

THEORIES OF LAW AND SHARI'AH: REVIEW OF INTRODUCTION TO LEGAL METHOD BY A. SANNI

Ahmad O. Murtadha¹
Muhammad Tahir Yahya²

ABSTRACT

Introduction to Legal method by Sanni,³ is a work on Legal Method in Nigeria. The work considers various theories of law in its description and explanation of the term law. However, the work completely shunned Shari'ah notion of law/divine law in its discussion of theories of law. This article argued, contrary to position tacitly maintained by the author of the book under review, that Shari'ah notion of law deserves recognition both in the definition of law and in the discourse of theories of law.

INTRODUCTION

Legal method is one of the courses that law students should be taught at the early years of LL.B programme in pursuit of degree in law in most of the faculties/school of law in Nigeria. Essentially, the course is designed to introduce law student to what is law and what is the nature of law. Hence, the course includes definition, features and theories of law among others.

The Book under review is one of the works on legal method in Nigeria. The work was first published in 1988 and later edited in 2006. The 2006 publication is the latest edition of the work based on the information available to the authors. Hence, this work concentrates on the 2006 edition. The book contained 9 distinct chapters. However, the chapter of interest to this work is chapter 1. Chapter 1 of the book concentrates on definition, nature and importance of legal method on one hand and

¹ LL.B Combined Honours(BUK), B.L., LL.M Islamic Law (Unilorin), Lecturer (Part time), Kwara State College of Arabic and Islamic Legal Studies

² LL.B Combined Honours (BUK), B.L., LL.M Islamic Law (BUK), Lecturer II (Bayero University, Kano.)

³ Sanni, A., Introduction to Nigerian Legal Method (2nd ed., Obafemi Awolowo University Press Limited, Ile-Ife, Nigeria, 2006)

definition, feature, theories, functions and objectives of law on the other.

Theories of law otherwise described as philosophy of law simply portray the notion of some scholars/philosophers on what is law, what law ought to be and what is not law and what law ought not to be. This aspect of the course is discussed under pages 9 to 25 of the work under review. The work examined eight theories of law even-though some theories have outlived their relevance in the contemporary legal systems of the world. Conversely, Shari'ah which is ever relevant and useful to various legal systems including Nigeria was completely omitted in the discussion. This paper argues that Shari'ah law and its key protagonists who have consistently work to espouse Shari'ah theory of law deserved recognition for their contribution to knowledge on one hand and to avoid misconception in the mind of law students in believing that Shari'ah law is not a legal system but a mere moral code.

Qur'an is the first primary source of Shari'ah. It is revealed by Allah through Angel Jibril to Prophet Muhammad son of 'Abdullah and transmitted in a reconciled manner (*Mutawatir*) to companions before it was documented during the era of the first successor (*Khalifah*) of the Prophet. Other sources are; Sunnah (Saying, conduct and tacit approval of the prophet), *Ijma'* (Consensus of Scholars) and *Qiyas* (Analogical deduction). These are also primary sources of the law. It is pertinent to mention that every rule of Shari'ah deduced from any of the sources are considered divine because the Sunnah of the Prophet has been affirmed to be inspiration from Allah.⁴ Whereas, *Ijma* and *Qiyas* flow from the text of the Qur'an and Sunnah.⁵

Therefore, a study of these sources of Shari'ah as espoused by jurists will reveal the notion of law according to Shari'ah and its theory of law will be garnered. This paper is particularly important for reasons which include; critiquing the approach of Sanni particularly on theories of law, identifying Shari'ah notion of law, acknowledging some key

⁴ Surat Al-Najm (Quran Chapter 53) Verse 3 -4: "Nor does he say (ought) of (his own) Desire. It is no less than inspiration sent down to him"

⁵ This work cannot go into the details of sources of Shari'ah. For further reading, however, these books may be considered: Zubair, A., *The Major Sources of Islamic Law* (Al-Madinah Heritage Publications, Lagos, 2005), Khan Nyasee, I.A, *Islamic Jurisprudence (Usul al-Fiqh)* (Adam Publishers & Distributors, New Delhi 2006)

protagonists of Shari'ah theory of law and placing Shari'ah legal status into proper perspective for students and researchers.

From another perspective, this research allays the fear and misconceptions that Shari'ah rules for all intent and purposes are legal rules and not mere code of conduct.

LAW AND ITS FEATURES

Definition of legal terms and their features are important for proper appreciation of a concept. They assist in making conceptual clarification and differentiate a term from the other. Notwithstanding these invigorating functions, several attempts to define law have shown that definition of law is uncertain, particularly due to divergence view of law across different disciplines. It is often said that law has no acceptable definition even though its features are relatively settled. Like many other authors, the authors of the work under review equally stated that there is no acceptable definition of law. However, they proffer a working definition of law thus:

A rule or body of rules made by institutions, bodies and persons vested with the power to make such rules which are binding and enforced among the members of a given state or society.⁶

The above quoted definition gives insight as to reason why Shari'ah notion of law is omitted in the discourse of theory of law in the work under review. The author appears to erroneously view law and teach students of law that all laws are man-made and thereby define it as rule or body of rules made by institutions, bodies and person. This pre-supposed working definition does not work! It confuses and creates ambiguity rather than shed light to true nature of law.

