QANUN (SECULAR LAW) AND SHARIAH:

CAUSES AND EFFECTS OF THE DICHOTOMY AND AN ATTEMPT TO TACKLE THE QUESTION

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Introduction

The dichotomy between *Qanun* (secular law) and Shariah in the Islamic world is a chronic ideological, social and political problem and there are no signs on the horizon of any serious attempts to tackle it or shake the majority of Muslims' belief in the latter.

It can be traced to the following verses in the Qur'an:

"Their wish is to turn for judgement to the *Taghut* (Evil One), though they were ordered to reject him". (*Al Nisa'* 60).

"If any should judge by other than what Allah has revealed, they are Unbelievers". (*Al Ma'idah* 44).

"If any should judge by other than what Allah has revealed, they are wrongdoers". (*Al Ma'idah* 45).

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"If any do judge by other than what Allah has revealed, they are evil-doers". (*Al Ma'idah* 47).

"Do they then seek after a judgement of the Time of Ignorance? But who, for a people whose faith is assured, can give better judgement than Allah?" (*Al Ma'idah* 50).

Many writers have described *Qanun* as "the *Taghut*", as "other that what Allah has revealed" and as "the judgement of the Time of Ignorance" and several of them regard Islamic societies that live under *Qanun* as collective "wrongdoers" and "evil-doers". Some go even further and claim that they are guilty of unbelief and rebellion against the Faith.

As this is clearly a matter of crucial importance, it is vital that we define the difference between *Qanun* and "the *Taghut*" and understand precisely what the Qur'an means by "other than what Allah has revealed" and "judgment of the Time of Ignorance". To do this we must not only seek the reasons behind the linkage between *Qanun*/Shariah and the two types of judgement that are prohibited in the Qur'an, but also try to find ways that will help sever that linkage and enable the terms *Qanun* and Shariah to be understood correctly.

We shall endeavour to tackle this problem in two short sections. In the first, we shall look at the reasons that have allowed the linkage to exist between *Qanun*/Shariah and the two types of judgement that are prohibited in the Qur'an, while in the second we shall try to resolve the problem and examine the consequences of that linkage.

Section One: Causes

We believe there are three reasons why *Qanun* has been described as "other than what Allah has revealed" and even as "the *Taghut*". They are:

- The status of *tafsir* (interpretation/commentary) and *ijtihad* (interpretative judgement).
- The nature of *ijtihad* opinion.
- The source of the *Qanun* and the circumstances surrounding its introduction into Islamic societies.

Firstly: The status of *tafsir* (interpretation/commentary) and *ijtihad* (interpretative judgement).

Towards the end of the second century AH Imam al Shafi'i wrote in his *Risala*: "No misfortune will ever descend upon any of the followers of God's religion for which there is no guidance in the Book of Allah to indicate the right way".[1] He also set out the conditions that would entitle a person to extrapolate the rulings on such misfortunes; a person who fulfils those conditions will be a *Mujtahid* (person qualified to exercise *ijtihad*), while anybody who does not fulfil those conditions must "follow" and "imitate"[2].

We can deduce two points from what al Shafi'i said.

Firstly: all the actions of a Muslim individual and all aspects of individual and communal life are subject to the rulings of the Shariah.

Secondly, leaving aside the fixed rulings laid down definitively in established texts, the *Mujtahid* is the only person qualified to deduce and pronounce on all Shariah rulings, and everybody else is under an obligation to "follow" him and "imitate" him.

Where these two points are concerned, since al Shafi'i the concept of Shariah rulings governing all Muslim individual and communal affairs has never been analysed. Nor has there been any discussion or justification of the general authority vested in the *Mujtahid* entitling him to issue rulings to the point of ignoring the Qur'anic verse: "…who conduct their affairs by mutual consultation…"

This situation has continued over the generations and centuries and it has come to be generally believed that a ruling issued by other than a *Mujtahid* cannot be classed as being within the Shariah. And if it is not within the Shariah which Allah has revealed, then it must categorically be other than what Allah has revealed. There can only be one conclusion from this – that is, that "*Qanun* rulings" are not sanctioned by a *Mujtahid* and therefore do not belong to the Shariah and are not from that which Allah

1 P. 20.

2 From P. 507.

has revealed and ordained and which constitutes the only legitimate source of judgement.

Secondly: The nature of *ijtihad* opinion

The scholars agree unanimously that an *ijtihad* ruling is a matter of opinion. In their view the furthest that *tafsir* can go is to give preponderance to a ruling declared by a *Mujtahid* in comparison with another ruling or rulings which the text or texts allow, in cases where the *ijtihad* is limited to texts that are not definitive and established as authentic.[1]

In such a situation the *ijtihad* ruling – assuming that it needs to be applied – will be classed as separate and distinct from the rulings that are definitive and laid down in established texts, since they will be regarded as opinions, and only opinions, and subject to revision and alteration; moreover, they will in all probability exist alongside other, different rulings on the same issue. It is very rare to find a single interpretation of a text that is not definitive and established.

Even so, what has actually happened in practice is that the *Mujtahid*'s opinion has been accepted as being the actual "judgement of Allah".

If it is classed as the "eternal judgement of Allah", as certain misguided scholars maintain, then in their view the *Mujtahid* has merely revealed and promulgated it.

On the other hand, scholars who hold the correct view[2] see the

1 With regard to rulings based on *qiyas* (analogy), Imam al Ghazali lists six errors; if the *Mujtahid* falls into any one of them, his *qiyas* will be invalid and the ruling he bases on it will be incorrect – *Al Mustasfa* – 2/279.

