable through pure logic. Although al-Ghazali frequently is represented as attacking reason, or rationality, in *The Incoherence*, this is not the case. Not only *The Incoherence*, but most of al-Ghazali's writings, demonstrate his aversion to irrationality. However, in his epistemology, it is the fallacy that God's will (including natural law) is discoverable by unaided reason that is the target. Let us focus on the most celebrated (and perhaps most misunderstood) passage in his argument, on the flammability of cotton.

The connection between what is habitually believed to be a cause and what is habitually believed to be an effect is not necessary, according to us. But [with] any two things, where "this" is not "that" and "that" is not "this" and where neither the affirmation or the one entails the affirmation of the other nor the negation or the one entails negation of the other, it is not a necessity of the existence of the one that the other should exist, and it is not a necessity of the nonexistence of the one that the other should not exist—for example, the quenching of thirst and drinking, satiety and eating, burning and contact with fire, light and the appearance of the sun, destined decapitation, healing and the drinking of medicine, the purging of the bowels and the using of a purgative, and so on to include all that is observable among connected things in medicine, astronomy, arts, and crafts. Their connection is due to the prior decree of God, who creates them side-by-side, not to its being necessary in itself, incapable of separation. On the contrary it is within [divine] power to create satiety without eating, to create death without decapitation, to continue life after decapitation, and so on to all connected things. The philosophers denied the possibility of this and claimed it to be impossible.¹⁵

Notice that al-Ghazali is distinguishing between "habitual" connection and logical connection. That he does not completely reject the notion of logical connections underscores that he is not rejecting rationality. He is castigating the philosophers for confusing habitual connection with logical connection, that is, for asserting a logical

¹³ al-Ghazali, *The Incoherence of the Philosophers*, trans. by el E. Marmura (Provo: BYU, 2000).

¹⁴ For an interesting discussion of the implications of al-Ghazali's ideas on empirical knowledge see John Bowker, *The Religious Imagination and the Sense of God*. Oxford, Oxford University Press, 1978, pp. 192-243.

¹⁵ al-Ghazali, p. 166.

connection where none exists. The laws of nature demonstrate habitual connections, which are “due to the prior decree of God.” That which God has decreed is not the less real, nor even the less natural. It is simply not, *contra* the philosophers, a logical necessity. Thus, God may, through miraculous intervention make a fire cool for Abraham, but he may not make a four-sided triangle since a triangle is by definition (and therefore by necessity) limited to three sides.

The upshot of this analysis is not to deny the possibility of science, but to transform it from an exercise in mere logic into a study of the divine will, i.e., of God’s signs in the heavens and on the earth. In the same way the social sciences become the study of God’s signs in ourselves. That is to say, the social sciences are the study of laws of human nature, which is, like the nature of physical reality, God-given. As the laws that govern human behavior are God given, the knowledge of revelation is relevant to its study.

Ibn Tufayl makes an interesting case study, for he was a student of al-Ghazali and, according to G.A. Russell, an influence on John Locke.¹⁶ In his novel *Hayy ibn Yaqzan* (Alive the Son of Awake),¹⁷ Ibn Tufayl tells the story of a spontaneously generated perfect reasoning being who lives alone on an island where he educates himself in the laws of the natural sciences and an appreciation of the glory of the divinity. The arrival of an ordinary human being from a nearby island provides the opportunity for Hayy to go and live with the humans and to attempt to share with them his insights. Although he fails in that mission, in his tenure among them he acquires an understanding of human nature and an appreciation of the wisdom and mercy in God's providing revelation to guide them to follow the natural law, the purpose of which is to bring them success.

The content of the narrative provides a perfect support for the Lockean notion of the mind as *tabula rasa* where ideas are acquired by means of sensory experience and reasoning as opposed to the Cartesian notion of their innateness.¹⁸

In 1671, the year that Locke abandoned his earlier pragmatic philosophy to embrace the idea of natural rights, Edward Pococke translated *Hayy ibn Yaqzan* into Latin under the title *Philosophicus Autodidactus*.¹⁹ Russell argues for a critical role for the *Philosophicus Autodidactus* in the evolution of Locke’s thinking on natural law. A meeting that year attended by both Locke and James Tyrell began as a discussion of the “principles of

¹⁶ G.A. Russell, "The Impact of the Philosophus Autodidactus: Pockokes, John Locke, and the Society of Friends," *The "Arabick" Interest of the Natural Philosophers in Seventeenth Century England* (Brill's Studies in Seventeenth Century England; Leiden: E.J. Brill, 1994), pp. 224-265.

¹⁷ Ibn Tufayl's *Hayy ibn Yaqzan*; a philosophical tale translated with introd. and notes, by Lenn Evan Goodman (NY: Twain, 1972).