Surprisingly, the author acknowledges divine law as a type of law,⁷ albeit with abrupt description insufficient to explain this distinct notion of law. Thus, the choice of the author's definition is not as a result of lack of knowledge of the existence of divine law. Rather, it is either as a result of research complacency or academic hypocrisy. It is conceded

⁶ Sanni, A., *Introduction to Legal Method* (Obafemi Awolowo University Press, Limited Ile-Ife Nigeria, 2006), 5

⁷ *Ibid*, 58

that no definition of law or any other term is expected to cover all its features; it is enough for a definition to encompass few major features of the concept. However, a good and acceptable definition must be unbiased. Thus, a definition that relegates a type/class of a concept is unacceptable. Therefore, Sanni's definition of law quoted above cannot be accepted. This is because, it out rightly cut-out the notion of law according to Shari'ah.

It is suggested that a proper definition of law must accommodate the major classes of law. Generally, law is either man-made or divine. Hence, a proper definition is expected to either expressly or impliedly accommodate these broad classes of law as well as the striking features of the major legal systems of the world. The express mention of institutions, bodies and persons in the above quoted definition of law does not accommodate divine law and therefore inapposite.

Definitions of terms are often derived from combination of two or more features and/or functions of the term. And proper definition of law is not an exception. As such, it is necessary to consider the definition and features of law as presented by the authors. The feature of law stated and discussed by the author are: Law is a body of Rules, Law is man-made, Law is normative in character, Law has an Element of coercion, Law has territorial Limitation and that Law is dynamic in nature.

Law as a body of Rules signifies that law consists of multifarious rules which cannot be found in one document but rather in several documents. For instance, all the laws of a state cannot be found in the Constitution but also contained in numerous Statutes, Rules and Judicial Precedents. This feature is unarguably common to many if not all legal systems of the world. However, it seems not to be inherent feature of law. In other words, enactment of several laws/statutes is not responsible for conferring legal force or legitimacy on law. For instance, an association or political party that has only one bye-law or constitution is bound by the rules contained in such bye-law or constitution even though the law is contained in single document. Therefore, description of law as a body of rule is an alienable feature of law and not necessarily the yardstick for defining law.

The second feature of law mentioned by the author of the book under review is that law is Man-Made. Perhaps, this is most controversial! For, the answer to the question: who is the Law-maker is a striking

difference between Man-made and divine law. In attempt to explain this feature, the author declare that divine law is not considered as law. He stated: *'Laws are rules adopted by the society to govern itself. Hence, law within the context of our definition cannot be regarded as God-given as contained in the holy books'*. This declaration is clear enough yet, cannot be substantiated! The statement betrays the author's classification of law into positivist and divine law among others.⁸

Another feature of law stated by the author is that law is normative in character. The author explained further that law is a rule or system of rules. Being a rule, law prescribes what activities may, should or should not be carried out. Arguably, this is the most apposite feature of law. This feature is inalienable because it is inherent in every law. Every law set out to regulate an aspect of human conducts and thereby prescribe and/or proscribe certain conducts in human society.

In furtherance, the author stated that law has an element of coercion. The authors of this article agree that element of coercion is part of the features of law but not without qualification. This is because, the feature is only pronounced in aspect of criminal law. Conversely, aspect of civil law does not, naturally, involves coercion. Damages, compensation and restitution are most often adopted in civil matters and not punishment or coercion. The feature is, therefore, not common to all branches of the law. To this end, this feature of law is dispensable and not inalienable.

Territorial limitation is another feature of law espoused by the authors. The author appears to rightly hold the opinion that this feature is alienable when they state: *"Laws are usually made to guide the conduct of the people of a particular society or territory and are binding on the people within that society or territory"*. The adoption of the word: "usually" suggest that not all laws are intended to have territorial limitation. For example, the Universal Declaration of Human Right (UDHR) are intended to apply to all mankind. Therefore, it is safe to conclude that, like many other features of law, this feature of law is equally not inherent. In other words, it is alienable.

⁸ The author of the book under review recognized divine law as one of the types of law at page 58.

Also, the author avers that law is dynamic in nature. It connotes law as not static but dynamic in nature. Dynamism of law can be understood from both perception of amendment of law or flexibility of law. However, the authors appear to restrict their exposition to the former, he states: *“Since law is meant to regulate the behavior of man in the society, the content of the law of each society usually changes as the social, political and economic world in which he lives changes.”* Undoubtedly, no good law is static; every law is dynamic either in the sense of changes from time to time or flexibility to regulate novel activities of different era. Although, this feature is common to both man-made and divine law, it is alienable in the sense that a law will not lose its legitimacy for being static. Instead, the law may be described as bad and lose its relevancy at some time.

