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THE NATURE AND SOURCES OF LAW IN ISLAMIC AND WESTERN JURISPRUDENCE

a

Master of Comparative Laws' dissertation

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18th May 1993

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Master of Comparative Laws,
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SYNOPSIS

This is a comparative work on the nature and sources of law in Islamic and western jurisprudence. I will begin my comparison with outlines of both legal systems. The English legal system will be used as a model of western legal systems and it will be compared with the legal system of Islam. Towards the end of the paper the discussion will focus on aspects of law where the two legal systems differ and where they meet. The usefulness of the study of comparative law cannot be understated although its utility might be lost on the practitioner. It is more of a topic of interest to the draftsman tasked with drafting a new statute or the academic lawyer. Comparative law is relevant and important to the study of the law since it will help and enable a lawyer to understand and to improve a country's national laws; and it assists in the promotion of the understanding of foreign peoples,

and thereby contribute to the creation of a context favourable to the development of international relations.[1]

Comparative law is also useful in another aspect. It introduces us to the variations which exist in the very concept of law itself. It enables us to get to know societies where the western notion of law is altogether unknown, or where law is synonymous with force and sometimes even the symbol of injustice, or again where law is intimately linked to religion and takes on its sacred character. Comparatively law manifestly has a crucial role to play in the development of legal philosophy.[2]

Comparative law is often used as the easiest means of acquiring a new piece of legislation by draftsmen. Our Penal Code for example, is one of the many statutes adapted to local use from the laws of another country. Other areas which have also benefitted from this quick and easy method of drafting includes the Federal Constitution, land law, criminal

[1] David, Rene and John E.C. Brierley, *Major Legal Systems of the World Today*, p.4.
[2] Ibid., p. 5.

procedure, civil procedure and also the new legislation proposed to counter domestic violence. Through examining a foreign country's laws and the methods that it has brought about to solve a particular problem we may learn of the strengths of their legislation and perhaps borrow the virtues of their laws and improve on them to suit our local conditions.

In this dissertation, I will attempt to present to the reader an analysis of the fundamental differences between the sources of law in Islamic and Western jurisprudence and the nature of law in both systems. By understanding them it is hoped that we may gain new insight into how both systems operate and the outlook on the functions and purpose of law.

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1

JURISPRUDENCE ACCORDING TO WESTERN PERSPECTIVE

Western Jurisprudence in General

The term "jurisprudence" is perhaps the most baffling of all law terms. This is because Western jurisprudence encompasses all aspects of law and each writer on jurisprudence is at liberty to define for himself the provinces of jurisprudence. It is perhaps easier to describe what jurisprudence is not about then describing what jurisprudence is about. According to Walker[3] the term *"jurisprudence"* has been used in a variety of senses. It originates from the Latin *"juris prudentia"* or *"juris scientia"* which means expert knowledge of the law. In the broadest sense jurisprudence is also known as *"legal science"*.

Jurisprudence has also been described as the term for the division of legal science concerned with

[3] David M. Walker, *The Oxford Companion to Law*, p.p. 678 - 684.

thinking about law generally.[4] By this the term "jurisprudence" is not meant to include a discussion of the legal processes of a specific legal system. In this second sense jurisprudence is only concerned with an examination of general and fundamental conceptions of law. This form of jurisprudence is also called "theory of law", "legal theory", "science of law" or "legal science". Jurisprudence, according to some jurists, also means the study of the philosophy of law. Therefore all we can say about jurisprudence is that it has no clearly delimited boundary as it "rubs shoulders with and shares common ground with ethics, politics, history, theology and philosophy."[5] In jurisprudence, discussions of law sometimes overlap with ethics, politics, history, theology, philosophy, morality and everything else. In western jurisprudence there is a linkage between law and politics as in the discussion on sovereignty, law and Christianity as in the discussion on natural law etc. When faced with such a plethora of issues the law students' customary

[4] Ibid.
[5] J. G. Riddall, *Jurisprudence*, p.5.

contempt for the study of jurisprudence at the first degree level is somewhat justifiable! It can be said that all writers of jurisprudential ideas tend to try to go one-up against one another by always thinking of new and more abstract concepts. The more perplexing the better and a thinker may then criticise a proposition forwarded by his colleague and summing it up as absurd and then suggesting his own theory as the best. In western jurisprudence the ideal is to think of something new to say.[6]

According to Walker again[7] among the questions commonly discussed in works on jurisprudence are such as: What are the sources of law? What is the connection between law and morality? Why should law be obeyed? How are the principles of a legal system be grouped and classified? How does law control conduct and protect persons?, What is meant by the term "legal right"? What is law and perhaps most importantly, what law ought to be. In western comparative jurisprudence the scope covers the examination of various legal