2 The difference between the two groups was purely theoretical and had no practical effect. The "misguided scholars" say that when there are several different opinions on the same issue, one *Mujtahid* – and only one – is correct and has revealed Allah's eternal judgement, while all the others are wrong. Practically speaking, however, there is no way of knowing which of them is right and which of them is wrong, so consequently the "imitators" of each *Mujtahid* believe that the opinion of the one they are imitating is the only one that reveals Allah's eternal judgement and that in imitating that *Mujtahid* they are applying Allah's True Judgement. The result is precisely the same as the one reached by the "correct scholars", who believe that a case not covered by a definitive text does not have a definitive ruling, but is a matter of opinion. Al Ghazali's *Mustasfa*, 2/263. =

"judgement of Allah" as being dependent upon the judgement of the *Mujtahid*.

What has been the result of this unquestioning acceptance of *ijtihad* opinion? It has led to *ijtihad* rulings which are a matter of opinion becoming mixed up with definitive rulings. Consequently, both classes of rulings have acquired the status of Shariah rulings revealed by Allah. That is to say, *ijtihad* opinions have been transposed from their direct source to the Higher Source; they have thus ceased to be recognised as merely opinions and acquired the garb of definitive Shariah rulings, thereby becoming "eternal" and – thanks to their newly assumed Divine character - incapable of amendment or alteration. This is why people have held fast to them through thick and thin and rejected the *Qanun*, regardless of its content.

Consider, for example, matters such as the admission of written proof, attestation of contracts, minimum wages and working hours, week-end and annual holidays in contracts of employment and lease conditions that favour the lessee. All these come under the *Qanun* and are at odds with the Shariah, the provisions of which have been determined by *fiqh* (jurisprudence) *ijtihad* in which witness testimony is given orally, a contract becomes valid on the basis of "offer and acceptance" and work and lease contracts are subject to the desire and agreement of the two parties involved. In fact, the realities of everyday life actually mean that the provisions of the *Qanun* are closer to the essence of the Shariah than those laid down by *fiqh ijtihad* in a social environment that was totally different from the one we know today.

= Alternatively, as al Shatibi says, their rulings are regarded as "additional": "If in their view the judgement of Allah depends on the view of the *Mujtahid*…….than the *masalih* (benefits) or *mafasid* (harmful elements) of the questions in which there is a difference of opinion are established in the same way that applies to the *Mujtahid* and his opinion. ….If the prevailing view of al Maliki is that *riba al fadhl* (selling one type of item in exchange for the same type of item that is of better quality) with regard to vegetables, and fresh fruit is permissible, then this means that he judges the *masalih* element is the weightier. He conjectures that it falls outside the category of prohibited *riba* (usury) ….. and what is permissible is not harmful either in this world or the next. Indeed it is beneficial and that is the reason why it is permissible. On the other hand, when al Shafi'i is of the view that this kind of *riba* is not permissible, this means that in his judgement it comes under the heading of forbidden *riba* and the benefits are outweighed (by harmful factors).. As this is conjecture on his part, there will also be no harm in it either in this world or the next". *Al Muwafaqat*, 2/56.

Thirdly: The source of the *Qanun* and the circumstances surrounding its introduction into Islamic societies

The term *Qanun* in the sense it is understood today was introduced to the Islamic countries with the arrival of Western imperialism when it conquered them by force of arms. It was the imperialists who established the system for promulgating laws in their modern form which had previously been unfamiliar to the Islamic regions.[1]

Imperialism did not only introduce regulations and procedures for promulgating and amending laws. The substance of the laws it introduced was also imported, either in the form in which they existed in their countries of origin or with some minor amendments which left them essentially unchanged.[2] This was at a time when the prevailing culture in Islamic societies regarded the *fiqh* produced or passed on by Islamic jurists and

1 Even the system followed in the last days of the Ottoman State was adopted from the Western model, particularly the French legal code.

2 In Morocco, for example, the Protectorate Treaty was signed with France in 1912 and basic law provisions were promulgated the following year:

The French Criminal Law and Criminal Procedures Law were promulgated on 12th September 1913 and another ordinance was issued the same year stating that companies established in Morocco would be subject to the French Companies Law of 24th July 1867.

The Civil Code promulgated on 12th September 1913 covered "obligations and contracts" and adopted the "Tunisian Civil Code" promulgated by the imperialist authorities in Tunisia in 1906 and drawn up by the Jewish Italian lawyer Mose Santyana, who said that he had summarised the "European Code following his university studies in Britain and Italy. He had also become fluent in Arabic and French in Tunisia, the land of his birth.

All the basic laws were imported with virtually no changes from their original French texts. They included the Commercial Law, the Real Estate Law, the Civil Procedures Law and the Judicial Regulation Law., among others.

This was confirmed by the committee in charge of formulating them – all of whose members were French – in its report to the French president on 25th June 1913.

The report was issued in French and no Arabic translation of it was published. According to Article 5 of the Protectorate Treaty, all laws promulgated by the King will only be published in the Official Gazette after they have been ratified in the name of the French Republic by the Resident-General and permission has been granted for their publication.

What happened in Morocco was typical of the situation in the other Islamic lands that had been occupied by force of arms. It was therefore natural that the *Qanun* should be regarded in both its form and its content as "imperialist baggage" introduced by an infidel enemy and thus in breach of the Shariah of Islam.

scholars as representing the Shariah which governs every aspect of individual and communal life and relationships.