Flowing from the above, it is demonstrably clear that the only alienable feature of law is that, law is normative in character. It therefore, follows that other features of law like; Law is a body of rules, Law is Man-made, Law is dynamic and Law has element of coercion are not yardstick for determining what qualify as law. Notwithstanding, Shari'ah boasts of many of features of law identified and discussed above.

The Features of Law versus Shari'ah

Undoubtedly, Shari'ah is a body of rules. This is because Shari'ah rules are found in different documents; notably the Qur'an, books of hadith and copious number of works by jurists or protagonists of this school. Hence, Shari'ah undoubtedly satisfies this feature. Equally, Shari'ah is normative in character. For, Shari'ah prescribes and proscribes conduct either in mandatory or recommendatory sense.⁹ For instance, Shari'ah prohibits homicide,¹⁰ theft,¹¹ adultery,¹² interest¹³ among others and prescribes justice and fairness in our commercial and other dealings as well as rights and obligations of individuals. Shari'ah regulates the

⁹ AbdulWahab., K., *‘Ilmu Usul al-Fiqh (Dar Al-Ghad al-Jadeed, Cairo 2009)*, 115-125

¹⁰ Surat al Maidah (Chapter 5): Verses 33 -34

¹¹ Surat al Maidah (Chapter 5): Verses 38

¹² Surat al Nur (Chapter 24): Verses 2

¹³ Surat al Baqarah (Chapter 2): Verses 275; Al- Bukhari, Sahih al-Bukhari (Tr: Khan M.M, The Translation of meanings of Sahih al- Bukhari Arabic –English) Vol. 4, p. 172; Hadith Nos: 2080 and 2201

conduct of every individual in the society; hence, the normative character of law is equally inherent in Shari'ah. Another important feature of law identified and discussed in the Book under review is an element of coercion especially criminal aspect of the law. Like Man-made laws, Shari'ah law also has element of coercion. Under Shari'ah criminal justice system, coercion ranging from canning,¹⁴ amputation,¹⁵ banishment and death penalty¹⁶ are recognized and reserved for prescribed offences. Thus, element of coercion is also a feature of Shari'ah.

Other feature of law identified by the author of the book under review is that law has territorial limitation, it is dynamic in nature, and that law is Man-made. Territorial limitation is not one of the inherent features of Shari'ah. As a divine law, it is made by the Creator of mankind and applicable to all mankind without territorial limitation or differences. However, modern world and concept of sovereignty has directly or indirect imposed territorial limitation on application of Shari'ah. For instance, application of the criminal aspect of Shari'ah in Nigeria is limited to some Northern states which include Zamfara State, Kano State, Bauchi State, Kaduna State etc¹⁷ while the entire 19 Northern states applied Islamic personal law. Contrariwise, the states in southern part of Nigeria do not apply Islamic law except for the recent development in Lagos state.¹⁸ By implication Shari'ah rule has territorial limitation even within Nigeria. It is pertinent to restate that this is an imposed limitation and not an inherent feature of law. Unarguably, territorial limitation is not a feature of Shari'ah.

¹⁴ Canning is one of the punishments of fornication. See Surat al Nur (Chapter 24): Verses 2

¹⁵ Surat al Maidah (Chapter 5): Verses 38

¹⁶ Surat al Nisaa (Chapter 4): Verses 92 -93

¹⁷ Baderin, M.A., *Review of Sharia implementation in Northern Nigeria 1999- 2006: A Sourcebook* (Spectrum Books Limited, Ibadan, 2008), 1, Peters, R., *The Reintroduction of Islamic Criminal Law in Northern Nigeria* available at researchgate.net ,13 -14, Kamaldeen, A.F., *Comparative Analysis of the Jurisdiction of the Shari'ah and Customary Courts of Appeal in Nigeria* (LL.M Dissertation, University of Ilorin, Ilorin, Nigeria 2019) , 78

¹⁸ The Lagos State Judicial Service Commission designated a Customary Court in Lagos State to adjudicate on Islamic law and matters in relation to marriage, divorce, custody and inheritance. See The <https://theguildng.com/lagos-govt-approves-customary-court-for-islamic-laws-related-matters/>

Dynamic nature of law is another feature of law. This is understood as the adaptive feature of law in different era in a given society. This adaptive nature may take the form of amendment of law to suit the changes of the society or flexibility of the rule to cater for the novel issue in the society. While the man-made law sticks to the former, Shari'ah law is flexible enough to cater for novel issues without amending the content of the law. Thus, it is apt to posit that Shari'ah is dynamic in nature. In fact, its dynamism is unique and this further strengthened the postulation that that Allah is the Ultimate Law-Maker.

The author further stated that Law is Man- made. This outright declaration cannot be substantiated because it amounts to blowing hot and cold on the part of the author who at other pages of the book recognized divine law as a class of law.¹⁹ It follows therefore that this feature cannot be yardstick for determining what is or what ought to be law. Therefore, the statement deserves qualification. At best, it can only be said that some laws are man-made and some laws are divine.