[6] Ibid.
[7] Walker, supra, note 1, p. 679.

systems, institutions, structure, concepts, and rules by reference to their growth, scope, application, and use in different legal systems at comparable stages of development.[8] At this juncture it is useful again to remember that jurisprudence is a rich and diverse subject which is in a constant state of growth.[9] As such it is clearly difficult to define jurisprudence in the western sense of the word for not only does every jurist have his own notion of the subject-matter and proper limits of jurisprudence, but his approach is governed by his allegiances, or those of his society.[10] To end this general discussion therefore it is worth to note that in view of the vastness of the frontiers of jurisprudence it would be idle to aspire to a formula which would establish, objectively, once and for all, the exact province and scope of such a study in jurisprudence.[11] The world of jurisprudence is too wide to be circumnavigated and the jurisprudential

[8] Ibid.
[9] Raymond Wacks, *Jurisprudence*, p. 1.
[10] Lord Lloyd, *Introduction to Jurisprudence*, p. 1.
[11] Ibid., p. 2.

sailor will never be able to visit and drink at all the fountains of wisdom of its many harbours.)

Evolution of Western Jurisprudence[12]

A brief summary of the growth of western jurisprudence is hereby reproduced below:

> "Jurisprudence originated in Greek philosophy, in speculation about justice and the social order, notably by Plato and Aristotle, and by the Stoics who developed the concept of natural law, an emanation of the law of reason of the cosmos. It continued in a more practical way among some of the Roman thinkers, notably Cicero, who was much influenced by Stoic ideas and began to analyse some of the general ideas found in Roman law and, in particular, developed the ideas of the *jus civile*, the rules applicable to Roman citizens, the *jus gentium*, rules generally applicable among civilised men, and hence

[12]Walker, supra, note 1, p. 679.

applicable to foreigners as well as Romans, and the *jus naturale*, a body of principles derived from reason and worked out philosophically, potentially applicable to all men everywhere, and serving, sometimes, as a basis for legislation, for decision, and for criticism of existing laws. The Roman jurists however, were generally more practical legal scholars than speculative theorists about law.

In the dark ages, St. Augustine reintroduced Stoic philosophy beside Christian thought, putting divine reason beside divine will as the highest source of the divine law binding both man and all other creatures. Below divine law he placed natural law and the positive law of the State. This helped to preserve the idea of government under law until the dark ages had passed.

The modern science of law began with the revival of the study of Roman law in the twelfth century and proceeded down to the seventeenth century on two parallel lines - legal and philosophical. The legal line began with Irnerius, Accursius, and the other glosators, continued with Bartolus and the other commentators, and culminated in the great humanists, Alciatus, Cujacius, and Donellus.

The philosophical line began with Thomas Aquinas, and the schoolmen with whom jurisprudence was subject to theology, and temporal law subordinate to natural and eternal law. A late example of this line of thinking is St. Germain's *Doctor and Student*. But jurisprudence broke away from theology in the works of Hemmingius, Belli, Gentilis, Soto and Swarz.

In the seventeenth century, thinking about the fundamentals of law became freed, both

from connection with theology and from almost exclusive consideration of the text of the *Corpus Juris Civilis*, by the work of such as Hotman and Conring. The law-of-nature school, which sought to deduce a complete system of principles of universal validity from the nature of man in the abstract, arose in the works of Grotius and Pufendorf.

The positivists, insisting on the supremacy of human lawgivers, represented a different divergence from theology; they are represented by Machiavelli, Bodin and Hobbes.

The law-of-nature school continued influentially throughout the eighteenth century and into the nineteenth century, as exemplified in the work of such as Burlamaqui, Wolff, Rutherforth, and Vattel. It influenced Blackstone and some decisions, in America it provided a

background for some of the earlier decisions on judicial review. As late as the work of Lorimer, it was seen by some as the basis of law.

Since the early nineteenth century, a variety of schools of thought about legal problems have flourished. There was a reaction against both natural law thinking and Kantian Idealism. One major development was analytical positivism, concerned with positive law, as laid down in particular communities and with the analysis of concepts, logical examination of terms and principles, classification and exegesis; not with the ethical evaluation of rules of law or their effects. This approach has been extremely influential in England and the USA. Starting with Bentham and Austin, it was the basic standpoint of Markby, Holland, Salmond and Gray.

Another development was historical jurisprudence, in which the leading figure was Savigny, who saw law as a development of the popular consciousness of a people. In England, Maine's broader interests and the influence of ideas of biological evolution, and of anthropological studies led him to a comparative historical jurisprudence and to the recognition of legal evolution.