The inevitable consequence of this culture and the circumstances surrounding the introduction of the *Qanun* system was that it was opposed – firstly because its source was illegitimate, secondly because many of its provisions were incompatible with the Shariah and Islamic *fiqh*, thirdly because these provisions were copied from the laws of "infidel countries" and fourthly because opposing them was a kind of jihad, which was obligatory in the face of the imperialist occupier.

Fourthly: parallel education: *fiqh* and *Qanun*

All Islamic states have a parallel structure of systems regulating their societies.

There are institutions that teach *fiqh al mu'amalat* (*fiqh*/rules of transactions) according to the prevailing Islamic school in the country concerned. These rules cover:

- The constitutional and political systems known in former times as *al Ahkam al Sultaniyyah* (Laws of Governance), which deal with matters such as the appointment of the Caliph or Imam by "*Ahl al Hall wa'l 'Aqd*" ("Those who Untie and Tie" – i.e. the leading scholars), the definition of his powers and other institutions that help enforce his rule and the law, as well as the *Bait al Mal* (Treasury) resources and relations between the Islamic nation and non-Muslims, whether individuals or communities.
- Rulings on the judicial system and its operations.
- Crimes, punishments and procedures for imposing and carrying out punishments.
- The rights and obligations of individuals in exercising their civil or commercial rights and implementing contracts signed with the aim of serving mutual interests.

This *fiqh* is taught because it comprises the "rules of the Shariah" which Muslims are required to follow – though non-Muslims are not. The

rules regulate Muslims' personal behaviour, public affairs and relations with non-Muslims without making a distinction between definitive and *ijtihad* rulings, despite the fact that the latter should be tested on the basis of the following two principles to ensure that they are suitable for the realities of present-day life:

- Account should be taken of the consequences of actions.
- Rules should be dependent upon the circumstances that have given rise to them.

In addition to these institutions, there are also *Qanun* colleges which teach their students the different branches of the law that actually regulate their society. These include the constitutional system and relations between states, as well as other legal fields – some long established and others that apply specifically to present-day societies.

Of everything the human mind has been able to produce throughout its history on earth, the *Qanun* offers the latest and best ways of managing mankind's affairs and regulating day-to-day relations between individuals.

Each of these two schools – *Qanun* and Shariah – operates as if the other does not exist. It is impossible to underestimate the negative results that have ensued from having two mutually incompatible sets of rules of behaviour governing the way a society organises its life. One consequence it that the *Qanun*, with its man-made laws, is seen as an "intruder" into Islamic societies and a "violator" of the Shariah which Allah has revealed and commanded mankind to follow to the exclusion of all other systems such as the *Taghut* and the rule of the Time of Ignorance.

What were the factors that led to this dichotomy between the *Qanun* and the Shariah?

The fact that a *Mujtahid* is the only person with the authority to interpret texts and pronounce on Shariah rulings has led to a culture developing over the centuries that does not accept discussion or debate, as well as an unquestioning belief that the only source of Shariah rulings is the *Mujtahid* – later replaced by the *'alim*, or scholar. Hence we find people with university educations consulting an *'alim* to ask him about the Shariah

ruling on very basic matters. They do not even draw conclusions from their own readings of the Shariah texts and it is completely out of the question for them to question the *'alim* about matters upon which he has pronounced, even if the ruling he gives is incompatible with present-day life and the values of tolerance and justice.

Indeed, how could it be possible to question a *Mujtahid* or an *'alim* when "imitating" him is itself a Shariah ruling and obligatory for members of the general public; as Ibn Rushd the Grandson says, it is their "*fardh*" (religious duty). That means that the monopolisation of authority and the obligation to "imitate" will inevitably "delegitimize" any ruling than might come from any other source.

Moreover, describing *ijtihad* rulings as "the eternal judgements of Allah" or as subject to the opinion of the *Mujtahid* reinforces people's aversion to the *Qanun*, since how is it possible to believe in Islam while rejecting the rulings of Allah and replacing them with a legal system imposed by an occupier who does not follow the Islamic religion?

Several scholars – led by the late Abul Ala Maududi - have promoted the notion that *Qanun* is incompatible with Shariah; when Pakistan became independent, he maintained that it must pronounce the two *Shahadah*s ("There is no god but Allah" and "Muhammad is the Messenger of Allah") so that it could return to the fold of Islam, repeal the laws left behind by the British and reinstate the Shariah which had been implemented before the arrival of British imperialism.

Sheikh Maududi was followed by others who set up associations and launched movements calling for the implementation of Islamic Shariah and rejection of the *Qanun*. Their appeals have found support thanks to the parallel educational system – a system that teaches *fiqh*/Shariah and another that teaches *Qanun*, or "positive law".

In our opinion this situation has remained unchanged for the following reasons:

– Students of *Qanun* are extremely reluctant to question *ijtihad fiqh* rulings with respect to the Shariah texts and rules of *tafsir* used by

the *fuqaha* (scholars of doctrine and jurisprudence) themselves, or to become involved in controversy over personal opinions on the interpretation of a text and acceptance of an "official" ruling – i.e. a ruling that has mandatory status. This reluctance is due to the hereditary culture found in all religions where rulings and the interpretation of texts are concerned. This is a well-known fact and no further explanation of it is needed.

- Students of *fiqh* are prone to excessive "imitation" and shun the study and analysis of *Qanun*. This is despite the fact that if they were willing to do so, they would be able to understand how to bridge the gap between the two concepts and help Islamic societies to avoid the schisms and conflicts that are costing them time and money and depriving them of the benefits of stability and social cohesion.
- An obsession with the circumstances that led to *Qanun* being introduced into Islamic societies and a lack of interest in analysing its substance.