From the forgoing, it is crystal clear that Shari'ah substantially boast of the features of law identified by the author as demonstrated above. In summary, Shari'ah is a body of rules, it is normative in character, it is dynamic in nature, it has element of coercion, but, Shari'ah is not Man-made. Although human's rational efforts in the interpretation and exposition of the divine law through the instrumentality of *ijtihad* is notable. Particularly, in a situation where *mujtahid* is about to formulate a new law when he could not find an existing rule for the case at hand through literal interpretation of the divine rules or through strict analogy (*qiyas*). The *mujtahid* therefore, can employ rational sources of law to formulate new principles that will regulate the new case. Be that as it may, all potential laws under Shari'ah to be processed by the *mujtahid*, must technically conform with the intention of the Lawgiver (which is divine in nature).²⁰ As earlier argued, the only

¹⁹ See pages 58 and 59 of the Book under Review: A. Sanni, Introduction to Nigerian Legal Method

²⁰ For instance, Imam Ghazali in his discussion of *Maslahah Mursalah* (extended analogy), he identified three conditions for rationally formulating new principles; 1. He has to make sure that the new principle he has formulated does not clash with a text (*nass*) or attempt to alter the implication of a text; 2. He has to make sure that the principle does not clash with the existing principles and propositions of Islamic law; 3. The jurist must ensure that the principle he has formulated is not *gharib* (strange) to the shariah and must promote the *maqasid* (purpose) of Shari'ah. See Al-Ghazali,

inalienable feature of law is the normative character of law. That is, every law regulates human conduct. In other words, every law prescribes and/or proscribes conduct. A critical look at this feature reveals that it is a characteristic that relate to functions of law in the society.

FUNCTIONS AND OBJECTIVES OF LAW

Functions and objectives of law is another important sub-topic that is capable of delineating what is law and what is not law. The author of the book under review mentioned Definition and Regulation of Social Relationships, Identification and Allocation of Official Authority, Dispute Settlement as well as Remedies and Change of Law as the functions of law while Law and Order, Law and Justice, Law and Freedom, Law and the State, Law and Legitimacy, Law and Sovereignty are mentioned as the objective of law. These functions and objectives are performed by all legal systems of the world and Shari'ah is not an exception. Shari'ah, undoubtedly, defines and regulates social relationship through its branch of law known as Islamic personal law.²¹ Shari'ah has set of rules that regulate marriage institution,²² prescribe rights and duties of spouses,²³ right and duties of parent to their children²⁴ and rights and duties of children to their parents. Equally, Shari'ah enacted rules of inheritance.²⁵ For instance, where husband died, Shari'ah recognized the right of wife, children, parents and siblings to inherit the deceased.²⁶ Therefore, Shari'ah adequately defines and regulates social relationship.

A., M., *Al-Mustafah min 'Ilm Al-Ussu*. Vol. 1, (Matba'ah Mustafa Muhammad. Cairo, 1937) p.286

²¹ This branch of law is technically referred to as *Ahkam al-ahwal al-Shakhsiyyah* (law of personal status) or Mu'amalat in broader sense. The branch comprises of family law, law of succession, *al-waqf* (endowment) and *al-wasiyyah* (legacies). See Zubair, A., *Exegesis of Legislative Verses in the Qur'an and the Relevant Traditions* (Book One: *Al-Hudud*) (Al-Madinah Heritage Publications, Lagos, 1997), 1-141

²² Surat al Nisaa (Chapter 4): Verses 3, 4 and 23

²³ Surat al Baqarah (Chapter 2):: Verses 226 and 228, Qur'an 65: Verse 1

²⁴ Surat al Talaq (Chapter 65): Verses: 6

²⁵ Surat al Nisaah (Chapter 4): Verses 11, 12 and 176

²⁶ Ibid, Muhammad, A., *Al-Mawarith fi Shari'yat al-Islamiyyat fi Duhi al-Kitab wa As-Sunnah* (Dar Asabuni, n.p., 2002) pp. 41 -50, Haider Ali Lakhi, S., *Al-mirath: Justice of Islam in the Rules of Inheritance* (Al-Maktabah Al-Muhammedia, Pakistan, 2011), 41 -97

Identification and Allocation of Official Authority is another important function of law identified by the authors of the book under review. This function is one of the essential functions of law because it is responsible for maintenance of orderliness in the society. Shari'ah does not permit three people in society without a leader among them. This is pursuant to the firm instruction of the Prophet. This demonstrates the seriousness Shari'ah attached to allocation of official authority. Furthermore, Shari'ah protects the people in authority from all form of disloyalty from their followers. To this end, Shari'ah proscribes protest against the leader of the community.

Furthermore, Shari'ah provides mechanism for dispute settlement and remedies. Administration of justice system is one of the key functions of a Muslim leader. This function is either carried out by the leader personally or by a delegated authority. Through this mechanism, Shari'ah achieves justice be it among individuals or state and individuals. Therefore, Shari'ah performs all the identified functions and objectives of law as postulated by the authors of the book under review. It is however worthy of mention that Shari'ah does not change but flexible enough to regulate novel issue.

