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THE CROSSING POINT OF DIVINITY INFLUENCE
AND THOUGHT IN NATURAL LAW THEORY AND
ISLAMIC LEGAL PHILOSOPHY

BY

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A thesis submitted in fulfilment of the requirement for
the degree of Master of Comparative Laws

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ABSTRACT

The lines of discussion in this thesis run along the following areas: First, the rise and fall of persuasive value of the religious influence in natural law over man-made rules. Secondly, the position of religious influence in natural law theory once existed alongside Islamic legal philosophy, but this position is no longer so. This thesis is to find the crossing point and the cause(s) of the departure. Thirdly, the future position of man-made rules and western legal philosophy are uncertain. This thesis will find out the cause(s) of these uncertainties. Lastly, an unexplored dimension of legal philosophical approach is proposed in this thesis, which is, to consider if Western legal philosophy may adopt some principles of Islamic legal philosophy. Further, an uncharted common platform is proposed for the common good of mankind. The methodology adopted in this research is theoretical approach base. The main source of this research is from legal text books, articles and journals. There are many text books written on the areas of interest. Library research dominated the majority findings in this thesis. The findings in this research reveal that man-made rules are required to premise on divine guidance; otherwise, man-made rules will have no focus or direction. Therefore, efforts to trace the crossing point are essential in order to revive this position, but on different terms. These different terms may defuse the tensions between the Western and Muslim worlds. Both worlds should come together to chart the course of the future of legal philosophy.

ملخص البحث

إن الخطوط العريضة التي نوقشت في هذا البحث تدور حول الأفكار التالية: أولاً؛ قيمة الإقناع للأثر الديني في القانون الطبيعي على القوانين الوضعية. ثانياً: أثر فلسفة القانون الإسلامي على الموقف الديني ونظرية القانون الطبيعي. وبالتالي فإن الهدف من هذا البحث هو نقاط التقاطع وأسباب زوال الحالة المذكورة. ثالثاً: المكانة المستقبلية للقانون الوضعي وفلسفة القانون الغربي تبقى غير محددة. وأخيراً، نعرض بعد منهج الفلسفة الشرعية الذي لم يدرس بكفاية، والنظر في إمكانية تبني فلسفة القانون الغربي لبعض مبادئ الفلسفة الشرعية الإسلامية. إضافة إلى ذلك اقتراح مساحة شاملة بقصد السعي للمصلحة العامة للإنسانية. إن المنهج المتبع في هذا البحث أساساً هو المنهج النظري التحليلي، وإن المصدر الرئيس لهذا البحث هو الكتب والمجلات القانونية، وأن هنالك عدة كتب كتبت حول الموضوع. والنتائج المتحصل عليها في هذا البحث كان مصدرها أساساً المواد المذكورة من الكتب والمجلات القانونية. وهذه النتائج تكشف لنا أن القواعد القانونية الوضعية يجب أن تكون بهداية إلهية (سماوية) بطريقة يجعلها لا تتحرف عن وجهتها الصحيحة. وإن الجهود المتبعة لتقصي نقاط التقاطع وهو اتجاه أساسي لإحيائها، لكن بعبارات مغايرة. وتلك العبارات المختلفة بإمكانها أن تؤدي إلى توتر المواقف، وظهور حساسيات بين العالمين الإسلامي والغربي. يجب أن يجتمع كلا العالمين لأجل تحديد الاتجاه المستقبلي لفلسفة القانون.

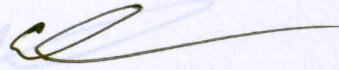
APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.



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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Choo Kah Sing

Signature.......... Date.....13th December 2006.....