If the substance were analysed, it would be possible to identify some instances in which it is indeed at variance with the Shariah. It would then be acceptable to criticise them and propose alternatives to them, while at the same time showing that most of the content is essential in view of the fact that, even if it appears to be at variance with *fiqh ijtihad*, it does not conflict with the texts and higher values of the Shariah. Compare, for example, the constitutional system - which bases the state on institutions rather than individuals, defines the composition and prerogatives of each institution as well as the procedures for holding it to account, and sets out the basic rights and obligations of the individual – with the provisions laid down in *al Ahkam al Sultaniyyah* and the rules of Shariah governance, which are still cited in *fiqh* studies.

Compare, for example, the tax laws and public accounts system - which regulate the citizen's contribution to public expenditure and control the way in which it is spent – with the fatwas which allow the *wali al amr* ("master of affairs" – i.e. ruler) to take from the "rich" such sums as are required by the *Bait al Mal* "when the need arises".

Consider, for example, intervention in some contracts - such as employment contracts and leases - to protect the weaker party rather than leaving the stronger party to impose whatever conditions he pleases on the employee or lessee.

As regards the procedures for approving and promulgating *Qanun* laws, although there may be legitimate criticism of their implementation they appear to be closer to the message in the Qur'anic verse: "…who conduct their affairs by mutual consultation…" What remains debatable is how one should regard the institution charged with promulgating the *Qanun* as a credible representative of the community.

Now that we have considered the reasons behind the Shariah/*Qanun* dichotomy, let us take a brief look at possible ways of resolving it and eradicating its damaging effects on society's stability and values.

Section Two: An attempt to resolve the problem

If we wish to find a way of ending the dichotomy between the sources of legislation we should first distinguish between the *ahkam al nassiyyah* (the definitive rulings laid down in the texts) and the *ahkam al ijtihadiyyah* (the *ijtihad* rulings) categories, both of which are classed under the term "Shariah rulings". Then we should see the points on which the *ijtihad* rulings and the Qanun converge or differ and – finally – evaluate the latter.

Firstly: Distinguishing between *ahkam nassiyyah* and *ahkam ijtihadiyyah*

Criticism and rejection of "positive law" may be summed up as: "Shariah rulings are laid down by Allah and positive law is man-made".

This generalisation suffers from an obvious fallacy, since "Shariah rulings" fall into two categories – *ahkam nassiyyah* and *ahkam ijtihadiyyah*.

Ahkam nassiyyah – or definitive rulings – are sanctioned by the Shariah on the basis of established and definitive texts and are covered by a very limited number of Qur'anic verses which provide detailed judgements in wording that is capable of only one interpretation. They include the verses stipulating the circumstances in which marriage is prohibited and

permitted, as well as provisions governing inheritance and the termination of marital relationships.

Ahkam ijtihadiyyah, on the other hand, are deduced from:

- Specific textual injunctions, including cases where their reliability (e.g. they may be narrated from only a single source) or meaning is a matter of opinion. There are very few of these, particularly in the Qur'an.
- "General" texts and principles such as those enjoining justice, virtue, leniency, honesty, avoiding the "eating" of people's property unjustly, etc. or prohibiting their opposites. The vast majority of judgements that regulate society and its interests – or relations between individuals - are derived from these.

The first category – *ahkam nassiyyah* – is indeed to be regarded as Divine in origin.[1] However, it would appear to be somewhat of an exaggeration to describe *ahkam ijtihadiyyah* as being Divine in origin, since they are based upon texts capable of more than one interpretation or on general Shariah principles. In either case the most the *Mujtahid* can do is to "be of the opinion" that his interpretation is correct; this is demonstrated by the fact that there is no consensus over the vast majority of *ijtihad* rulings. This can be confirmed if you look at any area of *fiqh* – contracts, guarantees, nursing or rearing children, puberty, legal representation, proof of testimony, etc. So can it seriously be said that all the different views on these and other subjects are from Allah?

Would it not be more realistic to suppose that the origin of these rulings was the *Ummah* (Islamic Nation), not Allah, and that many of the detailed Shariah rulings were formulated – either with a number of possible interpretations or on the basis of general principles – in response to the *Ummah*'s specific circumstances at a particular time and place?

1 These rulings may not be revised or amended except in extremely rare circumstances when a judgement has been given for a specific reason, in which case the principle "rules should be dependent upon the circumstances that gave rise to them" will apply. This principle was applied by the Caliph 'Umar – May Allah be pleased with him – to "those whose hearts have been (recently) reconciled (to the truth)".

For example, when *ijtihad fiqh* first appeared on the scene, the concept of "*shakhs ma'nawi*" ("juristic person") was unknown and the *fuqaha* talked about *sharika mufawadha* (a *sharika mufawadha* is a type of company in which each accords the other the right to transact freely, whether in the other's presence or when he is absent, with each partner's transaction being the liability of the other), *al 'anan wa'l abdan* ("controls and bodies") and *al wujuh* ("faces"). All these terms merely convey the idea of partnership and association and were permitted by Abu Hanifa but prohibited by al Shafi'i with the exception of the *sharikat al 'anan* class of company. (*Sharikat 'anan* is a company in which that each partner invests gold or silver in a single investment or places it in a strong box and then each trades with it but without acting independently – i.e. neither proceeds with a transaction without the other). Malik prohibited the *sharikat al wujuh* class of company but ruled that the other categories were permissible.[1] (*Sharikat al wujuh* is a partnership of two persons who buy goods on credit, sell them, pay off the debt and share the profit between the two of them).