Moreover, beyond the man-made notion of law, research has shown that Shari'ah has 5 main objectives.²⁷ Al-Gazali highlighted the objectives thus: preservation and protection of religion, life, progeny, property and intellect.²⁸ These objectives are core to peaceful co-existence.²⁹ They demonstrate that Shari'ah rules are comprehensive. The objectives are of dual purposes/benefits;³⁰ they are beneficial to mankind in this life and in the hereafter.

Shari'ah protects life and grievous harms through its retaliation justice system (*Qisas*). Equally, Shari'ah recognized right to life. The divine law also protects family lineage or progeny. This is protected through

²⁷ Al- Ghazali, *Shifa' al- Ghalil*, p. 186 – 187 referred to in Nyazee I.A.K, *Islamic Jurisprudence (Usul al- Fiqh)* (Adam Publishers & Distributors New Delhi, 2006), p. 202

²⁸ Ibid

²⁹ Yusuf, A.B, *A Study of Evolution of Maqahid As-Syari' ah as a Legal Theory* (2015) Madania 19 (1), p. 5

³⁰ Al-Ghazali, *Jawahir al-Qur'an* (Beirut Dar Ilya' al- Ulum, 1985), p. 32 -35

the institution of marriage and prohibition of fornication/adultery.³¹ Shari'ah protects property and intellect by permitting consensual commercial transaction³² and prohibiting theft,³³ fraud and all form extortion.

In the same vein, the objectives of Shari'ah transcends this world: it specifically aims at protecting religion while other objectives are also connected with religious commitment as observing them attracts benefit in this world and in the hereafter.³⁴ Conversely, disobeying the rule of Shari'ah attracts punishment/discomfort in this world and in the hereafter.³⁵

THEORIES OF LAW

The author presented 8 theories of law to wit; Positivist School, Pure Theory of law, Natural Law School, Historical School, Sociological School, Utilitarian School, Functional School and The Realist School. These theories of law posit different description in their attempt to define law. Their descriptions of law are distinct and different from Shari'ah notion of law. Thus, Shari'ah perception of law is excluded in both nomenclature and connotation of law.

Positivist school considers law as the law put, placed or imposed upon the situations by the rulers.³⁶ In this vein, a major protagonist of the school, John Austin, defines law as a command set by superior being to inferior beings and enforced by sanctions. The sovereign is referred to as the superior being while the subjects are the inferior beings. Therefore, positive law refers to the law made by the authority which has binding effect on its subject. This definition of law mirrors monarchical legal order which was the reigning system prior to the era of John Austin, the proponent of this definition of law. Although, Austin definition of law is rightly criticized on the ground that not all

³¹ Surat al-Nur (Qur'an Chapter 24): Verse 2, Zubair A, *Exigesis of Legislative Verses in the Qur'an and the Relevant Traditions* (Book One: Al-Hudud) (Al-Madinah Heritage Publications Lagos 1997) pp. 1 -17

³² Surat al-Baqarah (Qur'an Chapter 2): Verse 275

³³ Al-Maidah (Qur'an 5): Verse 38, Zubair, A, Zubair A, *Exigesis of Legislative Verses in the Qur'an and the Relevant Traditions* (Book One: Al-Hudud), Pp. 38 -68

³⁴ Nyazee I.A.K, *Islamic Jurisprudence (Usul al- Fiaqh)*, p. 202

³⁵ Ibid

³⁶ Monteque, *The Spirit of Laws* (2nd ed., Hafner, 1949) p. 2

laws are made in form of command, the sovereign is also bound by law (that is, nobody is above the law) and that not everybody obeys the law, it is apt to state that his definition fits the traditional monarchical system where the kings/queens made law in form of command, and he and his family are always above the law while his/her subjects are bound by the law. Therefore, it is more appropriate to criticize the Austinian notion of law on the basis that dictatorship system of governance has fade out, the sovereign are now being established and bound by the constitution and therefore not above the law. Again, the reigning legal systems of the world have demonstrated that not all laws are made in form of command. Therefore, Austinian definition of law can be criticized for being archaic and that the societies have moved beyond that notion of law. In modern time however, positive law has been stressed to refer to the Constitution, the statutes, the case law and the rules and regulations made by administrative agencies.³⁷ It is worthy of note that this later approach to the positivist notion of law is not in harmony with Austinian definition of law.

Contrariwise, pure theory of law described law as a system of norms. In other words, it described law as a system of rule. To this school, a law is valid if it has been created by a higher norm within the legal order. The higher norm herein can be in form of Statute, Constitution or authorized institution. For instance, the rule criminalizing theft is valid because it is legislated in the Penal Code.³⁸ The Penal Code is valid because it is enacted by the legislature.³⁹ The act of the legislature is valid because it is established and constituted in line with the provision of the Constitution.