¹⁸ Russell, p. 231.

¹⁹ Russell, p. 233.

morality and revealed religion” and turned to include a discussion of the nature of human understanding.²⁰

We need not accept the validity of this connection in order to acknowledge the parallels in Locke’s understanding of the natural law to what I have outlined above.

And thus, in the state of Nature, one man comes by a power over another, but yet no absolute or arbitrary power to use a criminal, when he has got him in his hands, according to the passionate heats or boundless extravagancy of his own will, but only to retribute to him so far as calm reason and conscience dictate, what is proportionate to his transgression, which is so much as may serve for reparation and restraint. For these two are the only reasons why one man may lawfully do harm to another, which is that we call punishment. In transgressing the law of Nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure God has set to the actions of men for their mutual security, and so he becomes dangerous to mankind; the tie which is to secure them from injury and violence being slighted and broken by him, which being a trespass against the whole species, and the peace and safety of it, provided for by the law of Nature, every man upon this score, by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one who hath transgressed that law, as may make him repent the doing of it, and thereby deter him, and, by his example, others from doing the like mischief. And in this case, and upon this ground, every man hath a right to punish the offender, and be executioner of the law of Nature.²¹

The question is whether Locke’s reference to God above is merely rhetorical flourish or a substantive element of his understanding of natural law. The same question may be asked of numerous other declarations in Locke’s essay such as:

God hath certainly appointed government to restrain the partiality and violence of men....²²

Where there is no judge on earth the appeal lies to God in Heaven...²³

[W]e see the positive law of God everywhere joins them [parents and children] together without distinction....²⁴

²⁰ Russell, pp. 231-2.

²¹ John Locke, *An Essay Concerning the True Original Extent and End of Civil Government*. (1690). <http://www.4lawschool.com/lib/locketable.htm> (accessed 7/21/09).

²² Locke, II, 13.

²³ Locke, III, 20.

Adam was created ... capable from the first instance of his being to ... govern his actions according to the dictates of the law of reason God had implanted in him....²⁵

For God having given man an understanding to direct his actions, has allowed him a freedom of will and liberty of acting, as properly belonging thereunto within the bounds of that law he is under.²⁶

“God hath made it their business to employ this care on their offspring, and hath placed in them suitable inclinations of tenderness and concern to temper this power, to apply it as His wisdom designed it, to the children's good as long as they should need to be under it....”²⁷

GOD, having made man such a creature that, in His own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination, to drive him into society, as well as fitted him with understanding and language to continue and enjoy it.²⁸

[F]orce is to be opposed to nothing but to unjust and unlawful force. Whoever makes any opposition in any other case draws on himself a just condemnation, both from God and man....²⁹

In most cases one could interpret the reference to God either as an assertion of the divine source of the authority or of the rights under discussion. Further, one might argue that in those cases where appeal to divine authority seems likely, that the argument is unaffected if one substitutes “nature” for “God.” There seems to me to be one insurmountable problem with such an analysis, and that is the context. In the earlier part of the essay (where he most frequently mentions God) Locke is addressing man in a state of nature. Any discussion of the enforcement of natural rights in a state of nature absent the belief in a higher power than man cannot avoid degenerating into a might-makes-right argument, a variety of the pragmatism that Locke had abandoned. Further, we are well aware that Westerners have similarly accused Muslims like ibn Khaldun of being secularists who disguised their secularity under a cloak of religious language. I believe that writers like Locke and Jefferson who invoked the divinity in their arguments for natural law had an understanding of natural law closer to the Muslim view of law as God’s will than to the ancient Greek notion of axiomatic truth. The departure from this in modern thought comes not from Locke, but Thomas Hobbes. For Hobbes, the state of nature is a brutish state because there is no Leviathan state to constrain him into

²⁴ Locke, VI, 52.

²⁵ Locke, VI, 56.

²⁶ Locke, VI, 58.

²⁷ Locke, VI, 60.

²⁸ Locke, VII, 77.

²⁹ Locke, XVIII, 204.

obedience to the laws that would be for his own good. Locke is relatively optimistic, for the divinity is in the long run a better enforcer than any state. For Locke the state is necessary only because men are not the impartial judges of their own disputes. For Hobbes, men are inherently evil and absent the authority of the state will live in a life of “no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.”³⁰ Hobbes may have been influenced by a Christian pessimism about man’s sinful nature, but he opened the door to a secularized and materialistic conception of natural law in modern political thought.