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*To my parents,
my wife Ai Li & my son Zhèng Hóng*

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TABLE OF CONTENTS

Abstract.....	ii
Abstract in Arabic.....	iii
Approval Page.....	iv
Declaration Page.....	v
Copyright Page.....	vi
Dedication.....	vii
Acknowledgements.....	viii
Lists of Cases.....	xii
CHAPTER ONE: INTRODUCTION.....	1
Natural Law.....	1
The Current Rules Reflect the Trend of Western Legal Thoughts.....	3
Departing from Divinity Principles.....	5
Divinity Principles Are Significant in the Contemporary Period.....	6
The Statements of Problem.....	11
Literature Review.....	14
CHAPTER TWO: THE DOCTRINE OF NATURAL LAW.....	17
Part I	
Introduction.....	17
The Origin of Natural Law Doctrine.....	20
The Ancient Theories:	21
Socrates, Plato, Aristotle, Stoics Philosophy.....	21
Socrates.....	21
Plato.....	23
Aristotle.....	24
Stoics Philosophy.....	26
Secular Natural Law Doctrine.....	28
Ancient Period.....	28
Hugo Grotius.....	31
Thomas Hobbes.....	33
John Locke.....	35
Jean Jacques Rousseau.....	38
Immanuel Kant.....	41
Conclusion.....	42
Part II	
Natural Law Undermined.....	43
Revival of Natural Law.....	48
Rudolf Stammler.....	50
Conclusion.....	52

Part III	
Relevance of Natural Law Doctrine in Modern Time.....	53
The Revivalists.....	55
HLA Hart - The Minimum Content Theory of Natural Law....	55
John Mitcell Finnis - Restatement of Natural Law.....	57
Lon H. Fuller - Inner Morality of Law.....	62
Observation of Both Deontological Approaches.....	64
John Austin - The Command Theory.....	65
Ronald Dworkin.....	66
Conclusion.....	69
CHAPTER THREE: THE THEOLOGY SYNTHESSES OF NATURAL LAW..	72
Introduction.....	72
St. Augustine.....	72
St. Anselm.....	74
St. Bonaventure.....	76
St. Thomas Aquinas.....	77
Lex aeterna (Eternal law).....	79
Lex naturalis (Natural Law).....	79
Lex humana (Human Law).....	80
Lex divina (Divine Law).....	80
Natural Inclination.....	81
Natural Law "Nat the Same" For All Men.....	83
Speculative reason and Practical Reason.....	83
Natural Law Can Be Changed.....	85
Conclusion.....	86
CHAPTER FOUR: THE RELIGIOUS THOUGHT AND INFLUENCE IN ISLAMIC LEGAL PHILOSOPHY.....	91
Introduction.....	91
Religious-Based Legal Philosophy and Some Basic Ideas.....	92
Islamic Jurisprudence.....	95
Sources.....	98
Primary Sources: <i>Qur'ān</i>	99
Primary Sources: <i>Sunnah</i>	101
The Matrixes of Islamic Legal Philosophy - The Methodologies.....	104
Secondary Sources: Consensus of Opinion.....	103
Analogical Deduction.....	107
Equity in Islamic Law/Juristic Preference.....	108
Custom.....	110
Consideration of Public Interest.....	111
Presumption of Continuity.....	112
Imitation.....	113
Personal Reasoning.....	114
Abrogation.....	119
Equation to Positive Law.....	121
Conclusion.....	124

CHAPTER FIVE: THE CROSSING POINT.....	127
Introduction.....	127
Abū Ali Ibn Sina (Avicenna).....	130
Abū Hāmid Al-Ghazālī.....	131
Abū al-Walīd Muhammad Ibn Ahmad Ibn Rushd (Averroes).....	136
Averroes and St. Thomas Aquinas.....	137
Other Peculiar Features.....	139
In St. Thomas Aquinas’s Theory.....	139
In Modern Natural Law Theories.....	143
Conclusion.....	145
CHAPTER SIX: THE CAUSE OF DIVERGENCE.....	148
Introduction.....	148
The Focus of Religious Influence of Natural Law.....	148
The Focus of Islamic Legal Philosophy.....	152
The Understanding of Religious Influence of Natural Law.....	154
The Understanding of Islamic Legal Philosophy.....	156
The Objective of Religious Influence of Natural Law.....	158
The Objective of Islamic Legal Philosophy.....	158
The Eventual Cause of Divergence.....	160
CHAPTER SEVEN: CONCLUSION.....	163
Introduction.....	163
The Future Horizon of Western Legal Philosophy.....	163
Benefiting From Islamic Legal Philosophy.....	167
From the <i>Qur’ān</i> and <i>Sunnah</i>	168
From the Secondary Sources.....	168
The Way Forward to a New dimension of Legal Jurisprudence: Based on the Realm of Religious Influence of Natural Law and	
Islamic Legal Philosophy.....	169
A Core Objective as the Common Platform.....	169
The Motion.....	174
Openness is the First Step.....	179
Conclusion.....	181
BIBLIOGRAPHY.....	185