Natural Law School view law in a different perspective from the positivist and pure school of law. To this school of law, law is what is fair, just or right. The protagonists of the school hold the view that there are certain objective principles in every man telling him what is fair, just or right. Thus, any law that does not portray fairness, justice or righteousness is no law according to this school. In counter-argument, the Historical school view law from the historical background of the

³⁷ Fisher, B.D., *Introduction to the Legal System – Theory, Overview, Business Applications* (West Publishing Co., 1977)

³⁸ See Section 286 Of the Penal Code

³⁹The legislature is the appropriate authority empowered to enact law. See Section 4 of the 1999 Constitution of the Federal Republic of Nigeria (As Amended)

people. They argue that before law is made for a society, there must be a good understanding of the history of the people. Thus, for a law to be valid it must be in line with historical background, custom and way of life of the people.

Sociological school also takes a different approach to the notion of law. To them, it is the action or conduct of people in the society that determine the law. They aver that there is relationship between law and conduct and that one affects the other. The protagonists of the school are of the view that if law is at variance with societal value and conduct, the law is doomed as an instrument of social control. On other hand, Utilitarian approach to law is premised on promotion of communal utility and utility in the context implies that which affects people's happiness. They identify security, equality, liberty and abundance as the key utilities that law must promote in the society.

Functional and Realist concentrate, in their attempt to define law, to the study of courts and how law is applied in the court of law. Functional school viewed law from the perspective of what the court do with respect to a particular legal problem. Realist school on the other hand, focused on trial court and external factors, unrelated to law, that influence their decisions with ultimate objective of reforming the judicial system.⁴⁰

The review of the highlighted theories of law revealed that the protagonists of each school substantially describe law based on their perception and reasoning of the concept. However, none of the reasoning is in accord with Shari'ah notion of law. Therefore, it deserves mentioning as a distinct theory of law. For instance, positivists' definition of law tilts towards notion of law in traditional monarchical legal system. Undoubtedly, the description of law as a command from superior being to inferior being fit monarchical administration of law in several facets. First, monarchical administration makes law in a form of command. Also, the king or queen of the era are considered superior and above the law while ordinary citizens are considered inferior being to the kings and their cabinet. Thus, the positivists' description of law, particularly the

⁴⁰ Fisher, B.D., Op. cit

Austinian definition of law, is in tandem with notion of law in the traditional monarchical system.

Pure law description of law as system of norms mirrors the definition of law in democratic settings. Norm in the democratic setting may be referred to as the statute where a particular rule is derived and the Constitution is the ground norm where the norm (statute) derives its legitimacy. In the same vein, functional and Realist school also fit democratic settings from the perspective of interpretative function of court under democratic dispensation. These schools, rather view, court as the institution that have final say on the position of law as the proper institution to study in attempt to define law.

From another perspective, Natural, Historical, Sociological and Utilitarian schools appear to view law from the perspective of what law ought to be as against what law is. To natural school every valid law must be fair, just, or right. Historical school hold the view that law is only valid when it reflects the historical background or custom of the people while sociological school validate law from the perspective of its extent of compliance with conduct and value of the society. Utilitarian school of thought views law from its potential of guaranteeing basic utilities to wit; security, equality, liberty and abundance, to the people. In essence, these schools set barometer for determining valid law in the society.

Against the forgoing, it is save to posit that Positivist, Pure, Functional and Realist School of thought attempt to define law from a perspective; arguably owing to their protagonists' allegiance and persuasion to different systems and institutions. While Natural, Historical, Sociological and Utilitarian set standards for determining good or valid law in the society. From whichever angle one looks at it, Shari'ah notion of law worth mentioned in both the definition/notion of law and standard /barometer for determining a valid law in the society and this is demonstrated under.

SHARI'AH THEORY OF LAW

Shari'ah is a divine law having its sources from the Qur'an, Sunnah and other sources of law which include *ijma'* and *Qiyas*.⁴¹ Therefore,

⁴¹ Zubair, A., Op Cit., 38 - 156

Shari'ah can be described as body of rules primarily derived from the Qur'an and Sunnah to regulate human conducts. (Un) like other form of law, Shari'ah performs vital function in the society ranging from societal orderliness, administration of justice, peaceful social co-existence, recognition of citizens' rights, definition of governmental and citizens' obligations, recognition of social institution, security of lives and properties among others. Distinctively, Shari'ah also serves as barometer for validating novel actions. Hence, the rules of Shari'ah continue to be relevant to the past, present and future generations. Thus, the authors wonder how this legal system that boasts of distinct relevancy is left out in the discussion of notion of law in the chapter of the book under review! This is despite the fact that Nigerian law recognized Shari'ah as a source of law. In fact, the Constitution creates courts that administer Shari'ah justice system.⁴² In the same vein, Nigeria tapped and continue to tap from the transparent and fair commercial regulation of Shari'ah. This led to permission to float Islamic compliant bank, adoption of *sukuk* as a means of funding monumental projects⁴³ and issuance of Shari'ah compliant poverty alleviation schemes by Nigerian government.