If we say that these judgments were laid down by Allah, then how is it that they conflict with each other? And if they really are of Divine origin, it would not be permissible to amend or alter them, because mankind is forbidden to change rulings revealed by Allah in His Shariah. If this were not the case, it would not be possible to believe in the basis and meaning of the Shariah.

If alteration is not possible or permitted, every Islamic region will be obliged to limit its economic activity to the forms of partnership or association permitted by the school to which it belongs and - since man-made law is *haram* (prohibited) - it will be prohibited by the *din* (Islamic religion) from accepting or dealing with any of the types of companies that exist today, despite the fact that they are fundamental to the world economy and play a leading role in the propagation of knowledge and scientific research.

In other words, we must recognise that the definitive Shariah rulings do not cover every aspect of human life in detail. They do not cover every

1 Ibn Juzai: *Al Qawanin al Fiqhiyyah*. P. 209.

obligation, prohibition and permitted action; if they did, a Muslim wishing to perform a particular action or facing a particular circumstance would have to consult lists of the three categories for guidance on what to do.

Most Shariah judgements consist of rulings that are capable of more than one interpretation or provide general principles and values for the guidance of Muslims in the way they organise their daily lives and perform their duties upon earth. In practice, people themselves are responsible for setting out the rules that will govern their lives and they have to review them constantly to see how they can be improved: "It is He Who created death and life, that He may try which of you is best in deed".

In their daily lives and the judgements they make, the only obligation people are under is to stay within the limits of the "unambiguous" Shariah and not conduct themselves in a way that is incompatible with its principles and higher values. They must remain true t the principle of promoting that which is beneficial and warding off evil or, in the words of the Hanbali Ibn 'Aqil: "the kind of action with which people are closer to the good and further from the evil, even if the Prophet did not (specifically) ordain it and nothing has been revealed about it".[1]

As al 'Izz bin 'Abdul Salam points out, the difference between the beneficial and the harmful is something that is recognised by one's powers of reasoning and understood as a result of "exigencies, experience, custom and opinion; if any of these elements are lacking, it seeks evidence. Anyone who wishes to know if something is appropriate, good or bad – on the balance of probability – should submit the matter to his intellect when the matter is not covered by the Shariah and then devise the appropriate ruling on it.....".[2]

Does this not all confirm that it is difficult to regard *ijtihad* rulings as having been laid down by Allah and indicate that – if one takes their original circumstances into account – they are in fact closer to *Qanun* – i.e. "positive law"?

1 Ibn al Qayyim: *Al Turuq al Hakimah*, P. 13.

2 Al 'Izz bin 'Abdul Salam: *Qawa'id al Ahkam*, 1- 4 and 8.

Secondly: Where *ijtihad* rulings and "positive law" coincide or converge.

The main areas in which *ijtihad* rulings and "positive law" coincide:

1 – Goals and objectives

Al Shatibi says: "Shariah laws are for the benefit of mankind in both the near and distant future…The Mu'tazilites agreed that the judgements of the Most High are designed to promote the wellbeing of mankind now and in the hereafter. And this is the view of most of the later *fuqaha*"[1]

He quotes al Razi as believing: "The judgements of Allah the Most High are not justified by any particular reason", then comments: "What is actually true is that we have concluded from our examination of the Shariah that it was devised for the benefit of mankind and this is not something that al Razi or anyone else would dispute".[2]

If Shariah rulings were devised to promote the wellbeing of mankind and keep people away from evil, the *Mujtahid* seeks to achieve this through his *ijtihad* rulings – either by interpreting a piece of text with more than one possible meaning, or by giving preponderance to one text rather thann another, or by applying a general principle to a specific situation. The rules laid down in "positive law" seek to serve the same objectives, and anyone who proposes or supports a draft law bases his proposal or support on the benefits that that law will provide or the degree to which it will counter harm or injustice.[3]

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1 2/6.

2 Same ref.

3 One can say that difference between the concepts of good and evil in the Shariah and *Qanun* is that the Shariah is concerned with man in his life and property, while the *Qanun* is only concerned with regulating the relationships between people in their daily lives and is not interested in transcendental matters or life after death.
This is true when there are difficulties in defining the concepts of this-worldly interests/benefits and next-worldly interests/benefits – a situation which has indeed occurred, even among legists in their interpretation of the interests/benefits that the *Qanun* is obliged to uphold. The individualist school defines them on the basis of the individual rather than the community as a whole, which is the opposite of the socialist school. The experiences of the past three centuries have shown that it is wrong to align oneself totally with one side and claim that it alone is right. Such an approach has =

It is true that *Qanun* sometimes fails to achieve this noble goal, but when this is the case it is due to society's lack of awareness and to deviant behaviour on the part of some of its members, rather than the philosophical and ethical principles within which the *Qanun* and its objectives are framed.

So if there are any problems with regard to the substance of the *Qanun* laws, our criticism should be directed at the causes of those problems (which we should suggest means of resolving), rather than at the *Qanun* as a system based on man's experience over the centuries during which he has lived in human communities.

2 – The means one should use in order to identify the goal

If the promotion of what is beneficial and the avoidance of what is harmful is the goal of both *ijtihad* rulings and "positive law", the two also coincide with regard to the means they should adopt for identifying that goal, which is the intellect:

We have quoted al 'Izz bin Abdul Salam as stating that the beneficial and the harmful are recognised through the intellect and experience. This is unquestionably the case. The alternative view which maintains that "the intellect does not do good or evil", and that Allah is the Lawgiver Who defines the beneficial and the harmful,[1] would appear to be unsound, even if the majority of scholars and *fuqaha* have been inclined towards it, owing to the fact that they came under the influence of the anti-Mu'tazilite campaign during the second half of the third century AH.