LIST OF CASES

Riggs v Palmer 115 NY 506, 22 N E 188(1889)

Henningsen v Bloomfield (1960) 32 N J 358

Spartan Steel and Alloys Ltd. v Martin & Co. [1973] QB 27

CHAPTER ONE

INTRODUCTION

NATURAL LAW

Natural law doctrine is immanent in Western jurisprudence. It is the only legal doctrine that has intensively dealt with philosophical questions of essence and being. Natural law doctrine also relates the questions of essence and being with fundamental question of the relationship between law and reason. On this form of endeavours, inevitably, natural law doctrine has to be the lead of all legal theories in the pursuit of valuable principles that deal with man's understanding as to why certain lines need to be drawn for social orders.

Man forms reason, and reason produces law. This tenet raises one fundamental question, which is, "On what basis should man's reasoning premise upon?" Two diverse philosophical schools have attempted to give meaning to this question, the Christian theologians and pragmatic philosophers. At one point of time in Western legal history, the natural law doctrine was marked by lucidity in its association with theological influence. Ironically, before that point, the time when natural law theory purportedly originated, it had no tenuous link to religious influence.

During the turn of the medieval period into the Renaissance period, religious influence in natural law theory was whisked away by the overwhelming resurrection of classical scepticism which made the introduction of humanism possible. Although religious influence in the natural law theory has been discarded for many centuries, debates in the subject are still very alive, and there is still a continuing interest in the subject today.

Many beginners in legal philosophy studies have a misunderstanding of natural law as a form of theological legal philosophy, or think the principles within natural law are an attachment to the pursuit of divinity. The Natural law doctrine is neither a divinity pursuit nor a mysticism endeavour. Early religious groups are partly to be blamed for this misconception. They had instilled strong attachment of divine principles in natural law theory. They had also put forward systematic theological syntheses to explain and describe the form of existence in this complex world. Due to their wise comprehension of intricate questions, their perception of natural law had created a milestone in the legal philosophy of the West. This happened at the time of early Christian forefathers (it was Catholic forefathers to be precise) during the fourth century AD and also later in the medieval period. It was at these two periods that this very much divinely influenced thought was instilled deeply in the natural law doctrine. These divine principles that were left by the Catholic forefathers were based on the religion of Christianity. Their works on natural law theory have impacted the modern debates and subsequent understanding of natural law theories. These divine principles also have caused a lasting impression, and they can still be felt despite the various secular approaches that have attempted to define and redefine the theory of natural law. The divine principles in the natural law theory have left a long-lasting impression in Western legal philosophy; therefore, discussion of natural law cannot be avoided in any contemplation of legal philosophy. The attribution of these divine principles has even spilled over into modern legal theories.

Modern jurists, while postulating their theories, do not admit or recognize their legal thoughts are drawn to a thin line of higher principles. These higher principles were, in the past, said to be descended from higher authority - that is, GOD. This defying attitude of modern jurists is perilous. The absence of religious recognition

whilst postulating legal theory leads to a free-for-all thinking behaviour. This trend of legal thinking leads to the assertion of new legal principles that have no limit or boundary. The effect of these new legal principles is outright rejection of moral principles. Moral issues were asserted in legal philosophy previously for the good of man. Morality is the cornerstone of man's uprightness. A man without moral conscience is worse than a beast.¹ When man lacks moral direction, his life is vulnerable to be captivated by many immoral seductions. It is unfortunate to say that the thinking of certain sections of Western society has reached this alarming condition. Now, some have come to a point of outright defiance of God or His divine principles. Perhaps, to them, there is no God. Some lobby, at the same time, try to justify man-made rules that are in direct opposition to divine principles. This unwarranted direction of western legal thinking brings western legal philosophy to a position of distress. For those Westerners who accept religious conviction, they are trapped in this distressing world. If this entangled distress position is not resolved or prevented from further deteriorating, the future of western legal philosophy is obscure.