Substantive Debate

Thus far, I have argued that the debate of natural law vs. Shariah has been misframed. I now wish to add that it is misguided in that the important debate today is not between natural law and divine law, but between any fixed law (natural or divine) and positive (that is, man-made) law. The notion of positive law is as ancient as the notions of divine or natural law. Thus, in Sophocles immortal play *Antigone* the conflict between the eponymous protagonist and her uncle Creon is a dispute over the nature of just law. Creon, having just been crowned king of Thebes, invents a law that would prevent Antigone's late brother from having a proper burial to punish the dead man for having led foreign troops against his own city. Creon believes that it is his right as the ruler of the city to make law. Antigone, who buries her brother in violation of Creon’s innovation, believes that the making of law is for the gods. Further, Antigone appeals to the ancient traditions of the city in her fight against Creon’s innovation (*bid’ a*). Finally, she appeals to reason by invoking common decency against Creon’s tyranny. Creon himself, however, also invokes reason claiming that his affront to the dignity of the dead, not to mention whatever consequences it may hold for the deceased’s status in the afterlife, is necessary for the promotion of the interests of the state. Thus reason, when divorced from religious guidance, may be used on either side of the argument.

In modern times absolute monarchy has fallen out of favor, but the advocates of positive law persist. They kneel before a new sovereign, not the monarch, but “the People.” It is “the People,” or more properly speaking the majority, who now may invent legislation according to their whims, without regard to reason, tradition, divine writ, or nature itself.

We live in the era of democracy, or popular sovereignty. The dominant paradigm is that the people shall rule. There are good practical reasons why they should. As Henry David Thoreau astutely observed, the reason majority is allowed to rule “is not because they are most likely to be in the right, nor because this seems fairest to the minority, but because they are physically the strongest.”³¹ The appeal of such pragmatism is limited, however,

³⁰ Thomas Hobbes, *Leviathan, or, Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (Chicago:Encyclopaedia Britannica, 1952), p. 85.

³¹ Henry David Thoreau, “Civil Disobedience,” 4. <http://thoreau.eserver.org/civil1.html>. Accessed 7/22/09.

and there is no strong moral argument for rule by the majority. Thus, Thoreau, continues, “But a government in which the majority rule in all cases cannot be based on justice, even as far as men understand it. Can there not be a government in which majorities do not virtually decide right and wrong, but conscience? — in which majorities decide only those questions to which the rule of expediency is applicable?”³²

The advocates of positive law will disagree with Thoreau and argue that what the majority deems to be right is right by definition. *Vox populi, vox Dei*. However, there are many varieties of democrats. To a theodemocrat like Maulana Maududi, the people must be guided in their decisions by the Shariah. In the absence of the Prophet, we may leave the interpretation of the Shariah to the people, but only interpretation (*fiqh*) and not the invention of law out of whole cloth (*bid`a*). The natural law advocates have a perfectly analogous position. The people may be the final arbiters as to what the natural law is, but they have no right to abuse their sovereignty by willfully or with gross negligence ignoring the laws of nature. Thus Thoreau will argue that when the injustice of invented law is great enough the individual has no duty to obey it. Indeed he has a duty to disobey it. Thomas Jefferson goes further, calling for armed rebellion, and declaring, “the tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants.”³³

I have put forward the claim that natural law is closer to divine law than to positive law. In order to scientifically test this assertion one must ask whether the conclusions of the natural law theorists as to the specifics of the law are closer to the dicta of Holy Scripture than to the products of modern legislatures. We must be cautious here. Modern legislatures are in part influenced by both Holy Scripture and natural law theory. However, they are also influenced by popular pressure and special interest groups. Therefore, any scientific comparison will require sorting out the degree to which legislation has been influenced by human whims. For example, the anti-slavery movement has been falsely portrayed as a triumph of modern secularism over religious prejudice. In reality, the anti-slavery movement was largely driven by pietist sentiments. The most fanatical opponent of American slavery was John Brown whose religious motivations are well documented.

Another complicating factor is the consideration as to whether religious jurisprudence accurately reflects the objectives of holy scripture or the desires of the human jurists who have codified the law. This brings us to the controversial question of what is the Sharia? Is it the literal words of the Qur'an and authentic hadith, or is it the straight path as the literal translation of Sharia meaning “the path to the well” suggests? Here we tread on complex and controversial terrain. Nonetheless, the very fact that the science of fiqh exists illustrates that in Islam the law is not a human creation to be invented, but a divine creation to be discovered by human effort.

³² Ibid.

³³ Thomas Jefferson, November 13, 1787, letter to William S. Smith, quoted in Padover's Jefferson On Democracy, ed., 1939. http://quotes.liberty-tree.ca/quote_blog/Thomas.Jefferson.Quote.EFEC. Accessed 7/22/09.