It is obvious that the Shariah texts cannot contain provisions covering every specific eventuality of life (whether good or bad) in a constantly changing world. However, they do contain general values and principles

= led to injustice and tyranny, with the result that most societies have found themselves compelled to adopt legal systems comprising a combination of the two positions, which endeavour to establish a balance between the interests of the individual and the community.
We believe that there is no conflict between *din* (Islamic religion) and *Qanun* when it comes to defining the concepts of the beneficial and the harmful when they are applied to the organisation of society and its members – when there is a belief that there is a need for coexistence despite differences of opinion.

1 For example, see al Ghazali's *Al Mustasfa*, 1/8 and 55 and al Shatibi's *Al Muwafaqat*, 2/315.

which can only be applied through the agency of the intellect and experience.

Take, for example: "Allah enjoins justice…" or "And do not eat up your property among yourselves for vanities". Can you imagine these two verses being applied to thousands and thousands of social relationships without the agency of the intellect and experience? How can it be possible to establish regulations governing the judicial, labour, economic, and financial sectors without involving the intellect and experience, while at the same time ensuring compliance with the principles of justice and not "eating up people's property in vanities"?

Hence the assertion that the intellect does not do good or evil is a denial of visible and tangible reality and is no more acceptable than the view that sees the intellect as being entitled to rebel against man's creedal values and accepted beliefs.

When we say *ijtihad* rulings and the *Qanun* agree that the intellect is the means one should use to identify what is beneficial and what is harmful, we are referring to an intellect armed with knowledge and experience, which recognises man's material and spiritual needs and respects the freedom to hold different opinions on the principle that coexistence is more important than opinions and ideologies.

3 – The possibility of altering or amending judgements

An *ijtihad* position is based upon opinion and is subject to the circumstances in which it is adopted and this, as al Ghazali says[1], also applies to the situation when the person holding that position changes his mind. He needs to keep his position under constant review so that it can continue to be justifiable in the light of any new circumstances (including different historical eras and geographical locations) that might affect the results of its application.

In theory there is no disagreement about this. The scholars assert that "the door" of ijtihad is "open" for as long as there is life on earth, that

1 *Al Mustasfa*, 2/376.

"rulings are dependent upon the circumstances that have given rise to them" and that an *ijtihad* ruling – whether it be in the form of order, prohibition or permission – must take the "desired result" into consideration.

However, in practice the door of *ijtihad* is now closed. *Ijtihad* opinions have become mixed up with definitive rulings and have become immune to any amendment or alteration, while the intellect has been deprived of any role whatsoever.[1]

To sum up, we can say that amendment and change are part of the basic nature of *ijtihad* rulings, so that in this respect they are no different from "positive law". The stagnation they have suffered from for over ten centuries is due to an attitude which is unscholarly and the result of imitation of the kind referred to by Ibn al Jawzi, which has incorporated them into the Shariah's "definitive rulings" category.

Thirdly: The areas in which they differ

The difference between *ijtihad* rulings and "positive law" appears to lie essentially in their points of reference and the sources that give them their validity.

1 – Points of reference

We have already pointed to the use of the general, and inaccurate, distinction between Shariah and *Qanun* - i.e. that the former is created by Allah while the latter is man-made. We have also shown the reason why it is wrong – that is to say, that the Shariah laid down by Allah consists of definitive rulings taken from definitive, unambiguous and established texts, while *ijtihad* opinions cannot be described as being Divine in origin. It is true that – whether they are general or specific - they are derived from Shariah texts, but their meanings and validity are a matter of subjective opinion.

It is this basis – or point of reference – on which *ijtihad* opinions are founded that marks the difference between them and "positive law", since

1 Ibn al Jawzi, says: "In imitation there is destruction of the benefit of the intellect, because the (latter) was created to deliberate and examine. Repugnant is the person who is given a candle to light his way, yet extinguishes it and walks in darkness". See *Talbis Iblis*, P. 81.

in the view of its critics the latter is not backed by any religious authority. Instead, its sole aim is to ensure the interests and welfare of the community it regulates, so its only point of reference is the interests (and benefits) as defined by the lawmakers.

This statement raises some points which we shall now endeavour to analyse.

An *ijtihad* opinion is based either on a text that deals with specific issues in which the meaning and validity are a matter of opinion or nor proven, or on a text which provides a general rule or principle.

In the first instance the *Mujtahid*'s objective is to provide the interpretation that is most likely to promote what is beneficial and avert that which is harmful, on the basis of the principle: "Wherever you find benefit (or interests), there is the Shariah of Allah". In arriving at the interpretation most likely to be correct, he applies his intellect to current realities and circumstances; evidence of this can be seen in the fact that one finds different opinions about a particular subject; for example, on limiting the legal competence of a minor or mentally deficient person.[1]

In the second instance – in which the *Mujtahid* applies a general rule – there appears to be a clearer link between the ruling and the benefit or interest as defined by the intellect.

This, according to al Shatibi, is "determined by the customs familiar to the people who apply their intellects and by what good manners and character dictate should be applied to encourage good habits and discourage bad ones, apart from those areas which the intellect is not qualified to determine such as the rules of the Prayers and similar things[2].