THE CURRENT RULES REFLECT THE TREND OF WESTERN LEGAL THOUGHTS

Western legal philosophy is the most studied branch of philosophy in the world. It has influenced most parts of the world. This is because of the enormity of invasion and colonization that had occurred in the past. These colonized states continue to follow and adopt the legal rules, systems and thoughts of the West after they have achieved independence. In the twentieth century, the integrity of Western legal philosophy faced an unprecedented challenge. The challenge came from the nature of changing

¹ Those who manipulate moral questions in the name of God for their own benefits are equally nothing but evil.

moral values and the perception adopted against moral values. Moral values in the modern world, especially Western countries, have changed. The perception of righteousness is no longer present in society. Worse still, immoral behaviours are presently accepted as legal. This is a cultural and religious shock to many people. These outrageous changes have put the western legal philosophy into questionable state, in particular its uprightness.

Legislators in some Western countries have passed laws that seriously contradict long-accepted moral values, for example, laws that legalize same-sex unions, homosexuality, prostitution, abortion (for non-medical reasons), and other activities that are considered immoral. All these behaviours were generally regarded as unnatural behaviours of man and sinful in nature, and they were once considered to remain to be socially deviant behaviours for all time to come. In recent years, man's actions have gone even further; they have begun to encroach into what has long been held as the domain of God's will. Human cloning is beginning to be acceptable in medical science. The taking of life is seen as justified in order to save life.

In this modern world and modern society, various sorts of social groups are formed to protect their own interests. Some of these interests are previously described as wicked behaviours of man. But in today's society, these wicked behaviours have been given the legal protection and right of exercise. Man has claimed that he has a "right" to enjoy and exercise these unnatural and sinful behaviours. This "individual right" has now been recognised now in many states as part of *humans rights*. This position cast a serious doubt on the moral aspect of western legal philosophy. Two questions stem from this doubt: What is the position of the contemporary legal philosophy in view of such changes in social behaviours? Will moral issues be of any relevance to western legal philosophers in future?

DEPARTING FROM DIVINITY PRINCIPLES

At one point in time of western legal history, religion had influenced the political and administration affairs of a state, and moral issues were clothed within the sphere of religious conviction. Indirectly, moral belief had highly influenced man-made rules. This approach had produced what was regarded as an almost perfect administration of a legal system for a state. All man-made rules were below the laws of God. Divine principles were inserted into man-made rules. As a result, all man-made rules were premised on divine conviction. Man-made rules were promoting righteousness, and the rules did not go astray. Revealed scriptures were used to guide man-made rules. Man-made rules were susceptible to changes, but not the basic divine principles. Divine principles were always intact no matter how society had changed. Man-made rules were always subordinate to these divine principles. This approach was fundamental, as it had always put man into the correct approach in their undertakings. It applied to all aspects of man's life, such as political endeavours, social participations, religion pursuits and domestic interactions.

Further, man's reasoning was considered as short of perfection. To remedy this defect, man had been guided by divine principles. These divine principles revealed the wisdom of God. Man rode on these divinely principles coupled with his capability to reason to formulate principles to suit the social conditions of his time.

The above approach is generically classified by legal philosophers as religious influence on natural law theory. Basically, natural law theory is made up of two fundamental components, man's reasoning and divine principles. Man's reasoning is influenced by the observation of natural surroundings. Divine principles are from higher authority. Therefore, when man exercises his ability to reason, he is to observe the surrounding nature and divine principles. Flowing from this approach, man's

reasoning will produce a man-made rule that consist divine principles. It is also a decree that man's reasoning is always secondary to the reason provided in divine principle. Following this course of understanding, man's reasoning will not go astray. As mentioned, man's reasoning is short of perfection. If man's reasoning strays away from the guidance of divine principles, man's reasoning will be without a course or objective. From the sixteenth and seventeenth centuries onwards, this was the time were man's reasoning begun departing from divine principles. This course of man's reasoning seems tainted awfully in the course of legal history development. The past generations could not have imagined that man's reasoning would go so far outside the divine line. In today's rule, man's reasoning can assert legal rights that religious conviction would have strongly opposed. This position presents the basis for an investigation to be called upon to find out as to why man-made rules no longer take into consideration of principles that are inspired by divine belief.