The study of society, social evolution, and the development of the social sciences generally, gave rise to sociological jurisprudence which is more concerned with the social effects of legal institutions and rules, and effectiveness and effects of law, and with law in society. It was influenced in its early stages by Comte and Jhering, by biology and psychology, and developed by Kantorowicz, Pound and Stone. The approaches and methods of the

social sciences, and their findings are increasingly invoked in the making and application of law.

The Marxist economic interpretation of history emphasising economic factors has had most influence in Eastern Europe but, combining with English utilitarianism, has had some influence in England. Some jurists, such as Renner and Weber, without accepting economic determinism, have shown how influential economic factors have been in law-making.

In America, a modern development has been realism, concentrating attention on what courts and legal officers do about disputes. Holmes, Frank, and Llewellyn have been the most notable figures. A distinct kind of realism has developed in Scandinavia, in the work of Hagerstrom, Lundstedt and Olivecrona.

In the twentieth century, there has been a revival of natural law thinking, springing from disillusionment with positive law; it was initiated by Geny and Stammler, and followed by Rudbruch. Linked to this has been the French institutionalist school, notably Hauriou and Renard, who regarded social institutions as expressing the social reality underlying law.

Another noteworthy development has been Kelsen's pure theory of law, which seeks to segregate law from ethical, social and other factors, The quest is for the Grundnorm or fundamental norm from which all the norms in the hierarchy of norms in a particular legal system are derived. The sole object of study for jurisprudence is the nature of the norms or standards which are set up by law.

In modern jurisprudence, there is increasing recognition that all approaches

to legal thinking have something to contribute to understanding law, and there has been increasing acceptance that, particularly in English language jurisdictions, excessive attention was devoted in the nineteenth century to law as a logical structure of norms and too little attention to the factors which gave rise to and influenced the development of law and to the actual effects and consequences of particular rules and categories of rules. Much more than in the past law is looked on in relation to society and the other social sciences, as an instrument of social policy. Law is being consciously modified on the basis of research into the operation of rules and their consequences and deficiencies. The major problems of jurisprudence include clarification of the relations between law and the State, authority, liberty,

conscience, and justice. There is need for consistent and continuing reappraisal of these issues in the light of contemporary problems."

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2

AN OVERVIEW OF ISLAMIC SHARI'AH

Islamic Shari'ah in General

Literally speaking, the word "shari'ah" means the path to the watering place.[13] A watering place is a place where in a desert setting men and other creatures would converge to satisfy their thirst. Thus a watering place would be the focal point of desert life and indeed since water is the great sustainer of life human communities throughout the ages have been founded in places where water is readily accessible.

Metaphorically speaking shari'ah means the path over which man must traverse in order to achieve spiritual guidance towards the attainment of a fulfilling and rewarding life in the mortal world and salvation in the Hereafter. The shari'ah is the great quencher of man's thirst for Divine guidance as it

[13] Muhammad Hashim Kamali, *Source, Nature and Objectives of Shari'ah*, p. 215.

lays down the principles upon which man should act in order to achieve the pleasure of Allah.

The main objective of the shari'ah is to construct human life on the basis of *ma'rufat* (virtues) and to cleanse it of the *munkarat* (vices). The term *ma'rufat* denotes all the virtues and good qualities that have always been accepted as good by the human conscience. On the other hand, *munkarat* denotes all the sins and evils that have always been condemned by human nature as evil. In short, the *ma'rufat* are in harmony with human nature and its requirements in general and the *munkarat* are just the opposite. The shari'ah gives a clear view of these *ma'rufat* and *munkarat* and states them as the norms to which the individual and social behaviour should conform.[14]

Allah has explicitly mentioned the word shari'ah in the Qur'an in surah Al Jathiyah ayah 18 which reads as follows:

[14] Sayyid Abul 'Ala Al Maududi, *The Characteristics of Islamic Shari'ah*, p. 1.

"Then We put thee on the (right) Way of Religion. So follow thou that (Way) and follow not the desires of those who know not."

The shari'ah is best translated as "the right way of religion", which is wider than the mere formal rites and legal provisions.[15] Therefore from this explanation shari'ah has an all encompassing meaning as it covers matters of religious rites and legal provisions. But according to Muhammad Hashim Kamali although shari'ah is a path of religion, it is not a separate path but one which is a part of it. According to him religion is thus the larger entity and shari'ah only a part.[16] Nevertheless I see no basic differences between these two explanations as the *Din* (Religion) is inextricably intertwined with the shari'ah. The Din covers matters of *'aqidah* (belief), *akhlaq* (Islamic mode of behaviour) and *shari'ah* (Islamic law). Thus the shari'ah is the instrument for the purpose of realising the objectives of the *Din* as the shari'ah

[15] Abdullah Yusuf Ali, *The Holy Qur'an, Text, Translation and Commentary*, p. 1297.
[16] Muhammad Hashim Kamali, supra note 13, p. 215.