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1 There are differences of opinion over when a minor should be classed as an adult. One view says that the limitation of legal competence ceases at puberty, while another stipulates psychological maturity. Malik makes a distinction between males and females and between a young person who has a father or a guardian or is uncared for.
Some scholars say it is never permissible to declare a mentally deficient person legally incompetent, others say he should remain legally incompetent in perpetuo, while a third view restricts legal incompetence to giving him money until he reaches the age of twenty-five.

2 That is to say, the rules governing acts of worship cannot be defined on the basis of recognised =

Most of these matters are the province of the people who are well versed in those customs and it is for them to exercise their *ijtihad* and adopt what is best….".[1]

Al Shatibi notes that the general rules and principles were revealed in Mecca, after the *Hijrah* and following the rise in the number of Muslims. "Disputes arose between them over *mu'amalat* (transactions; the way people behave towards each other and deal with material matters), and they demanded what they regarded as their maximum possible entitlements, or they were faced with situations which required specific rulings. Therefore they needed judgements covering the situations that had arisen, including rules on procedures and pronouncements that distinguished between the categories of obligatory, recommended, prohibited and disliked…. So Allah revealed to them all the Divine (instruction) they needed, sometimes in the Qur'an and sometimes in the Sunnah, which applied the general (principles revealed) in Mecca to specific situations, explained the contingencies and qualified the absolutes…"[2]

We can deduce from what al Shatibi says that the Shariah "generalities" are determined by the customs of the people who apply their intellects and by what good manners and character dictate should be applied to encourage good habits and discourage bad ones, while the detailed rulings that occur in the Qur'an or the Sunnah were practical applications of those "generalities". This meant that they too are in the class of good customs familiar to the people who apply their intellects.

If the point of reference for *ijtihad* rulings is the generalities and specifics determined by the good customs familiar to the people who apply their intellects, would it not appear to be actually identical to the *Qanun*'s point of reference?[3]

= customs, which only apply to the rules governing *mu'amalat* (transactions; the way people behave towards each other and deal with material matters).

1 *Al Muwafaqat*, 4/233.

2 *Al Muwafaqat*, 4/234 and 235.

3 Several schools have discussed the *Qanun*'s basis and point of reference. However, it seems clear from its formulation and content – and from the critical studies and commentaries that have been written on it – that its point of reference must be the interest, and benefit, of society.

2 – The sources of their validity

Ijtihad rulings are pronounced by the *Mujtahid*, while "positive law" – or *Qanun* – is laid down by the institutions designated in the constitution of a particular state. In most Islamic states the *Qanun* is generally regarded as comprising three branches: 1) the constitution; this - the highest of the three – is established by a public referendum 2) the Law; this comprises the basic rules for regulating the community, as well as relations between its members and their rights; it is enacted by an elected institution – the parliament - and 3) decrees and regulatory decisions, including details and rulings on the application of the provisions of the Law; these are promulgated by the executive authority appointed by the parliamentary majority.

Several criticisms of the institutions that promulgate the Law need to be considered seriously. They include:

- Society is not genuinely represented in the conduct and results of the elections.
- Draft laws are not approved or rejected on the basis of an adequate study of their substance or by a personal conviction expressed in a vote. What determines their approval or rejection is party political loyalty.
- The basic idea of the Law and its contents is all too frequently imported from the West.
- The institutions that promulgate the Law usually consist of people who are insufficiently versed in the provisions of the Shariah and this can lead to laws being enacted that are incompatible with it.

The first two criticisms are apt but what is needed here is a suitable alternative that is both applicable and capable of eradicating the shortcomings. This is not easy in societies with limited awareness and a lack of commitment to religious and ethical values.

The question of importing from the West is due to the West's superiority in science and knowledge, and the only way we can overcome it is if we produce – or generate – knowledge that will contribute to human civilization and help open up new prospects for development and renewal.

Finally, the claim that members of the institutions that promulgate the Law are insufficiently versed in the Shariah would appear to be somewhat exaggerated, since most fields covered by the Law are not covered by detailed Shariah texts. Hence they are determined by the "generalities" and higher principles of the Shariah which come under the heading of "achieving benefits and averting harm". These elements are familiar to everyone, even to people who have no knowledge of Arabic. [1]

The fields referred to in the previous paragraph comprise a vast range of disciplines and it is the specialists in each discipline who prepare the relevant draft laws and propose the most suitable solutions and approaches based on their knowledge of the realities and circumstances relating to the law in question. This means that a clash between their proposals and the Shariah is unlikely or almost impossible. In all cases, draft laws are prepared and debated openly, and it is up to those with a specialist knowledge of the Shariah to take steps to correct anything that they consider to be in violation of it by using analysis and cogent argument.

These are some of the criticisms of "positive law". Whether or not they are apt, the solution is to look for ways of resolving them. There are two reasons for this:

Firstly: The theoretical basis for the promulgation of the Law appears to be sound and in line with the principle: "…who conduct their affairs by mutual consultation…" as well as with the fact that "life goes on" and evolves, which means that the rulings that regulate society and the relationships between its members are of necessity subject to constant change.