DIVINITY PRINCIPLES ARE SIGNIFICANT IN THE CONTEMPORARY PERIOD

Besides the threat to western legal philosophy posed by man's behaviours in the modern world, the world itself is under a state of trepidation, and the position is alarming. A series of recent acts and conduct have brought the two worlds, the Muslim and the Western, into a state of confrontation. The horrendous terrorist attacks that struck the World Trade Centre in the United States of America on 11th September 2001 by certain extremists raised the mark of discomfort openly. Then retaliation carried out by United States of America and its alliances in 2002 against the

Taliban in Afghanistan² added tension to this stressful world. In year 2003, war against the regime of Saddam Hussein of Iraq³ further left vivid marks in the pathetic history of the world. All these events have added fuel to the long misunderstanding between the Muslims and the Westerners. Beside these events, the never-ending political and religious strife between the Israelis and Palestinians has always put the Muslims and Westerners in opposite positions.

Many modern Westerners have deep-rooted misunderstanding of Islam and its teachings. In the context of world history, the relationship between the Christian and Muslim worlds is thus a long and tortuous one.⁴ The modern threatening events, such as, the dreadful terrorist attacks and declarations of wars on the ground of pre-emptive strike have worsened this misunderstanding. Many in the West accuse Muslim countries of being lands of the terrorists. This untoward accusation is baseless and unfounded. Perhaps, this utterly wrong impression of Muslim countries is caused by some fanatical Muslim believers. These fanatical so-called Muslim believers misinterpret Islamic teachings. They claim their violent activities in the name of divine course. They verily believe what they do is right in accordance to their understanding of Islam. These misguided believers continue to drive away the trust of the Westerners. Their actions further contribute to the misperception as perceived by the West about Islam.

² The Taliban in Afghanistan was accused of harboring the suspected mastermind terrorist, Osama Bin Laden, which being accused of the person behind the attack on 11th September 2001. However, after successfully removed the Taliban regime in Afghanistan, Osama Bin Laden was no where to be found.

³ The Sun News Paper, Tuesday, 1 April 2003, 10, it is reported that Saddam Hussein was accused by the United States of America of having weapons of mass destruction, despite United Nations Security Council resolution sanctioned on Iraq against possession of weapons of mass destruction after the invasion on Kuwait in 1991. However, a pre-emptive strike was taken by the coalition forces (United States of America and Britain) against Iraq, despite the fact that there was no resolution passed to cause the attack. Roger Hill, a former United Nations chief arms inspector was of the opinion that mere discovery of some remaining weapon of mass destruction did not justify to cause a war against Iraq. He further commented that the US attack was not about the remaining weapons but it is about control in the Middle East.

⁴ Hugh Goddard, *A History of Christian-Muslim Relationships*, Edinburgh: Edinburgh University Press, 2000, at 2.

The most unfortunate thing that has happened between the Westerners and Muslims is that religion has been dragged into the conflict. Many Westerners generally regard Muslims as terrorists. This is because many fanatical misguided terrorists label themselves as representing Islam. To many Muslims, they relate Westerners as believers of the Christian religion. Ironically, most of the Christians today are not from the western countries. It is also an irony that neither religion preaches or supports terror campaigns. Both religions are for peace, harmony and the ultimate salvation of man. All these false accusations, untoward claims and misunderstandings are unfortunately asserted between the two major religions and cultures of the world. Perhaps, it is time to sit back and think again about all these assertions.

The uncalled-for changing social behaviours and all these calamitous events force man to go back to basic human principles. This thesis is about a research conducted on the history of western legal philosophy. The purpose in doing so, *inter alia*, is to demonstrate that man-made rules will go astray when they deviate from the guidance of divine principles. This thesis also proves that divine principles are important for man's future endeavours. To justify this stand, Islamic legal philosophy will also be considered. This is because Islamic rules are permanently premised on divine principles.