For avoidance of doubt, Shari'ah is a complete and comprehensive legal system. Shari'ah notion of law is multi-faceted and transcend all the notion of law earlier identified by the eight Schools of thought. For instance, Positivist School of thought received criticism and disagreement in its description of law as command from the sovereign over its subject from other theories of law. They decisively posit that law is not made in command tone at all times. If this is considered as consideration for recognizing other theories of law, Shari'ah doses more; Shari'ah placed every human action under five rulings to wit; *Wajib* (Obligatory), *Mandub* (Recommended), *Mubah* (Permissible), *Makruh* (Detested) and *Haram* (Prohibited).⁴⁴ These five rulings demonstrated that some languages of laws are in form of prescriptive and proscriptive command, prescriptive and proscriptive

⁴² See Sections 262 and 277 of the 1999 Constitution of Federal Republic of Nigeria (As Amended)

⁴³ Nigeria issued its first sovereign Sukuk in 2017. See Alaro A.A, *Islamic Financial services: The Interplay of Religion, Law and Corporate Social Responsibility* (The One Hundred and Ninety Six (196) Inaugural Lecture University of Ilorin, Ilorin, Nigeria 2021)P.9

⁴⁴Khan Nyasee, I.A., Op Cit., 57 -72

recommendation and others are permissible.⁴⁵ In other words, Shari'ah recognized command and recommendation both in form of positive and negative assertions as well as permissibility or indifference as the languages of laws. The author of this work strongly avers that no theory of law or legal system provides a better description of the rulings or language of the law than Shari'ah. Therefore, Shari'ah does not only decisively disagree with positivist that not all law are in form of command but also state other forms every other language of law can be placed. In this authors' view, this contribution is sufficient for recognition of Shari'ah notion of law and to teach law students the contribution of Shari'ah protagonists to the understanding of the term Law.

Pure theory of law's contribution, perhaps, account for its recognition is its description of law as a system of norm. This contribution is also not alien to Shari'ah protagonists. From the working definition of Shari'ah given above, it is inherent that Qur'an and Sunnah are norms or ground norm of Shari'ah. That is, for any rule to be considered valid law in Shari'ah, the rule must be traceable to Qur'ah and/or Sunnah. Thus, Shari'ah notion of law also implies system of norm. However, the norms or the ground norms are of divine source. Natural school's view of law as what is fair, just or right actually mirrors the perception of law in Shari'ah. In several passages of Qur'an and Sunnah, the Ultimate Law-Giver, emphasize on justice. To this end, *Ibn Qayyim Al-Jawzi*, an iconic jurist of Shari'ah, stated:

Shari'ah is all about justice, mercy, common good and wisdom. Any rule that departs from justice to injustice...or departs from common good to haram, or depart from wisdom to frivolity is not part of Shari'ah, even if it is arrived at by (literal) interpretation.⁴⁶

Perhaps, the only difference in Natural and Shari'ah notion of justice and fairness is that the justice of Shari'ah is at times beyond human intellect or human perception while justice under the natural school of

⁴⁵ Ibid

⁴⁶ Ibn Al-Qayyim, M.A, *'Ilaam al-Muwaqq'in 'An Rabil 'Aalamin* (Al-kuliyyaat al-Azhariyyah Publishers, Cairo, 1968) referred to in Alaro A.A, *Islamic Financial services: The Interplay of Religion, Law and Corporate Social Responsibility* Op. Cit. P. 28

thought is premised on human intellect. To this end, natural school theory is criticized on the ground that the concept of fairness, righteousness and justice is subjective. That is, individuals may have different perception as to what is fair, right or just in a given circumstance. Shari'ah perception of justice is beyond the criticism of natural school to the effect that fairness, righteousness and justice is subjective.

It is worthy of note that historical school perception of law as being determined by historical background and custom of the people is contradictory to Shari'ah notion of law. Shari'ah is universal and not premised on any ethnic or customary practice. Rather, Shari'ah stands as barometer for determining validity of customary practices. In this wise, some customs are declared valid, some valid if modified and some invalid *ab initio*. Functional and Reality schools see law from perspective of the court decision is equally not in tune with Shari'ah notion of law. Courts under Shari'ah legal system administer justice and not saddled with responsibility to redefine or determine law. Though, judges are given some discretionary powers, these powers do not negate the fact that all laws are derived from the divine sources; Qur'an and Sunnah. Finally, utilitarian notion of law is not absolutely alien to Shari'ah because Shari'ah task governance to provide security, liberty, equality and justice among other for its citizenry. However, viewing what is law and what is not law from this perspective is an indices of imperfect man-made law and the divine law is free of this anomaly. Undoubtedly, Allah is the best and Ultimate Law-Maker.

It is therefore not surprising but rather apt that National Universities Commission approves Shari'ah department in various faculties/schools of law in Nigeria. Equally, the Commission approves various courses for LL.B, LL.M and PhD programmes in Islamic law in Nigeria. This further fortifies the authors' argument that Shari'ah is a legal system and worth mentioning in the discourse of theories of law.