1 Al Shatibi says: "If *ijtihad* involves deducing from texts (detailed), a knowledge of Arabic must be a condition. However, if it involves concepts related to things that are beneficial and things that are harmful, unconnected with any texts relating to them or requiring no *ijtihad* based on texts, a knowledge of Arabic is not necessary". *Al Muwafaqat*, 4/162. He adds: "If it is strictly a matter of concepts, all people with sound intellects will understand them". Ibid. P. 163. On P. 168 he says: "From all this we can conclude that scholars share a common view about general principles; however, where specifics are concerned scholars need to deduce them from previously (available) Shariah (texts) to find the answers…"

Secondly: There is no practical alternative. *Fiqh ijtihad*, which considers questions on the basis of *usul al fiqh* (the "roots" of *fiqh*), has an advisory and didactic role; it appears to be unable to acquire the status of binding legislation governing the daily affairs and relationships of people's lives and every other field. This is confirmed by:

1. The fact that people are divided into the "*Mujtahid*", who decides, and "*muqallid*s" ("imitators") who implement without question or debate; this is not a practical way of operating in the world of today with its notions of freedom and equality and in view of the status the individual enjoys within the social system.

Several thinkers and *fiqh* scholars of earlier times denied that religion and the social system could be understood on the basis of *ijtihad* and imitation. They based their position on Shariah texts which affirm the individual's responsibility for his own personal behaviour,[1] and the fact that everyone has a role in the conduct of public affairs;[2] moreover, while in reality a knowledge of the religious texts may vary greatly from one individual to another, this does not mean that people should be dictated to and forced to implement to order; rather, it reflects the fact that there are different areas of specialist knowledge, all of which are of potential benefit to the Nation.

2. Individual *ijtihad* on matters pertaining to *usul al fiqh* is not feasible – i.e. it is not feasible either to assume recognition of a particular person as a *Mujtahid* or to expect a commitment to implement his opinions.

There have been several different views on collective *ijtihad*.

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1 There are numerous Qur'anic verses on the subject, including:- "Every man's fate We have fastened on his own neck; on the Day of Judgement We shall bring out for him a scroll, which he will see spread open. It will be said to him: 'Read thine (own) record; sufficient is thy soul this day to make out an account against thee.' Who receiveth guidance, receiveth it for his own benefit: who goeth astray doth so to his own loss; no bearer of burdens can bear the burden of another; nor would We visit with Our Wrath until We had sent a messenger". (*Al Isra'* 13-15); "…Every act of hearing, or of seeing, or of (feeling in) the heart will be enquired into (on the Day of |Reckoning)". (*Al Isra'* 36); "If anyone does a righteous deed, (it accrues to the benefit) of his own soul; if he does evil, (it works) against his own soul". (*Al Jathiyah* 15); "Each individual is in pledge for his deeds". (*Al Tur* 21).

2 "…who conduct their affairs by mutual consultation…" (*Al Shura* 38).

However, would it not be fair to refer the composition of its membership to a collective *ijtihad* body and give it the authority to issue legal pronouncements?

With regard to the composition of that body, if it is composed of "scholars" alone, or "scholars" and other "specialists" – whether on the basis of appointment, selection or election – it would not be a feasible proposition, due to the fact that it would be impossible:

Firstly, to draw up a list of "scholars" and "specialists" that excludes other categories, including those calling for the creation of a body whose remit covers the entire Islamic world.

Secondly, because even if this body were set up, the scholars comprising it would find themselves having to legislate in areas outside their specialist areas of *usul al fiqh* knowledge.

With regard to the powers enjoyed by the legislating authority, it is unlikely that the different societies that accept it – nominally – would actually give such a body precedence over their representative legislative institutions.

3. Where the problem of "differences of opinion" is concerned - whether it arises from individual or collective *ijtihad* - *usul al fiqh* is incapable of resolving them, since differences must inevitably occur between individuals, whether or not they are scholars, and even whether they are Muslims or reject Islam.

According to the scholars, a *Mujtahid* is prohibited from practising *taqlid* (imitation). It is true that they maintain it is wrong to adopt an "aberrant" opinion. However, nobody with the authority to issue a binding ruling would describe a particular opinion as "aberrant", particularly in conjunction with the popular adage: "Right is right, even if everybody ignores it, and wrong is wrong, even if everybody follows it".

Sheikh al Qaradhawi proposes a World Council. Of the scholars who would comprise it he says: "If there is a difference of opinion, preponderance should be given to the majority view unless there is another view to which

preponderance should be given on the basis that it is stronger from the point of view of the Shariah".[1]

However, the question here is: Who should decide that the minority opinion is or is not stronger from the point of view of the Shariah? These days large numbers of fatwas are issued that are endorsed by some and rejected by others, yet each side claims that its view is right and any other position is wrong.

So how is it possible to regulate society's affairs and the daily lives of its members with conflicting fatwas when there is no way of determining which of them is correct?

4. The task of deciding and pronouncing on Shariah rulings is assigned to the *Mujtahid*s - a class that came to be regarded as extinct over a thousand years ago when the schools of *fiqh* subject to *taqlid* were defined and designated. These days the term "'ulama" ("scholars") is used instead, though what precisely 'ulama are has not been defined, even when the concept is refined with the addition of the word "*kibar*" ("leading").

These are some of the reasons why it is unrealistic to give credence to those scholars who maintain that all rulings on the regulation of society should be the province of the *Mujtahid* and, moreover, that they are the only legitimate Shariah rulings and that any others apart from them are erroneous and deviant.

We need to be realistic and understand the circumstances in which the rules of *usul al fiqh* were developed, as well as the intellectual environment in which they were studied during subsequent centuries. We will then be better qualified to criticise (if and when such criticism is appropriate) both the form and content of the *Qanun* – or "positive law" – in a logical manner and put forward practical proposals for formulating and implementing the rules governing society's affairs and relations between its members in a way that is compatible with life in the changing world of today and in tune with the established creed of our Nation.

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1 In his book *Al Ijtihad fi'l Shari'ah al Islamiyyah*, P. 242.