Islamic legal philosophy has, since its inception, been premised on divine principles. This proposition is remarkably interesting in the pursuit of this thesis. We have earlier asked the question, "Why are divine-inspired principles no longer the main concern in man's reasoning when making rules, particularly in the West?" On the contrary, the Muslims' reasoning has always been rooted in Islamic divine principles when making rules. The Muslim approach has never deviated since the

inception of Islamic legal philosophy from the seventh century AD. Islamic legal philosophy has a permanent form and values. However, this feature is not present in the Western natural law doctrine.⁵ Accordingly, what is observed in the development of man's history is that military and technological power may thus be seen as residing more in the Western world, but religious conviction and motivation may be discerned as being more powerful in Islamic societies.⁶

From the observation of legal history, it seems there was a point of time in the Western and in the Muslim worlds when their man-made rules were premised on divine principles. Man-made rules were guided closely by higher standards. These standards were said from higher authority. In western context, it was said to be from God, whereas from Islam standpoint, it was said to be from *Allah*. In both worlds, man-made rules embraced these higher laws. But, in today's modern Western legal philosophy, as demonstrated earlier, the position seems different. This thesis will look at the point where the two systems of legal philosophy crossed, where divine principles were at the height of contemplation when making man-made rules.

The history of Islam legal philosophy is valuable in this research. This is because Islamic legal philosophy has played a prominent role in the development of legal thought in the Islamic world as well as the Western world. In the Islamic world,

⁵ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 2nd revised Edition, Kuala Lumpur: Ilmiah Publishers Sdn. Bhd., 1998, at xv he says, "It is perhaps true to say that Islamic jurisprudence exhibits greater stability and continuity of values, thought and institutions when compared to Western jurisprudence. This could perhaps be partially explained by reference to the respective sources of law in the two legal systems. Whereas rationality, custom, judicial precedent, morality and religion constitute the basic sources of Western law, the last two acquire greater prominence in Islamic Law. The values that must be upheld and defended by law and society in Islam are not always validated on rationalist grounds alone. Notwithstanding the fact that human reason always played an important role in the development of *Sharī'ah* through the medium of *ijtihād*, the *Sharī'ah* itself is primarily founded in divine revelation. A certain of fluidity and overlap with other disciplines such as philosophy and sociology is perhaps true both Islamic and Western jurisprudence. But it is the latter which exhibits the greater measure of uncertainty over its scope and content.... *Uṣūl al-Fiqh*, on the other hand, has a fairly well-defined structure, and the ulema had little difficulty in treating it as a separate discipline of Islamic learning."

⁶ Hugh Goddard, *A History of Christian-Muslim Relationships*, n. 4 at 2.

the Muslims have the *Qur'ān* and *Sunnah*, whereas, in the West, they have the Holy Bible and other sacred documents written by earlier Catholic forefathers. These sacred written scriptures and documents are said to be the primary sources for both Islamic legal philosophy as well as in the Western legal philosophy respectively. According to secular legal philosophers, all man-made rules derive from human reasoning. But, according to Islamic legal philosophy and the religious influence of the natural law doctrine, these made-made rules, although they derived from man's reasoning, they have to conform to all the holy principles preserved within the primary sources. The entire Islamic legal philosophy is said to be premised on this concept. This approach develops a complete code for governing human relations and human behaviours. This comprehensive code covers the political administration and social regulation of a state, rights and duties, moral obligations and religious observance.⁷ The mechanisms in Islamic jurisprudence (*uṣūl al-fiqh*) may be of assistance to this research. Generally, the many doctrines of natural law have played a prominent role in the developments of western legal thought. They have shaped the development of social behaviours, legal systems and man's history in the Western world.⁸ The doctrine of natural law has a long and illustrious history.⁹ It has two thousand years of history, and the idea of natural law doctrine is still alive today, but it has received

⁷ Mohd. Hammeedullah Khan, *The Schools of Islamic Jurisprudence-A Comparative Study*, 2nd Edition, New Delhi: Kitab Bhavan, 1997, at the preface, he says, "Islamic Jurisprudence or *Fiqh* is a discipline of paramount importance, its scope is very wide, it covers all spheres of life, temporal as well as spiritual whereas, it deals with prayers; it also studies political institutions, socioeconomic affairs, international relations, matters relating to war and peace etc. In fact it is an ever-growing subject since the birth of Islam, the period of Prophet Mohammad (Peace be upon him) was the period of legislation. After completion of his mission, his immediate successors developed it on the same line of their master."