From the above analysis, it is obvious that Shari'ah boasts of proper perspective of law than any other theory of law and thereby deserved to be mentioned and recognized as a theory of law in academic works. As espoused above, it encompasses the strength of some theory on their perspective of law and remedied the defects of others. Thus, Shari'ah law definition of what is law and what law ought to be transcends all the identified theory of law. Therefore, it is inappropriate to continue

to reject Shari'ah notion of law in the legal method course content particularly in Nigeria where Shari'ah is unarguably a source of law of the country and same is recognized as degrees' programmes in various faculties/schools of law in Nigeria by the appropriate Universities Commission.

Finally under this heading, Imam Ghazali also emphasized Shari'ah notion of law through its *Maqasid* (purpose). Imam Ghazali widely classified the purpose of Shari'ah into two types; *Dini* (purposes of the Hereafter) and *Dunyawi* (purposes pertaining to this world). Each of the above classification is divisible into securing of the interest (*tahsil*) and preservation of the interest (*ibqa*). Therefore, preservation of life, progeny, intellect and wealth are classified under *dunyawi* while religion is classified as *dini*.⁴⁷

THE PROTAGONISTS OF SHARI'AH

Undoubtedly, Shari'ah is a divine law. Put differently, Shari'ah rules are revealed by Allah. However, the protagonists of Shari'ah in the context of this work denote persons who exerted great efforts in the interpretation, explanation and generational transmission of the Shari'ah to mankind. In this sense, uncountable number of Muslim scholars and researchers in Shari'ah deserved to be mentioned as protagonists of Shari'ah. Though, it is impossible to mention them all! Thus, this work only mention few persons whose efforts in the interpretation and transmission of Shari'ah is inevitable.

Against the foregoing, the Chief protagonist of Shari'ah is Prophet Muhammad bn Abdullahi (*salallahu alayhi wa salam*). It is through him the primary sources of Shari'ah was revealed. Qur'an was revealed and explained contemporaneously along Sunnah by the Prophet between the period of 609 C.E and 623 C.E.⁴⁸ Hence, Shari'ah rules (or Shari'ah notion of law) were revealed and explained to the *sahabah* (the companions of the Prophet) within the period of 23 years particularly the last 10 years after the *hijra*. It follows, therefore, that the *sahabah* (the Companions of the Prophet) are next protagonists after the prophet. For, they were the recipients of the interpretation and

⁴⁷ Al-Ghazali A., M., *Shifa' Al-Ghalil fi Bayan Al-Shabah wa Al-Mukhil wa Masalik Al-Ta'lil* (Mat'ba'ah Al-Irshad, Baghdad, 1970). 186-187

⁴⁸ Philip A.B, *The Evolution of Fiqh*, p. 15 available at <https://www.google.com>

explanation of the major sources of Shari'ah and the *sahabah* transmitted same to the next generation.

Research had shown that the Companions of the prophet are in thousands. Hence, this work cannot afford to list all of them. It is sufficient to mention the four rightly guided *Khulafa'* (The successors of the Prophet) as the representative and foremost of the protagonists of Shari'ah in this respect. The *Khulafa'* are Abubakar Siddiq, Umar bn Al-Khatab, Uthman bn Affan and Aliyy bn Abi-Talib. The work of these *Khulafa'* in the spread of Shari'ah cannot be over-emphasized. It was during their period that Shari'ah notion of law was spread and applied by several nations even beyond Arab peninsular.

Another category of Shari'ah protagonists are scholars of different generations whose work and efforts explain Shari'ah and its notion of law. However, four notable jurists work are worthy of mention because their efforts led to development of the four basic Shari'ah school of thought known as Hanafi School, Maliki School, Shafi'i School and Hanbali School. These schools were founded by Imam Abu-Hanifah, Imam Maliki, Imam Shafi'i and Imam Ahmad bn Hanbal respectively. These great scholars advanced the teaching of Shari'ah and have number of students who equally espoused Shari'ah to the mankind. Thus, they further the proposition of Shari'ah notion of law and as such worth mentioned among the protagonists of Shari'ah.

Finally, it is worthy of mention that there are Millions of research works in different part of the world by the protagonists of Shari'ah notion of law solely dedicated to explain the set of rules derived from Qur'an and Sunnah to regulate human conduct. For emphasis, these protagonists view law as set of rules that are derived and/or in tandem with the Qur'an and Sunnah. According to them, any rule that contradict the provision of Qur'an and Sunnah is null and void.

CONCLUSION

This work reviewed theories of law alongside definition and features of law as presented in chapter 1 of Sanni Introduction to Nigerian Legal method. The author found that the book under review neglected Shari'ah perception of law in its definition, features and theories of law in spite of Shari'ah relevance in the Nigerian legal system. Therefore, this work argues from different angles ranging from the feature of law,

function of law and theory of law in demonstrating that Shari'ah notion of law and its protagonists are integral part of Nigerian legal system and therefore worth of mention. It is therefore recommended that Shari'ah contribution to the jurisprudence of law and its theories in the Nigerian legal system should be part of legal method course contents of the Nigerian faculties of law.