So in Islam, the word *shari'ah*, which is usually translated as Islamic law, literally means “the path to the well.” Like the path to the well, like the natural laws of physics, Islamic law is whatever it is, and like the map to the path to the well, like the theories of the physicists, the struggle of the scholars to understand, is the jurisprudence of Islam, called the *fiqh*. The books of jurisprudence written by these scholars contain their conclusions as to God wants us to do, after looking at the Qur'an, the practice of the Prophet, after considering what is equitable, what is in the public interest, etc.³⁴

Therefore, just as we must carefully sort out from the work of legislators what is their considered judgment as to the prescription of divine or natural law from the whims of the people or the special interests, so we must sort out in what is called *Sharia*, what serves the *maqâsid* (or higher ends) of the *Sharia*³⁵ and what is the intrusion of human will due to historical circumstance or the narrow vision of the *fuqaha*. Clearly, a systematic scientific demonstration of my claim is beyond the scope of this paper. Instead I shall take a few illustrative example of human legislation and compare it against the verses of the Qur'an and the prevailing views of the natural law theorists to document my point in the face of expected objections.

One objection that can be made is that whereas natural law theory is centered around the concept of human rights, humans have no rights under divine law. On this account, it is argued that the term *huqûq al insan* is a modern term that falsely gives the impression that human rights are a concept found in the classical Islamic heritage. While the term may indeed be recent, that does not mean that the concept to which it alludes is foreign to Islamic law. The *haqûq al `ibâd* are distinct for the *huqûq Allah* precisely because the former protect the rights of individuals.³⁶

Another objection that may be made to my claim is that the particular human rights adduced from scripture are different from those deduced by natural law theory. To the contrary, I find them remarkably similar.³⁷

The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by His order and about His business; they are His property, whose workmanship they are made to last during His, not one another's pleasure.³⁸

³⁴ Imad-ad-Dean Ahmad, “Islam, Commerce, and Business Ethics,” in *Business and Religions: A Clash of Civilizations?* Nicholas Capaldi, ed. (Salem, MA: Scrivener), p. 204.

³⁵ See, e.g., Jasser Auda, “Maqasid al Sharia and the Methodology of Understanding the Scripts,” IIIT Scholars Institute 2009.

³⁶ See, e.g., Zainal Azam B. Abd. Rahman, “Free to Act Within Limits Set by Allah,” (Institut Kefahaman Islam Malaysia, 4/26/2005). <http://www.ikim.gov.my/v5/print.php?grp=2&key=769>. Accessed 8/2/2009.

³⁷ Imad-ad-Dean Ahmad, “Life, Libery and the Pursuit of Happiness,” *Islamic Horizons* (July/August 2009). Pp. 23-27.

³⁸ Locke, II <http://www.4lawschool.com/lib/locke2.htm>.

Both the particular rights and the qualification that they exist because of our common servitude to the Divine Master are striking. Islamic law recognizes rights to life, religion, intellect, lineage, and property. Locke's use of the word "health" here should be taken to mean the integrity of the body, and coupled with life is found in the Qur'anic allusion to "'Life for life eye for eye nose for nose ear for ear tooth for tooth and wounds equal for equal...'"³⁹ The term possessions here is equivalent to the term "*mâl*" in Islamic law, that is to say, property. This leaves the expansive term liberty, which could be understood to include religion, intellect, and heritage, among other things.

A possible objection that could be made to my claim is that the natural law can provide no particular penalties for crimes. This, however, only means that the optimal punishments cannot be derived from theory alone. The only constraint on punishment placed by natural law is the rule of proportionality, that the punishment must fit the crime. This in no way contradicts the religious law, for verse 5:45, quoted above, clearly calls for proportionality, as does this verse:

The prohibited month for the prohibited month and so for all things prohibited there is the law of equality. If then anyone transgresses the prohibition against you transgress ye likewise against him. But fear God and know that God is with those who restrain themselves.⁴⁰

Although the immediate circumstance of this call for proportionality is the violation of the rules of warfare during the prohibited months, the text is explicit that the rule applies to "all things prohibited."

A more realistic objection would be to state that the vagueness of the proportionality rule allows for the possibility of positive law in specifying particular punishments for particular crimes. Muslims, however, have not shrunk from employing positive law for this purpose as long as the laws do not exceed the limits (*hudûd*) of scripture. The important element of "rule of law" is not that it eliminates human judgment completely, but that fixed laws such as divine writ, human constitutions, and even man-made laws are implemented in such a fashion as to constrain the subjugation of some men to others.

Democratic positive law is the old divine right of kings with the majority taking the role of Pharaoh and, therefore, it is a form of *shirk*. The question confronting us in the world today is not the medieval philosophical dispute over whether the laws of nature are axiomatic or God-given. The important question today is put to us by the Qur'an: Shall we be ruled by Allah or by men? "...fear them not but fear Me; and that I may complete My favors on you and ye may (consent to) be guided."⁴¹

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³⁹ Qur'an 5:45.

⁴⁰ Qur'an 2:194.

⁴¹ Qur'an 2:150.