⁸ Alessandro, Passerin d'Entrèves, *Natural Law: an Introduction to legal Philosophy*, with a new introduction by Cary J. Nederman, New Brunswick, New Jersey: Transaction Publishers, 1994, at 13. See Lawrence M. Friedman, *Law and Society: An Introduction*, New Jersey: Prentice-Hall, Inc., 1977, as to how society changes through the effect of law and their relationship. For a general understanding of the philosophy of law, see article by Brown, Beverley and Neil Mac Cormick (1998), *Law, philosophy of*. In E. Craig (ed.), *Routledge Encyclopedia of Philosophy*, London: Routledge. (Retrieved October 08, 2005), <<http://www.rep.routledge.com/article/Too1>>.

⁹ Davies & Holdcroft, *Jurisprudence: Texts and Commentary*, London: Butterworths, 1991, at 149.

much resistance from modern thinkers. Despite all the resistance, the intrinsic ideas of natural law still attract modern thinkers to revalue them in modern terms and applications, and it has not been neglected as a topic for debate in contemporary legal philosophy dialogues. Islamic legal philosophy stands as important along side with natural law doctrine in the development of legal philosophy. Therefore, it is feasible to place the two systems of legal philosophy side by side. This exercise may reveal peculiar features for further research. It may also help the future development of legal philosophy.

It is observed that in recent years, a fresh interest in Islamic studies to develop greater harmony between *Shari'ah* and statutory laws¹⁰ is seen. How far this intrepid step will go is yet to be known. There are series of international dialogues on harmonizing *Shari'ah* and secularist laws, which are usually based on Western model of law. In light of this, perhaps Islamic legal philosophy has gone one step ahead in its legal philosophy development compared to other systems of legal philosophy. Whatever the outcome of this development, the Islamic legal approach will not change. The legal corpus and its jurisprudence shall remain the same.

THE STATEMENTS OF PROBLEM

Following from the above discussions, four statements of the problem are proposed for research in this thesis:

- i. Was there a crossing point in the past between Western legal thought and Islamic legal philosophy?
- ii. If the answer to the first question is affirmative, then why has religious influence in western legal thought lost its persuasion in the course of

¹⁰ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, n.5 at xiii.

development when it was at one point in history highly regarded as the perfected legal philosophy?

iii. What is the direction of Western legal philosophy in future?

iv. How can Islamic legal jurisprudence be of assistance to the future direction of Western legal philosophy?

The contents of this research examine five core areas; first, the natural law doctrine in general; secondly, the theological position of the natural law doctrine; thirdly, Islamic legal philosophy and its jurisprudence; fourthly, the crossing point between religious influence of natural law and Islamic legal philosophy; and lastly, the causes that lead to religious influence of natural law having lost its persuasiveness in Western world.

At the conclusion of this thesis, we will briefly discuss the future of Western legal philosophy. The prediction of Western legal philosophy's future is based on the current trend and the past events of Western legal history. History tells the future, on this assumption, a revelation is made. Lastly, a fragmentary proposal of a new dimension to legal jurisprudence is suggested. This proposal will explore all relevant parts of the religious influence of natural law, Islamic legal philosophy and its jurisprudence and modern legal theories. This part of the research is neither conclusive nor exhaustive. It is just the beginning of a new challenge.

Four Chapters are designated to carry out the findings of the first problem statement. One chapter will examine the findings and answer the second problem statement. The conclusion will examine and discuss the third and last problem statements.

The following is an overview of the contents for the respective chapters. Chapter Two comprises of three parts: Part I deals with the investigation of the